

# THE DADDY DOUBLE-BIND: HOW THE FAMILY AND MEDICAL LEAVE ACT PERPETUATES SEX INEQUALITY ACROSS ALL CLASS LEVELS

KARI PALAZZARI\*

For over a decade there has been a great deal of discussion in America about work-family conflict or work-life balance. These discussions have typically focused on the plight of women, mothers in particular, and the inhospitable labor market.<sup>1</sup> Advocates who seek to improve the status of women have been vocal in demanding changes in the workplace. In response, employer policies like job sharing and flextime have become common and awards for the most “family-friendly” workplace are readily visible.<sup>2</sup>

Despite all of this commotion, however, there is a persistent tension between employer expectations and employee responsibilities. Employers still espouse ideal worker norms<sup>3</sup> that require long hours and uninterrupted tenures, which were established by the breadwinner/homemaker family model of the mid-twentieth century. Meanwhile, most families need two wage-earners just to make ends meet. With the continuing decline in real

---

\* J.D., University of North Carolina School of Law; B.A., Gustavus Adolphus College. Special thanks to Professor Marion Crain for her guidance throughout the writing process and for her support and encouragement throughout law school.

<sup>1</sup> Nancy Gibbs, *Viewpoint: Bring on the Daddy Wars*, TIME MAG. ONLINE, Feb. 27, 2006, <http://www.time.com/time/nation/article/0,8599,1168125,00.html> (“The ratio of trend stories about Mommy Wars to Daddy Wars runs about 1,000 to 1. . . . Watching these stories, you would think we were a nation of single parent families, where only women wrestle with the challenges of balancing work and family. . . .”). A simple search on Time.com demonstrates this point—“motherhood” garnered 625 articles, “fatherhood” only 218.

<sup>2</sup> See, e.g., Arkansas Governor’s Family Friendly Employer Award, About the Family Friendly Employer Award, <http://arkansasbusiness.com/family/about.asp> (last visited Apr. 11, 2007).

<sup>3</sup> See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) [hereinafter WILLIAMS, UNBENDING GENDER].

wages, many families simply cannot afford to have one parent stay home.<sup>4</sup> Sociologist Theda Skocpol notes, “[I]n the late 1950s, a high-school educated father could make enough to sustain a family consisting of a homemaker mother and two children at an economic level above the poverty line.”<sup>5</sup> Today, only thirty-one percent of married couples with children under eighteen have a father who works and a mother who does not.<sup>6</sup> Skocpol observes, “[W]e no longer have an economy centered around the father-breadwinner who goes off to work at a full-time (or more), well-paid, lifetime job, leaving behind a mother to care for the home and family. Instead, single-parent or two-worker families are prevalent.”<sup>7</sup>

Although it is widely recognized that changing family structures creates a “second shift” phenomenon,<sup>8</sup> burdening women with both paid and unpaid labor, these trends also perpetuate women’s inequality in other seemingly invisible ways. Lurking just behind the popular discourse about women is a large group of workers whose work-family conflicts are going relatively unnoticed—fathers. Dads in America face as much, if not more, difficulty than moms when they try to strike a balance between their jobs and their families. In fact, a recent survey in *BusinessWeek* found that men reported greater frustration than women regarding the balance between

---

<sup>4</sup> Median real income for families in the United States has been stagnant since 1973. THEDA SKOCPOL, *THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY* 107 (2000). The average weekly paycheck for a worker in 1970 was \$125.80. When adjusted for inflation, this number should be \$633 in 2005, but average weekly wages for 2005 were only \$543.65. Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*, <http://www.bls.gov/webapps/legacy/cesbtab3.htm> (last visited Feb. 27, 2007). Housing costs, in particular, have risen sixty-nine percent since the mid-1970s, but fathers’ income has only risen one percent. Amelia Warren Tyagi, *Why Women Have to Work*, TIME MAG., Mar. 22, 2004, at 56, available at <http://www.time.com/time/archive/printout/0,23657,993642,00.html>.

<sup>5</sup> SKOCPOL, *supra* note 4, at 107.

<sup>6</sup> Bureau of Labor Statistics, *Families with Own Children, 2004-05 Annual Averages*, at tbl.4, <http://www.bls.gov/news.release/famee.t04.htm> (last visited Apr. 11, 2007).

<sup>7</sup> SKOCPOL, *supra* note 4, at 159.

<sup>8</sup> ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 271-73 (1989) (describing the second shift as situations where, after women return home from their paid jobs, they are also responsible for the unpaid household labor).

work and family.<sup>9</sup> Men often encounter subtle societal pressures as well as outright employer hostility.<sup>10</sup> The result is that dads have a harder time stepping out of the traditional breadwinner role to venture across the gender divide into a nurturing, caregiver position. While women have traveled toward work “at the speed of light,” men have trekked toward home “at the speed of a glacier.”<sup>11</sup> Because men have been unable to change their position, the gendered division of labor in households continues virtually unabated and the goal of sex equality fails to come to fruition.

To address the negative impact on women created by the persistent division of labor, a movement to value unpaid household and care work<sup>12</sup> has been added to the demands for more “family-friendly” workplace policies. While these strategies have some potential to improve the status of women, they fail to fully address the male factor in the gender equation. Men, and fathers in particular, have been on the margins of work-family issues, but progress in women’s equality cannot accelerate until the masculine side of the gender binary is also unraveled.

The Family and Medical Leave Act (FMLA)<sup>13</sup> of 1993 was one such attempt at redressing women’s inequality through a gender-neutral social policy.<sup>14</sup> The FMLA was aimed at protecting the jobs of caregivers,

---

<sup>9</sup> Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39 (1998) [hereinafter Malin, *Revisited*].

<sup>10</sup> Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994) [hereinafter Malin, *Fathers*].

<sup>11</sup> Kerry Daly & Rob Palkovitz, Guest Editorial, *Reworking Work and Family Issues for Fathers*, FATHERING, Fall 2004, at 211. In 1900, 5.1 million women worked, constituting eighteen percent of the labor force. In 2004, nearly sixty-five million women worked, constituting forty-seven percent of the labor force. Dep’t For Prof’l Employees AFLCIO, Fact Sheet 2005: Professional Women: Vital Statistics (2005), available at [http://www.dpeaflcio.org/programs/factsheets/archived/fs\\_2005\\_Professional\\_Women.htm](http://www.dpeaflcio.org/programs/factsheets/archived/fs_2005_Professional_Women.htm) [hereinafter Fact Sheet].

<sup>12</sup> See, e.g., Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13 (2000).

<sup>13</sup> 29 U.S.C. § 2601 (2006).

<sup>14</sup> While Congressional lawmakers cited statistics about the status of women to illustrate the burdens of the modern American family, they also emphasized how the Act would help all workers, male and female, overcome work-family conflict. See, e.g., 139 CONG. REC. S93-01 (statement of Sen. Dodd (D-CT)) (“With close to two-thirds of women with young children working, we need a national policy to assure that workers do not have to choose between their jobs and their families.”); 139 CONG. REC. S195-02, S268 (statement of Sen. Chaffee (R-RI)) (“In 9 out of 10 two-parent families, both parents work outside the home—usually out of economic necessity. For most Americans it takes two incomes just to

most of whom are women, without codifying a sex-specific division of labor. However, glaring limitations in the law itself, as well as the judicial interpretation and enforcement that followed, have left most men and women in the same position they occupied when the Act was passed. Two major problems need to be addressed. First, since the Act provides only unpaid family leave, it is seen primarily as a job security statute for middle- and upper-class workers. Providing a mechanism for replacement pay would make the Act more relevant for low- and middle-income workers who cannot afford to go without a paycheck. This would also significantly increase the usage by men who are still primary breadwinners. Second, weak judicial enforcement has left untouched a pervasive hostility on the part of employers. Lack of enforcement presents challenges to men at all class levels, but improving litigation outcomes would be most important for middle- and upper-income workers who can afford to take leave but are afraid to do so.

Without these two changes, the FMLA not only fails to address work-family tensions for most workers, but also fails to interrupt the cycle of inequality that takes over when workers become parents. Women continue to struggle to reconcile work with their traditional caregiver role, while men struggle to reconcile family with their traditional provider role. Work-family conflicts mean that both women and men are marginalized, although in opposite ways.<sup>15</sup>

Both mothers and fathers feel the inadequacy of the FMLA; however, this Article argues that the impact is greater for fathers and significantly inhibits men's movement toward domestic responsibilities. For fathers, the enduring grip of "hegemonic masculinity"<sup>16</sup> demands success as a breadwinner, while the call of "new fatherhood"<sup>17</sup> demands active involvement with and responsibility for daily family life. I call this situation the "daddy double-bind" because, like the "double-bind" women face,<sup>18</sup> the

---

make ends meet. No father should be forced to choose between caring for a sick child and his job. No mother should fear that she will be fired from her job—and lose her health insurance—because she needs to take a few unpaid weeks of leave to stay home with her newborn.”).

<sup>15</sup> Malin, *Fathers*, *supra* note 10, at 1052.

<sup>16</sup> Beth Skilken Catlett, *Class-Based Masculinities: Divorce, Fatherhood, and the Hegemonic Ideal*, *FATHERING*, Spring 2004, at 165.

<sup>17</sup> Daniel A. McDonald & David M. Almeida, *The Interweave of Fathers' Daily Work Experiences and Fathering Behaviors*, *FATHERING*, Fall 2004, at 235.

competing demands on fathers leave men with primarily lose-lose “choices.” Success as a provider means time away from family, while time spent with family spells failure at work. The FMLA could offer a way out, but it falls short.

To explore and explain the daddy double-bind, this Article begins with a portrait of the modern American family. Part I outlines the average family arrangement in terms of division of labor and parenting trends. Part II looks more specifically at the situation of fathers and the class implications of the daddy double-bind. Part III dissects the FMLA, including an overview of the law, participation rates, and implications of the Act’s provisions. Part IV proposes changes in the FMLA and alternative policies that may begin to dismantle the barriers faced by fathers at all class levels and interrupt the cycle of sex specialization that perpetuates gender inequality. By bringing fathers from the margin of work-family discussions to the center,<sup>19</sup> this Article suggests how the law can accelerate social change and support greater equality across class, as well as across gender.

## I. TODAY’S TRADITIONAL AMERICAN FAMILIES

The most notable trend for American families over the past half century has been the mass entrance of women into the paid labor market. In the early 1950s, only thirty percent of married mothers with school-aged children were working outside the home.<sup>20</sup> Today, that figure is over seventy-seven percent.<sup>21</sup> As women have moved away from a strict homemaker role, the structure of American families has moved away from the breadwinner/homemaker model. Despite this shift, women still face significant economic disadvantages relative to men, and traditional norms remain entrenched.

---

<sup>18</sup> See generally KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* (1997).

<sup>19</sup> Nancy E. Dowd, *Women’s Work Is Never Done: Employment, Family, and Activism: Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433 (2004).

<sup>20</sup> SKOCPOL, *supra* note 4, at 124.

<sup>21</sup> Bureau of Labor Statistics, *Employment Characteristics of Families in 2005*, NEWS: U.S. DEP’T LAB., Apr. 27, 2006, at 9 tbl.5, available at <http://www.bls.gov/news.release/pdf/famee.pdf> [hereinafter Bureau of Labor Statistics, *Employment of Families in 2005*].

### A. Women's Woes

Modern feminist advocacy and activism has been instrumental in illuminating and elevating the status of women for decades. Despite several successes on both the legislative and litigation fronts, two key indicators of women's subordination remain—the wage gap and the division of labor. In 2004, women who worked full-time earned 76.5% of men's wages, up from 59.4% in 1970.<sup>22</sup> Not surprisingly, the gap was worse for women of color—African American women earned sixty-seven percent and Latina women earned fifty-five percent.<sup>23</sup> Overall, the wage gap amounts to \$200 billion annually, and will cost the average twenty-five-year-old working woman \$523,000 over her lifetime.<sup>24</sup> This loss in income is compounded by a subsequent loss in investment returns, which reduce women's retirement and pension savings. It numerically illustrates the lingering inequality women face throughout their lives.

Although the wage gap between women and men is significant, the gap between mothers and women without children is even larger than the gap between men and women overall.<sup>25</sup> The first child tends to reduce a woman's income by 7.5%, the second by another eight percent.<sup>26</sup> "Even after controlling for differences in characteristics such as education and work experience, researchers typically find a family penalty of 10-15 percent for women with children as compared to women without children."<sup>27</sup> Likewise, single women make nearly ninety percent of what men do, but married women less than sixty percent.<sup>28</sup> Young women make

---

<sup>22</sup> INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE RATIO: WOMEN'S AND MEN'S EARNINGS (2005), available at <http://www.iwpr.org/pdf/C350.pdf>.

<sup>23</sup> Fact Sheet, *supra* note 11.

<sup>24</sup> Cassandra Q. Butts, Marching on for Equal Pay (2004), <http://www.americanprogress.org/issues/2004/05/b68060.html>.

<sup>25</sup> Malin, *Revisited*, *supra* note 9, at 33.

<sup>26</sup> Butts, *supra* note 24.

<sup>27</sup> Lindsay R. B. Dickerson, "Your Wife Should Handle It": The Implicit Messages of the Family and Medical Leave Act, 25 B.C. THIRD WORLD L.J. 429, 445 n.124 (2005) (book review).

<sup>28</sup> Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 142 (1998).

ninety-four percent of men's wages, but this drops to seventy-three percent by mid-life.<sup>29</sup>

These statistics signal the particularly dismal status of mothers within the superset of women generally. When work and family conflict, women's wage-earning takes a noticeable hit. A national survey by the *Washington Post* and ABC News found that nine out of ten women surveyed had made "significant sacrifices at work because of their children."<sup>30</sup> Nearly sixty percent said they gave up or delayed career ambitions, sixty-four percent avoided full-time work outside the home, and forty-seven percent cut back on their hours.<sup>31</sup> Women in "high potential" positions who left their careers when a child was born claim this "choice" was "forced on them by long workweeks, unsympathetic employers, and inflexible workplaces."<sup>32</sup> Work simply would not accommodate family. Given that eighty-five to ninety percent of women become mothers,<sup>33</sup> the inability of mothers to blend gainful employment with family responsibilities is alarming.

In addition to the poor compensation for their paid work, women continue to bear the brunt of unpaid labor at home. Estimates indicate that women still perform between sixty-six and eighty percent of all housework.<sup>34</sup> Thus, even after accounting for recent increases in men's household labor,<sup>35</sup> women still perform two to three times the amount men

---

<sup>29</sup> Bureau of Labor Statistics, Differences in Earnings by Age and Sex in 2004, <http://www.bls.gov/opub/ted/2005/oct/wk5/art04.htm> (last visited Apr. 11, 2007).

<sup>30</sup> Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 182 n.146 (1998).

<sup>31</sup> *Id.*

<sup>32</sup> Sharon Rabin Margalioth, *Women, Careers, Babies: An Issue of Time or Timing?*, 13 UCLA WOMEN'S L.J. 293, 315 n.119 (2005).

<sup>33</sup> Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411, 416 (2002) [hereinafter Williams, *Mothers*]; Joan Williams, "It's Snowing Down South": *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 828 (2002) [hereinafter Williams, *Snowing*].

<sup>34</sup> Williams, *Mothers*, *supra* note 33, at 427.

<sup>35</sup> In 2002, fathers spent 2.7 hours each workday caring for children, almost an hour more than fathers in 1977, who spent 1.8 hours a day on caregiving. During the same period, working mothers' caregiving time stayed the same at 3.3 to 3.4 hours a day. FAMILIES AND WORK INST., GENERATION & GENDER IN THE WORKPLACE 12 (2005), available at <http://www.abcdpendentcare.com/docs/ABC-generation-gender-workplace-pdf> [hereinafter GENERATION & GENDER]. Gen-X fathers are leading this trend and spend an average of 3.4

do.<sup>36</sup> Women have not been able to shift the burden of this work to their partners by entering the paid market. For example, married women have decreased the number of hours they spend on housework, from 3.3 hours in 1977 to 2.7 hours in 2002, a reduction of forty-two minutes on workdays.<sup>37</sup> Married men have offset this by increasing their housework time from 1.2 hours to 1.9 hours, which also amounts to approximately forty-two minutes.<sup>38</sup> Even though the division of labor is narrowing, women are still doing the bulk of unpaid household labor, and are generally unable to trade paid work for care work. In fact, "women who out-earn their husbands actually do more housework than those whose husbands out-earn them, or who earn an amount roughly equal to that of their husbands."<sup>39</sup>

In addition, housework further hinders women's earning power. Each hour of housework correlates to a reduction in women's wages by 0.1% to 0.4%.<sup>40</sup> Contrarily, there is no evidence that housework reduces men's wages at all.<sup>41</sup> Thus, in the average American family, the father still

---

hours per workday caring for their children (slightly *more* than working moms). *Id.* at 4. These younger fathers are also at the forefront of using parental leave and demanding more family-friendly workplaces. Rebecca R. Kahlenberg, *Dad-Friendly Benefits Must Be Nurtured; Corporate Culture, Not Official Policy, Still Governs at Work*, WASH. POST, June 12, 2005, at K01 ("The younger generations of men seem to demand the same work/life benefits as women."). See also Patricia Wen, *Gen X Dad*, BOSTON GLOBE, Jan. 16, 2005, at 20. Furthermore, although there were too few "millennium" or "Gen-Y" fathers in the Institute study to make any definitive conclusions about their involvement time, it appeared that they were spending even more time with their kids than Gen-X dads. GENERATION & GENDER, *supra* note 35, at 4.

<sup>36</sup> SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY* 53 (1996).

<sup>37</sup> GENERATION & GENDER, *supra* note 35, at 11.

<sup>38</sup> *Id.*

<sup>39</sup> Margalioth, *supra* note 32, at 325 n.172. Men tend to just work longer hours in the paid market. One theory for this phenomenon is that breadwinning women perform "a larger share of the household work in order to shore up her husband's fragile gender identity." Marion Crain, "Where Have All the Cowboys Gone?": *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1915 (1999).

<sup>40</sup> Kristen Keith & Paula Malone, *Housework and the Wages of Young, Middle-Aged, and Older Workers*, 23 CONTEMP. ECON. POL'Y 224, 239 (2005). Differences in housework account for approximately twenty percent of the wage gap between men and women. *Id.* at 237.

<sup>41</sup> *Id.* at 239.

earns nearly seventy percent of the family income,<sup>42</sup> and the mother still performs seventy percent of the housework. Despite decades of shifting family structures, the traditional normative vision of family life as one in which men earn the money and women tend the children appears to be alive and well.

When viewed through the lens of socioeconomic status, the appearance of modern families becomes more complicated. For example, the breadwinner/homemaker model was never a reality for low-income families. Minority and low-income women have long struggled to balance paid work with unpaid caregiving responsibilities.<sup>43</sup> Today, this model is becoming less of a reality for middle-income families as well. In fact, the loss of earning power has impacted families throughout the bottom two-thirds of society.<sup>44</sup> Nevertheless, the normative vision of the middle-class nuclear family remains strong. For example, low-income African American families tend to rely on community networks and older, unemployed black women to provide care for children while both parents work.<sup>45</sup> However, these kin networks and “othermother” relationships typically dissolve for black middle-class families, because moving up economically means adopting “white” middle-class values and lifestyles.<sup>46</sup> Isolation in single-family homes and privatization of services tend to diminish solidarity along color lines so that “middle-class black women often see working-class and poor black women only as their employees or clients.”<sup>47</sup> Instead of having free informal care, middle-class women have to find a way to purchase care. This privatization “appears to be the hallmark of American middle-class existence, . . . stopping to help others to whom one is not related and doing it for free can be seen as rejecting the basic values of the capitalist market economy.”<sup>48</sup> Work-family conflict used to be a working-class issue. But shifting economic and work patterns have made it a middle- and,

---

<sup>42</sup> Williams, *Mothers*, *supra* note 33, at 418.

<sup>43</sup> SKOCPOL, *supra* note 4, at 127; PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 184 (2000) (“African-American women have long integrated economic self-reliance and mothering.”).

<sup>44</sup> SKOCPOL, *supra* note 4, at 125.

<sup>45</sup> COLLINS, *supra* note 43, at 181.

<sup>46</sup> *Id.* at 182.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

increasingly, upper-class issue as well, despite the lingering hold of traditional roles. While the economic remnants of traditional family structures remain in place for middle and upper classes, largely to the disadvantage of women, the conflict between work and family has intensified for all classes, making it even more difficult to change the division of labor and improve the status of women. These problems become even more pronounced once a couple has a child.

## B. The Particulars of Parenthood

For most of our history, women's status as caregivers was seen as biologically determined, a "natural" result of being born female and becoming a mother.<sup>49</sup> Even today, people hold onto the notion that women have "maternal instincts" that make them superior parents.<sup>50</sup> Sometimes this stereotype is subtle. For example, pediatrician and parenting expert Dr. T. Berry Brazelton titled his book on children during their first year *Infants and Mothers*, whereas his book on ages two and three is titled *Toddlers and Parents*.<sup>51</sup> The lingering perception of maternal competence encourages gender specialization, because the mother is often seen as one step ahead of the father in anticipating care needs of their children.<sup>52</sup> Even in role-reversed families where the father was the primary caregiver, eighty-eight percent thought fathers could be competent parents, but fifty percent still believed that mothers had a "biological advantage" in parenting.<sup>53</sup> Based on this misperception, the traditional division of labor is seen as more efficient because the more competent parent is tending to the children.<sup>54</sup>

In addition to perceptions of competence, the fact that women continue to earn less than men also encourages gender specialization. It is

---

<sup>49</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

<sup>50</sup> Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMP. RTS. & EMP. POL'Y J. 229, 247 (1999).

<sup>51</sup> Malin, *Fathers*, *supra* note 10, at 1054 n.39.

<sup>52</sup> *Id.* at 1055 n.45.

<sup>53</sup> *Id.* at 1054 n.40.

<sup>54</sup> Margalioth, *supra* note 32, at 295.

economically efficient for the family to forego the smaller income, particularly when a large portion of the second-earner's salary will be spent on childcare expenses.<sup>55</sup> Furthermore, immediately after childbirth, women can collect disability income while staying home with the infant. Thus, the economic pressure for mothers to take on primary caregiver status remains strong.

To make matters worse, the additional expense generated by a child puts even more financial strain on the new family. Since fathers are still the primary breadwinners, it is often their responsibility to cover these new costs. This "life-cycle squeeze" is evident in work patterns. Men with children put in more hours than those without.<sup>56</sup> Men with young children work more overtime than fathers with older children and up to four times more than men without children,<sup>57</sup> and new fathers are also more likely to get second jobs.<sup>58</sup> Economically speaking, it is entirely rational for a man who is the primary wage-earner to simply increase his already higher-paid work effort.<sup>59</sup> When these financial forces are added to the misperception regarding competence, the result is that when a baby comes along, men go to work and women go home.

The split in the division of labor caused by parenting pressures is further illustrated by the labor force participation rates of men and women with small children. When families have children less than six years old, the participation rate of mothers drops from seventy-seven percent down to sixty percent.<sup>60</sup> In contrast, the participation rate for fathers rises to its peak

---

<sup>55</sup> This is particularly true for low-income couples who do not generate enough tax liability to qualify for childcare tax credits. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1019 (1993).

<sup>56</sup> Michele Orecklin, *Stress and the Superdad*, TIME MAG., Aug. 23, 2004, at 38, available at <http://www.time.com/time/archive/preview/0,10987,994923,00.html> (noting that sixty percent of men with children work between forty-one to fifty-nine hours a week, as compared to only forty-nine percent of men without kids).

<sup>57</sup> Malin, *Fathers*, *supra* note 10, at 1074 n.162.

<sup>58</sup> Malin, *Revisited*, *supra* note 9, at 39.

<sup>59</sup> McCaffery, *supra* note 55, at 1027. Tax policy also encourages this result because social security and other taxes are phased out after a worker earns a certain amount. So for every dollar earned by the second-earner that is below the phase-out level, she will be required to pay a greater portion in taxes than if that same dollar was earned by her high-wage husband who is above the phase-out level. *Id.*

<sup>60</sup> Bureau of Labor Statistics, *Employment of Families in 2005*, *supra* note 21, at 9 tbl.5.

level of ninety-five percent.<sup>61</sup> When the child is less than one year old, the drop in women's workforce participation is even greater. In fact, the United States recently has seen a further reduction in the number of mothers who work during their child's first year, from fifty-nine percent in 1997 down to fifty-three percent in 2000.<sup>62</sup> This trend was primarily attributed to well-educated white women over thirty years old,<sup>63</sup> which means that when work and children start to conflict, "[m]any women who have any kind of choice are opting out."<sup>64</sup> Qualitative studies have corroborated this trend, finding that having young children at home does not change a man's commitment to work, but does have a dramatic impact on women's commitment. Women are more "family-centric" and less "work-centric" when their children are less than six years old.<sup>65</sup> But by the time children reach the age of eighteen, both mothers and fathers share the same level of work and family focus.<sup>66</sup> As children get older, mothers reduce their focus on the family.

Even though the level of work-family conflict changes after early childhood, there is continued economic pressure to maintain the traditional male breadwinner/female homemaker model. Married men continue to earn a "family wage" that is roughly ten to fifteen percent more than what unmarried men earn.<sup>67</sup> This marriage premium disappears if the marriage is

---

<sup>61</sup> *Id.*

<sup>62</sup> Claudia Wallis, *The Case for Staying Home*, TIME MAG., March 22, 2004, at 51, available at <http://www.time.com/time/magazine/printout/0,8816,993641,00.html>. This number stayed the same through 2002. *Id.*

<sup>63</sup> *Id.* More than twenty-two percent of women with graduate and professional degrees are now stay-at-home mothers, an increase over earlier rates. Roughly thirty-three percent of women with MBAs are not working full-time, compared to only five percent of men with MBAs. *Id.*

<sup>64</sup> *Id.* (quoting Sylvia Ann Hewlett, professor at Columbia University).

<sup>65</sup> GENERATION & GENDER, *supra* note 35, at 8-9.

<sup>66</sup> *Id.* Women's focus on family fell by more than a third as their children grew up and they became more likely to be "work-centric" or "dual-centric" (both family and work focused). *Id.* For men, although their absolute numbers followed the same general pattern, there was no statistically significant difference in their focus as their children aged. *Id.*

<sup>67</sup> The reasons for the "marriage premium" are unknown, but some speculate that it might be attributed to the possibility that married men simply make better employees. Hal R. Varian, *Economic Scene; Ask Not What You Can Do for Marriage; Ask What Marriage Can Do for Your Bottom Line*, N.Y. TIMES, July 29, 2004, at C1. Family-oriented, or "dual-centric," employees tend to have higher job satisfaction, better mental health, and higher

an egalitarian one. Recent studies confirm that “men with working wives are paid less and promoted less often than similarly situated men with stay-at-home wives.”<sup>68</sup> One study found that men who share household labor equally with their wives tend to earn twelve percent less.<sup>69</sup> Another study found the “peer marriage” penalty to be about twenty percent.<sup>70</sup> Economically, it is still in the couple’s best financial interest if men and women specialize into traditional sex roles, even after the child grows up.

The problem with modeling families based on parenting efficiency is that it is built on faulty assumptions. In spite of persistent stereotypes and archaic economic pressures, recent scholarship indicates the “maternal instinct” is a myth; rather, in actuality, successful parenting constitutes a learned skill.<sup>71</sup> As parents spend time with their new infant, they develop the ability to interpret the baby’s communication and respond to the baby’s needs.<sup>72</sup> Contrary to popular belief, new mothers often feel just as incompetent as new fathers, but they overcome this through practice.<sup>73</sup> The ability to take leave from work, then, becomes a critical factor in developing the competence of each parent. Social and economic incentives that urge the mother to stay at home and the father to stay at work perpetuate the myth of maternal instincts simply because they allow the mother to get more practice. When this misperception about parenting acumen joins with the social and economic forces outlined above, it establishes a default arrangement that hurts women. Both the wage gap and unequal division of labor contribute to the ways motherhood can limit a woman’s ability to break out of her traditional gender role. However, as emphasized in the next section, this situation also hurts fathers and limits their ability to change roles as well.

---

overall satisfaction with their lives. GENERATION & GENDER, *supra* note 35, at 10. This could translate into higher productivity, greater job stability, and stronger loyalty.

<sup>68</sup> Malin, *Revisited*, *supra* note 9, at 40.

<sup>69</sup> *Id.* at 347 n.82.

<sup>70</sup> Twomey & Jones, *supra* note 50, at 232.

<sup>71</sup> Malin, *Fathers*, *supra* note 10, at 1054-55 (“The scientific, sociological, and anthropological evidence does not indicate that mothers are biologically, genetically, or otherwise inherently superior at nurturing and caring for children.”).

<sup>72</sup> T. BERRY BRAZELTON, TOUCHPOINTS: BIRTH TO THREE 424-26 (1992).

<sup>73</sup> Malin, *Fathers*, *supra* note 10, at 1055 n.42.

## II. TODAY'S FATHERS FACE THE DADDY DOUBLE-BIND

Many have argued that the perpetuation of the traditional division of labor suits men just fine. Fathers get to have their careers and their families without a "second shift" because they can quietly depend on their wife's unpaid labor.<sup>74</sup> While this image of the content patriarch may be true for some families, there is a growing sense of discontent within the kingdom of fatherhood. The cultural and economic pressures on fathers place men in a no-win situation. If they focus on work, they neglect their family. If they focus on family, they lose income. This daddy double-bind makes it incredibly difficult for men to shift their traditional role and thus perpetuates gender inequality at all socioeconomic levels.

### A. Hegemonic Masculinity

As mentioned above, the economic and social pressures to live up to the provider role are still very strong. "Hegemonic masculinity" is still defined by breadwinning and work-competence, as these roles are "central to the dominant cultural understandings of manhood."<sup>75</sup> In some ways, "breadwinning is parenthood"<sup>76</sup> to many men.

Even in role-reversed households, where fathers are the primary caregivers, men are still driven to demonstrate masculine methods of providing. For example, an in-depth qualitative study of seventy stay-at-home fathers found that "each and every father . . . felt social pressure to be earning."<sup>77</sup> This powerful "societal gaze" caused stay-at-home fathers to engage in "public displays of masculinity"<sup>78</sup> that included paid work, self-provisioning, and community work. One father explained awkwardly:

I've always—in social occasions, dinner parties, talking with other people, or whatever—other men, I guess, especially—just being able to talk about something I do in the "real world" was kind of important socially—that didn't make me sound limited,

---

<sup>74</sup> Williams, *Mothers*, *supra* note 33, at 419.

<sup>75</sup> Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1691 (1998).

<sup>76</sup> Crain, *supra* note 39, at 1907.

<sup>77</sup> Andrea Doucet, "It's Almost Like I Have a Job, But I Don't Get Paid": Fathers at Home Reconfiguring Work, Care, and Masculinity, FATHERING, Fall 2004, at 277.

<sup>78</sup> *Id.*

or stuck . . . to show that I am able to work, although I have chosen to do this.<sup>79</sup>

The researchers noted that a majority of the stay-at-home fathers felt compelled to talk about their paid work in addition to their caregiving, the connection to paid work being an important link to their masculinity and identity as men.<sup>80</sup> One father stated: "I'm not sure that I would have done it [childcare] full time for as long as I did if I had not been working part-time, if I didn't have some sense of worth."<sup>81</sup> Another father made a point of telling the interviewer that he fixed cars while caring for his children. He said: "For me, not working was the bigger issue than being at home."<sup>82</sup> Although these men valued the care they provided, they still felt obligated to show how they were providers in the traditional financial sense.

In addition to paid work, fathers in the study emphasized masculine self-provisioning activities, such as renovation projects, and masculine parenting activities, such as coaching. In particular, the emphasis on sports was a way to "distinguish their caring from mothering and to reconstruct particular kinds of 'masculine care.'"<sup>83</sup> Overall the researchers found that stay-at-home fathers were "quite adamant" about distinguishing themselves "as men, as heterosexual, as masculine, and as fathers, not as mothers."<sup>84</sup> In other words, they were compelled to overcompensate for their caregiver status by conclusively demonstrating how they lived up to hegemonic masculine norms.

The strong correlation between breadwinning and fatherhood was echoed in a similar in-depth study of divorced fathers. For example, one unemployed college student who had eight children stated unequivocally: "I know what it takes to be a father. In today's society it takes cash, moolah,

---

<sup>79</sup> *Id.* (quoting "Peter").

<sup>80</sup> *Id.* Studies of mothers found that women talk about how paid work does not interfere with their caregiving. "Fathers feel the weight and pull of moral responsibilities as earners whereas mothers feel pulled by a moral responsibility to care." *Id.*

<sup>81</sup> *Id.* (quoting "Marc").

<sup>82</sup> *Id.* (quoting "Adam").

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

and I don't got any."<sup>85</sup> Researchers discovered that divorced fathers believed that successful providing would lead directly to relationships with their children. To some extent the fathers were right. Upper-income fathers who had enough money to wage successful custody battles essentially "bought" time with their children. One father even called it "ransom." Whether it is child support payments or the cost of custody battles, divorced fathers in particular see how fatherhood is defined by dollars. However, as explained in the next section, the emphasis on money and financial provision was only part of the story told by divorced dads.

## B. New Fatherhood

While the divorced fathers "begrudgingly recognized that providing was a non-negotiable need for children,"<sup>86</sup> they also described a new expectation of fatherhood that included direct involvement and caregiving. One unemployed father of two said curtly: "Any idiot can send a check. A check don't make you a daddy. A father is supposed to raise his child."<sup>87</sup> A number of studies have confirmed this view and found that internal values for men have shifted such that fathering is now central to men's lives.<sup>88</sup> "There is considerable evidence that fathers are more emotionally involved with [and] derive more satisfaction and self-worth from family involvement than from paid employment."<sup>89</sup> Apparently, the myth that men are inherently work-focused is just as false as the myth that women are naturally family-focused. To press the point, even fathers' physical health is more affected by their relationships with their children than it is by

---

<sup>85</sup> Kevin M. Roy, *You Can't Eat Love: Constructing Provider Role Expectations for Low-Income and Working-Class Fathers*, 2 FATHERING, Fall 2004, at 253 (quoting "Stoney").

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (quoting "Damion").

<sup>88</sup> Suzanne M. Nangle et al., *Work and Family Variables as Related to Paternal Engagement, Responsibility, and Accessibility in Dual-Earner Couples with Young Children*, FATHERING, Feb. 2003, at 71.

<sup>89</sup> Malin, *Fathers*, *supra* note 10, at 1065.

problems at work.<sup>90</sup> Dads who are involved with their kids tend to have longer lives and are less likely to die from accidents or suicide.<sup>91</sup>

In general, researchers have discovered that men have an “expansion” orientation to work-family balance, meaning that they experience better work-family “fit” when they take on greater responsibility for childcare.<sup>92</sup> Even when conflicts and stress arise at home, fathers are less likely than mothers to report feeling “drained” at work because of these problems.<sup>93</sup> “Fathers have an expectation of engaging positively with their families as a counterbalance to the stressors experienced at work.”<sup>94</sup> And fathers are increasingly viewing family involvement as an enriching, essential part of their lives and identities.

This focus on the family is not just about having leisure time. Many men are placing greater emphasis on having close personal relationships with their kids.<sup>95</sup> When surveyed, seventy-five percent of men say that they would prefer the “daddy track” to the “fast track,” more than fifty percent said they would take a twenty-five percent pay cut if they could have more family time, and forty percent would quit altogether to spend more time

---

<sup>90</sup> Malin, *Revisited*, *supra* note 9, at 33-34.

<sup>91</sup> Rosemary Black, Today’s Dads Q&A, <http://www.sesameworkshop.org/parents/advice/article.php?keyword=dads&contentId=99082> (last visited Apr. 11, 2007). Rosemary Black is an editor at *The New York Daily News*.

<sup>92</sup> E. Jeffrey Hill et al., *Studying “Working Fathers”: Comparing Fathers’ and Mothers’ Work-Family Conflict, Fit, and Adaptive Strategies in a Global High-Tech Company*, FATHERING, Oct. 2003, at 239. Contrast that with the “scarcity” model for women whereby they experience a better “fit” when they off-load caregiving responsibilities. *Id.* This dichotomy could be explained by women’s larger caregiving role and “second shift” responsibilities because women are still largely overworked at home compared to men. As a testament to the power of traditional marriage norms, however, one study found that as men spent more time with their children, the man’s satisfaction with his marriage decreased while the woman’s increased. Nangle et al., *supra* note 88.

<sup>93</sup> Hill et al., *supra* note 92 (noting that “[f]amily is a place of greater rejuvenation for fathers compared to mothers” even during times of family conflict).

<sup>94</sup> McDonald & Almeida, *supra* note 17.

<sup>95</sup> Malin, *Fathers*, *supra* note 10, at 1066 n.125. Even *Maxim*, one of today’s racy men’s magazines, recently featured a “how-to” article that educated readers about the ups and downs of pregnancy, childbirth, and infancy. Tim Dowling, *Goodbye Poker, Hello Pampers!*, MAXIM ONLINE, Mar. 2000, [http://www.maximonline.com/articles/index.aspx?a\\_id=3159](http://www.maximonline.com/articles/index.aspx?a_id=3159) (“Parenting, particularly in its early stages, can be daunting and even frightening, so it’s best to be prepared.”).

with their children if they could.<sup>96</sup> In another study, more than two-thirds of fathers said they felt they were not getting enough time with their one-year-old child.<sup>97</sup>

The drive for more kid contact has fueled fathers' decisions to spend more time actively involved in family life and to take on more nurturing parent roles. In fact, the Population Reference Bureau reported a thirty-three percent increase in just three years in the number of children under five who had working moms and caregiving dads.<sup>98</sup> The tug of new fatherhood is also visible in the efforts of the divorced fathers mentioned above who purposefully tried to "buy" time with their children. In their minds, providing was partially a means to caregiving.

Bolstering this new fatherhood expectation is a body of additional research indicating that active fathering is good for children. Studies confirm that "at every stage of child development from infancy through adolescence, fathers' involvement has significant positive effects on their children."<sup>99</sup> Children of involved, loving fathers are significantly more likely to do well in school, have healthy self-esteem, exhibit empathy and pro-social behavior, and avoid high-risk behaviors such as drug use, truancy, and criminal activity.<sup>100</sup> This is not just because they have involved parents, but because fathers, in particular, have shaped their development. Studies show fathers stimulate their children in ways that are different from mother-child interactions.<sup>101</sup> For example, dads tend to play more physically and less predictably, which is more stimulating and active, and dads tend to give their children longer tethers and offer help or support a little more slowly than moms.<sup>102</sup> Parenting, then, is not a "zero-sum game," because mothers and fathers contribute to the child's development in different

---

<sup>96</sup> Williams, *UNBENDING GENDER*, *supra* note 3, at 59.

<sup>97</sup> Malin, *Fathers*, *supra* note 10, at 1066 n.127.

<sup>98</sup> *Id.* One study found an increase from fifteen percent to twenty percent; another study found a 17.9% to 22.9% increase. *Id.*

<sup>99</sup> Malin, *Revisited*, *supra* note 9, at 28.

<sup>100</sup> National Fatherhood Initiative, Top Ten Father Facts, [http://www.fatherhood.org/fatherfacts\\_t10.asp](http://www.fatherhood.org/fatherfacts_t10.asp) (last visited Apr. 7, 2007).

<sup>101</sup> BRAZELTON, *supra* note 72, at 55.

<sup>102</sup> FamilyEducation.com, The Father Factor, <http://life.familyeducation.com/family/fathers-day/36138.html?page=1%detoured=1> (last visited Feb. 23, 2007).

ways.<sup>103</sup> Even conservatives who place high value on traditional family structures are coming around to support co-parenting, because they see the benefits of active father involvement in children's lives.<sup>104</sup> Across the political spectrum, ninety-one percent of men and ninety-four percent of women agreed that "everything about the care of children should be shared equally by both parents."<sup>105</sup> Fatherhood is not just about breadwinning anymore.

### C. Daddy Double-Bind

The new ideal of fatherhood, defined by active engagement and direct relationships with children, creates a counterforce to the traditional provider role where dad is the absent, working, check-sending parent. The tension between hegemonic masculinity, which values men's traditional provider role, and new fatherhood, which emphasizes caregiving and egalitarian partnerships, creates what I call a daddy double-bind. One divorced father described the situation succinctly by saying, "you can't eat love, unfortunately—you got to do both the loving and the providing."<sup>106</sup> Fathers today are struggling to live up to both sets of expectations even

---

<sup>103</sup> Some research indicates, for example, that fathers' involvement is important for academic performance while mothers' involvement is important for behavior. Malin, *Revisited*, *supra* note 9, at 29. See also BRAZELTON, *supra* note 72, at 422-23.

<sup>104</sup> David G. Myers, *Wanting More in an Age of Plenty*, CHRISTIANITY TODAY, Apr. 24, 2000, at 94. See also Lord Griffiths of Fforestfach, *The Third Way: Sacred or Secular?*, reprinted in CONSERVATIVE CHRISTIAN FELLOWSHIP, Nov. 1999, [http://ccfwebsite.com/search\\_display.php?type=speech&ID=24](http://ccfwebsite.com/search_display.php?type=speech&ID=24) ("[T]here should be an increase in co-parenting so that fathers assume greater responsibility for child care . . ."). Of course this view also dovetails with the conservative emphasis on heterosexual marriage as the pinnacle of social institutions, which casts even longer shadows on single and same-sex parents. When the Act was passed, conservatives spoke at length about how the FMLA would support "family values." See, e.g., 139 CONG. REC. S195-02, S267 (statement of Sen. Bond (R-MO)) ("[W]e as a society need to make family obligation something we encourage rather than discourage. That's why I believe we should enact the Family and Medical Leave Act."); 139 CONG. REC. E29-02, E30 (statement of Rep. Ford (D-MI)) ("If you are pro-family, the Family and Medical Leave Act of 1993 is legislation you can support wholeheartedly. . . . There is no higher family value than taking care of a newborn baby, a sick child, or a sick parent.").

<sup>105</sup> Kirstin Downey Grimsely & R.H. Melton, *Full-Time Moms Earn Respect, Poll Says*, WASH. POST, Mar. 22, 1998, at A16 (reporting on 1997 polls by the *Washington Post*, Harvard University, and the Henry J. Kaiser Foundation); Malin, *Revisited*, *supra* note 9, at 31 n.31.

<sup>106</sup> Roy, *supra* note 85.

though high success in one area often means failure in the other. One researcher noted: "The contradiction at the heart of fatherhood for successful providers [i]s that providing [i]s no longer equated with success as a parent or partner. Too much commitment to providing could limit and even harm paternal involvement."<sup>107</sup> The increasing feelings of frustration regarding work-life issues are a result of these shifting fatherhood norms. "Fathers are often torn between their desires to provide financial security for their families and their desires to establish close relationships with their children."<sup>108</sup>

The daddy double-bind is evident in both mothers' and fathers' expectations. A study of divorced fathers, for example, found that mothers sought men who could secure a "conventional family life through full-time jobs with benefits."<sup>109</sup> A similar study found that ninety percent of unmarried women say a steady job and emotional maturity are important for a successful marriage.<sup>110</sup> In other words, women still aspire to find men who will help them achieve the traditional, middle-class dream as defined by the breadwinner/homemaker model. However, both men and women also say they want the father to play an active caregiving role. In one study, 99.8% of unmarried fathers and ninety-three percent of unmarried mothers said that they wanted both parents to be involved in raising their children.<sup>111</sup> Fathers, in particular, usually held "high hopes" about their continued involvement with their child.<sup>112</sup> The problem was that "fathers often did not

---

<sup>107</sup> *Id.*

<sup>108</sup> Malin, *Fathers*, *supra* note 10, at 1066-67.

<sup>109</sup> Roy, *supra* note 85.

<sup>110</sup> National Fatherhood Initiative, Father Facts, [http://www.fatherhood.org/fatherfacts\\_lb.asp](http://www.fatherhood.org/fatherfacts_lb.asp) (last visited Apr. 7, 2007) (quoting SARA McLANAHAN ET AL., CTR. FOR RESEARCH ON CHILD WELLBEING AT PRINCETON UNIV. & THE SOCIAL INDICATORS SURVEY CTR. AT COLUMBIA UNIV., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY BASELINE REPORT (2001)).

<sup>111</sup> Ctr. for Research on Child Wellbeing at Princeton Univ. & the Social Indicators Survey Ctr. at Columbia Univ., *Dispelling Myths About Unmarried Fathers*, 1 FRAGILE FAMILIES RESEARCH BRIEF (2000), available at <http://www.fragilefamilies.princeton.edu/briefs/researchbrief1.pdf>.

<sup>112</sup> Ctr. for Research on Child Wellbeing at Princeton Univ. & the Social Indicators Survey Ctr. at Columbia Univ., *New Parents' Attitudes Towards Fathers' Rights and Obligations*, 2 FRAGILE FAMILIES RESEARCH BRIEF (2001), available at <http://www.fragilefamilies.princeton.edu/briefs/researchbrief2.pdf>.

know how to ‘do both’ employment and time with children.”<sup>113</sup> They did not know how to solve the daddy double-bind.

This call to be both provider and caregiver is felt across all socioeconomic class levels. As mentioned above, upper-class divorced fathers were often the most successful at navigating the double-bind, because they could use their financial resources to successfully litigate custody disputes and thereby “buy” time with their children. Upper-income dads, divorced or not, also have the most flexibility at work,<sup>114</sup> so caregiving may not create as much work-family conflict. Thus, they can muster both time and money to help them solve the daddy double-bind.

Lower-income dads’ inability to provide financial capital was sometimes offset by their ability to provide human and social capital. Researchers at the Families and Work Institute found that “low-income fathers and fathers of color exhibit both disengaged and nuanced paternal involvement shaped by poor job opportunities, crime, and limited education opportunities.”<sup>115</sup> They were often forced to pursue more creative forms of “providing,” such as offering in-kind support like food or diapers and connecting children to paternal kin who could serve as additional resources for the child.<sup>116</sup> Low-income fathers also rely on mobility aspirations as a way to minimize their dissatisfaction as providers. They strive to be involved fathers so that they can maximize their children’s future achievements—a process researchers call “generative engagement.”<sup>117</sup> If they cannot pay to support their children financially, these fathers focus on building their children’s potential to reap financial benefits later in life. In this way they solve the double-bind by spending time teaching their kids and offering non-cash support when they can.

Middle-class fathers, especially divorced dads, have the hardest time with the double-bind because the loss of “head of household” status for

---

<sup>113</sup> *Id.*

<sup>114</sup> Higher-income workers such as managers and professionals are more likely to have flextime, paid sick and vacation time, and family leave benefits. ELLEN GALINSKY ET AL., FAMILIES & WORK INST., WHEN WORK WORKS: A STATUS REPORT ON WORKPLACE FLEXIBILITY: WHO HAS IT? WHO WANTS IT? AND WHAT DIFFERENCE DOES IT MAKE? (2002), available at <http://familiesandwork.org/3w/research/downloads/status.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

these fathers causes significant trauma to their sense of masculinity and fatherhood.<sup>118</sup> One researcher explained:

The higher income fathers, after all, appear to relatively successfully negotiate the divorce transition. And for their part, the lower-income group already were not achieving societal ideals of masculinity and fatherhood, and thus their continued failure to do so after divorce does not cause a significant disruption in their self-constructions. It is therefore not accidental that expressions of anger and resentment by middle-class men at “the system” and at their ex-wives were often the most vehement.<sup>119</sup>

In other words, the middle-income divorced dads experience the steepest fall from grace because they feel increased pressure from both sides of the double-bind. Before the divorce, they could “do both” by relying on time after work to fulfill their caregiving responsibilities. After the divorce, fathers are still required to work to provide child-support, but the opportunity for caregiving disappears, especially if they have insufficient resources for custody battles. For middle-income dads who are not divorced, their success largely hinges on their employer. If they make enough money or have enough flexibility to afford time off, they can successfully “do both.” Otherwise they are caught squarely in the daddy double-bind and have few resources to get out.

Like the “choices” offered to women in the work-family context, “ambiguous standards for successful fatherhood may appear to offer personal choice and flexibility, but they also mask risky propositions for men with few resources.”<sup>120</sup> As long as the provider role persists in creating a hegemonic masculine ideal, the addition of new fatherhood simply increases the pressure on men because they are expected to “do both.” Of the fathers that are most successful in combining providing and caregiving, they exhibit greater “adaptive capacities,” such as being creative about diverse types of fathering experiences. They also have better “role flexibility,” meaning parents actively negotiated the role men would have in their children’s lives.<sup>121</sup> Flexibility and adaptability are also central to an

---

<sup>118</sup> Catlett, *supra* note 16, at 165.

<sup>119</sup> *Id.*

<sup>120</sup> Roy, *supra* note 85.

<sup>121</sup> *Id.*

improved employment structure, which would go a long way toward helping fathers meet the expectations of hegemonic masculinity, as well as new fatherhood.

### III. FAMILY AND MEDICAL LEAVE

The daddy double-bind directly correlates to the level of work-family conflict that fathers experience. If men have enough money and time they can “do both” breadwinning and caregiving, but employer practices can severely limit one or both of these resources. Social policies like the Family and Medical Leave Act are one way to tip the scales of the employment market in fathers’ favor.

#### A. The Importance of Parental Leave

Although men have a growing desire to fulfill the obligations of new fatherhood, research shows that several factors influence the level of active father involvement in family life. The attitudes and work status of both the mother and the father are important variables. Material characteristics include a mother’s employment,<sup>122</sup> her level of income relative to the father, her relationship with her own father, her attitudes toward paternal involvement,<sup>123</sup> and her belief about the father’s potential competence as a caregiver.<sup>124</sup> Other research points to the father’s employment status,<sup>125</sup> his “commitment to and identification with the fatherhood role,”<sup>126</sup> and the father’s initial involvement in pre-natal and infancy care as determinative.<sup>127</sup> What is most relevant for this discussion of the FMLA is that studies indicate that the more days a father takes off from work when the child is born, the more involved the father is later in the

---

<sup>122</sup> Nangle et al., *supra* note 88 (“Research has demonstrated that the more hours mothers work per week outside the home, the more time fathers spend taking care of children.”).

<sup>123</sup> Malin, *Fathers*, *supra* note 10, at 1058 n.5, 1051 n.19, 1050 n.16.

<sup>124</sup> Nangle et al., *supra* note 88.

<sup>125</sup> Malin, *Revisited*, *supra* note 9, at 35 (“Unemployed fathers are three times as likely to be primary caregivers, fathers who work part-time or who work evening or night shifts are twice as likely.”).

<sup>126</sup> Nangle et al., *supra* note 88.

<sup>127</sup> BRAZELTON, *supra* note 72, at 4 (finding that fathers who attend prenatal pediatric visits are more likely to stay involved later).

child's life.<sup>128</sup> Thus, parental leave that is legally protected and socially viable is a critical factor for parenting equality. Employment regulations that allow all fathers to take leave for caregiving become vital to challenging the daddy double-bind and to shifting gender division of labor norms.

Again, as outlined in Part I, parenting is not an inherent skill. It takes practice. This means that fathers, as well as mothers, need protected time to devote to learning how to be an effective parent. After the birth of a baby, the mother can get protected time via disability policies and paid maternity leave, but fathers are not given this same opportunity.<sup>129</sup> As a result, sex specialization creeps into the relationship and a traditional gendered division of labor ultimately forces the woman to shoulder both work and household duties. Meanwhile, the "life-cycle squeeze" pushes fathers to work even harder when they have young children, thereby exacerbating the unequal division of labor at home. This squeeze is particularly harsh for low-income families where second jobs<sup>130</sup> and "tag-team" parenting are becoming the norm, putting additional strains on the partnership.<sup>131</sup>

The legal protection of family leave plays a vital role in determining whether leave is a socially viable option for mothers and fathers. If mothers are the primary leave-takers, they get a head start on developing their parenting skills and are, therefore, perceived as more competent parents than men, thus reifying the "biological" division of labor within families. The ability to take family leave, then, plays a determinative role in the overall pattern of sex inequality. As one commentator stated, "Just as the absence of adequate maternal leave policies has been a barrier to women's roles in the workplace, the absence of adequate paternal leave policies has been a barrier to men's roles in the home."<sup>132</sup> Without

---

<sup>128</sup> Malin, *Revisited*, *supra* note 9, at 36; Malin, *Fathers*, *supra* note 10, at 1058 (noting how studies show that fathers who take parental leave are more likely to be involved later on).

<sup>129</sup> A survey of businesses with more than 100 employees found that fifty-three percent offered replacement pay for mothers on leave, but only thirteen percent offered paid leave to men. Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967, 976 (2001).

<sup>130</sup> For fathers in the low-paid service sector, "[s]uccess depended on their abilities to weave together two or more jobs at the same time." Roy, *supra* note 85, at 260.

<sup>131</sup> Williams, *Mothers*, *supra* note 33, at 428.

<sup>132</sup> Malin, *Fathers*, *supra* note 10, at 1052.

government intervention or a dramatic shift in the employment market, this cycle will remain unchanged. Men will continue to face the overwhelming obstacle of the daddy double-bind, and women will continue to shoulder the burden of the gendered division of labor.

## B. FMLA Benefits and Limitations

The Family and Medical Leave Act<sup>133</sup> was passed in 1993 to address both the low status of women and the work-life problems of all workers.<sup>134</sup> The stated purposes of the Act are to “balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity,”<sup>135</sup> as well as to “promote the goal of equal employment opportunity for women and men.”<sup>136</sup> The basic provisions of the Act state that “eligible employees” are entitled to twelve weeks of leave during any twelve-month period for the birth or adoption of a child, the care of an immediate family member who has a “serious health condition,” or the employee’s own “serious health condition.”<sup>137</sup> During the duration of leave, the employer is obligated to maintain health benefits.<sup>138</sup> Upon returning from leave, the employee is entitled to be restored to the same position or one that has “equivalent employment benefits, pay, and other terms and conditions of employment.”<sup>139</sup>

Employer policies, collective bargaining agreements, and state law can all provide greater protection or better leave benefits than that provided by the Act,<sup>140</sup> but the FMLA sets a minimum standard that cannot be diminished.<sup>141</sup> In addition, an employer cannot “interfere with, restrain, or

---

<sup>133</sup> Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2006).

<sup>134</sup> See *supra* note 19 and accompanying text.

<sup>135</sup> 29 U.S.C. § 2601(b)(5).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 2612(a).

<sup>138</sup> *Id.* § 2614(c)(1). However, if the employee does not return to work, the employer can seek to recover the premiums paid during the duration of leave. *Id.* § 2614(c)(2).

<sup>139</sup> *Id.* § 2614(a).

<sup>140</sup> *Id.* §§ 2652(a), 2653.

<sup>141</sup> *Id.* § 2652(b).

deny the exercise of or the attempt to exercise, any right” provided by the Act.<sup>142</sup>

Although the basic provisions of the FMLA sound generous, the details reveal significant limitations on the Act’s utility. First, employees do not become “eligible” for leave until after they have been employed for at least twelve months *and* have worked at least 1,250 hours during that twelve-month period.<sup>143</sup> New employees, those who work multiple part-time jobs, or those who work in high-turnover fields may never become eligible.

Second, the term “eligible employee” does not include federal employees or “any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.”<sup>144</sup> In other words, workers who are employed by small employers or those whose workforce is spread over a larger geographic area are also not eligible.

Third, employers can require “certification” from a medical professional stating that the employee needs leave.<sup>145</sup> If the employer has “reason to doubt the validity of the certification,” the employer can require a second opinion before granting leave.<sup>146</sup> The employer can also require certification before the employee may return from leave.<sup>147</sup> Employers can use these hoop-jumping requirements to create significant administrative obstacles to an employee’s leave taking, especially for employees who do not have health insurance and who are not in the regular care of a physician.

Fourth, employers can require employees to use accrued vacation, personal, or sick time as part of the twelve weeks.<sup>148</sup> Thus, for employees who have twelve or more weeks of accrued time, most of whom are middle- and upper-income workers, the Act provides little to no additional benefit. Furthermore, upon the birth or adoption of a child, if both parents work for

---

<sup>142</sup> *Id.* § 2615(a)(1).

<sup>143</sup> *Id.* § 2611(2)(a). This translates to twenty-four hours a week for the entire year (fifty-two weeks). *Id.*

<sup>144</sup> *Id.* § 2611(2)(b).

<sup>145</sup> *Id.* § 2613.

<sup>146</sup> *Id.* § 2613(c).

<sup>147</sup> *Id.* § 2614(a)(4).

<sup>148</sup> *Id.* § 2612(d)(2).

the same employer, they can be required to split the twelve weeks.<sup>149</sup> This provision means mothers and fathers must “compete” for leave time. Given the tendency of couples to credit the mother’s parenting time as more vital, and the likelihood that foregoing her smaller income will be easier on the family’s finances, this provision creates a significant barrier to the father’s initial contact with the child and therefore his continued active involvement in the child’s life.<sup>150</sup>

Fifth, employees do not accrue seniority while they are on leave.<sup>151</sup> This hurts those workers at all income levels who rely on seniority for pay increases, but it also significantly impacts fathers who still fulfill the majority of the family’s financial needs, which increase after the birth of a child. If the father is unable to obtain increased pay based on seniority after leave, there exists another economic barrier to taking leave in the first place.

Sixth, an employer can refuse to restore executive employees to their previous position if the employee is “among the highest paid 10 percent” of employees, and such refusal would “prevent substantial and grievous economic injury to the operations of the employer.”<sup>152</sup> This directly limits upper-income fathers because, without job protection, the Act does nothing to change the employment relationship. Given that management support and use of leave is a significant predictor for FMLA use,<sup>153</sup> this provision also creates a chilling effect on the entire workforce, which lessens the likelihood that lower-level employees will take leave. In addition, given that the overwhelming majority of employees at this class level are male, the provision further encourages “key employees” to avoid family responsibilities altogether and shift them entirely onto their wives.<sup>154</sup>

Finally, and most importantly, the Act does not require any replacement pay during the duration of leave. This means a vast majority of employees who do not already have benefits, such as accrued paid time off,

---

<sup>149</sup> *Id.* § 2612(f).

<sup>150</sup> Heather A. Peterson, *The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act*, 15 WASH. U. J.L. & POL’Y 253, 269 (2004).

<sup>151</sup> 29 U.S.C. § 2614(a)(3)(A).

<sup>152</sup> *Id.* § 2614(b).

<sup>153</sup> Malin, *Revisited*, *supra* note 9, at 41; Twomey & Jones, *supra* note 50, at 230; Peterson, *supra* note 150, at 270 n.74 (remarking that the exemption of high ranking employees means there is “an unspoken message that the top officials neither sanction nor embrace such behavior”).

<sup>154</sup> Peterson, *supra* note 150, at 270.

simply cannot afford to take leave. In fact, sixty-five percent of eligible employees who needed leave said they did not take it because they could not afford the loss in income.<sup>155</sup> As mentioned above, mothers can collect disability during the initial post-partum period. As a result, the financial barriers associated with unpaid leave end up affecting men more than women. Without paid leave, fathers must choose between breadwinning and caretaking. For low- and middle-income fathers who cannot afford to lose pay, the FMLA is irrelevant to their lives.

### C. The Effect of the FMLA

A 1996 Report to Congress from the Federal Commission on Family and Medical Leave estimated that roughly two-thirds of American workers are considered “eligible” under the Act.<sup>156</sup> With over 143 million workers in the labor force as of March 2006,<sup>157</sup> that would mean nearly 48 million workers are excluded from the Act altogether. These workers must rely on the generosity of their employer to take unpaid family leave or sick time.

Since its passage, approximately 35 million people have taken leave under the Act.<sup>158</sup> Most were young, hourly employees with children who earned between \$20,000 and \$30,000 a year.<sup>159</sup> Not surprisingly, fifty-eight percent of leave takers were women,<sup>160</sup> though only thirteen percent of leave taken was for childbirth or adoption reasons.<sup>161</sup> The median length of leave was ten days.<sup>162</sup>

---

<sup>155</sup> Twomey & Jones, *supra* note 50, at 230-31 (citing COMM’N OF FAMILY & MED. LEAVE, A WORKABLE BALANCE REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVES POLICIES (1996) (sixty-six percent)); Eichner, *supra* note 30, at 148 n.51 (citing Pat Swift, *Lobbying for the Next Steps in Family Leave*, BUFFALO NEWS, May 17, 1997, at C7).

<sup>156</sup> Peterson, *supra* note 150, at 266-67.

<sup>157</sup> Bureau of Labor Statistics, *The Employment Situation: March 2006*, NEWS: U.S. DEP’T OF LABOR, Apr. 6, 2007, at 8 tbl.A-1, available at <http://www.bls.gov/news.release/pdf/empst.pdf>.

<sup>158</sup> Dickerson, *supra* note 27, at 438 n.75.

<sup>159</sup> Twomey & Jones, *supra* note 50, at 236.

<sup>160</sup> Peterson, *supra* note 150, at 266-67.

<sup>161</sup> *Id.* at 267 n.58 (noting that eighty percent of FMLA leave is for a “serious illness” and sixty percent of illness leave is for one’s own illness).

<sup>162</sup> *Id.* at 267 n.59.

A survey by the Bureau of National Affairs found that only seven percent of men said they would take the full twelve weeks of leave after the birth of a child, compared to forty-three percent of women.<sup>163</sup> On average, though, both mothers and fathers said they would take less than twelve weeks—men would take 2.7 weeks, women 8.5 weeks.<sup>164</sup> Sadly, more than twenty percent of men said they would elect to take no leave at all under the FMLA upon the birth of a child.<sup>165</sup> Usage rates indicate that men are more likely to take FMLA leave to care for their own serious illness<sup>166</sup> and will often substitute paid vacation or sick leave upon the birth of their child.<sup>167</sup> This is another indicator that affordability is a huge issue. It also demonstrates the fear men have regarding “family” leave. As outlined in Part IV, section B, fathers do not want to jeopardize their income by appearing overly devoted to family. Since time with their children has been shown to improve fathers’ health as well as the children’s welfare, without paid leave, the FMLA forces workers to choose between financial well-being and physical well-being.<sup>168</sup> This is precisely the choice lawmakers sought to eliminate when they passed the FMLA;<sup>169</sup> however, the problem remains relatively unabated.

The overarching trouble with the Family and Medical Leave Act is that it merely confirms the status quo. One commentator stated succinctly: “Because the patterns of care-taking are established in the days and weeks following the birth or adoption of the child, the FMLA ensures that the burden of caregiving falls on the mother.”<sup>170</sup> Since perception of competence is a determinative factor in father’s caretaking, the pattern established at birth becomes increasingly difficult to break as time passes.

---

<sup>163</sup> *Id.* at 267 n.61.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Dickerson, *supra* note 27, at 438 n.75 (noting that fifty-eight percent of men’s leaves were for their own illness compared to forty-nine percent for women).

<sup>167</sup> Peterson, *supra* note 150, at 267 n.61.

<sup>168</sup> *See supra* notes 90, 99-100 and accompanying text.

<sup>169</sup> *See, e.g.*, 139 CONG. REC. S195-02, S266 (statement of Sen. Kennedy (D-MA)) (“The Family and Medical Leave Act will finally guarantee that millions of American workers will no longer be forced to make the impossible choice between the job they need and the family they love.”).

<sup>170</sup> Dickerson, *supra* note 27, at 443.

Professor Martin Malin explains: “As women take more of the leave, the myth that mothers are better parents becomes self-perpetuating. Kids turn to Mom more often, thereby reinforcing her role as primary caretaker.”<sup>171</sup> Furthermore, the FMLA is limited to “medical crisis moments” and does not begin to address the work-family conflict that can arise from general parenting responsibilities beyond a child’s first year.<sup>172</sup> For all these reasons, the Act has largely failed to “challenge the workplace or family structures that were in place prior [to] its passage.”<sup>173</sup>

Indeed, gender disparities in both paid and unpaid leave remain relatively untouched by the FMLA. A national study of employers conducted by the Families and Work Institute found lingering differences in the number of employers who offer job-guaranteed leave following the birth of a child:<sup>174</sup>

*Percentage of Employers Offering Unpaid Leave in 2005*

	Less than 12 weeks	12 weeks	More than 12 weeks	Average
For Women	14%	56%	31%	16.7 weeks
For Men	18%	61%	20%	14.5 weeks

These numbers show that, while the FMLA seems to have established a new norm for most employers, it has not changed the general inclination to favor maternity leave over paternity leave, with women, on average, garnering two more weeks of leave time than men.

When it comes to *paid* leave, the study found even greater disparities:<sup>175</sup>

<sup>171</sup> Malin, *Fathers*, *supra* note 10, at 1056.

<sup>172</sup> Eichner, *supra* note 30, at 149.

<sup>173</sup> Dickerson, *supra* note 27, at 445.

<sup>174</sup> JAMES T. BOND ET AL., FAMILIES & WORK INST., 2005 NATIONAL STUDY OF EMPLOYERS 11 tbl.6 (2005), available at <http://familiesandwork.org/eproducts/2005nse.pdf>.

<sup>175</sup> *Id.* at 12 tbl.7.

*Percentage of Employers Offering Paid Leave in 2005*

	Small Employers (50 to 99 employees)	Large Employers (1,000 or more employees)	Overall
For Women	36%	66%	46%
For Men	14%	13%	14%

Similarly, a survey of businesses with more than 100 employees found that fifty-three percent offered replacement pay for mothers on leave, but only thirteen percent offered paid leave to men.<sup>176</sup> Despite the aspirations of Congress to balance work and family needs and to provide economic security to families, these results remain elusive.

#### **D. The Concerns of Class**

Additionally, the Act does nothing to address the challenges of socioeconomic class. When the Act was passed, commentators were concerned that the FMLA would have a negative impact on low-income women because it was an unfunded mandate for their employers.<sup>177</sup> The logic was that, if family leave created new costs for the employer, these costs would be passed onto the employee through lower wages or fewer jobs because the employer would not want to reduce profits.<sup>178</sup> Since women were more likely to take leave, they would be seen as the more expensive employee, and would, therefore, be more likely to lose pay or employment opportunities.<sup>179</sup> This fear, however, did not come to fruition.

First, since the Act did not mandate paid leave, employers incurred little to no additional cost. Studies indicate that “[a]lmost 87% of employers found no noticeable effect on productivity, profitability, or growth, [but] reported increased morale and loyalty as a result of the law.”<sup>180</sup> In addition, more than ninety percent of employers found the Act “somewhat” or “very”

<sup>176</sup> Cunningham, *supra* note 129, at 976.

<sup>177</sup> See generally Maria O’Brien Hylton, “Parental” Leaves and Poor Women: *Paying the Price for Time Off*, 52 U. PITT. L. REV. 475 (1991).

<sup>178</sup> Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMP. RTS. & EMP. POL’Y J. 273, 277-78 (2001) [hereinafter Waldfogel, *Policies*].

<sup>179</sup> *Id.*

<sup>180</sup> Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 85 (2000).

easy to administer.<sup>181</sup> If the law were to mandate paid leave, which is necessary for low- and middle-income workers who cannot afford to take leave under the current Act, and employers were obligated to contribute to the replacement pay funds, employer costs would increase. To date, however, this has not happened.

Second, even if employer costs rise, it would not necessarily mean reduced wages or jobs for women because the number of men taking family leave is significant and growing. So far, men have taken approximately forty-two percent of leave under the FMLA.<sup>182</sup> According to one estimate, the number of men taking paternity leave has doubled in the last five years from seven percent in 2000 to sixteen percent in 2005.<sup>183</sup> If paid leave were available, likely more men would take leave, thereby eliminating the perception that female employees are inherently more costly. As it is, many low-income workers, men and women, cannot afford to take leave because it is unpaid. Employers are aware of this and, as such, they are not likely to prefer male over female candidates because neither is likely to ask to be out of work for any extended period of time.

Third, if paid leave were added without any other changes to the Act, it could cause problems for lower-income employees, since they are unlikely to have paid vacation or sick time now.<sup>184</sup> Employers would be obligated to provide a new paid time-off benefit for these workers, which would, depending on how it is funded, make low-income employees more expensive. However, if eligibility is universal and employers are no longer allowed to force substitution of paid vacation and sick time, then family leave costs would be the same for all employees at all income levels, and the disparate impact on low-income employees could be mitigated or avoided.

Currently, low- to middle-income workers are less likely to have paid vacation or sick days,<sup>185</sup> and are the least able to afford any interruption to their income, especially upon the birth of a child, when they

---

<sup>181</sup> *Id.*

<sup>182</sup> Peterson, *supra* note 150, at 266-67. Usually men take FMLA leave to care for their own serious illness. See *supra* note 161 and accompanying text.

<sup>183</sup> Paul B. Brown, *Great Job, Vacation Is on Us*, N.Y. TIMES, Sept. 24, 2005, at C7 (citing Caroline Howard, *Dads Want Paternity Leave*, WORKING MOTHER MAG., Sept. 2005, at 22).

<sup>184</sup> GALINSKY ET AL., *supra* note 114.

<sup>185</sup> *Id.*

experience a “life-cycle squeeze.” Work-family conflict and the growing tension over the change in gender norms tend to cause the most problems for people with less education, lower incomes, and fewer economic prospects.<sup>186</sup> Low-income men, in particular, do not have the option of juggling work and family because, in many cases, they are already juggling two or more jobs, leaving them very little time for caregiving.<sup>187</sup> Middle- to higher-income workers continue to risk losing their jobs if they take leave and can also experience setbacks due to their stagnant seniority during their absence. Although high-income fathers may have more money and more flexibility, the Act still does nothing to address subtle workplace hostility or the chilling effect of exempting “key employees” that can discourage fathers from taking leave.<sup>188</sup> The enduring grip of hegemonic masculinity and the lack of support for new fatherhood mean that, for men across class levels, the FMLA does nothing to change the daddy double-bind and, for women across class levels, it does nothing to change the gendered division of labor.

#### IV. ALTERNATIVE INTERVENTIONS

Two main strategies would change this status quo. First, paid leave would allow low- and middle-income men to take leave without compromising family income. Second, more robust judicial enforcement would allow middle- and upper-income men to take leave without fear of retribution by their employers. These strategies would help men “do both”—providing and caregiving—such that the lingering economic and social structures holding men and women in traditional roles would begin to crumble.

##### A. Amend the FMLA and Provide Replacement Pay

As “minimum standards” legislation, the FMLA could be amended to raise the floor for all workers who struggle to balance work and family

---

<sup>186</sup> Richard Morin, *How the Haves and Have-Nots Differ*, WASH. POST ONLINE, Feb. 1, 1999, <http://www.washingtonpost.com/wp-srv/politics/polls/wat/archive/wat020199.htm>.

<sup>187</sup> Wen, *supra* note 35.

<sup>188</sup> Peterson, *supra* note 150, at 282 (“[P]owerful social forces, found most significantly in the form of workplace hostility, are what reinforce the perception that male employees are not interested in parental leave and prevent them from displaying such an interest.”).

responsibilities. Several fairly obvious changes could make the Act a much more effective tool in pursuing the purposes for which it was passed. Proposals since the law was adopted in 1993 have included:

[L]owering the firm size threshold so that employees at smaller firms would be covered; allowing leave for different reasons, such as attending parent-teacher conferences at children's schools; expanding the categories of people for whom one can take leave, so that care for people other than those specified in the FMLA would be covered; redefining "serious health conditions" [so that a broader range of situations are covered]; . . . extending the duration of leave permitted so that employees can take longer leaves if necessary; extending coverage to currently non-eligible workers, such as part-time employees and new employees; and making some provision for paid leave so that employees do not forego taking leave, cut their leave short, or experience financial hardship due to the lack of paid leave.<sup>189</sup>

Extending the Act to cover all employees, allowing employees to use paid vacation and sick time in addition to, rather than instead of, FMLA leave, allowing mothers and fathers to each take twelve weeks, and providing a bonus number of weeks if mothers and fathers take equal amounts of time off, would all help make the Act more effective and more relevant to workers', especially fathers', lives.

The most important change, however, would be to provide replacement pay. In the United States, several strategies have been suggested or implemented to pay for family leave. The first strategy was the use of unemployment compensation funds; however, this approach proved highly controversial<sup>190</sup> and was ultimately made illegal by the Bush Administration.<sup>191</sup>

---

<sup>189</sup> Waldfogel, *Policies*, *supra* note 178, at 286. Peterson, *supra* note 150, at 268 (showing that eleven percent of women who took leave had to go on welfare while they were on leave).

<sup>190</sup> "Unemployment insurance is designed for people who are unemployed because employers do not have work for them," says Eric Oxfeld of UWC Strategic Services, a business lobbying group. "Using unemployment insurance to provide benefits to people who take leave when employers have jobs for them is turning the program on its head." Cheye Calvo, *Parental Leave as Unemployment*, STATE LEGISLATURES MAG., Oct./Nov. 2000, at 26.

<sup>191</sup> Use of unemployment funds for family leave arguably violates the longstanding "able and available" requirement that unemployment insurance recipients must accept "suitable employment" when offered or lose benefits. *Id.*

The second common mechanism for funding paid leave has been the use of temporary disability programs. Hawaii, New Jersey, New York, and Rhode Island provide paid maternity (but not paternity) leave in this manner.<sup>192</sup> Some states fund these programs through employee contributions, others through employer contributions.<sup>193</sup> Benefits range from one-half to two-thirds of an employee's pre-leave wages.<sup>194</sup> While this approach is helpful for women during pregnancy and after childbirth, it offers no solution for fathers who just had a child or for caregivers in general.

To date, the only comprehensive paid family leave program is in California. In 2002, the state enacted a paid family leave system through the state's temporary disability program that covers both men and women and provides "up to six weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption."<sup>195</sup> The system is funded entirely by employee payroll deductions, which began in 2004.<sup>196</sup> Employees receive up to fifty-five percent of their weekly salaries, or \$728 per week, whichever is less.<sup>197</sup> The program is still too new to be able to report on its effectiveness, and concerns over the low level of replacement pay may prove critical to the participation rates of workers in the state.

Another approach offers a partial solution for families who choose to have one parent stay home. In Minnesota<sup>198</sup> and Montana,<sup>199</sup> low-income families can secure some wage replacement if one parent provides full-time

---

<sup>192</sup> Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 378 (1996).

<sup>193</sup> *Id.* at 393.

<sup>194</sup> *Id.*

<sup>195</sup> CAL. UNEMP. INS. CODE § 3301(a)(1) (2006).

<sup>196</sup> Lisa Girion & Megan Garvey, *Davis OKs Paid Family Leave Bill*, L.A. TIMES, Sept. 24, 2002, at B1.

<sup>197</sup> *Id.* If a person makes more than \$68,800 per year, the percentage of wage replacement begins to drop below the fifty-five percent level.

<sup>198</sup> MINN. STAT. § 119B.035 (2005).

<sup>199</sup> MONT. CODE ANN. § 52-2-710 (2005).

care for a child in their first year of life. Both states shift subsidy money that would otherwise go to a commercial child care provider and, instead, give up to ninety percent of the subsidy to the family. While these programs are positive steps, they do not encourage both parents to remain involved with the child; thus, women will still provide the bulk of the caregiving.

Other strategies that have been suggested include using tax subsidies to induce employers to provide replacement pay,<sup>200</sup> and using state funds to pay for universal paid leave.<sup>201</sup> As mentioned above, if eligibility stretches across income categories, and if the cost to employers is commensurate to the benefits of increased morale and employee loyalty, then adding a replacement pay mechanism would not adversely affect jobs or wages. In general, creating paid family leave would most directly benefit low- and middle-income families who cannot afford a reduction in income, especially during the life-cycle squeeze. For middle- to upper-income families, a different solution is needed.

## **B. Increase judicial enforcement of FMLA rights**

Fear of workplace retribution still causes considerable anxiety for fathers who are trying to solve the daddy double-bind. One reporter said: "A number of men I interviewed declined to have their full names used, fearful they would be perceived by their bosses as weak in their commitment to work if they were quoted about their devotion to family."<sup>202</sup> Likewise, a 2005 study found that sixty-eight percent of men feared that talking about work-family conflict risked making them appear less ambitious and focused at work.<sup>203</sup> "They still don't feel like they can talk about wanting more quality time with the kids, or take that paternity leave, or ask for flextime, without compromising their careers—and surveys of employers suggest they're right."<sup>204</sup> In 1996, seventy percent of employees said their employer recognized the strain they face between the demands of

---

<sup>200</sup> SKOCPOL, *supra* note 4, at 157.

<sup>201</sup> In trying to get a comprehensive paid leave bill passed, Minnesota Senator Ellen Anderson said that employers do not necessarily have to pick up the bill, but someone must. "If you support family values, you should support this," she said. "The problem is that people want free family values, not those that cost money." Calvo, *supra* note 190.

<sup>202</sup> Wen, *supra* note 35.

<sup>203</sup> Gibbs, *supra* note 1.

<sup>204</sup> *Id.*

their family and the demand of work.<sup>205</sup> In 1999, this number had fallen to thirty-eight percent.<sup>206</sup>

On its face, the Act states an employer cannot “interfere with, restrain, or deny the exercise of or the attempt to exercise, any right” provided by the Act.<sup>207</sup> In reality, however, employers often make it difficult for men in particular to take leave under the Act. “Even in organizations that provide [family] benefits, use may be low if supervisors don’t encourage men to take them.”<sup>208</sup>

Lingering sexual stereotypes make it easier for women to take leave because women experience a great deal of societal approval when they seek to fulfill their caregiving role.<sup>209</sup> As one commentator noted, “Although mothers who take time off from work for caregiving may be considered less valuable workers, they may well be deemed to be living up to widely held ideals of motherhood.”<sup>210</sup> Contrarily, men who want to take leave face a great deal of resistance because admitting they are using leave for fatherly responsibilities runs counter to their role as breadwinner.<sup>211</sup> The basic perception is that “[y]our wife should handle it.”<sup>212</sup> This view denies many fathers’ deep felt desire to have an equal relationship with their partners and a close relationship with their children under the new fatherhood model. The persistent strength of hegemonic masculinity links being a good father with being a good provider. The daddy double-bind once again means that “the father who takes time off from work for caregiving may actually be viewed as a failure as a father,”<sup>213</sup> and a failure as a worker too. Thus, fear

---

<sup>205</sup> Fathers in America, 1996 Gallup Poll on Fathering, <http://www.fathers.com/research/gallup.html> (last visited Apr. 11, 2007).

<sup>206</sup> Nat’l Ctr. for Fathering, Fathers in America: 1999 National Random Sample Poll Results, <http://www.fathers.com/research/summary.html> (last visited Apr. 11, 2007). Changes in the economy between 1996 and 1999 may be a driving force behind the reduction in employer flexibility.

<sup>207</sup> 29 U.S.C. § 2615(a)(1) (2006).

<sup>208</sup> Kahlenberg, *supra* note 35.

<sup>209</sup> Eichner, *supra* note 30, at 165 n.99.

<sup>210</sup> Margalioth, *supra* note 32, at 326 n.178.

<sup>211</sup> Eichner, *supra* note 30, at 165 n.99.

<sup>212</sup> Malin, *Fathers*, *supra* note 10, at 1077.

<sup>213</sup> Margalioth, *supra* note 32, at 326 n.179.

of employer retribution is reflected in men's use of paid vacation and sick leave upon the birth of a child rather than FMLA leave.

As outlined above, the economic and cultural forces that perpetuate this situation are complex. In addition to lingering employer stereotypes, the premium paid to married men with stay-at-home wives is another example of the "current incentives that make it relatively riskless for men to overinvest in market work and underinvest in family relationships."<sup>214</sup> This "carrot" is matched by "sticks" such as demotions, unfavorable reinstatements, or subtle slow-downs in career advancement, which are used to "punish anyone who does not perform as an ideal worker."<sup>215</sup> Although the FMLA prohibits interference on its face, weak judicial enforcement means workers have virtually no protection from subtle discrimination and retaliatory actions.

In addition, another provision of the FMLA exacerbates this problem because it provides an affirmative defense for employers who try to hide negative treatment. The Act states that employees are only entitled to "any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."<sup>216</sup> In other words, if negative treatment is challenged, an employer simply has to claim that the employee would not have been entitled to better treatment. In this way, employers often disguise discrimination through vague comments about the employee's lack of "commitment" to the job.<sup>217</sup> Ultimately, the employer is punishing the employee for taking leave, but on the surface the reinstatement after family leave hides this subtle discrimination. As long as the employee has been allowed to take leave and has been returned to his prior position, courts have been reluctant to link subsequent negative treatment by the employer to an employee's FMLA leave, particularly if there is any temporal distance between the two.<sup>218</sup> The result has been enduring workplace hostility with very little legal recourse.

---

<sup>214</sup> Williams, *Snowing*, *supra* note 33, at 822.

<sup>215</sup> *Id.*

<sup>216</sup> 29 U.S.C. § 2614(a)(3)(B) (2006).

<sup>217</sup> Sixty-eight percent of employed men, compared to fifty-four percent of women, consider working long hours to be a sign of commitment. Cunningham, *supra* note 129, at 993.

<sup>218</sup> See, e.g., *Dodgens v. Kent Mfg.*, 955 F. Supp. 560 (D.S.C. 1997) (granting summary judgment for an employer even though the employee was asked to accept a demotion and, after refusing, was fired three days after he returned from leave).

Courts have analogized disputes under the FMLA to cases under Title VII of the Civil Rights Act of 1964<sup>219</sup> and applied the burden shifting analysis under the Title VII line of jurisprudence.<sup>220</sup> This makes it more difficult for plaintiffs to prevail because it requires some initial finding of discrimination, which is difficult for plaintiffs to prove when the employer grants leave and restores the employee to his prior job position. Despite these difficulties, however, a father could capitalize on the Title VII analogy by bringing three similar claims under the FMLA: a disparate impact claim if mothers and fathers are treated differently, a discrimination claim based on sex stereotypes if fathers are discouraged from taking leave, and a hostile environment harassment claim if fathers face negative treatment for their commitment to family.

First, if leave is denied or discouraged, a Title VII type of analysis offers hope for fathers, because a male employee could point to the use of benefits by female employees as evidence of disparate treatment. At least one commentator has suggested that fathers should focus on this aspect of the law when they are negotiating leave.<sup>221</sup> “Fathers should find out what benefits are available to women and whether they are taken routinely, then

---

<sup>219</sup> 42 U.S.C. § 2000e-2 (2006).

<sup>220</sup> See, e.g., *Dollar v. Shoney's, Inc.*, 981 F. Supp. 1417 (N.D. Ala. 1997) (using Title VII to grant summary judgment for the defendant because the employer laid off two other supervisors who had not taken leave at the same time as the plaintiff). Under *McDonnell Douglas*, plaintiffs must first prove a prima facie case of discrimination. If the employer asserts any legitimate non-discriminatory reason for the negative employment action, then plaintiff must further prove that the stated reason is really a “pretext” for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>221</sup> Disparate treatment claims are hard to prove in court because they tend to hinge on statistical differences in employer practices and employee benefits. For example, in *Dodgens v. Kent Manufacturing*, 955 F. Supp. 560 (D.S.C. 1997), the court failed to redress a demotion during the male plaintiff's leave because the employer had granted 129 FMLA leaves and had returned each employee to his or her prior position. Thus, the plaintiff could not prove the employer tended to restore women more than men. In addition, the court noted that this particular plaintiff had taken a number of leaves in the past and had always been restored to his position, which proved the employer was not discriminating against this plaintiff for any impermissible reason under Title VII. If FMLA jurisprudence were separated from Title VII, the court could have simply inquired into whether a statutory entitlement had been denied, which was the case in *Dodgens*, and the plaintiff would have been more likely to prevail. The substantive question would have been simply “whether the requested demotion and subsequent discharge interfered with, restrained or denied *Dodgens*' right to FMLA leave.” Malin, *Revisited*, *supra* note 9, at 53. Given that courts are reluctant to enforce the FMLA without analogizing it to Title VII, using the disparate treatment claim in negotiations might prove more fruitful than using it in court.

ask the boss for the same thing.”<sup>222</sup> If the boss denies or discourages the father from using the same benefit, a “gentle and non-confrontational” protest about the disparity may be enough to overcome the employers’ reluctance. Simply put, when faced with suggestions of disparate treatment, “no employer wants to go there.”<sup>223</sup>

Second, if leave is denied or discouraged, or if the employer disparages a male employee for fulfilling caregiving duties, a sex discrimination claim based on impermissible use of sex stereotypes might also prove fruitful.<sup>224</sup> In fact, denial of leave led a *father* to file the first sex discrimination suit under the FMLA.<sup>225</sup> Kevin Knussman had worked as a Maryland state trooper for eighteen years when his first child was born. His employer approved ten days of leave, but Kevin’s wife Kim was still suffering from medical complications that rendered her too weak to care for the baby. When Kevin asked for additional leave time, the personnel manager responded, “Unless your wife is in a coma or dead, you can’t be primary care provider.”<sup>226</sup> A jury awarded Kevin \$375,000, and he became the poster dad for the FMLA. The Court said the reliance on a stereotype that only a woman can be a primary care provider was impermissible.<sup>227</sup> The same argument could be made for other fathers who face obstacles when trying to take FMLA leave.

Finally, a hostile work environment claim could also provide fathers with protection when employers make it difficult for men to take leave or punish them after they return. In the sexual harassment context, a

---

<sup>222</sup> Kahlenberg, *supra* note 35.

<sup>223</sup> *Id.* (quoting Joan Williams, director of the Program on WorkLife Law at American University’s Washington College of Law).

<sup>224</sup> The United States Supreme Court deemed discrimination based on sex stereotypes illegal in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989), which said: “Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping.”

<sup>225</sup> Jodie Morse, *Make Time for Daddy*, TIME MAG., Feb. 15, 1999, at 61, available at <http://www.time.com/time/archive/printout/0,23657,990197,00.html>.

<sup>226</sup> *Id.*

<sup>227</sup> *Knussman v. Maryland*, 65 F. Supp. 2d 353, 360 (D. Md. 1999) (holding a personnel officer personally liable because she “should have recognized that she was applying a gender-neutral leave statute in a discriminatory manner by making only men prove they are primary care givers to a newborn or adopted child”), *aff’d*, 272 F.3d 625 (4th Cir. 2001).

hostile work environment is created when an employer tolerates unwelcome sexual conduct that is sufficiently severe and pervasive to alter the conditions of employment such that a reasonable person would perceive the workplace as hostile.<sup>228</sup> The basic inquiry is whether the work environment makes it more difficult for the employee to perform his job.<sup>229</sup> Comments by bosses or co-workers that denigrate a male employee for attending to his family could qualify as evidence of a hostile work environment. Employers would be allowed an affirmative defense if they pursued prophylactic measures to prevent such treatment, just as under traditional sex harassment claims.<sup>230</sup> This would create an incentive for employers to foster “intracompany cultures which recognize male employees as fathers and sons with family needs equivalent to their female counterparts.”<sup>231</sup> A change in the culture at work would help reduce or remove the barriers that prevent men from taking a more active role at home.<sup>232</sup>

While such changes in corporate culture would benefit all workers, litigation strategies are primarily advantageous for employees who can afford to sue. Thus, mostly middle- and upper-income fathers would benefit from increased judicial enforcement of the FMLA and claims brought under a Title VII analogy. When coupled with paid leave policies, however, these two solutions work across class levels to address the biggest obstacles

---

<sup>228</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (stating that a workplace must be “permeated” with discrimination that is “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment”); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (shifting the judicial inquiry to focus on “whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (allowing hostile work environment claims in same sex situations).

<sup>229</sup> *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (stating that the judicial inquiry should focus on whether the conditions at work made it “more difficult to do the job”).

<sup>230</sup> See generally *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (upholding vicariously liability unless the employer exercised reasonable care to prevent and promptly correct harassment and the employee unreasonably failed to take advantage of policies in place or otherwise avoid harm).

<sup>231</sup> *Twomey & Jones*, *supra* note 50, at 250.

<sup>232</sup> *Peterson*, *supra* note 150, at 282 (“[P]owerful social forces, found most significantly in the form of workplace hostility, are what reinforce the perception that male employees are not interested in parental leave and prevent them from displaying such an interest.”).

fathers face when trying to balance work and family. Together, they would change the economic and cultural forces that perpetuate the daddy double-bind and the gendered division of labor.

## V. CONCLUSION

A 1999 longitudinal study of male and female perceptions related to the FMLA found the following beliefs to be prevalent among American workers: (1) women are better caregivers, (2) taking leave would have a negative effect on their careers and would be viewed negatively by their employers, (3) male employees are less likely to take leave if reinstatement is not guaranteed, and (4) economics are a major factor in deciding whether to request a leave.<sup>233</sup> Changes in the Family and Medical Leave Act are necessary if the statute is going to have any impact on work-family conflicts and sex specialization common to modern families. Fathers in particular face tremendous obstacles and significant pressure to be both good providers and good caregivers. The daddy double-bind affects men at all class levels and prevents men from stepping out of their traditional gender role. Since parenting patterns are usually self-perpetuating, the gendered division of labor that results from fathers' inability to take on domestic responsibilities means women will continue to face "second shift" burdens until fathers can get engaged early in the parenting process. Paid parental leave coupled with stronger judicial enforcement of the FMLA would allow fathers from all income classes to take leave under the FMLA when their children are born. These changes would enable fathers to take an active role in their children's lives from the beginning, and would go a long way toward shifting the balance of equality and improving the status of women.

---

<sup>233</sup> Twomey & Jones, *supra* note 50, at 247.