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The Work-Family Conflict: An Essay on Employers, Men and Responsibility

Michael Selmi¹

I. Introduction

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

Within that debate, three different perspectives have emerged. The two most prominent perspectives – which in many ways mirror the equality vs. accommodation debate from an earlier era – differ primarily with respect to women’s attachment to the labor market. A perspective arising out of equality tends to focus on finding ways to allow women to spend more time in the workforce through proposals such as equal parenting, longer school days, and greater public support for childcare. Within this perspective, one that I have advocated, the primary goal is to allow women greater workplace equality.² The second perspective focuses on allowing women to spend more time out of the workplace, at least while their children are young. The idea here is that women should be able to balance their demands from inside and outside of the workplace by splitting their time between the two. Those who operate within this perspective tend to emphasize more and better part-time jobs, often with proportional benefits, and likewise focus primarily on employers as responsible for the difficulties that many women face.³ More recently, there has been an emphasis on the benefits flexible

¹ Professor of Law, George Washington University Law School. An earlier version of this paper was presented at a symposium held at the University of St. Thomas Law School, March 2007. I benefited by questions and comments I received at that time, as well as by conversations with Naomi Cahn, Joan Williams and Kathy Baker, and the research assistance of Kate Moore.

² For some of those prior contributions see Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?* 13 DUKE J. OF GENDER LAW & POLICY 7 (2006); Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435 (2006); Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 290 (2002); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000). See also Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) (emphasizing importance of work to women’s lives).

³ See, e.g., SYLVIA HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002) (advocating restructuring workplace to accommodate women’s needs outside of workplace); ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 258-67 (2001) (advocating creation of part-time jobs and proportional benefits); PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2006) (emphasizing the need for flexible workplaces and better part-time options). Within the legal literature, Professor Joan Williams has been the most prominent and influential

workplaces provide to employers, what is sometimes referred to as the business case for work-life benefits.⁴

The third perspective is quite different, and not typically associated with the academic literature though a variant is present in this symposium issue.⁵ This perspective is far more ambivalent about the role of women in the workplace, and seems to yearn for a lost era when women tended the home and men the work. Conservative commentators are most apt to align themselves with this traditional view, though when it comes to low-income women, conservatives insist on work rather than public support. Yet, for middle-class and elite women, these commentators identify a preferred role for women to care for children and home-life. While this view is perhaps most closely associated with conservatives, it is also a view that pervades the popular media, particularly in all too frequent articles published in the New York Times.⁶ These articles emphasize how women, almost always extremely high income professional women, are dropping out of the workforce to spend time with their children and are choosing to do so, rather than being forced out for reasons of discrimination or some other factor that complicates their choice.

Although there is limited support for the notion that substantial numbers of women are dropping out of the workforce,⁷ there is no question that this perspective has strongly influenced the debate over how best to mediate work-family conflict. This is true not only for those who identify women as mothers but for a much broader group given that the media attention has created the perception that women are choosing to opt out, in part because of the high demands of the workplace as well as the rewards of life outside of the workplace. This highlights two recurring problems with moving the debate forward.

commentator and she has straddled the lines between the two perspectives. Professor Williams advocates the creation of more and better part-time jobs that would have proportional benefits and she decries the penalties attached to motherhood. At the same time, she has also suggested that the demands placed on women outside the workplace are excessive and she is attentive to the persistence of discrimination that deeply affect women's lives. See JOAN WILLIAMS, *UNBENDING GENDER* (2000)

⁴ This issue is discussed in section II *infra*.

⁵ Please provide citation [add citation to the article by the person who was on our panel who discussed how women working had hurt men's income].

⁶ See, e.g., Lisa Belkin, *The Op-Out Revolution*, N.Y. TIMES, Oct. 26, 2003 (Magazine), at 42; Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1. Joan Williams has documented the persistent media emphasis of the lives of upper-class women, and the ways these stories distort reality. See Joan Williams, "Opt Out" or Pushed Out?: How the Press Covers Work/Family Conflict, WorkLifeLaw Publication, available at http://www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf (last visited May 15, 2007). For a discussion of the media coverage see E.J. Graff, *The Opt-Out Myth*, COLUMBIA JOURNALISM REVIEW, Mar./Apr. 2007, at 51. For the latest New York Times piece see Judith Warner, *The Full-Time Blues*, N.Y. TIMES, July 24, 2007, at A23 (advocating creating greater part-time sector).

⁷ As noted above, the data receive extensive media hype, but the reality is quite different. A recent analysis from the Department of Labor demonstrated a decline in the participation rate of married mothers of about 4% between its peak in 1997 and 2005. Some of this decline is recession driven, but the authors found a decrease among all income levels. See Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, MONTHLY LABOR REV., Feb. 2007, at 9. For an analysis that emphasizes the effects of a slumping economy on women's participation see Heather Boushey, *Are Women Opting Out? Debunking the Myth* (Center for Econ. Policy Rsrch. Briefing Paper Nov. 2005).⁴

First, the various perspectives are undeniably influenced by normative considerations – normative considerations that are not easily influenced by data, even though there is no shortage of empirical explorations in the field. This is one area where writers are frequently discussing their own lives, often implicitly, and there is likely a desire to justify personal decisions in a way that may not be present in other areas of scholarship or journalism. Second, and equally important, there remains a substantial ambivalence over what ought to be the end state, namely what it would mean to balance the demands of work and family life. Some writers seem to believe that women should be able to take a significant amount of time out of the workplace when their children are young without suffering any labor market penalty – indeed, occasionally these authors sound like they are advocating that women ought to be able to do whatever they want without penalty. Women who want to work a little should be able to do so; women who want to move in and out of the workforce should likewise be able to without compromising their chances for promotion or prestige; and women who want to work a lot, or not at all, should also be able to do so.⁸ But there is no reason why all of these alternatives ought to be available, or why women should expect to leave the workplace for significant periods of time without suffering any financial penalty.

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

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

⁸ Although this extreme position is not often articulated, towards the end of her book Susan Chira states: “Parents need more time with their children. Those who work need high-quality, affordable child care. Those who want to stay home should be able to do so. Those who are poor need enough social supports to keep them in the workforce. Help must come from individuals, from communities, from business, and from the government.” SUSAN CHIRA, *A MOTHER’S PLACE: TAKING THE DEBATE ABOUT WORKING MOTHERS BEYOND GUILT AND BLAME* 279 (1998).

advancement in the workplace, then we should not focus on policies that allow more women to stay at home, or spend more time out of the workplace.

This essay will address one particular issue that has generally been at the margins in the work-family debate: why should employers be expected to change their practices to accommodate the demands of family life when men fail to do so? Should the onus be on employers, or should we expect men to change their behavior, or perhaps some combination of the two? The essay will proceed in three parts. First, I will explore the various rationales for concentrating policy options on employers, and then I will discuss the role of men in the work-family debate. In particular, I will dissect the various excuses that are made for why men do not share a greater responsibility for easing the burdens that come with balancing the demands of work and family. And finally, in a short third section, I will discuss ways we might consider moving the debate forward, by in some ways, moving backwards.

II. EMPLOYERS VS. MEN: WHO IS RESPONSIBLE?

A. *The Employer's Domain.*

Within the work-family literature, firms typically receive most of the blame for the problems that arise in balancing the demands of work and family, and as a result, most of the policy prescriptions focus on restructuring the workplace or imposing some additional burdens on employers. This is true of virtually all of the common policy suggestions: more and better part-time jobs, more flexibility for workers, including the ability to work at home, proportional benefits, more leave and paid leave.⁹ But much of this blame seems misplaced and our excessive focus on employers may obscure some of the deeper issues that are in play.

1. *The Responsibility of Employers.*

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

⁹ See sources cited in note __ *supra*. A recent special issue of the liberal magazine the American Prospect featured a number of articles about the need for restructuring the workplace. See, e.g., Ellen Bravo, *The Architecture of Work and Family: To Have a Job and a Life, We Need to Redesign the National Household*, AMER. PROSPECT, Mar. 2007, at A5 (emphasizing need for paid leave and flexible workplaces); Jodie Levin-Epstein, *Responsive Workplaces: The Business Case for Employmnet that Values Fairness and Families*, AMER. PROSPECT, Mar. 2007, at A16 (arguing that employers benefit by flexible practices including part-time equity).

either by extending school hours or by providing more high quality publicly-financed after care programs.

Employers might be responsible for the persistent difficulties women face in balancing work and family life in a variety of ways. Most clearly, employers might be requiring their employees to work excessively long hours – hours that would preclude attention to non-work issues. It is commonplace today to talk about the 24/7 economy but the reality is that most employees are not working exceedingly long hours when measured against historical trends. In their excellent recent book, *The Time Divide*, Jerry Jacobs and Kathleen Gerson extensively analyze the most recent data on working hours and conclude that “the average length of the workweek does not appear to have changed appreciably in recent decades.”¹⁰ The authors note further that virtually all of the increase in working hours that has occurred over the last several decades is attributable to women entering the workforce: “In percentage terms, over three quarters (77.7%) of the growth in working time among married couples is due to the growth of dual-earner couples.”¹¹ The added work that comes from dual-earner incomes unquestionably adds stress to families because there is less time available to devote to non-work issues, but it is hard to see how that is an employer’s fault or their responsibility to correct.

Employers might be faulted for failing to adapt the workplace to meet the needs of dual-earner families by not, for example, creating more flexible work arrangements. Indeed, one of the mysteries of the workplace is just how uniform employment practices remain and how rigid the labor market has proven. At this point, one might have expected the labor market to create more varied options so that workers would have more choices about when to perform their work, and even how much to work. Yet, as anyone who travels during rush hour can attest, most workplaces still operate on a basic nine-to-five schedule with some modest variation: eight to four or five, and sometimes ten to six.¹² The labor market rigidity is surprising in that many jobs could be performed at different hours, and there also seems to be sufficient employee demand to make varied hours more desirable.

There are, however, significant advantages to having uniform schedules, indeed, even, or especially, for family life. If more work schedules were staggered, dual-earner couples would likely spend even less time together, as often happens when a couple engages in shift-work as a way to juggle childcare needs.¹³ There are also significant

¹⁰ JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 19 (2004).

¹¹ *Id.* at 46. Naomi Cahn and I have recently explored some of the other findings in the book in Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?* 13 *DUKE J. GENDER L. & POLICY* 7, 9-13 (2006).

¹² Just under fifteen percent (14.8%) of full-time workers work non-standard hours. See Bureau of Labor Statistic Workers on Flexible and Shift Schedules in 2004, Table A (2005), available at www.bls.gov/news.release/flex.nr0.htm (last visited May 30, 2007). Men were more likely than women to work shifts, and the figures have declined since the mid-1980s. *Id.* Most of those who engaged in shift work did so because it was the nature of the job, and only 8.2% indicated they were doing so to balance work and family obligations. *Id.*

¹³ Those who study individuals working during non-standard hours consistently find that such schedules are associated with higher health risks and greater marital discord. See, e.g., Harrier B. Presser,

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

Within an economics framework, employers would be expected to adapt to the changing labor market if there were greater demand from employees. Most employers, or most of those employers that want to be seen as offering a desirable place to work, compete for the best workers, and if those workers were demanding more flexible workplaces, we would expect employers to meet that demand. Greater workplace flexibility might come with some costs to employees, and those costs, in turn, might further temper the demand for changes. Indeed, this is one of the unresolved questions in the work-family debate. It is frequently noted that workers, including men, express a desire to work less and to spend more time with their family.¹⁴ But those polls rarely ask the more critical question: are workers willing to work less if that means earning less? Generally, what the polls indicate is that workers would like to work less for the same salary. This is kind of like asking children if they would like to have more ice cream – who wouldn't, one might wonder, want to work less for the same salary?¹⁵ We also know that even when employees, especially men, express an interest in trading salary for more leisure time, they rarely do so. After studying dual-earner couples where most expressed a desire to change work and family patterns, Professor Jean Potuchek noted, “[T]his study has not supported the widespread assumption that changed attitudes are precursors of changed behaviors.”¹⁶ Rather, traditional behavior patterns continue despite the claims of a desire for change.

One reason employees may not be willing to make the tradeoff between work and salary is because they cannot afford to do so, and employers can clearly be faulted for keeping employee wages too low. As is well known, real wages have largely stagnated over the last decade, although the wage growth for women has been higher than for

Embracing Complexity: Work Schedules and Family Life in a 24/7 Economy, at 47, in *WORK, FAMILY, HEALTH & WELL-BEING* (S. Bianchi, L. Casper, R. Berkowicz eds. 2005).

¹⁴ See, e.g., ELLEN BRAVO, *TAKING ON THE BIG BOYS: OR WHY FEMINISM IS GOOD FOR FAMILIES, BUSINESS AND THE NATION* 218 (2007) (citing 2005 survey of male executives indicating that 84% would like to spend less time working and more time with their family).

¹⁵ Surprisingly, one answer might be the French. A recent study exploring the ramifications of the mandatory thirty-five hour workweek established in France found that workers were generally dissatisfied with the arrangement. Because when initially implemented, the mandate did not apply to smaller employers, the study found a shift of employees from large to smaller employers, and the study also found a significant number of individuals felt pressure to obtain another job, even though in France the lower-hour mandate was not accompanied by a loss of wages. See Marcello Esteveo & Filipa Sa, *Are the French Happy With the 35-Hour Workweek?*, International Monetary Fund Working Paper No. 06/251 (Nov. 2006), available at www.ssrn.com.

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

men.¹⁷ The fact that employers are paying too little, however, is different from requiring their workers to work too much,¹⁸ and it is less clear how the inadequate wages are contributing to the work-family dilemma, other than by adding real and substantial financial stress. Overtime, particularly when it is mandatory, can cause further conflicts but mandatory overtime remains a problem in only a few industries where a shortage of employees exists, such as nursing.¹⁹

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

The other area in which employers should be faulted is one that is also too commonly discounted today: workplace discrimination. Some of this discrimination has been documented through a surge of class action lawsuits filed over the last decade, the most recent of which is the largest involving Wal-Mart.²² I have previously argued that these lawsuits suggest a persistence of discrimination that extends well beyond common perceptions, and also indicates continued hostility to the presence of women in traditionally male jobs.²³ Joan Williams has also recently documented a sharp rise in

¹⁷ See ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2006/2007 at 122-24 (2007). Between 1989-2000, female workers' wages increased 20.9%, while male workers experienced an increase of 15.0%. For the period 2000-05, the increase for women was 8.3% and for men 5.9%. *Id.*

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

¹⁹ It is difficult to obtain data on mandatory overtime since overtime statistics are not typically broken down into mandatory and voluntary categories. For a discussion of mandatory overtime and the various measurement difficulties see Lonnie Golden & Helene Jorgensen, Time After Time: Mandatory Overtime in the U.S. Economy (Econ. Policy Inst. Briefing Paper #120 2001). Nursing is one area that has been widely acknowledged as having excessive and mandatory overtime due to a shortage of qualified nurses, although that shortage is often attributed to poor working conditions including high overtime rates. See Gordon Lafer, *Hospital Speedups and the Fiction of a Nursing Shortage*, 30 LABOR STUDIES J. 27 (2005).

²⁰ See Vicky Lovell, No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave 6-7 (2004).

²¹ Legislation has been introduced in Congress to mandate seven paid sick days annually for all employers with 15 or more employees. See Molly Selvin, *Sick-Pay Bill Rises Again*, L.A. TIMES, Mar. 26, 2007, at C1 (discussing Healthy Families Act). Voters in San Francisco recently approved a proposal requiring employers to offer one hour of paid leave for every thirty hours worked. See Ilana DeBare, *Law Now Entitles All Workers in S.F. to Paid Sick Leave*, S.F. CHRON., Feb. 6, 2007, at A1.

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

²³ See Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMPL. RTS. & EMPLOY. POL'Y J. 1 (2005). See also Laura T.

lawsuits involving discrimination against mothers.²⁴ Additional empirical studies indicate that working mothers typically suffer a significant wage penalty that cannot be fully explained by their workforce characteristics.²⁵ A recent audit study that varied resumes solely based on motherhood found that employers offered significantly more call-back interviews to women who did not have children, suggesting that the employers were considering motherhood as a negative factor in their hiring decisions.²⁶ In short, there remains widespread evidence that employers discriminate against women in pay and promotion, and do so for reasons that cannot be explained by various human capital factors. In a recent exhaustive review of the literature, Professor Joni Hersch concluded: “Women earn less than men no matter how extensively regressions control for market characteristics, working conditions, individual characteristics, children, housework time, and observed productivity, an unexplained gender pay gap remains for all but the most inexperienced of workers.”²⁷ She added,

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

Kessler, *Keeping Discrimination Theory Front & Center in the Discourse Over Work & Family Conflict*, 34 PEPP. L. REV. 313 (2007).

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

²⁵ A motherhood wage penalty of approximately 5% for one child and up to 10% for two children has been consistently documented. See Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AMER. SOCIOLOGICAL REV. 204 (2001); Deborah Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LABOR REL. REV. 273 (2003); Jane Waldfogel, *The Effect of Children on Women’s Wages*, 62 AMER. SOC. REV. 209 (1997); Jane Waldfogel, *Understanding the Family Gap in Pay for Women With Children*, 12 J. ECON. PERSP. 137 (1998). Efforts to refine the analysis have shown that some of the motherhood penalty is attributable to time mothers take out of the workforce and the study by Michelle Anderson and her colleagues indicated that college-educated women suffered little penalty, whereas high-school educated women experienced a substantial wage penalty. See Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LABOUR ECONOMICS 689 (2000) (finding that continuously employed mothers suffered no wage penalty); Anderson et al, *supra*, at 287 (finding that high school graduates suffered highest penalty and that “highly skilled mothers appear to experience a wage penalty only for their middle-school children”).

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

²⁷ Joni Hersch, *Sex Discrimination in the Labor Market*, 2 FOUNDATIONS AND TRENDS IN MICROECONOMICS 1, 80 (2006).

²⁸ *Id.*

2. Flexibility is Good for Employers.

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

There is certainly some logic to this argument, and in fact, it is a variant of management philosophies extending back to the turn of the century that emphasize the benefits of providing a humane workplace in attracting and retaining quality employees.³⁰ Surveys indicate that more than 40% of employers have adopted some form of flexible workplace practice,³¹ and these practices often prove a strong inducement for some employees to continue with their employment or to gravitate towards employers with desirable practices. For many employers, this latter issue raises potential adverse selection issues because offering the most generous child leave policies might attract employees who expect to spend a significant amount of time out of the workforce. This might be a worthy tradeoff to the extent those individuals offer some higher productivity so that the costs of the leave are balanced against higher work output or lower turnover. Employers might also be able to trade salary for more generous benefits, although studies indicate that employees currently pay little for flexible workplace practices and may even receive higher wages.³² Relatedly, if employers were to offer lower wages for family-friendly practices, it might compound the adverse selection problem by deterring employees who do not plan to take extended leaves.

In any event, the primary difficulty with the argument that flexibility provides benefits to employers is that there is very little reliable data to support the productivity

²⁹ See, e.g., Jodie Levin-Epstein, *Responsive Workplaces: The Business Case for Employment that Values Fairness and Families*, AMER. PROSPECT, Mar. 2007, at A16.

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

³¹ See Maury Gittleman, Michael Horrigan, and Mary Joyce, "Flexible" Workplace Practices: Evidence from a Nationally Representative Survey, 52 INDUS. & LABOR RELATIONS REV. 99 () (based on 1993 Survey data, 42% of all establishments had at least one practice identified as flexible). According to the Bureau of Labor Statistics, 27.5% of workers have access to some form of a flexible schedule, though only one in ten had a formal flexible program. See Bureau of Labor Statistics, *Workers on Flexible & Shift Schedules in 2004*, at Table A (2005).

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

benefits of flexible workplaces.³³ Most of the studies to date are surveys conducted by advocacy groups, such as Catalyst or the Families and Work Institute.³⁴ While these studies tend to show significant benefits to workplace flexibility, one should be skeptical of relying on the work of advocates, just as one would likely be hesitant to look to the ACLU to document the benefits of workplace privacy or speech protections. This does not mean there are no such benefits, only that better data are needed before we can conclude that flexibility offers significant advantages common to a wide range of workplaces.³⁵

The arguments for a flexible workplace echo those that have been made regarding the benefits of diversity, and indeed, the notion that diversity is good for business has become a mantra for many workplace advocates. A number of recent studies have sought to measure the benefits of diversity, and, to date, the evidence is mixed. The best known study conducted by MIT Business School Professor Thomas Kochan, along with others, concluded that there were no demonstrated benefits to having a diverse workforce that could be universally applied.³⁶ Equally important, the study also determined that there were no clear costs to a diversified workforce. In other words, diversity appeared to be a neutral factor, and in some workplaces it might be valuable while in others perhaps not. The fact that diversity appears to be neutral is potentially significant insofar as employers perceive diversity to include negative effects; this is, after all, one of the arguments that has been made against affirmative action policies, namely that they will bring in less qualified employees. So far those who have studied the issue have not found any loss of productivity associated with affirmative action or diversity programs,³⁷ and it is quite likely that the same will prove true for flexible workplace practices. Although the practices may not prove to be productivity enhancing, they are likely not detrimental either, or at least not as detrimental as employers might fear. Moreover, there is little question that work practices designed to ameliorate work-family conflicts can enhance

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

³⁴ For examples see Catalyst, *The Bottom Line: Connecting Corporate Performance and Gender Diversity* (2004); Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for Expansion* (2005); Ellen Galinsky & Arlene A. Johnson, *Reframing the Business Case for Work-Life Initiatives* (1998) (publication of the Families and Work Institute). For an academic review of the literature see Ellen Ernst Kossek & Alyssa Friede, *The Business Case: Managerial Perspectives on Work and the Family*, in *THE HANDBOOK OF WORK & FAMILY: MULTIDISCIPLINARY PERSPECTIVES AND APPROACHES* 611 (2006).

³⁵ See Ellen Ernst Kossek, *Workplace Policies and Practices to Support Work and Families*, at 104-05, in *WORK, FAMILY, HEALTH, AND WELL-BEING* (S. Bianchi, L. Casper & R. Berkowicz eds. 2005) (reviewing the literature and finding as many negative as positive findings and many that found no effect).

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

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

retention – employers who allow significant leave time or flexible leave policies to care for ill children are almost certain to retain employees who place a priority on these issues.³⁸ Reducing employee turnover can lead to significant cost savings, but simply arguing that the practices will increase retention is not the same as proving that the practices are efficient. The practices would only be efficient if the cost reduction associated with higher retention exceeded the costs imposed by the practices, and this will depend on who is retained and the general costs of turnover, since many companies expect and tolerate a high level of turnover.

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

The argument regarding the benefits of flexibility would also have more power if the advocates grappled with the various economic arguments. In its most basic form, neoclassical economics suggests that to the extent the practices are efficient, employers will adopt them, and it would be useful for advocates to develop arguments for why more employers have not adopted flexible workplace practices, if those practices are, in fact, efficient. Arguments along these lines have been made in the context of affirmative action, although in that case, to show why employers adopt affirmative action policies. Professor Michael Yelnosky, for example, has demonstrated that affirmative action can have the salutary effect of preventing unconscious bias from creeping into an employer's judgments.³⁹ While the context is different, it might be that employers have failed to adopt more flexible practices because of their perceptions that they are costly, or perhaps due to some ambivalence about having more women in the workplace, or even a less subtle form of bias that prefers perpetuating gender roles outside the workplace. A

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

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

simple resistance to change – again likely fostered by a perception that the practices are costly – may also explain employers’ reluctance to adopt the practices.⁴⁰ The only point I wish to make here is that, even if one believes flexible work practices are efficient, it is important to explain why more employers have not adopted them and to offer better data to support the benefits.

In the end, my sense is that it is unlikely that one will stake a claim based on the benefits of the practices to employers, but rather more flexible workplaces are necessary for the benefit of employees. Whether we should expect employers to voluntarily adopt such practices is a different matter entirely.

B. The Responsibility of Men.

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

Whenever the issue of men taking more leave to care for children is raised, one, or more, of three responses is typically be triggered. The most common response is to emphasize the penalty men face in the workplace if they take leave. Men are, in other words, excused from sharing the responsibility of leave because of the costs that will be exacted in the workplace. Characteristic of this view, a management consultant has explained, “Men who [take leave] . . . are looked upon as not being very committed or serious about their jobs. It’s a workplace dirty secret.”⁴² A related response emphasizes men’s higher incomes, noting that it is more costly for men than women to take leave, and thus, men are often excused from leave taking because of these higher costs. The third reason is just as common in most discussions, and this reason stresses the progress

⁴⁰ For a discussion along these lines see Harry J. Holzer, *Work & Family Life: The Perspective of Employers*, at 87, in *WORK, FAMILY, HEALTH & WELL-BEING* (S. Bianchi, L. Casper & R. Berkowicz eds 2005).

⁴¹ Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000).

⁴² Mary Beth Grover, *Daddy Stress*, *FORBES*, Sept. 6, 1999, at 202 (quoting Charles Rodgers chairman of Boston-based consulting firm WFD). For additional citations see ROB PALKOVITZ, *INVOLVED FATHERING AND MEN’S ADULT DEVELOPMENT: PROVISIONAL BALANCES* 228 (2002); Amy Andrews & Lotte Bailyn, *Segmentation and Synergy: Two Models of Linking Work and Family* 272, in *MEN, WORK, AND FAMILY* (J.C. Hood, ed., 2003); Ron Lieber, *Green Thumb: The Next Frontier Paternity Leave*, *WALL ST. J.*, July 8, 2006, at B1 (noting that leaving a job to spend more time with family is often a code for having been fired).

men have made over the last three decades. Men, it is often asserted, now do more housework, spend more time with children, and take more paternity leave than ever.⁴³ Rather than excuse men's patterns, this rationale applauds the improved conditions. Each of these responses will be explored in turn.

1. The Workplace Penalties Men Face.

The argument that men face high workplace penalties for taking leave seems to be the most, and in some ways the most potent response, but it is also the most misdirected. I have encountered this response in virtually every conversation I have had on the issue, and yet, there is very little empirical support for the notion that men are penalized to a greater extent than women when they take leave to care for children, or to spend more time with their children. This is instead a perception about the repercussions men will face, but it is a perception that is based simply on expectations rather than reality.

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

So in assessing whether men are penalized we need to be mindful of the penalties women face and there is very little data to suggest that men are penalized to a greater extent than women. In general, the perception that men will be penalized heavily arises because men who take leave are typically acting out of stereotype and we assume that such transgressions will lead to significant penalties. The issue is complicated, however, because acting out of stereotype in this instance means adopting a behavior associated with women that employers already penalize, and so the question is whether there is any reason employers will punish men more heavily? The best answer to this question would be data showing the penalties men face but I have been unable to find any significant study showing that male leave takers are penalized more heavily than their female

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

⁴⁴ This is one of the most well-documented relationships. See, e.g., Hersch, *supra* note --, at --; Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LABOR REL. RVW. 273, 282 (2003); (noting that “[a]ctual experience and years out of the labor force alone account for 19% to 37% of the observed total motherhood penalties.”); Julie L. Hotchkiss & M. Melinda Pitts, At What Level of Labor-Market Intermittency are Women Penalized, 93 AMER. ECON. RVW. PAPERS AND PROCEEDINGS 233 (2003) (noting that women are penalized “at a fairly low level of intermittency”); Joyce P. Jacobsen & Lawrence M. Levin, *Effects of Intermittent Labor Force Attachment on Women’s Earnings*, 118 MONTHLY LABOR RVW. 14, 18 (1995) (find significant and persistent wage loss from extended leaves though the penalty recedes some with time).

⁴⁵ Selmi, *supra* note --[Family Leave and the Gender Wage Gap], at 744-47.

counterparts. A practical reason for the lack of data is that there are generally too few male leave takers in any workplace to study, and this is also likely true of larger data sets where the number of men who take significant leave – that can be identified as something specific to family leave – are also likely too small to provide reliable results.⁴⁶

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

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

Admittedly, those discrimination suits might be difficult to prove, but that is true of most discrimination lawsuits, and the theory articulated above underlies a number of

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

⁴⁷ Studies designed to assess productivity differences between men and women generally show no significant difference. See, e.g., Harry J. Holzer, *The Determinants of Employee Productivity and Earnings*, 29 INDUS. REL. 403, 415 (1990) (finding that women had “comparable productivity” but “much lower wages” than men based on data from early 1980s); David M. Smith, *Pay and Productivity Differences Between Male and Female Veterinarians*, 55 INDUS. & LABOR REL. REV. 493 (2002) (finding pay differences of 15% that were not explained by differences in productivity).

large class action suits that have recently ended in successful settlements.⁴⁸ Moreover, the notion that employers might discriminate against men who take leave should not be used to justify men's behavior. It has long been argued that if we require employers to promote women, or to accommodate the disabled, they may be inclined to discriminate against them in the hiring process.⁴⁹ Yet, the claim that employers might discriminate against some employees to avoid statutory mandates has never been a convincing reason not to advance those mandates, nor should the argument be used to justify men's reluctance to take paternity leave. But beyond that normative argument is the flimsy nature of the case for employer discrimination. As noted above, there is little question that some employers will likely penalize men who act out of stereotype out of a desire to preserve gender stereotypes, but those employers are likely to constitute a small segment of employers, and again, the actions of a small group should not be used to excuse men from sharing in the task of childrearing or housework.

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

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

⁴⁸ I have discussed these cases, many of which have arisen in the securities industry, in Selmi, *supra* note –[Sex Discrimination in the Nineties], at 6-12.

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

⁵⁰ For an example of this kind of workplace see Clara Bingham & Laura L. Gansler, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002).

2. *Men Make More Money.*

The second response to men's unwillingness to take leave emphasizes their higher incomes. Because men typically make more money than their female partners, it is rational, according to this view, for them to continue working while their spouse stays home.⁵¹ In other words, if only one parent can stay home, it should be the one making a lower salary. This argument has an air of truth to it but it also ignores many complexities of income distribution and leave taking, including the circular nature of the claim. While it is true that most men enjoy higher incomes than their spouses, one reason for that is the fact that they express a greater attachment to the workplace. Those higher incomes are thus, in part, a product of existing leave-taking patterns. If we were to change those patterns, we would also likely alter some of the wage gap. To accept this excuse is to accept a gendered division of labor, along the lines asserted by Gary Becker many years ago⁵² but perhaps for slightly different reasons, one now having to do with norms as opposed to any degree of advantage in particular activities.

The flaws in this argument, however, go deeper. If one wants to stay with the data, a significant portion of women now have higher incomes than their husbands. Approximately 25% of married women have higher incomes, and for those couples,⁵³ we would expect the men to be the ones to shoulder responsibility outside of the workplace. But no study has ever documented anything near this level of participation by men in childrearing. According to the census bureau, there are approximately 143,000 stay-at-home dads compared to 5.6 million mothers.⁵⁴ Thus, if the decision regarding who ought to spend time outside of paid labor market is truly driven by economics, we would expect to find a substantially higher number of men currently doing so. Primary earners should not be treated differently based on their gender; rather, the higher income earner should take less leave regardless of gender.

Not only is the argument circular and flawed as an empirical matter, but it also ignores the realities of leave taking. For most couples, leave taking can be done in serial fashion so a couple is not forced to choose which income to sacrifice in order to tend to home life. This is particularly true when it comes to leave associated with the birth or adoption of a child – parents would typically not take leave at the same time but would stagger their leave. It might be the case that many couples feel they cannot sacrifice the male's income even for a short time, but in that situation, one would expect there to be significant differences in the male and female incomes, which may sometimes be the case but not always. Most men have access to some form of paid leave, likely vacation or sick

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

⁵² His argument is laid out in most detail in HUMAN CAPITAL (1974).

⁵³ According to data reported by the Bureau of Labor Statistics, in 2003 25.2% of women earned more than their husbands. See Bureau of Labor Statistics, *Women in the Laborforce: A Databook*, Table 25 (2005). Since 1991, the figure has exceeded 20%. *Id.*

⁵⁴ See United States Census Bureau News, *Families and Living Arrangements* (Press Release), May, 25, 2006, available at www.census.gov/Press-Release/www/releases/archive.

leave rather than paternity leave. Many women utilize vacation or sick leave as a means of assuring some income during their leave, and men could do the same.

Even where there might be an income disparity within the household, these decisions are not so easy to rationalize. Assuming a mother has an income of \$30,000, or roughly \$575 a week, and the father has an income 25% higher as would be consistent with data on the gender gap, the weekly difference is \$144, or approximately \$110 a week after taxes.⁵⁵ This is not a trivial difference to most families but it is also not a dramatic difference that would obviously justify choosing one income over the other, particularly if the leave is temporary. It is quite likely that a couple's decision on how to structure their leave is made easier by stereotypical assumptions regarding who should be the primary caretaker and who the breadwinner. From this perspective, it may be easier to forego a woman's income, even where it is close to a man's, because it is assumed that she should be the one responsible for childrearing and the husband should be the one responsible for providing economically for the family.

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

The notion that the high cost of childcare makes it economically rational for women to drop out of the labor market is a myth perpetrated by a disproportionate focus on high-income families. Many professional women, and academics, are accustomed to childcare that costs in excess of \$1,000 a month,⁵⁶ but most childcare is far less costly. A recent study based on the 1996 Survey of Income and Program Participation (SIPP) indicated that, on average, families spend 4.9% of their after-tax income on daycare.⁵⁷ Sixty-three percent of families incurred no expenses, while only 10% had expenses that were more than \$600 a month.⁵⁸ For lower-income families, relatives were the most

⁵⁵ The figures in the text roughly correspond to existing data. In 2005, the median hourly wage for white men was \$17.42 an hour with a gender wage gap of 18%. I have used a higher estimate assuming that men and women are not necessarily working the same job. For the data see LAWRENCE MISHAL ET AL., *THE STATE OF WORKING AMERICA 2006* at Tables 3.24 & 3.25 (2007).

⁵⁶ The cost of center-related care of all of the universities I have been affiliated with in the last decade have all exceeded \$1,000 a month. For an additional discussion of professionals paying more than \$1,000 a month see Stephanie Armour, *High Costs of Child Care Can Lead to Lifestyle Changes*, USA TODAY, April 18, 2006.

⁵⁷ See Dan T. Rosenbaum & Christopher J. Ruhm, *The Cost of Caring for Young Children*, NBER Working Paper No. 11837, at 11 (Dec. 2005).

⁵⁸ *Id.* In this survey, 90% of families had costs that averaged \$80 a month. *Id.*

common means of care.⁵⁹ These figures are consistent with most other studies that have sought to document the cost of childcare.⁶⁰ The figures can be troubling to the extent there is a relationship between quality of care and cost, which many studies have documented. And in general relative care typically offers the lowest quality of care.⁶¹ But this is a very different kind of objection, one that has little to do with whether the cost of childcare can justify foregoing an income, and much more to do with the quality of childcare that is available to lower-income families.

I should note that a number of studies have documented a relationship between the labor force supply of married women and the cost of childcare and these studies might provide some support for the claim that the costs, and possibly the quality, of childcare are driving women out of the labor market.⁶² These studies, however, do not get at the more difficult question of why childcare costs have such an effect on women's but not men's labor force participation, nor do they suggest that most women are affected. Rather, what the studies show is that women's labor force participation is sensitive to the costs of childcare.⁶³ But as noted earlier, for most women, childcare costs are not a significant portion of their income, and certainly do not consume all of their wages, even after factoring taxes into the equation.

3. Men are Much Better than They Used to Be.

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

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

⁵⁹ *Id.* at 17.

⁶⁰ See U.S. Census Bureau, *Who's Minding the Kids? Child Care Arrangements: Spring 1997 at 14-15* (2002) (noting that on average \$67 per week was paid per preschooler and \$40 for children older than 5); Linda Giannarelli & James Barsimantov, *Child Care Expenses of America's Families at 4* (2000) (for those who paid for childcare the average cost for a child under 13 was \$286 per month).

⁶¹ Cite urban institute paper in this symposium.

⁶² See, e.g., Wenjui Han & Jane Waldfogel, *Child Care Costs and Women's Employment: A Comparison of Single and Married Mothers With Pre-School Aged Children*, 82 *SOC. SCI. Q.* 552 (2001).

⁶³ *Id.* See also David M. Blau & Alison P. Hagy, *The Demand for Quality in Child Care*, 106 *J. POL. ECON.* 104 (1998) (finding that individuals focus more on price than quality of care).

thirty years ago, again contrary to an important claim that is central to the work-family debate.⁶⁴

In any event, studies consistently show that women do approximately twice as much child and homework than men.⁶⁵ This can be seen as a significant decline from a generation earlier where women typically performed three times as much non-market work.⁶⁶ Even so, looking beyond the bare numbers reveals a substantial persistence of gendered care. Although men are doing more work, the majority of the decline in the housework gap is attributable to women doing less work in an absolute sense.⁶⁷ Many meals are now purchased rather than prepared in the home, and cleaning is more frequently outsourced and also performed less often. Men and women, however, continue to perform different tasks. Men still do much of their house-related work outside, or while playing with their children, and the time they spend on more mundane inside work such as cleaning, cooking, or doing laundry has not increased appreciably over the last three decades.⁶⁸ Similarly, much of their time is shared time rather than alone time with children, and in those cases they may not be providing primary care.⁶⁹

Those who are apt to see progress in the data are likely to stress that change takes time, but when it comes to balancing the equities in the home, one has to wonder how much time is necessary. After all, we are not talking about global changes, or even deep attitudinal changes such as were necessary during the civil rights era. Instead, we are talking about doing laundry, cooking, and taking children shoe shopping. Even if we see these activities as reflecting deeply gendered tasks that are part of how we construct gender, at the end of the day we are still talking about laundering, cooking and shoe

⁶⁴ For example, in their most recent analysis, which is based on data from 2000, the authors of the Maryland project concluded, “[E]ven ultra-busy parents still average about 33 hours of free time per week (with fewer than 10 percent of couples having less than 20 hours per week which is what most parents estimate they have).” SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, *CHANGING RYTHMS OF AMERICAN FAMILY LIFE* 124 (2006).

⁶⁵ Based on 2000 data, married mothers performed 12.9 hours of child care per week, while married fathers performed 6.5. In the separate category of housework, married fathers performed 9.7 hours of primary housework per week, and married mothers performed 19.4 hours. *Id.* at 64, Table 4.1 and at 93, Table 5.1.

⁶⁶ *Id.*

⁶⁷ Men’s housework has not increased since 1985, and in fact, has decreased an hour during that time. Married mothers, however, have decreased their housework from 34.5 hours in 1965 to 19.4 in 2000. *Id.* at Table 5-1.

⁶⁸ The recent time diary data released by the Bureau of Labor Statistics indicates that men perform twice as much lawn and garden care, while women perform three times as much work related to food preparation and cleanup. Women also performed twice as much housework and devoted twice as much time to the purchasing of consumer goods. See Bureau of Labor Statistics, *American Time Use Survey*, Table 1 (accessible at www.bls.gov). For a comprehensive survey on the division of household tasks see Suzanne M. Bianchi, et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Housework*, 79 *SOCIAL FORCES* 191 (2000).

⁶⁹ In 2000, 61% of married fathers childcare occurred during a simultaneous free-time activity, nearly a third of which (31%) was watching television. Bianchi et al, *supra* note, at 71. Married mothers also did a significant amount of their childcare – 43% -- while engaged in another activity. *Id.* Men also spend more of their time with their wife present. See L.C. Sayer, Susan Bianchi & John P. Robinson, *Are Parents Investing Less in Children? Trends in Mothers’ and Fathers’ Time With Children*, 110 *AMER. J. OF SOCIOLOGY* 1 (2004).

shopping. From that perspective, neither Michel Foucault nor Judith Butler is likely to be of much assistance.

The strongest argument to excuse the behavior of men would be to suggest that men do not have access to leave, if only it were true. What is true is that more women have access to paid family leave because many of the policies are designed for women, but it is also true that most women do not have access to paid leave. Only eight percent of workers in private industry have access to paid family leave, and that leave is concentrated among white collar workers making above-average wages.⁷⁰ Most women who are able to take some form of paid leave typically do so by cobbling together vacation and sick leave. When the paid leave expires, many women will then take some form of unpaid leave. Men, however, typically have the same, and often better, level of benefits. Many men have higher level of benefits in the form of greater vacation or sick leave, particularly since these benefits are often tied to seniority or salary, areas in which men generally have significant advantages. Studies also indicate that men are more likely to have flexible work schedules.⁷¹

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

III. The Next Frontier

It has always been a bit of a mystery why men have received such a pass in the work-family debate, although mystery may not be the right word. There is little question that much of the reason men have been neglected in the debate arises out of frustration: the hope of equal parenting, equal housework, has not been realized, and it does not look like it will arrive any time soon. But it also seems that we have lost the grander aspiration, not just for equal parenting, but for issues of gender equality more broadly. This is true even though polls continue to demonstrate overwhelming support for the concept of equal parenting. Indeed, one recent poll showed that 82% of the birth cohort 1965-81 supported the concept of equal care giving.⁷² These polls can quickly become self-serving fountains of excuse, however, as the necessary follow-up question is: what have you done to bring about equal care giving in your relationship? That question focuses on what individuals have done instead of concentrating on what individuals say they would like to do. In the end, what matters is what people have actually done, and on that score, we have made far too little progress, and there is reason to believe we are now

⁷⁰ United States Department of Labor, National Compensation Survey: Employees Benefits in Private Industry in the United States, March 2006, at Table 19, p. 24 (2006).

⁷¹ See Joni Hersch, *Sex Discrimination in the Labor Market*, 2 FOUNDATIONS AND TRENDS IN MICROECONOMICS 1, 59 (2006)(based on Department of Labor data 28.1% of full-time men had flexible schedules and 26.7% of women).

⁷² Bianchi, et al, *supra* note --, at 128.

backsliding.⁷³ As noted previously, most of the progress we made towards gender equity in housework and childwork was made prior to the 1990s with little progress since then, and the same is true for expressions of egalitarianism.⁷⁴ There also remains a stubborn desire for gendered spheres. As the authors of a retrospective on attitudes towards the family noted, “Within [the] widespread acceptance of gender equality, there is also a strong current of continued support of a gendered division of labor. A substantial number of Americans – more men than women – continue to believe in men having primary responsibility outside the home, with women being in charge of the home.”⁷⁵

Perhaps the primary explanation why scholars and advocates have focused on employers rather than men is for the very practical reason that it is easier to force change on employers than on private individuals. We can mandate that employers change their policies, but we cannot mandate that men become active parents, do the dishes or work less. This is, however a strategy of convenience rather than conviction and our efforts to create social policy through the workplace have had a checkered history that should offer caution regarding the prospects of fostering change by focussing exclusively on employers. We can see this most clearly today in the state of our health insurance system. The American employer-based health insurance has produced extremely high costs for many employers – particularly in some of the older industries such as automobiles where health costs add significantly to the cost of an automobile – and uneven results for employees, many of whom are increasingly unable to afford the shared costs of employer-provided insurance.⁷⁶ It has never been clear why employers would be good agents for employees, or why they ought to devote their own time and resources to managing health care plans, other than that we lacked the political will to create a broader governmental solution.

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

⁷³ A recent polling study showed a significant increase in women who preferred part-time to full-time work. In 1997, 32% of working mothers indicated that full-time work was the ideal whereas in 2007 only 21% did. The numbers describing part-time work as the best option increased from 48% to 60%. See Pew Research Center, Fewer Mothers Prefer Full-Time Work (July 12, 2007). Mothers were not asked whether they were willing to sacrifice income to work part-time but rather the focus was on what would be ideal “considering everything.”

⁷⁴ See Arland Thornton & Linda Young-De Marco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s through the 1990s*, 63 J. MARRIAGE & FAMILY 1009, 1014 (2001) (“The data . . . suggest that there may have been not only a leveling off of the egalitarian trend in the late 1990s but a small reversal of a long-term pattern.”)

⁷⁵ *Id.* at 1032.

⁷⁶ While this is not the place for an extended discussion those interested in a recent critique of the current system see MICHAEL E. PORTER & ELIZABETH OLMSTED TEISBERG, *REDEFINING HEALTH CARE: CREATING VALUE-BASED COMPETITION ON RESULTS* (2006).

a day. While men need to change their behavior, women must as well – beginning with dropping their excuses for why men don't share more in home life.

The necessary changes run deep. Anyone who spends time with children sees a gendered world – a world where daycare employees are overwhelmingly female (with an occasional male director), where elementary school teachers are female, where boys and girls are quickly divided in their after school activities, where police and firefighters are male, where doctors are frequently male and nurses almost always female. When children visit the homes of their friends, they are likely to see parents engaged in gendered activities. Everywhere children turn they see gender divisions – of course, this is not true of all children, and the presence of same sex couples disrupts the balance in many areas but it is undeniable that the worlds of our children still look all too gendered, even if a tad less than was true for the previous generation.

This gendered world has a profound effect on that next generation of women and men. Studies continually show that children are strongly affected by the roles their parents play – working mothers produce more egalitarian-oriented children, as is also true when children experience non-stereotypical gendered parenting.⁷⁷ This is how norms are changed, and it is the most difficult work because it requires change on virtually everyone's part. This is true for men who need to live up to their stated aspirations, and need to be held accountable when they fail to do so. Women, too, may hold some responsibility for the continued gender patterns. A number of scholars, including my colleague Naomi Cahn, have suggested that women frequently play a gatekeeper role in the house, where they, often unintentionally, reinforce gendered parenting patterns by controlling how the work in the home is done.⁷⁸ This can occur when women hold onto certain tasks but it can also occur when women enforce particular norms for how housework is performed.⁷⁹

The reigning norms are certainly not easy to change, the web of gender, to use the phrase of Professor Potuchek, entraps us in many and subtle ways. But I am confident we will more likely break through the web if we are able to get men to act more like women. And I am equally confident that we will spin the web tighter by emphasizing the need for women to spend more time out of the workplace. We are simply not going to move closer to any notion of equality by emphasizing the benefits of flexibility for employers, by trying to create better part-time jobs or by mimicking the French, the Dutch or whomever else seems to have policies designed to allow women to be secondary workers while holding onto their primary caretaking roles. The emphasis on

⁷⁷ See, e.g., Teresa Ciabattari, *Changes in Men's Conservative Gender Ideologies*, 15 GENDER & SOC'Y 574, 584 (2001) ("Men whose mother's worked in the paid labor force and men with more educated mothers have less conservative attitudes."); Mick Cunningham, *Parental Influences on the Gendered Division of Housework*, 66 AMER. SOCIOLOGICAL REV. 184, 198 (2001) ("For both sons and daughters, parental behaviors early in the life course had long-term effects on the allocation of housework.").

⁷⁸ See Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEMINISM 177 (2000); Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors that Inhibit Greater Father Involvement in Family Work*, 61 J. OF MARRIAGE AND FAMILY 199 (1999).

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

part-time work seems particularly misguided. Most European countries have developed more robust part-time sectors than exists in the United States, but in no country are those positions desirable, other than as a means of allowing women to spend some time in the workplace. In every country, women dominate the part-time sector, and suffer in economic terms as a result of that dominance.⁸⁰ There is simply no reason to think we can create better part-time jobs here, better in that they will not offer lower wages or fewer promotional opportunities.

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

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

⁸⁰ See Selmi & Cahn, *supra* note – [Women in the Workplace], at 20 (discussing part-time work in Europe with citations). For an additional and recent paper see Alan Manning & Barbara Petrongolo, The Part-Time Pay Penalty for Women in Britain 17 (Institute for Study of Labor, Discussion Paper No. 2419, Nov. 2006) (“On average women work [part-time] in the UK have hourly earnings that are 22% less than women working FT . . .”). In the Netherlands, which has the largest part-time sector, the growth of part-time work resulted from a deal struck with unions to preserve existing full-time jobs by allowing an expansion of the non-union part-time sector. See MARTIN CARNOY, SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE 70 (2000).