

KEYNOTE ADDRESS

THE POLITICS OF TIME IN THE  
LEGAL PROFESSION

JOAN C. WILLIAMS\*

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\* Distinguished Professor of Law, University of California Hastings College of the Law; Director, Center for WorkLife Law; Co-Director, Project for Attorney Retention. This article was based on a speech given at the University of St. Thomas Law Journal’s symposium *Workplace Restructuring to Accommodate Family Life* (Mar. 16, 2007). The author wishes to thank Stephanie Bornstein for her editing help and Florence Yu for her diligent research assistance.

## I. INTRODUCTION

This article addresses the politics of time for workers in the United States, focusing on the legal profession. Section II explains current time norms in the legal profession, under which law firm attorneys are expected to work extremely long hours and have a near total devotion to work. The discussion includes how such time norms clash with the norm of “parental care”—the widespread and uncontroversial belief that children need, and deserve, time with their parents. That clash, this article argues, is bad for men (who are forced into breadwinner roles), worse for women (who are marginalized at work), and worst of all for children (who lose out when their parents are forced to make trade-offs between work and family). Section III addresses how time norms are enforced at work through stigma and marginalization and the role implicit bias plays in this stigma. Section IV discusses generational conflicts over time norms in the legal profession based on the differing viewpoints of older and younger generations of lawyers on work-family balance. Lastly, Section V sets forth the business case for changing those time norms in the legal profession, arguing that it makes economic sense for law firms to consider alternatives to “business as usual.” This discussion covers business development and client services, attracting talented lawyers, reducing attrition at law firms, and recognizing work-family balance as a risk-management issue, including a discussion of the growth of family responsibilities discrimination lawsuits. While work-family balance is often characterized as an individual problem of personal choice, this article argues that this is a mischaracterization: balancing work and family involves personal choices, but those choices occur within a context of discrimination. Workplace time norms are designed around our society’s notion of an ideal worker that is in direct conflict with our society’s notion of an ideal parent or caregiver.

## II. TIME NORMS, THE NORM OF “PARENTAL CARE,” AND THE CLASH OF IDEALS

### A. *Time Norms and the Ideal Worker*

What are time norms? In a well-known study of lawyers, sociologist Cynthia Fuchs Epstein wrote that “the legal profession measures . . . excellence and commitment not only by productivity and competence but by the number of hours logged,” which she described as “the politics of time.”<sup>1</sup> Within the context of law firms, she observed, time becomes a “proxy for dedication and excellence.”<sup>2</sup>

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1. CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTÉ, *THE PART-TIME PARADOX* 4 (1999).

2. *Id.* at 22.

This description continues to apply to the legal profession today, as law firm lawyers are required to bill an increasingly excessive number of hours. A recent article in *San Francisco Magazine*, entitled *Who Says Being a Lawyer Has to Suck?*, reported that associates in San Francisco now bill on average 2,200 hours a year, which, according to the author's estimates, amounts to 8:00 a.m. to 8:00 p.m. every weekday plus seven hours on Saturday twice per month with three total weeks off per year.<sup>3</sup> This definition of "full time" in the legal profession today represents a huge increase from past norms. Indeed, as recently as the 1960s, billing 1,300 hours per year was considered "full time."<sup>4</sup>

The long hours that lawyers and other professionals work is part of what has been called the "time divide" in the United States, whereby some Americans, including elite professionals such as lawyers, are overworked and expected to work excessive hours while others, typically low-wage workers, cannot get enough hours or earn enough money.<sup>5</sup> Americans as a group work among the longest hours in the world, including longer hours than workers in even Japan,<sup>6</sup> a culture that has a word for death from overwork.<sup>7</sup>

The norm of long hours among American professionals is accompanied by, what sociologist Mary Blair-Loy has called, the norm of "work devotion."<sup>8</sup> In a study of women in finance—a field similar to law in its expectations of professional workers—Blair-Loy described how high-level professionals are expected "to demonstrate commitment by making work the central focus of their lives"<sup>9</sup> and "manifest singular 'devotion to work,' . . . unencumbered with family responsibilities."<sup>10</sup>

Expectations of long work hours and total devotion to work are integral to how we define the "ideal worker" in the United States: as someone

3. Natasha Sarkisian, *Who Says Being a Lawyer Has to Suck?*, S.F. MAG., Jan. 2007, [http://www.sanfrancmag.com/archives/view\\_story/1517/](http://www.sanfrancmag.com/archives/view_story/1517/).

4. A.B.A. COMM'N ON WOMEN PROF., *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 14 (2001) (citing WOMEN'S B. ASS'N, MASS., *MORE THAN PART-TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS* 10 (2000)) (referring to A.B.A., *LAWYER'S HANDBOOK* (1962)).

5. JERRY A. JACOBS & KATHILEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 8, 126–27, 164–65 (2004) (discussing a time divide comprised of work/family, occupational, aspiration, parenting, and gender divides).

6. *Id.* at 126–27; see also Press Release, International Labour Organization, New ILO Study Highlights Labour Trends Worldwide: US Productivity Up, Europe Improves Ability to Create Jobs (Sept. 1, 2003), available at [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang—en/WCMS\\_005291](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_005291) [hereinafter ILO Study].

7. See, e.g., *Karoshi, Death from Overwork in Japan*, PBI ASIAN HR NEWSLETTER (Pacific Bridge Inc., Bethesda, MD) Sept. 2003, available at <http://www.shrm.org/global/publications/PBI/0903b.htm>.

8. Mary Blair-Loy & Amy S. Wharton, *Mothers in Finance: Surviving and Thriving*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 151 (2004).

9. *Id.* at 153 (citing MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG EXECUTIVE WOMEN* (2003)).

10. *Id.* at 153.

who begins employment in early adulthood and works, full time and full force, for forty years straight, taking no time off for childbearing, child rearing, or anything else. American workplaces are designed around this ideal worker norm, which is policed and enforced through language (like the term “go-getter”) that fails to differentiate between commitment and ambition with unbounded availability for paid work.<sup>11</sup>

### B. *The Norm of Parental or Family Care*

These workplace ideals directly conflict with our ideals of family life. As a society, we believe that children need and deserve time with their parents; this is what I have called the norm of “parental care.”<sup>12</sup> A common expression of this norm is when people say they do not want to send their children to day care because they do not want their children to be “raised by strangers.” The norm of parental care reflects the idea that, among middle-class families, parents’ participation is essential to helping their children develop the skills and values they need to succeed.<sup>13</sup>

Our traditions of nurturance include not only child care, but also elder care; informal networks deliver eighty-five percent of elder care in the United States.<sup>14</sup> A survey by the American Association of Retired Persons (AARP) found that between one-fifth and one-half of families care for an elder relative: forty-two percent of Asian families, thirty-four percent of Latino families, twenty-eight percent of African-American families, and nineteen percent of white families.<sup>15</sup> One in four employed adults has elder care responsibilities.<sup>16</sup> Nearly sixty percent of those caring for an adult over age fifty are working, the majority of whom are working full time.<sup>17</sup> One study revealed a growing concern by workers over elder care: a major health plan’s employee assistance program (EAP) reported an increase in calls related to elder care issues, as well as an increase in the proportion of callers to the EAP who were men, from one-third in prior years to forty

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11. See JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 4–6 (2000).

12. *Id.* at 51–53.

13. *Id.* at 51.

14. Judy Mann, *Blessed, and Undervalued, Are the Caregivers*, WASH. POST, May 11, 2001, at C9.

15. SHEEL PANDYA, AARP PUB. POL’Y INST., *LONG-TERM CARE TRENDS: RACIAL AND ETHNIC DIFFERENCES AMONG OLDER ADULTS IN LONG-TERM CARE SERVICE USE* (2005), [http://www.aarp.org/research/longtermcare/trends/fs119\\_ltc.html](http://www.aarp.org/research/longtermcare/trends/fs119_ltc.html).

16. JODY LEVIN-EPSTEIN, CTR. FOR L. & SOC. POL’Y, *GETTING PUNCHED: THE JOB AND FAMILY CLOCK 3* (2006), available at [http://www.clasp.org/publications/getting\\_punCHED\\_fullnotes.pdf](http://www.clasp.org/publications/getting_punCHED_fullnotes.pdf).

17. METLIFE MATURE MARKET INST. & NAT. ALLIANCE FOR CAREGIVING, *THE METLIFE CAREGIVING COST STUDY: PRODUCTIVITY LOSSES TO U.S. BUSINESS 5* (2006), available at <http://www.metlife.com/Applications/Corporate/WPS/CDA/PageGenerator/0,4132,P8894,00.html>.

percent in 2006.<sup>18</sup> The norm of parental care for children is accompanied by a norm of family care for elders and ill relatives. For example, most people would be shocked to hear that somebody had left a sick or dying partner or parent alone.

### C. *Work-Family Conflict as a Clash of Social Ideals*

Many Americans feel caught between two conflicting ideals: the norm of the ideal worker who is totally available for, and devoted to, work, and the norm of family care that mandates that adults be available to their children and to elderly or ill parents or relatives. When we talk about work-family conflict, what we are really talking about is not a matter of individual choice or an issue of ordering an individual's priorities, but a clash of these two cherished social ideals. An all-or-nothing workplace disadvantages most women (eighty-one percent of who have children by their mid-forties<sup>19</sup>) and an increasing number of men who want to participate in child rearing, by forcing them to "choose" between being either a bad worker or a bad parent. This clash, which affects virtually all Americans at some point in their working lives, is bad for men, worse for women, and worst of all for children.

While this article focuses primarily on time norms and the clash of work and family ideals in law firms, it is important to note that such problems affect families of all economic classes and work environments. A growing body of literature documents the somewhat different, but equally acute, work-family conflicts among middle-class, working-class, and low-wage families.<sup>20</sup> Demographic data supports this assertion. One study, for example, found that nearly two-thirds (sixty-two percent) of workers who

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18. BLUECROSS BLUESHIELD MINN., EMPLOYEE HELP LINE CALLS INCREASING: WORK, FAMILY AND PERSONAL STRESSES TRIGGER INCREASE IN CALLS; WITH SUPPORT, PRODUCTIVITY IMPROVES 8.5 PERCENT 1-2 (2007), available at [http://www.bluecrossmn.com/bc/wcs/groups/bcbmn/@mbc\\_bluecrossmn/documents/public/mbc1\\_eap\\_rpt.pdf](http://www.bluecrossmn.com/bc/wcs/groups/bcbmn/@mbc_bluecrossmn/documents/public/mbc1_eap_rpt.pdf).

19. JANE LAWLER DYE, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2004, POPULATION CHARACTERISTICS, P20-555 at 2 tbl.1 (2005), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf> (stating that 19.3 percent of women aged forty to forty-four had no children).

20. See, e.g., LISA DODSON, ET AL., RADCLIFFE PUB. POL'Y CTR. & 9 TO 5, NAT'L ASS'N WORKING WOMEN, KEEPING JOBS AND RAISING FAMILIES IN LOW-INCOME AMERICA: IT JUST DOESN'T WORK (2002) (analyzing acute work-family conflicts among low-wage families); JODY HEYMANN, THE WIDENING GAP 113-37 (2000) (documenting acute work-family conflicts among low-wage families); JOAN C. WILLIAMS, CTR. FOR WORKLIFE L., U.C. HASTINGS, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING-OUT" IS NOT AN OPTION 4, 13 (2006) (documenting patterns of work-family conflict among unionized families); see also Lisa Dodson, *Wage-Poor Mothers and Moral Economy*, 14 SOC. POL.: INT'L STUD. GENDER, ST. & SOC'Y. 258 (discussing low-wage mothers' defiance against modern economic ideology of work as morally legitimate); JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD & EMPLOYMENT 58-83 (2003) (documenting the existence of much higher levels of work-family conflict, stemming from much lower levels of work-family public policy supports, than in most other industrialized countries).

earn more than \$71,000 annually have access to flexible work schedules, as compared to fewer than one-third (thirty-one percent) of workers who earn less than \$28,000.<sup>21</sup> Surprisingly, claims persist that the work-family conflict is a problem only for elites despite the growing body of literature, demographic data, and number of examples that show how work-family conflict affects people of every class.

That, however, is the subject of a different article. This article focuses on the “lucky” ones—the elite professional or managerial class who generally have more flexibility and control over their schedules and earn more to help pay for child care than middle- or lower-wage workers—and how even among this group, work-family conflict is painful and acute.<sup>22</sup> Among elites, the work-family conflict is primarily a problem of excessive hours and an expectation that work always comes first. Typically, a part-time schedule in a law firm is the traditional full-time schedule of other workers—a forty-hour workweek—as opposed to the new full-time schedule of law firm lawyers—a sixty- or eighty-hour workweek. Indeed, only three percent of dual-career couples in which one or both partners work long hours (more than forty-five hours per week) express contentment about their high level of time committed to work.<sup>23</sup> That leaves ninety-seven percent who are unhappy with their work hours.

### 1. *The Impact on Men*

As mentioned above, Americans work among the longest hours in the world, and professionals work the longest hours among Americans.<sup>24</sup> Most of those working long hours are men. One out of three fathers works forty-nine or more hours per week; among fathers in elite professional jobs, this number rises to about half.<sup>25</sup> American men, particularly elite professional men, often are confined to what one author called “a life at hard labor.”<sup>26</sup> Given this context, an often overlooked yet important point is that the ideal-worker norm and its accompanying norm of work devotion are bad for even those men who can and do function as ideal workers. These norms impact men’s health and family relationships such that younger generations of men are beginning to challenge them.

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21. AFL-CIO, *Work and Family, Family-Friendly Work Schedules*, <http://www.aflcio.org/issues/workfamily/workschedules.cfm> (last visited Sept. 23, 2007).

22. See generally PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007); JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE L., U.C. HASTINGS, “OPT OUT” OR PUSHED OUT? HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), available at [http://www.uchastings.edu/site\\_files/WLL/OptOutPushedOut.pdf](http://www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf).

23. Marin Clarkberg & Phyllis Moen, *Understanding the Time-Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies* 44 *AMER. BEHAVIORAL SCIENTIST* 1115, 1127 (2001).

24. JACOBS & GERSON, *supra* note 5, at 126–27; see also ILO Study, *supra* note 6.

25. WILLIAMS, *supra* note 11, at 4, 51.

26. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 43 (1992).

Recent studies of lawyers dramatize the high costs of the norms of long hours and work devotion in the legal profession. One study found that many lawyers work such long hours that sleep deprivation has become a major issue.<sup>27</sup> Lawyers also have been found to have higher levels of divorce, depression, drug abuse, and suicide than the general population.<sup>28</sup> Not surprisingly, as men comprise eighty-three percent of law firm partners and fifty-six percent of law firm associates,<sup>29</sup> the bulk of these “hard-driving” lawyers are men. In a famous study, one woman, speaking of her husband’s death, told sociologist Arlie Hochschild, “I didn’t invite anyone from his work to his funeral. It was the company who killed him.”<sup>30</sup>

A common sentiment among elite professional men is the sense that they missed the opportunity to see their children grow up. For some men, this sentiment can come out in midlife crises: after realizing that they were too distant from their families, they try to get fatherhood right the second time around—with a younger second wife—as “start over” or “do-over” dads.<sup>31</sup> A recent study of work-life balance among attorneys found that one out of four vacation days were interrupted, and law firm lawyers took the fewest number of uninterrupted vacation days.<sup>32</sup> The study included the story of a male associate at a small New York law firm whose wife asked their child, “Don’t you miss daddy?” when he could not join them on vacation. “No,” his daughter responded, “I never see him anyway.”<sup>33</sup>

Research has shown that the new generation of male attorneys is beginning to challenge the ideal worker norm. It will not be easy. Sociologist Cynthia Fuchs Epstein described that men who violate time norms encounter a “double stigma” because masculinity and career success are intertwined.<sup>34</sup> For men, career success is associated not only with observing time norms but also with manliness, and working long hours is viewed as a “heroic activity.”<sup>35</sup> To quote one early study from the 1970s: Men measure “masculinity by the size of a paycheck.”<sup>36</sup> Thus, when men violate time

27. SUSAN SAAB FORTNEY, NAT’L ASS’N L. PLACEMENT FOUND., IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 26–27 (2005).

28. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

29. See Press Release, Nat’l Ass’n L. Placement Found., Women and Attorneys of Color at Law Firms Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), available at <http://www.nalp.org/content/index.php?pid=387>.

30. ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* 68 (1997).

31. See, e.g., Thomas Vinciguerra, *He’s Not My Grandpa. He’s My Dad*, N.Y. TIMES, Apr. 12, 2007, at G1; Carlene Hempel, *Do-Over Dads*, BOSTON GLOBE, Nov. 6, 2005, at 28.

32. FORTNEY, *supra* note 27, at 21.

33. *Id.* at 18.

34. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 35.

35. *Id.* at 22.

36. Robert E. Gould, *Measuring Masculinity by the Size of a Paycheck*, in MEN AND MASCULINITY 96 (Joseph Pleck & Jack Sawyer eds., 1974).

norms they face gendered criticism, such as being viewed as “wusses” or “sissies” for not putting in extreme hours at work.

## 2. *The Impact on Women*

The clash of work and family ideals has even worse effects on women, who are marginalized at work and forced out of the paid workforce yet depicted in the media as being pulled home. American newspapers generally cover work-family conflict as the story of professional women “opting out” of high-powered careers in response to newly discovered personal priorities that lead them to embrace traditional homemaker roles.<sup>37</sup> This is another perennial story that is untrue. In fact, highly-educated women are more likely to be in the labor force and work more hours than women with less education. Women in families that earn between \$10,000 and \$40,000 per year are the most likely to stay at home.<sup>38</sup>

Equally misleading is the picture of women cheerfully “opting out” to embrace traditional roles. In fact, one recent study found that only sixteen percent of highly-qualified women left the paid workforce because they felt the pull of home life.<sup>39</sup> In sharp contrast, roughly eighty-six percent cited workplace conditions, including workplace inflexibility and hostility toward mothers, as a key reason for leaving the workforce.<sup>40</sup> As one highly qualified woman who spent many years and many hundreds of thousands of dollars on education and training to enter her profession explained:

I decided to quit, and this was a really, really big deal . . . [b]ecause I never envisioned myself not working. I just felt like I would become a nobody if I quit. Well, I was sort of a nobody working too. So it was sort of, “Which nobody do I want to be?”<sup>41</sup>

These sentiments reflect the rigorous marginalization of part-time workers in professional jobs, in which working the traditional forty-hour workweek too often leads to blocked advancement, a lack of career-enhanc-

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37. See generally WILLIAMS, MANVELL & BORNSTEIN, *supra* note 22, at 15 (documenting and debunking the “opt-out” story line, and proposing alternatives).

38. *Id.* at 22–23 (women most likely to be stay-at-home mothers). One confusing pattern is that the very wealthiest women (those in the top five percent of income) are, in fact, much less likely to be in the labor force than most other women, but over fifty percent of even these women are employed. *Id.* at 25.

39. Pamela Stone & Meg Lovejoy, *Fast-Track Women and the “Choice” to Stay Home*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 66 (2004); see STONE, *supra* note 22, at 38.

40. *Id.* at 68. The numbers (sixteen percent versus eighty-six percent) total more than one hundred percent because respondents were allowed to list more than one factor that influenced their decisions. *Id.* at 66. For a discussion of work-family conflict in working-class families, see WILLIAMS, *supra* note 20, at 7–18. See also DODSON, *supra* note 20.

41. STONE, *supra* note 22, at 92.

ing assignments and greater vulnerability to layoffs.<sup>42</sup> Social psychologist Monica Biernat has documented that a key difference between the “good mother” and the “good father” is that the good mother is more likely to be seen as someone who is *always* available to her children; a mother will be viewed as only “all right” for spending about the same amount of time away from her children as a father who is viewed as “very good.”<sup>43</sup> Placing women in the position of being unable to live up to their perceived obligations as responsible workers and conscientious mothers is not only uneconomical for employers (as detailed in Section IV), but it is unjust to women; it creates a sense of painful inadequacy, as shown so poignantly by the quote above.

Another way in which the cheerful opt-out story line is misleading is that, contrary to the evidence, mothers who “take a few years off” can reenter the workforce without penalty. Alas, this is not true. For women, working part time carries a penalty in hourly wages of approximately ten percent.<sup>44</sup> The penalty is even more severe for those who take time out of the workforce entirely—twenty percent of lifetime earnings for one year out of the labor force and thirty percent for two to three years out.<sup>45</sup> One study showed that roughly forty percent of highly-qualified women take a break from working at some point in their careers, ninety-three percent of whom hope to return; yet only forty percent of them return to mainstream full-time jobs.<sup>46</sup> According to another study, seventy-five percent of women who return to work after a break do so to dramatically de-skilled jobs (that is, jobs that require less education and training) often at lower pay and with less room for advancement or leadership than the jobs they left.<sup>47</sup> Pamela Stone found that most of the high-level professional women who took career breaks wanted to return to work full time in teaching, because that is the only profession in which they felt they could have a job and still do right by their children.<sup>48</sup> The picture that emerges is one of highly-educated, highly-trained women driven out of traditionally masculine professions.

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42. PROGRAM FOR WORKLIFE L., AM. U., BETTER ON BALANCE? THE CORPORATE COUNSEL WORK/LIFE REPORT 35–36 (2003), available at <http://www.pardc.org/Publications/BetterOnBalance.pdf>.

43. Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579, 586–87 (1997).

44. Jane Waldfogel, *The Effects of Children on Women's Wages*, 62 AM. SOC. REV. 209, 215 (1997).

45. STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN'S POL'Y. RES., STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 10 (2004), available at <http://www.iwpr.org/pdf/C355.pdf>.

46. Sylvia A. Hewlett & Carolyn B. Lucc, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV., Mar. 2005, at 43, 45–46. For a more extended discussion of what makes women leave the workforce, see generally WILLIAMS, MANVELL, & BORNSTEIN, *supra* note 22.

47. CATALYST INC., WOMEN IN LAW: MAKING THE CASE 29 (2001).

48. STONE, *supra* note 22, at 200.

Women are pushed out of professional jobs not only by the time norms that affect their own jobs, but also by the impact of the same time norms on their husbands' jobs. For example, most of the highly-qualified women Pamela Stone interviewed cited not only their own workplace conditions but their husbands' workplace conditions, too, as instrumental in pushing them out of the workforce.<sup>49</sup> Indeed, two-thirds of the women surveyed cited their husbands' workplace conditions and schedules as a key reason they left the paid workforce.<sup>50</sup> For women married to law firm attorneys, this is not surprising. If one parent works 8:00 a.m. to 8:00 p.m. and every other weekend, the other parent has to pick up the slack and take care of the kids. When one parent has to leave work, it is almost always the mother who does so. Once a mother leaves the workforce, her husband's hours tend to rise, fueling neo-traditional roles that neither parent wants—with the mother often working less and the father working more than either would like.<sup>51</sup>

For all of these reasons, the price of motherhood in the United States is dramatically high.<sup>52</sup> While the United States is one of the best places in the world for a woman who wants the life pattern of a traditional man, it is one of the worst places in the industrialized world for a woman who wants the life pattern of a traditional mother.<sup>53</sup> In the United States, eighty percent of those in poverty are women and children,<sup>54</sup> in large part due to the severe economic penalty for any life pattern other than that of an ideal worker. One telling statistic is that, on average, Americans who work forty-four hours per week earn more than twice as much as those who work thirty-four hours per week.<sup>55</sup> While press coverage of women leaving the paid workforce gives young women the impression that it is easy to take time off and to return to work whenever they are ready, the reality is far different. It may be easy for some women to leave the paid workforce, but it is not at all easy to return.<sup>56</sup> Despite the happy face most women who “opt out” put on when interviewed in the press, coping with the marginalization that accompanies leaving the paid workforce leads to very high levels of depression among stay-at-home mothers.<sup>57</sup>

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49. *Id.* at 75.

50. *Id.* at 76.

51. See WILLIAMS, MANVELL & BORNSTEIN, *supra* note 22, at 29–36.

52. See generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001).

53. See generally GORNICK & MEYERS, *supra* note 20 (documenting that the United States offers no paid maternity leave, no mandatory paid sick or vacation days, no universal health care, no nationally subsidized child care, no economic parity for part-time workers, and no explicit protections against discrimination based on family caregiving).

54. WILLIAMS, *supra* note 11, at 115 (citing Peter A. Morrison, *Congress and the Year 2000: Peering into the Demographics Future*, BUS. HORIZONS, Nov. 1, 1993, at 55).

55. Warren Farrell, Op-Ed., *Exploiting the Gender Gap*, N.Y. TIMES, Sept. 5, 2005, at A21.

56. See WILLIAMS, MANVELL & BORNSTEIN, *supra* note 22, at 15–16.

57. *Id.* at 31.

### 3. *The Impact on Children*

The clash of work and family ideals has perhaps the worst consequences for children, who feel the economic effects of their mothers' marginalization at work (especially if their parents divorce) and the emotional effects of lack of time with their fathers and increased family stress. A society that pushes its mothers to the margins of economic life impoverishes its children. Today, most American mothers who are marginalized in (or pushed out of) the paid workforce are one divorce away from poverty, given our lack of the safety net that exists in most European countries for working families. Many European countries offer subsidized child care, paid maternity leaves, mandated vacation time, child allowances, health insurance not tied to employment, and public policies designed to raise the supply and quality of flexible work.<sup>58</sup> In the United States, however, our ideological obsession with *independence* erases the inevitability of *interdependence*, creating a lack of political will to provide the kind of social supports that protect children from poverty elsewhere in the industrialized world.<sup>59</sup> This clash of social ideals results in the United States having one of the highest levels of childhood poverty in the industrialized world,<sup>60</sup> a shocking statistic for a country that is among the richest in the world and that (in theory at least) prides itself on its commitment to family values.

Children are hurt when mothers make trade-offs on the work side; they are hurt, too, when fathers make trade-offs on the family side. In a study by the Families and Work Institute, children reported that they did not mind when their mothers were employed but wanted more time with their fathers.<sup>61</sup> Indeed, fathers show a disturbingly low level of knowledge of their children's lives according to sociologist Ann Crouter's study of intact families with two married parents.<sup>62</sup>

Children also pay for the clash of social ideals in an increased level of family stress. Again, while the children in the Families and Work Institute

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58. See GORNICK & MEYERS, *supra* note 20 (text accompanying note); see also ARIANE HEGEWISH, CTR. FOR WORKLIFE L., U.C. HASTINGS, EMPLOYERS AND EUROPEAN FLEXIBLE WORKING RIGHTS: WHEN THE FLOODGATES WERE OPENED (2005); Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 849-62 (2004).

59. Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 16-22 (2000).

60. See Joan C. Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER, RACE & JUST. 411 (2002).

61. ELLEN GALINSKY, ASK THE CHILDREN 67 (1999); cf. Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity*, 37 DEMOGRAPHY 401, 406 (2000). Not surprisingly, children with working moms spend eighty-six percent as much time with their mothers as do children with non-working moms, and working moms spend eighty-two percent as much time on childcare activities as do non-working moms. *Id.*

62. Ann C. Crouter & Melissa R. Head, *Parental Monitoring and Knowledge of Children*, in HANDBOOK OF PARENTING (Marc H. Bornstein ed., 2002); Matthew F. Bumpus & Ann C. Crouter, *Work Demands of Dual-Earner Couples: Implications of Parents' Knowledge About Children's Daily Lives in Middle Childhood*, 61 J. MARRIAGE & FAM. 465 (1999).

study did not object to their mothers working, they objected to the amount of stress their parents were under.<sup>63</sup> This is not surprising, given that dual-earner couples in America work sharply longer hours than their counterparts in many European countries, inevitably leading to stress.<sup>64</sup>

Finally, the clash of social ideals hurts children's economic futures. In a traditional family in which the father is the provider and the mother is the caregiver, when parents divorce—which, despite a recently reported dip, about forty to forty-five percent of American couples still do<sup>65</sup>—both mother and children suffer dramatically negative economic effects. Mothers' standards of living fall sharply when they divorce, with forty percent of divorced mothers ending up in poverty<sup>66</sup> in part because they typically retain custody but receive child support that covers only a quarter of the costs of raising a middle-class child. Consequently, children of divorced families are less likely to reach either the educational status or the class status of their fathers.<sup>67</sup> One of the true tragedies of the current clash between work and family ideals is that mothers who leave the workforce to “do right by” their children may end up impoverishing them.

### III. HOW TIME NORMS ARE ENFORCED

If time norms among elite professionals have grown to an unbearable level, why do workers put up with them? Time norms of excessive hours and work devotion have become such a part of law firm life that those who do not follow them may suffer stigma and marginalization at work, which translates into such things as a lack of plum assignments and less chance for advancement at the firm. Much of this stigma is due to implicit bias, which can be particularly strong against mothers.

#### A. *Stigma, Marginalization, and “Jokes”*

Time norms are enforced, first, by the stigma and marginalization that affect workers who fail to conform to the 24-7 ideal worker norm. Cynthia Fuchs Epstein documented the policing of time norms through stigma in her study of part-time lawyers.<sup>68</sup> Epstein concluded that lawyers who work part time “are challenging . . . [a] key part of the profession's traditional culture. They have become ‘time deviants’ who are flouting the time norms of professional life.”<sup>69</sup> Because eighty-one percent of women become

63. GALINSKY, *supra* note 61, at 238–39.

64. GORNICK & MEYERS, *supra* note 20, at 60.

65. David Crary, *U.S. Divorce Rate Lowest Since 1970*, ASSOCIATED PRESS, May 10, 2007, [http://www.breitbart.com/article.php?id=D8P1MG601&show\\_article=1](http://www.breitbart.com/article.php?id=D8P1MG601&show_article=1).

66. WILLIAMS, *supra* note 11, at 115 (citing DEMIE KURZ, FOR RICHER OR FOR POORER 3 (1995)); Joan C. Williams, *Is Coverture Dead? Beyond a New Legal Theory of Alimony*, 82 GEO. L.J. 2227, 2227–28 n.1 (1994).

67. Williams, *supra* note 66, at 2258.

68. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 4.

69. *Id.* (citation omitted).

mothers<sup>70</sup> and forty-seven percent of law firm partners who are mothers have worked part time,<sup>71</sup> time norms have a profound effect on the position of women in the legal profession. Given this context, it is not surprising that, nationwide, only seventeen percent of law firm partners are women<sup>72</sup>—despite the fact that women have comprised nearly half of graduating law school classes for the past fifteen years.<sup>73</sup>

Stigma, as noted sociologist Erving Goffman explained, has to do with “relationships, not attributes.”<sup>74</sup> In a survey of Boston-area lawyers by the Women’s Bar Association of Massachusetts, seventy-four percent of part-time lawyers surveyed said they thought their chances for partnership had been or would be negatively affected by their reduced hours.<sup>75</sup> The Project for Attorney Retention (PAR), which I co-direct, has worked since its inception seven years ago to create quality, usable, non-stigmatized part-time programs. In doing so, PAR has found many other examples of how stigma affects employees who wish to reduce their hours, including forced changes in practice groups, moves to interior offices, and assignments that are consistently dead-end. One senior attorney who was working part time was overlooked and not invited to her practice group’s retreat, although male attorneys who were much junior to her were invited.<sup>76</sup> As the latter example clearly demonstrates, stigma may constitute evidence of disparate treatment based on sex.

Another way that stigma plays out in the workplace and helps to enforce time norms is through comments and “jokes” made by colleagues. For example, one part-time lawyer in Cynthia Fuchs Epstein’s study explained that “she knew exactly why colleagues forget which days she works,” stating, “It’s just a little whack, getting the dig in.”<sup>77</sup> Another said her colleagues continued to ask her which days she worked long after she had returned to working full time<sup>78</sup>—an experience often relayed to PAR anec-

70. DYE, *supra* note 19 (stating that 19.3 percent of women aged forty to forty-four had no children).

71. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 137 (2004).

72. Timothy L. O’Brien, *Up the Down Staircase*, N.Y. TIMES, Mar. 19, 2006 § 3 (Late Edition), at 1.

73. NAT’L ASS’N WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 2 (2006), available at <http://www.abanet.org/nawl/docs/NAWIFINAL PUBLICATION10-25-06SURVEYREPORT.pdf>.

74. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

75. WOMEN’S B. ASS’N MASS., MORE THAN PART TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS at § II(C)(1) (2000), available at <http://womenlaw.stanford.edu/mass.rpt.html>.

76. JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, PROJECT FOR ATT’Y RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS 15 (2d ed. 2001), available at <http://www.parcd.org/Publications/BalancedHours.shtml> (follow “Balanced Hours 2nd Edition” hyperlink).

77. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 31.

78. WOMEN’S B. ASS’N MASS., *supra* note 75, at § II(B)(1).

totally, too. Interestingly, Epstein quoted a third attorney who opined, “I think to some extent [the jokes stem from the fact that] they are really jealous.”<sup>79</sup> Perhaps the jokes are made by men who feel like they have no choice but to work the brutal hours required by time norms because their wives are at home full or part time.

Indeed, such cruelty may reflect that nobody is really happy about their work situation. According to a recent study, the average male law firm partner is more likely than the average female law firm partner to have children, yet he takes no paternity leave and never uses part-time or flexible-hours options. This is not surprising given that he brings in eighty percent or more of the family income and is married to a spouse who is less committed to her career.<sup>80</sup> Another study found that men who left the practice of law were more likely to be satisfied with their work-life balance than men who stayed in it.<sup>81</sup> The friction that often surrounds law firm time norms may reflect the stress felt by lawyers stretched to their limits by the incompatibility of a conventional family life with the current requirement of 24-7 availability.

### B. *The Role of Implicit Bias*

A large part of the stigmatizing and stereotyping experienced by women who deviate from time norms stems from implicit or unexamined bias—defined as “cognitions, feelings, and evaluations that are not necessarily available to conscious awareness, conscious control, conscious intention, or self-reflection.”<sup>82</sup> A full discussion of implicit bias is beyond the scope of this article,<sup>83</sup> but unexamined gender bias plays a significant part in the stigma part-time attorneys face. For example, when PAR conducted training on gender bias for a law firm in San Francisco, a number of young women attorneys in a room full of law partners openly expressed the belief that most of the gender bias at the firm occurred around the issue of part-time work.<sup>84</sup> In another example, an attorney interviewed by PAR explained:

[B]efore I went part time, when people called and found I was not at my desk, they assumed that I was elsewhere at a business meet-

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79. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 32.

80. See MONA HARRINGTON & HELEN HSI, MIT WORKPLACE CTR., WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP: A REPORT OF MIT WORKPLACE CENTER SURVEYS ON COMPARATIVE CAREER DECISIONS AND ATTRITION RATES OF WOMEN AND MEN IN MASSACHUSETTS LAW FIRMS 4-5, 16-17, 26-31, 32, 34 (2007), available at [http://www.massbar.org/media/135612/law-report\\_4-07.pdf](http://www.massbar.org/media/135612/law-report_4-07.pdf).

81. Noonan & Corcoran, *supra* note 71, at 139.

82. See ProjectImplicit.net, Welcome to Project Implicit—Information Website, <http://projectimplicit.net/about.php> (last visited Sept. 24, 2007).

83. *Id.*

84. Interview with attorneys, confidentiality promised, Project for Attorney Retention Training, in San Francisco, Cal. (Feb. 2006).

ing. But after I went part time, the tendency was to assume that I was not there because of my part-time schedule—even if I was out at a meeting. Also, before I went part time, people sort of gave me the benefit of the doubt. They assumed that I was giving them as fast a turn-around as was humanly possible. After I went part time, this stopped, and they assumed that I wasn't doing things fast enough because of my part-time schedule. As a result, before I went part time, I was getting top-of-the-scale performance reviews. Now I'm not, though as far as I can tell the quality of my work has not changed.<sup>85</sup>

One common pattern of stigma is attribution bias, in which stereotypes drive the interpretation of ambiguous information. In the case of the lawyer quoted above, once she made her motherhood salient by going part time, assumptions about her were triggered by her status as a mother rather than her status as a worker. Another common pattern is leniency bias, which is part of a larger series of patterns called “in-group favoritism:” whereas in-groups (here, full-timers) are given the benefit of the doubt, out-groups (here, part-timers) are not.<sup>86</sup>

Both of these patterns reflect stereotypes triggered by motherhood. Social scientists have documented that motherhood is one of the key triggers for gender stereotyping.<sup>87</sup> In fact, in a recent study in which participants considered similarly qualified job applicants who were different only in whether they had children, mothers were seventy-nine percent less likely to be recommended for hire than non-mothers, offered an average of \$11,000 less in pay, and held to higher performance and punctuality standards.<sup>88</sup>

Law firms need to be mindful of the links between stigma and stereotyping, especially in light of the new Equal Employment Opportunity Commission's (EEOC) guidance issued in May 2007 on caregiver discrimi-

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85. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 97 (2003) (citing interview, confidentiality promised, in Washington, D.C. (Fall 2002) (on file with authors)).

86. See, e.g., Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429 (1999); Marilyn B. Brewer & Madelyn Silver, *In-Group Bias as a Function of Task Characteristics*, 8 EUR. J. SOC. PSYCHOL. 393 (1978).

87. See generally *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 667 (Faye J. Crosby, Joan C. Williams & Monica Biernat, eds., 2004).

88. Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1320–23 (2007); e-mail from Shelley J. Correll, Associate Professor of Sociology, Cornell University, to Stephanie Bornstein, Faculty Fellow, Center for Work-Life Law (Mar. 28, 2007, 19:12 PST) (on file with author).

nation.<sup>89</sup> The EEOC states, first, that discrimination against caregivers often is illegal under current statutes.<sup>90</sup> Second, it states that caregiver discrimination can be proved through evidence of stereotyping even when a plaintiff cannot identify a comparator (i.e., a similarly situated man).<sup>91</sup> Third, it declares that bias that is “unconscious[ ] or reflexive[ ]” is evidence of stereotyping.<sup>92</sup> In this context, law firms need to worry about the unconscious ways in which part-time lawyers often are stigmatized because some may rise to the level of a change in the terms and conditions of employment,<sup>93</sup> and much of the stigma results from gender stereotyping triggered by motherhood. The new guidance should make law firms look very closely at ways to avoid this situation.<sup>94</sup>

Time norms are enforced by stigma, marginalization, and “jokes” in the workplace that may reflect implicit bias and stereotyping. Implicit bias and stereotyping hold increasing potential for employer liability for discrimination. Legal employers need to become more mindful of this potential for liability<sup>95</sup> and how to avoid it.

#### IV. GENERATIONAL DIFFERENCES AND CONFLICT OVER TIME NORMS

##### A. *The Generation Gap at Law Firms*

While the time demands of the legal profession have spiraled out of control since the 1960s, younger generations of lawyers, including recent male law graduates, are beginning to draw a line in the sand. The result is a generation gap between the baby boomers who run law firms and the younger generations law firms now employ. This gap was documented in an article entitled *Meet the Millennials*—a term that refers to those who graduated from law school in 2000 or later.<sup>96</sup> As one young male attorney explained, “‘I want to get home and spend time with my child and be as involved in her upbringing as I can, and I think a lot of male attorneys I work with feel that way, too.’”<sup>97</sup> To quote another millennial:

89. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, in 2 E.E.O.C. COMPLIANCE MANUAL § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

90. *Id.* at 7.

91. *Id.* at 8–9.

92. *Id.* at 7.

93. 42 U.S.C. § 2000e-2(a) (2000).

94. *See, e.g.*, Joan C. Williams, Stephanie Bornstein, Diana Reddy & Betsy A. Williams, *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 399 (2007) (documenting family responsibilities discrimination lawsuits filed against law firms).

95. *See generally id.*

96. Melody Finnemore, *Meet the Millennials: Young Attorneys Prompt Need for Firms to Explore New Ways of Doing Business*, OR. ST. B. BULL., Nov. 2005, <http://www.osbar.org/publications/bulletin/05nov/millennials.html>.

97. *Id.*

"I know a lot of people I work with, including myself, who would rather be at home with their families than go out for drinks in the evening . . . . That's not to say I don't network or see the value of it. It's just that I'd rather do it during the day than in the evenings."<sup>98</sup>

Law students from the top law schools across the nation echo this lament as billable hours and student loans continue to climb. Leading the charge to reverse the escalating billable hours requirement are two students at Stanford Law School, Craig Segall and Andrew Kanter. Seeking to represent law students from across the nation with their organization Law Students Building a Better Legal Profession, Segall and Kanter have asked law firms to implement policies for greater work-life balance, including reduced billable hours required for the partnership track, reduced billable hours in exchange for reduced wages, and informing students about their firms' work expectations during the interview process.<sup>99</sup>

Statistics show that Generation X and Generation Y men, who are slightly older than millennials but younger than baby boomers, also are less willing to put in the long hours that the boomers helped to establish as the new norm. One early study suggested that part of this generational attitudinal shift can be attributed to many Generations X and Y men seeing their fathers sacrifice everything for their jobs, only to be laid off in middle age.<sup>100</sup> Another study showed that, in 1992, nearly seventy percent of college-educated men wanted jobs with increasing responsibility; thirteen years later, in 2005, this number had dropped to fifty-two percent.<sup>101</sup>

This generational shift may also be due, in part, to a new image of fatherhood that has arisen in recent decades. For example, far more men today push strollers and wear their babies in carriers than twenty years ago. The idea of the father as the breadwinner is still alive and well, but the idea of the father who is also a nurturer is on the rise.<sup>102</sup> This means that, like women, increasing numbers of men are now caught between the ideal worker norm and the norm of family care. Younger generations of married men are also more likely to be a part of two-career families where both

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98. *Id.*

99. Law Students Building a Better Legal Profession, Principles for a Renewed Legal Profession, <http://refirmation.wordpress.com> (last visited Feb. 22, 2007) (follow "Principles for a Renewed Legal Profession" hyperlink); see also Leigh Jones, *Interest in Summer Jobs at Top Firms Cools Down: High Billable Hours, Attrition Take Toll*, 29 NAT'L L.J. 1 (May 14, 2007).

100. JOAN C. WILLIAMS & CYNTHIA T. CALVERT, NAT'L ASS'N FOR L. PLACEMENT, SOLVING THE PART-TIME PUZZLE: THE LAW FIRM'S GUIDE TO BALANCED HOURS 13 (2004).

101. FAMILIES & WORK INST., GENERATION & GENDER IN THE WORKPLACE 30 (2002).

102. See, e.g., Patricia Wen, *Gen X Dads*, BOSTON GLOBE MAG., Jan. 16, 2005, at 20, available at [http://www.boston.com/news/globe/magazine/articles/2005/01/16/gen\\_x\\_dad/](http://www.boston.com/news/globe/magazine/articles/2005/01/16/gen_x_dad/).

parties expect to share responsibility for child rearing.<sup>103</sup> If the men do not deliver on this promise, the result may be divorce.<sup>104</sup>

Whereas the job prospects of men who play the expected breadwinner role are enhanced by fatherhood, men who try to join the front lines of family care often encounter powerful stigma. Accordingly, men seldom cite work-family imbalance as a reason for leaving a law firm even when it was.<sup>105</sup> Because young men have been so reluctant to speak up, law firms often miss the message that they are facing a generational shift. Said one law firm consultant:

[Law firms] sort of expect the women and the people of color to disappoint them, but they were shocked to find out that the young men did not want to make partner either. In fact, the young men were less interested in becoming partners than the young women. The young men are saying “we don’t want to be like them,” and the partners don’t get that. What the partners characterize as a gender problem is more accurately described as a generational problem.<sup>106</sup>

As a result, modern law firms are characterized by cross-generational conflicts over time norms. Older lawyers often see younger lawyers as “slackers” who “want the gravy and none of the grief.”<sup>107</sup> The generational difference can also translate into a sense of betrayal if, for example, a senior partner has mentored a younger attorney who the partner later realizes does not share the goals that have guided his or her own life. One younger attorney likened working to become a partner to “a pie-eating contest where the prize is more pie.”<sup>108</sup> When younger generations challenge the time norms upon which law firms have long been based, it is painful for the older generations who have lived by the old rules and now ask themselves uncomfortable questions about their own lives.

For women, generational conflicts are intertwined with the issue of having children. One study showed that female law firm partners are less likely than male law firm partners to be married or have children.<sup>109</sup> While older generations of women felt they could not “have it all,” younger gener-

103. See Finnemore, *supra* note 96.

104. CAROLYN PAPE COWAN & PHILLIP A. COWAN, *WHEN PARTNERS BECOME PARENTS: THE BIG LIFE CHANGE FOR COUPLES* 91–113 (2d ed. 2000) (documenting that the birth of children leads to increased conflict in couples, some triggered by issues related to the division of labor at home, and that couples who cannot resolve the challenges presented by the birth of children are at higher risk of divorce); see also Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 *STAN. L. REV.* 967, 994 (2001).

105. WILLIAMS & CALVERT, *supra* note 100, at 13.

106. Interview with M.J. Tocci, Principal of Trial Run Inc., in Pittsburgh, PA. (May 2007) (based on 250 interviews of partners and associates at one large firm).

107. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 60.

108. Jill S. Chanen, *Discontented in the Law*, 5 *A.B.A. J. E-REPORT* 3 (2006), available at <http://www.abanet.org/journal/ereport/m17study.html>.

109. Noonan & Corcoran, *supra* note 71, at 144.

ations of women are challenging this idea. Cynthia Fuchs Epstein's study found that "[t]here is a lot of tension."<sup>110</sup> One senior female attorney commented: "You can't have it all. I couldn't have it all. I made my choice. You have to make your choice."<sup>111</sup>

### B. *The Persistence of Law Firm Time Norms*

If Generations X and Y and the millennials are rebelling against a profession increasingly out of sync, why do law firms continue to raise salaries and billable hours? Starting salaries in the San Francisco Bay Area, for example, just rose to \$160,000 for lawyers just out of law school—the third increase in starting salaries since 2005.<sup>112</sup> Several possible explanations are emerging to explain why law firms continue to raise salaries despite the fact that, according to some associates, younger lawyers are distressed rather than pleased when they hear of yet another new raise.<sup>113</sup>

First, law firms refuse to believe that new associates prefer time over money. Managing partners often tell PAR that, even though recent graduates *say* they want more work-life balance, *in fact* associates will go to the firm that offers them the highest salary. Associates tell PAR that they are not interested in promises of reduced hours because they do not believe the promises. The associates believe that, if they go to a firm that promises work-life balance, they will end up working the same hours but for less money. Many thus take the money for a few years and then run. As law firms increasingly recognize, if they can actually deliver on promises of work-life balance, they will gain a valuable competitive edge in the war for talent.

Second, the upward spiral in associate salaries has nothing to do with associates at all. Some consultants believe that associates are caught in an ongoing process of market segmentation. Firms that consider themselves at the top of the prestige hierarchy may be raising salaries because they can afford to do so; if less prestigious or successful firms cannot raise salaries, the attitude of the top firms seems to be "let the chips fall where they may." Some informed commentators point out—confidentially—that every time the "top" firms raise their salaries, many firms who "cannot cut the mustard" go out of business, which, they argue, is exactly what the top firms anticipated.<sup>114</sup>

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110. EPSTEIN, SERON, OGLENSKY & SAUTÉ, *supra* note 1, at 66.

111. *Id.*

112. Eric Young, *Bay Area Law Firms Hike Starting Pay in Salary War*, S.F. BUS. TIMES, May 4, 2007, available at <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2007/04/30/daily49.html>.

113. Interview with attorneys, confidentiality promised, in Washington, D.C. (Mar. 2007).

114. Interview with attorney, confidentiality promised, in Washington, D.C. (Mar. 2007); interview with attorneys, confidentiality promised, in San Francisco, Cal. (May 2007).

Finally, the rise in salaries is being driven by a “mine is bigger than yours” syndrome—referring, of course, to salaries. Some might ask why, if a partner is earning a million dollars a year, it is so important to do whatever it takes to earn two million dollars a year. Commentators on masculinity often note that masculinity (unlike femininity) must be earned over and over again.<sup>115</sup> Within this context, the measuring stick for some male lawyers is profits per partner. This interpretation helps explain persistent reports of tension between male and female partners in some law firms when “top dog” men declare they want sharp increases in profits per partner, only to have some or all of the women reply they are quite happy with the salaries they have and have no interest in doing what it takes to increase profits per partner. To do so requires some combination of working associates and partners harder and shedding smaller clients for larger ones.<sup>116</sup>

Note that these three explanations of law firm salaries are not mutually exclusive. They reinforce each other; only one, all, or none may fuel salary increases within a given firm. What remains striking is the wide gap between older and younger lawyers. The opinion of many younger lawyers, male as well as female, is summarized by the statement of a second-year student at the University of Pennsylvania who rejected the idea of working for a large law firm, saying, “You can’t pay me enough to be unhappy.”<sup>117</sup>

## V. THE BUSINESS CASE FOR WORK-LIFE BALANCE IN THE LEGAL PROFESSION

The clash of social ideals in work life and family life combined with the unwillingness of younger generations of attorneys to accept current time norms of excessive hours and work devotion mean that something in the legal profession has got to give. Using the language of economics, there is a strong business case to be made for the legal profession moving toward policies that support better work-life balance. As detailed in this Section, the business case includes: maintaining or improving business development and client service; attracting talent; reducing attrition; dispelling the myth that firms lose money on part-time attorneys; and understanding work-life balance as a risk-management issue in light of the growing number of lawsuits alleging family responsibilities discrimination (FRD).

### A. *Business Development and Client Service*

It is well understood that law firms exist to serve clients. Demanding clients often want, or expect, 24-7 availability. In reality, however, no one

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115. See, e.g., MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* 7 (1996); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* (1990).

116. Interview with attorneys, confidentiality promised, in San Francisco, Cal. (May 2007); interview with attorneys, confidentiality promised, in San Francisco, Cal. (June 2007).

117. Jones, *supra* note 99.

is available 24-7, not even a full-time worker logging many twelve-hour days. Some attorneys may be in depositions, in trial, or traveling. Ironically, when PAR surveyed in-house lawyers who work with law firms, some of them reported that law firm lawyers who worked part time were often more responsive to them than the those who worked full time.<sup>118</sup> Part-time attorneys may answer their cell phones on the playground, but they answer their phones because they are not on a plane or in a deposition. It is true that law firm clients demand responsiveness, but it does not follow that allowing attorneys to reduce the number of hours they work jeopardizes responsiveness. Some law firms are beginning to allow job sharing or team approaches to staffing their clients' cases, which can not only maintain, but also increase, responsiveness to clients.<sup>119</sup>

In addition to responsiveness, clients need stability. As one in-house counsel told PAR, "Stability is extremely important. Outside lawyers who have an institutional memory are incredibly valuable to us."<sup>120</sup> Another stated, "The burden of educating new attorneys is aggravating, and turning new associates loose on a business client can be a recipe for disaster."<sup>121</sup> The one-size-fits-all model of legal practice based on an ideal worker has serious consequences when it comes to maintaining stability for clients. The "churn and burn" mentality of working young associates so hard that many of them leave does not serve the best interests of clients. As one law firm partner told PAR, "[C]lients, being very bottom-line oriented, quickly grasped that they would rather have 80% of an attorney that they knew and trusted, than 100% of an attorney that knows neither them nor their deals."<sup>122</sup>

These beliefs are leading some clients to consider law firms' attrition rates and average billable hours when making decisions about which law firm to hire. "'Firms losing associates is a big issue for us,'" one in-house counsel told PAR, "'and frankly it has caused us to move away from certain firms.'"<sup>123</sup> Corporations are implementing diversity among their own leaders, and they expect their lawyers to do so, too. For example, the signatories to "A Call to Action," including a number of very large clients, commit to not hire law firms that cannot retain women and other lawyers who reflect the diversity of the clients' own employees, customers, and communities.<sup>124</sup> Anecdotally, law firms have been thought to lose clients over this issue.

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118. PROGRAM FOR WORKLIFE L., AM. U., *supra* note 42, at 4, 51.

119. See Deborah Epstein Henry, *Stepping into Your Shoes: It's Time for Job Shares in Law Firms*, DIVERSITY & B. 16 (July/Aug. 2007), available at <http://www.fleximelawyers.com/pdf/art7.pdf>.

120. WILLIAMS & CALVERT, *supra* note 76, at 48.

121. WILLIAMS & CALVERT, *supra* note 100, at 17.

122. *Id.* at 11.

123. *Id.* at 17.

124. A Call to Action: Diversity in the Legal Profession, Commitment Statement, <http://www.local1toaction.com> (follow "Commitment Statement" hyperlink) (last visited Sept. 24, 2007).

Another piece of business development that law firms often forget is that today's associates are tomorrow's clients when they become in-house counsel for companies. Many young women associates have told PAR that a law firm treated them so badly when they worked there that, now that they are in-house counsel, they will never use that firm.

### B. *Attracting Talent*

Another key component in the business case for better work-family balance is attracting the most talented law school graduates, and nearly half of all graduates are women.<sup>125</sup> In the United States, eighty-one percent of women become mothers during their working lives,<sup>126</sup> and ninety-five percent of mothers work less than fifty hours per week.<sup>127</sup> This means that any employer who defines "full time" as fifty or more hours a week will come close to excluding all mothers—and more than three-quarters of all women<sup>128</sup>—from its labor pool. Given this demography and current law firm time norms, it is no wonder that only seventeen percent of law firm partners are women.<sup>129</sup> In a Catalyst study, forty-five percent of recent women law graduates listed work-family balance as their number one concern.<sup>130</sup> Countless women have told PAR and the Center for WorkLife Law that the reason they stopped working full time is because they rarely saw their children awake. As described above, we are now hearing similar sentiments from young male attorneys.<sup>131</sup>

New models for organizing law firms are not, and should not be viewed as, "accommodations." They are gender-neutral policies that are designed to reduce attrition among all young associates based on the idea that total work devotion is neither desired nor healthy for anyone. The ideal worker norm around which traditional law firms are organized is not a meritocracy; it is a masculine norm that systematically advantages people who can and are willing to live a traditionally masculine life, which means that it disadvantages most women and men who do not want their lives to be almost entirely work. People are being promoted not based on their talent but based on the schedule they can keep. In a professional services industry that

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125. NAT'L ASS'N WOMEN LAWYERS, *supra* note 73, at 1.

126. DYE, *supra* note 19, at 2 (stating that 19.3% of women aged forty to forty-four had no children).

127. Original calculations by Mary Still for the Center for WorkLife Law based on United States Census Bureau, *Current Population Survey: 2006 March Supplement*, using the DataFerrett, <http://dataferrett.census.gov> (files generated Apr. 26, 2005) (on file with author).

128. If eighty-one percent of women become mothers by their mid-forties (*see supra* note 19 and accompanying text), and ninety-five percent of that eighty-one percent work less than fifty hours per week (*id.*), then nearly seventy-seven percent of women work less than fifty hours per week.

129. O'Brien, *supra* note 72, at 1.

130. CATALYST INC., *supra* note 47, at 19.

131. *See supra* Section V(A).

sells talent, this is not only profoundly unfair but ultimately a self-defeating practice.

### C. Reducing Attrition

A related concept that is really the heart of the business case for increasing work-life balance at law firms is the astounding rate of attrition among law firm lawyers and the astronomical costs associated with it. Research has shown that, given such high starting salaries, law firms do not make a profit on associates until they reach their third or fourth year; but, within five years, more than two-thirds of associates leave their law firms, usually to seek better work-life balance.<sup>132</sup> It is estimated that to replace a single attorney costs a law firm between \$200,000 and \$500,000.<sup>133</sup> PAR estimates that the average cost for a law firm to replace an attorney is likely around \$350,000.<sup>134</sup> Even a partner at a New York City law firm has begun to see the flaw in the traditional business model of law firms, stating, “I’ve been increasingly persuaded that we’ve been kidding ourselves to hire and train all these women and then lose them. As an economic proposition that’s an absurdity.”<sup>135</sup>

Why do legal employers have such high attrition levels? Lawyers have the highest job dissatisfaction of all major professional groups.<sup>136</sup> The normal attrition rate at a large law firm is more than double the rate of other industries.<sup>137</sup> Why are attrition-related costs at law firms so high? Law firm attrition costs include both departure-related costs and replacement-hire costs for a highly-educated and skilled workforce. Departure-related costs include: lost productivity of the departing attorney; lost recruiting and training costs; lost skills, contacts, clients, and institutional knowledge; lost client satisfaction; and negative effects on morale. Replacement-hire costs include: interviewing time; recruiting expenses (such as headhunter fees and referral bonuses); training costs; and lost productivity due to a new attorney’s inexperience with clients and the employer’s culture.

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132. CYNTHIA L. SPANIEL & PAULA A. PATTON, NAT’L ASS’N L. PLACEMENT FOUND., TOWARD EFFECTIVE MANAGEMENT OF ASSOCIATE MOBILITY: A STATUS REPORT ON ATTRITION 19, 53 (2005).

133. WILLIAMS & CALVERT, *supra* note 100, at 18–19; Project for Attorney Retention, The Business Case, [http://www.pardc.org/LawFirm/Business\\_Case.htm](http://www.pardc.org/LawFirm/Business_Case.htm) (last visited Sept. 24, 2007).

134. *Id.* at 151–56. PAR has created an “attrition cost worksheet” to help firms estimate their attrition-related costs. *Id.*

135. Cynthia Fuchs Epstein, Robert Sauté, Bonnie Oglensky & Martha Gever, *Glass Ceiling and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 414 (1995).

136. Cunningham, *supra* note 104, at 970.

137. *Id.*

D. *The Myth that Firms Lose Money on Part-Time Workers*

Given the exceedingly high business costs of maintaining the current model of legal practice, it is also useful to debunk the myth that law firms lose money on part-time attorneys. This myth is perpetuated by current conventions for calculating overhead that rest on inaccurate assumptions. As Alison Hooker of Ernst & Young explained, “Often times it is the internal accounting practices that ensure that part-time employment will be infeasible.”<sup>138</sup>

Most law firms operate on a billable hour basis, using a cash flow accounting system that renders costs invisible by focusing largely on incoming cash. When it comes to attrition, costs can be astronomical and yet still be dismissed as “the cost of doing business.” By its very definition, the billable-hours system is illogical. It systematically rewards inefficiency because the more hours you bill, the more you get paid. While the billable-hours system is flawed, it is not likely to be abandoned any time soon given that it is the only form of accounting and management law firms know.

There is room for improvement in the work conditions at law firms even within the current billable-hours structure. One improvement is for firms to recognize and embrace the fact that reduced-hours schedules can be profitable for law firms due to large attrition-related savings and little reduction of profit to the firm. James Sandman, the current President of the District of Columbia Bar’s Board of Governors and the former managing partner of Arnold & Porter LLP, calculated the numbers and found that a part-time attorney working on an eighty percent schedule costs a firm about an additional \$11,000 a year as compared to a full-time attorney: \$10,000 in rent and \$1,000 in malpractice insurance.<sup>139</sup> Using standard industry estimates, however, the average part-time lawyer at a law firm will generate \$425,000 in revenues and \$225,000 in costs—which leaves the law firm with a hefty \$200,000 profit.<sup>140</sup> Thus, the idea that law firms lose money on part-time attorneys is entirely false. They may bring in slightly less revenue, yet the revenues they bring in still far exceed their costs. When law firms use a cash flow system of accounting, whereby they just look at business generation and cash flow, they neglect to factor in the tremendous costs in attrition and lost business that ultimately affect their bottom line.

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138. WILLIAMS & CALVERT, *supra* note 100, at 47.

139. James Sandman, *The Business Case for Effective Part-Time Programs*, 88 *WOMEN LAWYERS J.* 16, 16–18 (2003).

140. These numbers assume that the associate is in a large firm working eighty percent time, paid \$100,000 in salary and an additional \$40,000 in benefits, and incurs expenses of \$40,000 in rent, \$4,000 in malpractice insurance, \$30,000 in proportional support staff costs, and \$11,000 in utilities, office supplies, subscriptions, and equipment.

*E. Work-Life Balance as a Risk Management Issue*

Finally, another major factor in the business case for work-family balance is the potential liability law firms face from discrimination lawsuits filed against them by their employees alleging family responsibilities discrimination (FRD). To date, the Center for WorkLife Law has identified 1,150 lawsuits filed since the 1970s that allege discrimination based on employees' family responsibilities and seventeen different legal theories for those suits under existing state and federal law (for example, Title VII, the FMLA, the ADA, ERISA, and state equivalents). This number includes thirty-three cases filed by employees against law firms and other legal employers in just the past fifteen years.<sup>141</sup> A 2005 study of over six hundred FRD cases documented a nearly four hundred percent increase in the number of FRD lawsuits filed in the past decade as compared to the previous ten years, as well as a significantly higher success rate for FRD cases than employment discrimination cases overall (fifty percent versus twenty percent).<sup>142</sup> The success of plaintiffs in FRD cases may be because FRD cases are litigated as "family values" cases, which have broad political appeal to judges and juries. When a plaintiff wins, the employer's liability can be hefty. Among the cases the Center has tracked, over seventy-five cases have yielded verdicts or settlements of over \$100,000,<sup>143</sup> with the largest individual recovery at \$11.65 million<sup>144</sup> and the largest class recovery at \$49 million.<sup>145</sup>

## VI. CONCLUSION

Many people become lawyers because they view it as a profession within which they can do well and do good—that is, they can sustain a professional- or managerial-class life while helping people by protecting people's rights or helping companies follow the law. The problem with the practice of law today, however, is that the rapid escalation of time norms and work devotion (true of all elite American jobs, not just lawyers) has made such a standard of living come with a major cost: a near total absence

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141. Williams, Bornstein, Reddy & Williams, *supra* note 94, at 396.

142. MARY C. STILLE, CTR. FOR WORKLIFE L., U.C. HASTINGS, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 7, 13 (2006), available at [http://www.uchastings.edu/site\\_files/WLL/FRDreport.pdf](http://www.uchastings.edu/site_files/WLL/FRDreport.pdf).

143. E-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Center for WorkLife Law Staff (Sept. 26, 2006, 10:05 PST) (on file with author).

144. Dee McAcree, *Family Leave Suit Draws \$11.65 Million Award*, 26 NAT'L L.J. A4 (Nov. 11, 2002); e-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Joan C. Williams, Director, Center for WorkLife Law (Jan. 12, 2006, 12:23 PST) (on file with author).

145. *Verizon Paying \$49 Million in Settlement of Sex Bias Case*, SEATTLE POST-INTELLIGENCER, June 6, 2006, available at [http://seattlepi.nwsourc.com/business/272846\\_verizonbias06.html](http://seattlepi.nwsourc.com/business/272846_verizonbias06.html); e-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Stephanie Bornstein, Faculty Fellow, Center for WorkLife Law (Sept. 7, 2006, 18:39 PST) (on file with the author).

of work-life balance. While most women law partners ultimately do have children, less than one-fifth of all law firm partners are women.<sup>146</sup>

The politics of time involves two distinct languages: the language of values and the language of economics. Regardless of which language is used, both argue for restructuring the workplace—particularly the excessive hours and work devotion expected at law firms—to make it possible to live up to ideals of work and family life. To achieve this, the norm of work devotion must be replaced with a model of balanced lives that allows for people to be both excellent workers and excellent parents or family members by allowing time for work, family, and community and spiritual life.

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146. See O'Brien, *supra* note 72, at 1.