

## JUST LEAVE

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The story of work and family conflict is a story of social change. In the last three decades, millions of American workers have moved into precarious jobs, and most of these jobs lack benefits such as sick days, vacation, or family leave. Forty percent of the American workforce now works in non-standard, contingent, or precarious jobs. At the same time, more families now depend upon a single parent for both caregiving and financial support, and far fewer families have a full-time caregiver at home. Public policy has not kept pace with these changing social conditions, and as a result working families now face a caregiving crisis. Although federal lawmakers recently proposed paid family leave as a solution, studies of California's similar paid family leave program raise serious questions about whether this solution will work. These studies find that low-wage workers disproportionately do not take family leave even though it is paid, a startling finding because these are the workers who have the greatest economic incentive to use paid family leave. These findings suggest that lost wages are not the only deterrent to taking family leave.

This Article documents and explains barriers to using family leave, drawing on original survey data from a statewide representative sample of California workers who needed but did not take paid family leave. It analyzes how workplace practices and interactions dissuade workers from taking family leave even when it is nominally available. We find that these workers forgo leave because they both witness and experience retaliation at work for taking family leave. Their employers use gendered conceptions of work and family to justify this retaliation and to frame work-family conflict as a private, personal issue, rather than the product of changing work demands and social conditions. Employers continue to expect workers to be as available and dedicated as the outdated industrial-era male breadwinner with a stay-at-home wife, even when those employers no longer provide good wages, secure employment, or regular hours in return. Employers draw on work and family norms of the past to justify retaliation for taking leave and to extend their control over workers. Because care responsibilities dispropor-

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tionately burden women and low-wage workers who cannot purchase replacement care on the market, these dynamics contribute to gender and class inequality at work. Moreover, to the extent that low-wage workers are disproportionately people of color, these dynamics also exacerbate racial inequality. This Article proposes legislative reforms to address these non-economic barriers to taking paid family leave.

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## I. INTRODUCTION

Jannette Navarro, a single mother to four-year old Gavin, is a Starbucks barista working a grueling, unpredictable, and fluctuating schedule.<sup>1</sup> Her schedule and number of hours vary from week to week thanks to a savvy software system that monitors real-time sales data to minimize Starbucks's labor costs.<sup>2</sup> Her fluctuating work hours and shifts make it hard for her to earn enough regular income to have a secure place to live, and impossible for her to enroll in the last few community college classes she needs to finish her associate degree in business.<sup>3</sup> Her nonstandard schedule also makes arranging childcare for Gavin a herculean task.<sup>4</sup> She must find a babysitter for shifts at 4:00am on weekend mornings and wake Gavin at odd hours when she picks him up from the babysitter after her late night closing shifts.<sup>5</sup> Because she receives her schedule just three days before the start of the work-

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<sup>1</sup> Jodi Kantor, *Working Anything but 9 to 5*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html> [<http://perma.cc/R97W-F3NN>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

week, she scrambles to cobble together childcare at the last minute.<sup>6</sup> Although Jannette's extended family members help, her family struggles to balance their own work and childcare responsibilities with care for Gavin.<sup>7</sup>

Jannette Navarro personifies the growing ranks of workers employed in nonstandard, contingent, and precarious jobs who now constitute 40% of the workforce.<sup>8</sup> Her story illustrates how working families are struggling to adapt to unprecedented changes in the labor market. Scholars describe these profound changes as a second Great Transformation,<sup>9</sup> one from an economy based on regular, full-time work to an economy of precarious, part-time, casual, and contingent labor.<sup>10</sup> Although all work has become less secure in recent years, workers with the least skills and education lost the most ground in this transformation.<sup>11</sup> Not only do they earn less than before, but they also work less regular shifts, receive fewer benefits like health care or pensions, and have less job security.<sup>12</sup>

As Jannette's story illustrates, jobs with variable shifts and fluctuating hours are a hallmark of this emerging economy.<sup>13</sup> Last-minute, variable schedules transfer the risk of market volatility from employers to workers because they enable employers to utilize and discard labor quickly in response to market demand.<sup>14</sup> They also, however, create tremendous work-family conflict for workers with caregiving responsibilities.<sup>15</sup> The percentage

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> HARRIET B. PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES 1 (2003). Nonstandard, contingent, and precarious work are work arrangements that are not regular, full-time, year-round work, including part-time, temporary, seasonal, or subcontracted work, work with irregular scheduling, and day labor. See Arne L. Kalleberg et al., *Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States*, 65 AM. SOC. REV. 256, 258–59 (2000) [hereinafter *Bad Jobs*]. Women and racial minorities are overrepresented in the contingent workforce. Vicki Smith, *New Forms of Work Organization*, 23 ANNUAL REV. SOC. 315, 326 (1997).

<sup>9</sup> In *The Great Transformation*, first published in 1944, Karl Polanyi argued that the rise of the market economy in nineteenth century England produced political and social upheavals that threatened the economic and social fabric of society. KARL POLANYI, *THE GREAT TRANSFORMATION* 35, 73 (1944). For scholars heralding a second Great Transformation, see generally RONALDO MUNCK, *GLOBALISATION AND LABOUR: THE NEW "GREAT TRANSFORMATION"* (2002) (drawing an analogy between current patterns of change around work organization and Polanyi's argument) and Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2 (2009) [hereinafter *Precarious Work*] (noting that scholars have called the events of the past quarter-century the second Great Transformation).

<sup>10</sup> See, e.g., *Bad Jobs*, *supra* note 8, at 259.

<sup>11</sup> See Neil Fligstein & Taek-Jin Shin, *The Shareholder Value Society: A Review of the Changes in Working Conditions and Inequality in the United States, 1976 to 2000*, in SOCIAL INEQUALITY 401, 401–02 (2004).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *id.* at 402; Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers*, 61 HUMAN REL. 1203, 2015 (2008) [hereinafter *Passing the Buck*].

<sup>14</sup> See *Passing the Buck*, *supra* note 13, at 1206; Smith, *supra* note 8, at 326–27.

<sup>15</sup> Employers, rather than workers, generally control these nonstandard, variable schedules, so increased flexibility has not enabled workers to manage caregiving more

of workers in the United States with variable schedules they do not control grew 74.2% between 1997 and 2004.<sup>16</sup> Variable schedules mean less, not more, flexibility for families because workers have little control over when they work. For workers who are constantly on call or who have unpredictable schedules, finding reliable routine care is a challenge<sup>17</sup> and unexpected caregiving needs can be disastrous. Indeed, variable schedules shift risk to those who can least afford it. Workers in nonstandard jobs typically lack access to paid sick days or vacation to help manage care responsibilities,<sup>18</sup> and thus suffer lost wages and even lost jobs if they miss work.<sup>19</sup> Job loss can be particularly disastrous for independent contractors, another hallmark of this new economy, because they are not covered by unemployment insurance.<sup>20</sup>

At the same time that work is becoming more precarious and unpredictable, caregiving needs are increasing and family resources to meet them are shrinking. Most women with children now work out of economic necessity, leaving most families with no full-time caretaker at home.<sup>21</sup> In addition, more families now depend on a single parent for both economic support and caregiving.<sup>22</sup> Work and families have changed dramatically, yet the United

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easily. See Elaine McCrate, *Flexibility for Whom? Control over Work Schedule Variability in the US*, 18 FEMINIST ECON. 39, 44 fig.1 (2012); *Passing the Buck*, *supra* note 13, at 1205.

<sup>16</sup> McCrate, *supra* note 15, at 44. McCrate suggests that due to the wording of the questions about scheduling, existing estimates may actually underestimate the actual proportion of variable schedules. *Id.* at 45.

<sup>17</sup> See, e.g., Julia R. Henly et al., *Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs*, 80 SOC. SERV. REV. 609, 610, 620–21, 625, 629–30 (2006); *Passing the Buck*, *supra* note 13, at 1204, 1217–18; Ann O’Leary, *Risk Sharing when Work and Family Clash: The Need for Government and Employer Innovation*, in SHARED RESPONSIBILITY, SHARED RISK: GOVERNMENT, MARKETS, AND SOCIAL POLICY IN THE TWENTY-FIRST CENTURY 161, 163–64 (2012) [hereinafter *Risk Sharing*].

<sup>18</sup> See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, BULL. NO. 2776, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2013, at 44–47 tbl.16, 109–11 tbl.32 (2013), <http://www.bls.gov/ncs/ebs/benefits/2013/ebb10052.pdf> [<http://perma.cc/R97W-F3NN>].

<sup>19</sup> See *Passing the Buck*, *supra* note 13, at 1205, 1214–15. Workers with low levels of education and skill typically do not have access to paid leave through their employers. See RUTH MILKMAN & EILEEN APPELBAUM, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 7 tbl.1.1 (2013). There are few legal protections for workers who need time off for caregiving needs. See *Risk Sharing*, *supra* note 17, at 162. A majority of low-income mothers lose wages when they must care for a sick child. See generally ELISE GOULD, KAI FILION & ANDREW GREEN, ECON. POLICY INST., BRIEFING PAPER NO. 319, THE NEED FOR PAID SICK DAYS (June 29, 2011), [http://s4.epi.org/files/temp2011/BriefingPaper\\_319-2.pdf](http://s4.epi.org/files/temp2011/BriefingPaper_319-2.pdf) [<http://perma.cc/JU2W-BESY>] (discussing the costs of missing work without paid sick days). One in seven low-wage workers reports having lost a job in the past four years because they were sick or needed to care for a family member. OXFAM AMERICA, HARD WORK, HARD LIVES 4 (Aug. 28, 2013), <http://www.oxfamamerica.org/static/oa4/low-wage-worker-report-oxfam-america.pdf> [<http://perma.cc/Y3Y8-NDMM>].

<sup>20</sup> See, e.g., *Bad Jobs*, *supra* note 8, at 258–259.

<sup>21</sup> See Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 399–400 (2007) [hereinafter *Institutional Perspectives*].

<sup>22</sup> See *id.*

States continues to organize its work policies and welfare state around an outdated breadwinner/homemaker model.<sup>23</sup> Unlike every other developed country in the world, the United States has no national paid family leave policy,<sup>24</sup> and only a fraction of its workforce has access to unpaid family leave through the twenty-year-old Family and Medical Leave Act (FMLA).<sup>25</sup> Only 12% of the workforce has access to employer-provided paid family leave,<sup>26</sup> and workers at the bottom of the economic ladder have the least access to paid family leave.<sup>27</sup> Both employers and the state continue to expect families to bear the brunt of caregiving despite the demise of the full-time homemaker, and to find self-sufficiency in employment despite the dearth of jobs that pay a wage that will support a family. The result is growing economic insecurity for families.<sup>28</sup>

Lawmakers have finally begun to address these concerns. Some states, including California, now have paid family leave programs,<sup>29</sup> and federal lawmakers have proposed the Family and Medical Insurance Leave Act (FAMILY Act) to do the same at the national level.<sup>30</sup> The FAMILY Act seems like it will help low-wage working families by extending paid leave to workers in nonstandard jobs,<sup>31</sup> but research about the similar California Paid

<sup>23</sup> Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 POL. THEORY 591, 591–92 (1994); *Risk Sharing*, *supra* note 17, at 162.

<sup>24</sup> See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PF2.1: KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS 1, 3 (2015), [http://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) [<http://perma.cc/M9YK-5FX9>].

<sup>25</sup> JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE* 8 (2010) [hereinafter *RESHAPING THE DEBATE*].

<sup>26</sup> See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, BULL. NO. 2771, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2011, at 64–67 tbl.17, 116–19 tbl.30 (2011), <http://www.bls.gov/ncs/ebs/benefits/2011/ebb10048.pdf>, [<http://perma.cc/XV3M-7PK7>].

<sup>27</sup> See JAMES T. BOND & ELLEN GALINSKY, *FAMILIES & WORK INST., WORKPLACE FLEXIBILITY AND LOW-WAGE EMPLOYEES* 7 tbl.3 (Feb. 1, 2011), <http://familiesandwork.org/downloads/WorkFlexandLowWageEmployees.pdf> [<http://perma.cc/Y9DW-Z8D9>]; MILKMAN & APPELBAUM, *supra* note 19, at 7 tbl.1.1.

<sup>28</sup> See Linda McDowell, *Life Without Father and Ford: The New Gender Order of Post-Fordism*, 16 TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS 400, 412–16 (1991); Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 39–41 (2005).

<sup>29</sup> *Risk Sharing*, *supra* note 17, at 175.

<sup>30</sup> FAMILY Act, H.R. 1439, 114th Cong. (2015).

<sup>31</sup> The Act would cover workers in *all* companies, regardless of size, and make younger, part-time, lower-wage and contingent workers eligible for benefits. H.R. 1439 § 5(a). Individuals must have earned income from employment during the 12 months prior to filing an application for benefits to be eligible. *Id.* § 5(a)(2). The Act would provide partial wage replacement to workers who take leave for the serious health condition of a child, parent, or spouse; the birth or adoption of a child; or their own serious health condition. *Id.* § 3(6) (referencing the FMLA, 29 U.S.C. § 2612(a) (2012)). The Act also covers particular caregiving needs related a family member's active duty in the Armed Forces. *Id.* The Act would prohibit discrimination against an individual "because the individual has applied for, indicated an intent to apply for, or received family and medical leave insurance," but it would not require employers to reinstate workers to their jobs after their leaves. *Id.* § 5(h)(1). The FAMILY Act also does not require employers to continue health benefits during the leave. Approximately 60% of the workforce would

Family Leave (PFL)<sup>32</sup> raises serious concerns about whether the Act will help those at the bottom of the economic ladder. Many California workers who need PFL do not take it, low-wage workers are the least likely to take it,<sup>33</sup> and evidence suggests that some workers do not take family leave because they fear retaliation at work.<sup>34</sup> These findings indicate that lost wages during unpaid leave are not the only deterrent to using family leave, and that workers in low-paid, precarious jobs may be especially vulnerable to hidden workplace penalties for taking leave.

In light of this evidence, this Article asks two critical questions: other than lost wages, what deters workers who need paid family leave from taking it? And how can Congress craft legislation to improve access to paid family leave? As the United States scrambles to catch up with other Western nations, it is essential that federal legislation get family leave policies right. As a nation, we find ourselves in a new economic reality that is not compatible with public policies organized around the breadwinner/homemaker model of the past. Lawmakers need to develop a new model of social welfare provision that protects families that depend on the precarious and contingent jobs that are the new normal in the emerging economy.

This Article documents and explains barriers to using paid family leave drawing on original survey data from a statewide representative sample of California workers who needed but did not take paid family leave. It analyzes how institutional and cultural factors embedded in workplace practices, interactions, and social meanings dissuade workers from taking family leave. We follow the theoretical approach of law and society scholars who argue that structural and cultural influences mediate how rights on the books actually work on the ground.<sup>35</sup> We also build on sociological arguments that suggest that as employment relations become more informal and less regulated by law, workplace relations will be shaped by market power and social

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have some job protection and health insurance protection through FMLA, but the remainder would not. See *RESHAPING THE DEBATE*, *supra* note 25, at 8; 29 U.S.C. § 2614(a)(1), (c).

<sup>32</sup> The FAMILY Act is based in part on California's legislation. See H.R. 1439 § 2(14).

<sup>33</sup> See *MILKMAN & APPELBAUM*, *supra* note 19, at 94. Economic logic suggests that low-wage workers should disproportionately benefit from progressive programs like PFL or the FAMILY Act because relatively modest capped benefits replace more of their lost wages relative to other workers.

<sup>34</sup> See *id.* at 94 fig.5.4, 95. Among workers who did not apply for PFL, 31.5% said they were afraid their employer would be unhappy, 28.9% reported it would hurt their opportunities for advancement, and 23.9% reported they were afraid of being fired. *Id.* Because respondents could report more than one reason for not taking leave, the question wording does not allow a precise estimate of the total number of employees who feared retaliation of some kind at work if they took leave.

<sup>35</sup> See, e.g., CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 3* (2010) [hereinafter *RIGHTS ON LEAVE*]; Lawrence Friedman, *The Law & Society Movement*, 38 *STAN. L. REV.* 763, 764 (1986); Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 *YALE L.J.* 1689, 1690 (1989).

status characteristics like gender, race, and class.<sup>36</sup> Following these approaches, we focus on workers' actual experiences in the workplace and the contextual factors that deter them from taking leave even when it is nominally available.

We find that California workers, especially those in precarious and contingent positions, both fear and experience retaliation at work for taking family leave. Their employers draw on gendered conceptions of work and family to justify retaliation and to frame work-family conflict as a private, personal issue, rather than a product of variable scheduling and intensifying work demands. As our data reveal, these employers continue to expect their workers to be as available and dedicated as the industrial-era male breadwinner with a stay-at-home wife, even when these employers no longer provide a family wage, secure employment, or even regular hours in return. In this way, employers draw on cultural schemas<sup>37</sup> that reflect the work and family organization of the past to rationalize denying workers access to leave and to extend their social control over workers. Because care responsibilities disproportionately burden women and low-wage workers who cannot afford replacement care on the market, these dynamics recreate gender and class inequalities at work. Moreover, to the extent that low-income workers are disproportionately people of color, these dynamics also exacerbate racial inequality.

We argue that legislative solutions that focus only on wage replacement fail to address how structural shifts in both work and family make leave-taking a dangerous choice for many workers. The law needs to do more to protect low-wage workers from retaliation for taking paid family leave. To meet this goal, we propose extending FMLA protections to low-wage, precarious work, and amending the proposed FAMILY Act to prevent employers from reducing workers' hours or laying them off because they take paid family leave. By coordinating the coverage and protection of these two laws, lawmakers can respond to the sweeping changes in work and family that undermine economic security for American families. The law would also serve an expressive function<sup>38</sup> by providing a new cultural narrative to replace outdated conceptions of work and family that still drive the culture of

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<sup>36</sup> See *Precarious Work*, *supra* note 9, at 12.

<sup>37</sup> One sociologist defines a cultural schema as "an ordered, socially constructed, and taken-for-granted framework for understanding and evaluating self and society, for thinking and for acting. Schemas are objective . . . publicly available understandings. They are also subjective and partially internalized, thereby shaping personal aspirations and identities." Mary Blair-Loy, *Cultural Constructions of Family Schemas: The Case of Women Finance Executives*, 15 *GENDER & SOC'Y* 687, 689 (2001).

<sup>38</sup> For discussions of the expressive function of law, see generally Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 *IOWA L. REV.* 35 (2002); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 *OR. L. REV.* 339 (2000); Cass Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021 (1996); Cass Sunstein, *Social Norms and Social Rules*, 96 *COLUM. L. REV.* 903, 964-65 (1996).

the workplace but no longer reflect the social conditions of the new economy.<sup>39</sup>

The following Parts develop this argument further. Part II documents how dramatic social changes to work and to families sparked the economic and caregiving crises for working families, and how legal responses to work-family conflict shifted from a formal equality approach to a more substantive, paid family leave approach. Part III discusses our method and presents our findings on workers' experiences with paid family leave in California. Part IV analyzes how subtle workplace barriers reflect the old industrial-era organization of work and family and reinforce gender, race, and class inequalities. It proposes legislative reforms to the FMLA and the proposed FAMILY Act to counteract these barriers to taking paid family leave. We conclude by considering how legal reforms can avoid recreating inequality as changing economic and social conditions reconstitute the relationship between work and family.

## II. THE ORIGINS OF THE CAREGIVING CRISIS AND THE LEGAL RESPONSE

Radical changes to the workplace and the family are a global phenomenon, yet the U.S. policy response to families with caregiving needs lags far behind that of other industrialized nations.<sup>40</sup> Almost all industrialized countries now offer paid family leave and subsidized child care to workers.<sup>41</sup> Until recently in the United States, however, federal policy primarily addressed workers' caregiving needs through antidiscrimination laws that prohibit unequal treatment. This approach frames caregiving issues as a matter of gender discrimination rather than as a matter of the lack of substantive support for families. These antidiscrimination laws prohibit unequal treatment because of sex, but do not provide substantive leave rights for workers with caregiving responsibilities.<sup>42</sup> Even disparate impact theories under these

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<sup>39</sup> Existing law constrains not only how workers behave, but also how they think about their circumstances and possible solutions. For example, in her study regarding long-term care, sociologist Sandra Levitsky finds that even family members struggling with the burdens of long-term care conceptualize both appropriate care responsibilities and policy solutions in terms of the existing legal and public policies, which provide a template and cultural schema for interpreting their experiences. SANDRA R. LEVITSKY, *CARING FOR OUR OWN: WHY THERE IS NO POLITICAL DEMAND FOR NEW AM. SOCIAL WELFARE RIGHTS* 117–122, 140 (2014).

<sup>40</sup> For example, only two of 185 countries recently studied by the International Labour Organization provide no statutory cash benefits during maternity leave: the United States and Papua New Guinea. INT'L LABOUR ORG., *MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD* 16 (2014), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_242615.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf) [<http://perma.cc/8RDJ-MDXQ>]; see also JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 6–9 (2003); *Precarious Work*, *supra* note 9, at 14–16.

<sup>41</sup> INT'L LABOUR ORG., *supra* note 42, at 16.

<sup>42</sup> The Pregnancy Discrimination Act (PDA) provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employ-

laws provide only limited access to time off for workers with caregiving responsibilities, and then only in the context of unequal impact by gender.<sup>43</sup> Although advocates have pushed the boundaries of antidiscrimination law to try to encompass caregiver discrimination, formal equality doctrine constrains what they can accomplish.<sup>44</sup>

Nevertheless, both state and federal policies have slowly begun to change. As shifting social conditions revealed the limits of antidiscrimination approaches, California and a few other states moved toward a substantive leave approach, at first enacting unpaid but job-protected family leave.<sup>45</sup> Not long after, federal legislators followed with the FMLA, which also provides job-protected unpaid leave.<sup>46</sup> In the last decade, California, New Jersey, Washington, and Rhode Island enacted paid family leave programs.<sup>47</sup> Federal lawmakers also have proposed but not yet enacted the FAMILY Act, which would provide paid family leave.<sup>48</sup> These developments represent a shift from formal equality approaches toward substantive rights. In short, lawmakers came to realize that the caregiving crisis is not only a matter of unequal treatment by gender, but also part of larger economic and social hardships generated by structural changes in work and family. The parts that follow analyze this developing pattern to understand why and how paid family leave emerged as a legislative response to caregiving problems, and the significance of that development for policy moving forward.

### A. *From Fordism to Post-Fordism*

The caregiving crisis originates in the disintegration of a historically symbiotic relationship between work and family. The centerpiece of this story is the transition from a Fordist industrial economy based on full-time labor for a family wage to a post-Fordist economy of part-time, contingent, and precarious work.<sup>49</sup> In the Fordist economy, a historical bargain between labor and capital provided economic security to families.<sup>50</sup> Industrial em-

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ment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ” 42 U.S.C. § 2000e(k) (2012). For the most part, courts have interpreted the PDA to require formally equal treatment but not substantive rights to time off not provided to other workers. See Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1136–1137, 1149–51 (2009) [hereinafter *Institutional Inequality*].

<sup>43</sup> See *Institutional Inequality*, *supra* note 42, 1144–55.

<sup>44</sup> See *id.* at 1152–53.

<sup>45</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 29–32.

<sup>46</sup> 29 U.S.C. §§ 2601–2654 (2012).

<sup>47</sup> Washington State passed a paid family leave law in 2007, but it has yet to be implemented. *State Family and Medical Leave Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Dec. 31, 2013), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [http://perma.cc/PZ38-VDRU].

<sup>48</sup> See FAMILY Act, H.R. 1439, 114th Cong. (2015).

<sup>49</sup> See *Precarious Work*, *supra* note 9, at 2–6; Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 POL. THEORY 591, 591–92 (1994).

<sup>50</sup> MARIANNE COOPER, CUT ADRIFT: FAMILIES IN INSECURE TIME 29 (2014); Fraser, *supra* note 23, at 591–92.

employers promised organized labor high wages and generous benefits in exchange for control over the labor process and workers' loyalty and effort on the job.<sup>51</sup> In principle, this bargain offered a wage sufficient to support a homemaker responsible for taking care of a worker's family and other needs, freeing him to be an ideal worker, available and dedicated to labor for his employer.<sup>52</sup> The state supported this system by replacing the lost wages of an injured or deceased breadwinner, enabling homemakers to continue caring for children at home.<sup>53</sup> As longstanding institutional arrangements at work and at home unraveled, however, so too did the economic stability of families.<sup>54</sup> The United States did very little to respond to changing social conditions that left families without sufficient private resources to meet care needs.<sup>55</sup> It failed, for example, to adopt policies common in other industrialized countries such as paid family leave or state supported childcare.<sup>56</sup> As President Obama put it, "There's only one developed country in the world that does not offer paid maternity leave, and that is us. And that is not the list you want to be on by your lonesome."<sup>57</sup> The result has been predictably disastrous, especially for low-wage workers and their families.

American public policy around caregiving evolved out of a historical bargain among industrial employers, labor, and government that emerged in the post-World War II era. In the early twentieth century, decreasing wages, deskilling of jobs, and increasing employer control from modern industrial production methods provoked strong resistance from labor.<sup>58</sup> Periodic economic volatility, unstable employment, and growing economic inequality during this time culminated in the Great Depression, which spurred political pressure for government intervention.<sup>59</sup> After World War II, employers,

<sup>51</sup> See COOPER, *supra* note 50, at 29; Smith, *supra* note 8, at 317.

<sup>52</sup> See Fraser, *supra* note 23, at 591–92.

<sup>53</sup> See RIGHTS ON LEAVE, *supra* note 35, at 53.

<sup>54</sup> See COOPER, *supra* note 50, at 30–40.

<sup>55</sup> *Risk Sharing*, *supra* note 17, at 161–62.

<sup>56</sup> GORNICK & MEYERS, *supra* note 19, at 6–9.

<sup>57</sup> Tamara Keith, *Democrats Hope for Work Life Balance to Act as a Lever in Midterms*, NAT'L PUB. RADIO (June 23, 2014, 4:07 PM), <http://www.npr.org/2014/06/23/324906528/democrats-hope-for-work-life-balance-to-act-as-lever-in-midterms> [http://perma.cc/3NG6-DMMM]. President Obama called for national family supportive policies in his 2015 State of the Union address. President Barack Obama, *Remarks by the President in State of the Union Address*, WHITE HOUSE (Jan. 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [http://perma.cc/2RC3-3FCJ].

<sup>58</sup> During the late nineteenth to early twentieth century transition to modern industrial production, large industrial employers attempted to control workers through a management style called Taylorism that utilized the rhythm of machinery and the time clock. Workers feared the economic consequences of Taylorism's deskilling effects and increasing employer control, and strenuously resisted it. See, e.g., Matt Vidal, *Reworking Postfordism: Labor Process Versus Employment Relations*, 5 SOC. COMPASS 273, 274 (2011); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925*, at 226, 234–35 (1987); RIGHTS ON LEAVE, *supra* note 35, at 38–40.

<sup>59</sup> See COOPER, *supra* note 50, at 28–29; BENJAMIN HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK* 178 (1988).

faced with labor's new collective bargaining rights under the Wagner Act,<sup>60</sup> wage and hours regulation, and the prospect of further government intervention, sought a compromise.<sup>61</sup> To secure a stable and docile labor force, more industrial employers began to offer regular, well-paid work in exchange for workers' loyalty and commitment to their jobs.<sup>62</sup> This industrial bargain over the employment relation is a key feature of "Fordism," an economy based on a system of mass production by large, vertically integrated companies using assembly line production to generate standardized goods for mass consumption.<sup>63</sup> The Fordism moniker derives from Henry Ford, who famously instituted a five-dollar day to minimize turnover and resistance to the mind-numbing work of the assembly line.<sup>64</sup> Sociologist Matt Vidal notes that Fordism "included a variety of institutions to support mass markets and mass consumption, including public insurance and public assistance (such as the U.S. Social Security programs) and a system of collective bargaining which generalized the class compromise of relatively high and growing wages in return for labor peace through the core of the economy."<sup>65</sup>

A gendered conception of wage labor and the privatization of care within families underwrote Fordism.<sup>66</sup> In the Fordist economy, family economic security rested on a symbiotic relationship between the industrial organization of work and the organization of families built around a male breadwinner and a female homemaker.<sup>67</sup> Leading up to this arrangement, women's roles as homemakers were reinforced by laws which restricted women's access to the industrial labor force,<sup>68</sup> cultural norms which tethered

<sup>60</sup> The National Labor Relations Act of 1935 (also known as The Wagner Act) (49 Stat. 449) 29 U.S.C. § 151–169.

<sup>61</sup> See JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 204–06 (2006) (describing how, by accepting bargaining with unions over health insurance and other benefits, employers prevented the development of a state-centered system of social welfare provision that would have given workers more power and autonomy from their employers).

<sup>62</sup> See, e.g., COOPER, *supra* note 50, at 29; Vidal, *supra* note 58, at 275.

<sup>63</sup> See Vidal, *supra* note 58, at 274. Vidal notes that Fordism also referred to a pattern of economic growth: "Fordist mass production made possible mass consumption, generating a new *norm* of middle-class consumption based on relatively high wages and the production of relatively inexpensive, standardized products." *Id.* at 275.

<sup>64</sup> *Id.* at 274; see also MONTGOMERY, *supra* note 58, at 234–35.

<sup>65</sup> Vidal, *supra* note 58, at 275.

<sup>66</sup> See, e.g., GORNICK & MEYERS, *supra* note 40, at 6–7; Fraser, *supra* note 23, at 591–92; RIGHTS ON LEAVE, *supra* note 35, at 45–55. It should also be noted that this gendered conception of families and work was only achievable by and normative for relatively well-to-do white families. RIGHTS ON LEAVE, *supra* note 35, at 50.

<sup>67</sup> See GORNICK & MEYERS, *supra* note 40, at 6. To qualify for Ford's famous five-dollar day, which symbolized this system of production, workers were required to contribute to the support of others. See MONTGOMERY, *supra* note 58, at 235. Gender roles were such at this time that this requirement came to mean husbands supporting wives and families. See generally Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309–36 (1994) (discussing how wage work became the basis for male workers' claim to patriarchy).

<sup>68</sup> See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 180–216 (20th anniv. ed. 2003). To be sure, these restrictions

women to the private sphere as homemakers and family caregivers,<sup>69</sup> and labor and organizational practices which favored male breadwinners.<sup>70</sup> Welfare state policies both assumed and reinforced this arrangement by providing generous benefits to replace the loss of a breadwinner's income in the case of injury, sickness, unemployment or death, but little support to working families to meet caregiving needs in the event of the loss of a homemaker.<sup>71</sup> Instead, care responsibilities and the financial risks that go with them remained largely the private responsibility of families.<sup>72</sup> This policy approach presumed that someone other than the primary economic supporter of the family was available to meet those care needs, and that someone was typically a woman.<sup>73</sup>

In this way, the state and the economy allocated responsibility for caregiving to families through a gendered division of labor inscribed in the very organization of work.<sup>74</sup> Cultural commitments to this organization of work and family developed over time.<sup>75</sup> These cultural commitments normalized the privatization of care responsibilities, the gender division of labor in work and family, and the obedience and dedication workers owe to their employers in exchange for their wages.<sup>76</sup> This arrangement—men as lifelong, dedicated workers providing for the economic needs of their dependents, and women as homemakers and family caregivers supporting male workers—became widely accepted as natural and formed the presumed, if not always actual, basis of economic security for families.<sup>77</sup>

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were not always historically consistent. For example, during World War II, industrial employers welcomed women into the labor force to replace male workers fighting overseas, although women's participation was characterized as only a temporary measure to boost wartime production. See Melissa E. Murray, *Whatever Happened to G.I. Jane: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 107 (2002). When the war ended, women were encouraged to leave the workforce, and were also explicitly excluded by veteran's preferences and measures such as the Selective Training and Service Act, which required employers to discharge female workers to restore veterans to their pre-war employment. *Id.*

<sup>69</sup> See Murray, *supra* note 68, at 96, 98, 122–24; see generally Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151 (1966).

<sup>70</sup> See, e.g., IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 20–24 (2d ed. 2002); Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives*, 15 ANNUAL REV. SOC. 381, 398 (1989).

<sup>71</sup> See Fraser, *supra* note 23, at 591–92; *Risk Sharing*, *supra* note 17, at 161–62; Murray, *supra* note 68, at 100–01.

<sup>72</sup> See GORNICK & MEYERS, *supra* note 40, at 5; *Risk Sharing*, *supra* note 17, at 161–62.

<sup>73</sup> See GORNICK & MEYERS, *supra* note 40, at 5; *Risk Sharing*, *supra* note 17, at 161.

<sup>74</sup> RIGHTS ON LEAVE, *supra* note 35, at 45–55; see also GORNICK & MEYERS, *supra* note 40, at 5.

<sup>75</sup> RIGHTS ON LEAVE, *supra* note 35, at 48–51.

<sup>76</sup> See *id.* at 45–55.

<sup>77</sup> For low-income families and families of color, the male-breadwinner, female-homemaker was rarely achieved. In fact, even when this family arrangement was in its heyday, many families could not afford to support a family on a single income. Nonetheless, this arrangement was seen as the ideal for which all families should strive and was the basis of workplace practices like the family wage ideal. See PADAVIC, *supra* note 70, at 24–26; RIGHTS ON LEAVE, *supra* note 35, at 50.

For several mid-century decades, the Fordist economy bargain provided economic security and prosperity for many families.<sup>78</sup> Between the 1940s and the 1970s, far more workers held jobs that offered health, disability, and pension benefits as well as good wages, and far more families fit the breadwinner/homemaker model than do today.<sup>79</sup> Well-paid jobs with benefits, supplied by industrial production in several industries, reached deep into the working class.<sup>80</sup> This mid-century economy produced strong employment growth, a 56% increase in family income between World War II and the mid-1960s, and a significant decrease in family income inequality.<sup>81</sup> Employment also became a major source of social welfare benefits. By the late 1970s, nearly half of private wage and salary workers had private pensions and most Americans had access to health care through employment.<sup>82</sup>

Over the last few decades, dramatic social changes destabilized the social contract among workers, employers, and the state, and disrupted the symbiotic relationship between work and breadwinner/homemaker families. Women—particularly married women with young children—poured into the work force in record numbers.<sup>83</sup> The number of single-parent families skyrocketed as the result of divorce reform and rising out-of-wedlock childbearing.<sup>84</sup> According to recent statistics, only 21.3% of children live with families that fit the male breadwinner-female homemaker model,<sup>85</sup> and 21.6% of children live in families that rely on only one parent for both breadwinning and caregiving.<sup>86</sup> Most families no longer have an unemployed adult available to provide care when needed, yet families and especially women continue to shoulder the brunt of housework and family care responsibilities in addition to their paid work in the labor force.<sup>87</sup> The United States has not developed new policies, such as state-supported childcare or paid family leave, to help families cope with these rapid demographic changes.<sup>88</sup> As a consequence, the growing ranks of families that do not fit the bread-

<sup>78</sup> See KLEIN, *supra* note 61, at 258–59.

<sup>79</sup> *Id.*; see also COOPER, *supra* note 50, at 29–30; Howard V. Hayghe, *Family Members in the Work Force*, 113 MONTHLY LABOR REV. 14, 16 (1990); *Precarious Work*, *supra* note 9, at 4–5.

<sup>80</sup> See KLEIN, *supra* note 61, at 259; see also *Bad Jobs*, *supra* note 8, at 257.

<sup>81</sup> COOPER, *supra* note 50, at 29.

<sup>82</sup> *Id.* at 29–30; see also KLEIN, *supra* note 61, at 258–59.

<sup>83</sup> *Institutional Perspectives*, *supra* note 21, at 399–401.

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

<sup>85</sup> See JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, P20-570, AMERICA'S FAMILY AND LIVING ARRANGEMENTS: 2012, at 25 tbl.10 (2013), <http://www.census.gov/prod/2013pubs/p20-570.pdf> [<http://perma.cc/S5EV-VUBN>].

<sup>86</sup> See *id.* at 25 tbl.10.

<sup>87</sup> See *Risk Sharing*, *supra* note 17, at 169–70. Sociologist Suzanne Bianchi and her colleagues find that mothers' average time in childcare remains high, and fathers' time with their children increased beginning in the 1980s. SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 62–63 (2006).

<sup>88</sup> GORNICK & MEYERS, *supra* note 40, at 6–9; *Risk Sharing*, *supra* note 17, at 162.

winner/homemaker model face tremendous challenges meeting caregiving responsibilities with little outside support.

These changes in families occurred just as good jobs and secure employment began to disintegrate in earnest, marking the transition to the post-Fordist economy.<sup>89</sup> A range of factors, including globalization, increasing international competition, and legal deregulation contributed to the decline of family wage jobs and the rise of part-time and contingent work during the latter part of the twentieth century.<sup>90</sup> During this period, the U.S. economy transformed from a primarily goods-producing, industrial economy to a service-based one.<sup>91</sup> Deindustrialization eliminated low-skilled manufacturing jobs that provided good wages and benefits such as health care and pensions.<sup>92</sup> Although some highly paid jobs persisted, labor market growth shifted into temporary, part-time, and contingent jobs, and all work has become more precarious.<sup>93</sup> The Great Recession accelerated this trend toward non-standard work arrangements. The number of involuntary part-time workers in the U.S. economy has doubled since 2007,<sup>94</sup> and labor market growth remains concentrated in low-wage, precarious, and contingent jobs.<sup>95</sup> Post-Fordism, then, is characterized by deindustrialization, the demise of collective bargaining, the expansion of part-time, contingent, and temporary work, growth in jobs with nonstandard schedules and few benefits, and rising insecurity.<sup>96</sup> An economy built around contingent jobs and stagnant or shrinking wages has replaced the old industrial organization of work based on permanent jobs, full-time schedules, and year-round labor.<sup>97</sup>

These sweeping economic transformations undermined workers' bargaining power and eroded employers' commitment to their workers. In the emerging post-Fordist economy, businesses minimize labor costs by using non-standard, variable scheduling and employing more contingent workers.<sup>98</sup> Unlike the industrial employers of the past, new economy employers have little to no commitment to the regular scheduling, or even employment, of many of their workers.<sup>99</sup> Workers in this increasingly service-oriented economy lack the bargaining power to resist these changes because U.S. unions

<sup>89</sup> See *Precarious Work*, *supra* note 9, at 2–8.

<sup>90</sup> See COOPER, *supra* note 50, at 35–40; Susan Christopherson, *Flexibility in the US Service Economy and the Emerging Spatial Division of Labour*, 14 *TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHIES* 131, 139 (1989); *Precarious Work*, *supra* note 9, at 2–3.

<sup>91</sup> COOPER, *supra* note 50, at 35–36.

<sup>92</sup> See *id.* at 36.

<sup>93</sup> *Precarious Work*, *supra* note 9, at 5–8.

<sup>94</sup> Mina Kim & Lisa Pickoff-White, *Rep. George Miller Proposes New Rules for Part-Time Work*, KQED News (July 17, 2014), <http://ww2.kqed.org/news/2014/07/16/part-time-worker-job-protections> [<http://perma.cc/QA2D-8MXV>].

<sup>95</sup> See Fligstein & Shin, *supra* note 11, at 402.

<sup>96</sup> Vidal, *supra* note 58, at 275.

<sup>97</sup> See Fraser, *supra* note 23, at 592; *Bad Jobs*, *supra* note 8, at 273–74; *Precarious Work*, *supra* note 9, at 5–6; *Passing the Buck*, *supra* note 13, at 1206.

<sup>98</sup> See *Passing the Buck*, *supra* note 13, at 1203–06.

<sup>99</sup> *Bad Jobs*, *supra* note 8, at 259.

are primarily concentrated in the declining manufacturing sector and many laws protecting workers do not apply to contingent or temporary workers.<sup>100</sup> In short, the industrial proletariat has been replaced by a more precarious workforce, sometimes labeled the “precarariat,” which is less powerful and more vulnerable to economic risk.<sup>101</sup>

Thus, working families today face a far different landscape than their mid-century counterparts. Total household hours of paid and unpaid labor have increased, while wages have remained stagnant, leaving families working longer hours to maintain the same standard of living.<sup>102</sup> Compared to the average family four decades ago, today’s family spends far more time on combined paid and unpaid labor just to meet basic economic and caregiving needs.<sup>103</sup> A two-parent family earning the median income today works seven hundred more hours per year than its two-parent counterpart in 1975, largely from additional hours worked outside the home.<sup>104</sup> More than seven million workers hold multiple jobs, and most cite economic reasons such as supporting their families for doing so.<sup>105</sup> Most American families now have all

<sup>100</sup> See Christopherson, *supra* note 90, at 140; *Bad Jobs*, *supra* note 8, at 273–74.

<sup>101</sup> See Rosalind Gill & Andy Pratt, *In the Social Factory?: Immaterial Labour, Precariousness and Cultural Work*, 25 THEORY, CULTURE & SOC’Y 1, 2–5 (2008); *Bad Jobs*, *supra* note 8, at 273–74; see generally Guy Standing, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011) (discussing the growing number of people across the world living and working precariously, usually in a series of short-term jobs, without recourse to stable occupational identities or careers, stable social protection or protective regulations relevant to them).

<sup>102</sup> See COOPER, *supra* note 50, at 31; Michael Greenstone & Adam Looney, *The Great Recession May Be Over, but American Families Are Working Harder than Ever*, BROOKINGS INST. (July 8, 2011, 8:13 AM), <http://www.brookings.edu/blogs/jobs/posts/2011/07/08-jobs-greenstone-looney> [<http://perma.cc/9K6Z-S93H>]; Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?: Explaining Trends in Work, Leisure, and Family Time*, 28 WORK & OCCUPATIONS 40, 50–52 (2001) (noting that the primary driver in increased hours worked per family is the growth in dual-earner households from 35.9% of families in 1970 to 59.5% of families in 1997); Marin Clarkberg & Phyllis Moen, *Understanding the Time-Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1117 (2001). Even as total family hours of work increased, mothers’ average time in childcare remained high, and fathers’ time with their children increased beginning in the 1980s. BIANCHI ET AL., *supra* note 87, at 62–63; HEATHER BOUSHEY, CTR. FOR ECON. POL’Y & RES., TAG-TEAM PARENTING 3–4 (2006), [http://www.cepr.net/documents/work\\_schedules\\_2006\\_08.pdf](http://www.cepr.net/documents/work_schedules_2006_08.pdf) [<http://perma.cc/U5YX-SMJ3>].

<sup>103</sup> See COOPER, *supra* note 50, at 31.

<sup>104</sup> See *id.*

<sup>105</sup> See Jessica Heffner & Cornelius Frolik, *More Residents Working Two Jobs to Pay the Bills*, JOURNAL-NEWS (Aug. 18, 2011, 10:37 PM), <http://www.journal-news.com/news/news/local/more-residents-working-two-jobs-to-pay-the-bills-1/nNfF2/> [<http://perma.cc/9HKD-YLLZ>]. In 2009, about seven million workers held more than one job. Hispanic and black workers were more likely than white workers to report economic reasons for holding multiple jobs. Foreign-born workers were more likely than native-born workers to report economic reasons for holding multiple jobs. As educational attainment increases, the proportion of multiple jobholders who cite economic reasons declines. STEVEN F. HIPPLE, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, MULTIPLE JOBHOLDING DURING THE 2000s, at 21, 29–31 (2010), <http://www.bls.gov/pub/mlrf/2010/07/art3full.pdf> [<http://perma.cc/J6XL-4JRR>].

adults in the work force,<sup>106</sup> and the rapid increase in the proportion of dual worker families since the 1970s leaves families with fewer resources to meet care needs.<sup>107</sup>

Even as those resources shrink, families face growing care responsibilities not only for children but also for elderly relatives. Families provide most of the care for elderly and chronically ill individuals in the United States, and as the U.S. population ages and life expectancy increases the cohort of older Americans needing care is growing.<sup>108</sup> In her book, *Caring for Our Own*, sociologist Sandra Levitsky notes that nearly one in three American households are caring for an adult with a chronic disease or disability.<sup>109</sup> The U.S. provides very few benefits for long-term care of the elderly other than limited means-tested benefits for the poor.<sup>110</sup> As a result, more workers simultaneously care for children and elderly relatives, with little institutional support.<sup>111</sup>

Low-wage workers face especially difficult circumstances. Low-income families seldom have the resources to offset lost wages or purchase care on the market to meet caregiving needs.<sup>112</sup> Instead, they juggle work and caregiving by calling on extended family to provide a patchwork system of care.<sup>113</sup> Low-income families are also more likely to work tag team shifts to avoid the high cost of childcare,<sup>114</sup> which in California can be as much as

<sup>106</sup> By 2013, in 63% of families, all of the adults participated in the labor force. U.S. DEPT' OF LABOR, BUREAU OF LABOR STATISTICS, USDL-15-0689, EMPLOYMENT CHARACTERISTICS OF FAMILIES 8 tbl.4 (Apr. 23, 2015, 10:00 AM), <http://www.bls.gov/news.release/pdf/famee.pdf> [<http://perma.cc/KUS4-UW2L>]. The rise of a culture of intensive parenthood has also created more intense caregiving demands. See Sarah Winslow, *Work-Family Conflict, Gender, and Parenthood, 1977-1997*, 26 J. FAM. ISSUES 727, 727-55 (2005); see generally SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD (1996). This culture assumes that mothers should be constantly available and dedicated to their children's development, which puts normative pressure on working parents to spend more time with their children. *Id.*

<sup>107</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 2-4; *Institutional Perspectives*, *supra* note 21, at 399-400.

<sup>108</sup> LEVITSKY, *supra* note 39, at 24; see also MILKMAN & APPELBAUM, *supra* note 19, at 3.

<sup>109</sup> LEVITSKY, *supra* note 39, at 24.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., KERSTIN AUMANN ET AL., FAMILIES & WORK INST., THE ELDER CARE STUDY: EVERYDAY REALITIES AND WISHES FOR CHANGE 6 (May 7, 2014), [http://familiesandwork.org/site/research/reports/elder\\_care.pdf](http://familiesandwork.org/site/research/reports/elder_care.pdf) [<http://perma.cc/798R-QX7A>]; MILKMAN & APPELBAUM, *supra* note 19, at 4.

<sup>112</sup> See RESHAPING THE DEBATE, *supra* note 25, at 43; Jill M. Weigt & Catherine Richards Solomon, *Work-Family Management Among Low-Wage Service Workers and Assistant Professors in the USA: A Comparative Intersectional Analysis*, 15 GENDER WORK & ORG. 621, 628 (2008).

<sup>113</sup> See LISA DODSON, THE MORAL UNDERGROUND: HOW ORDINARY AMERICANS SUBVERT AN UNFAIR ECONOMY 42-46 (2009); Julia R. Henly & Sandra Lyons, *The Negotiation of Child Care and Employment Demands Among Low-Income Parents*, 56 J. SOC. ISSUES 683, 687 (2000); Weigt & Solomon, *supra* note 112, at 630.

<sup>114</sup> See GORNICK & MEYERS, *supra* note 40, at 51; CATHERINE ALBISTON, MELISSA RODGERS & SHIRA WAKSCHLAG, BERKELEY CTR. ON HEALTH, ECON. & FAM. SEC., CUTTING CHILDCARE OUT FROM UNDER CALIFORNIANS 5 (2010), <https://www.law.berkeley>

college tuition.<sup>115</sup> Low-wage workers face these challenges largely without a social safety net, and one sick relative can result in lost employment and poverty for the family.<sup>116</sup>

Given these patterns, it is not surprising that families report experiencing growing difficulty reconciling care demands with work responsibilities,<sup>117</sup> and high levels of work-family conflict.<sup>118</sup> Indeed, the caregiving crisis affects both employers and families. Work-family conflict jeopardizes workers' physical and mental health, leads to low job satisfaction and disengagement from work, and results in costly organizational turnover and low levels of productivity.<sup>119</sup> But the post-Fordist transformation made the consequences of the caregiving crisis especially dire for the economic well-being of low-wage working families. The new jobs in this economy rarely provide paid sick days, vacation time, or family leave,<sup>120</sup> and research consistently shows that workers at the bottom of the economic ladder have the least access to paid family leave.<sup>121</sup> These workers must either forgo income to care for family members or scramble to try to pay the high market cost of replacement care while they continue to work. The rise in variable, non-standard schedules leaves low-wage workers struggling to manage family care responsibilities with unpredictable, irregular hours that yield exceedingly insecure incomes.<sup>122</sup> Because even regular full-time work is not guaranteed in contingent positions,<sup>123</sup> workers risk dramatic reductions in their hours or even losing their jobs if they miss work to provide care to their families.<sup>124</sup> In

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.edu/files/chefs/Child\_Care\_in\_California\_Sept\_2010.pdf [http://perma.cc/TXW3-XDGG].

<sup>115</sup> ALBISTON, RODGERS & WAKSCHLAG, *supra* note 112.

<sup>116</sup> RESHAPING THE DEBATE, *supra* note 25, at 42–46, 50–52.

<sup>117</sup> See, e.g., KERSTIN AUMANN, ELLEN GALINSKY & KENNETH MATOS, FAMILIES & WORK INST., THE NEW MALE MYSTIQUE 5 (2011), <http://familiesandwork.org/site/research/reports/newmalemystique.pdf> [http://perma.cc/29NJ-ML8L].

<sup>118</sup> A survey found that the percentage of fathers experiencing “some” or “a lot” of work-family conflict increased to 60% in 2008 from only 35% in 1977. MILKMAN & APPELBAUM, *supra* note 19, at 4–5 (citing Ellen Galinsky, Kristin Aumann, and James T. Bond, *Times Are Changing: Gender and Generation at Work and at Home*, New York: Families and Work Institute (2011)); see also Winslow, *supra* note 106, at 734–35 (noting that overall, the mean level of reported work-family conflict was higher in 1997 than in 1977).

<sup>119</sup> Erin L. Kelly et al., *Getting There from Here: Research on the Effects of Work-Family Initiatives on Work-Family Conflict and Business Outcomes*, 2 ACAD. MGMT. ANALS 305, 326–30 (2008).

<sup>120</sup> U.S. DEP'T OF LABOR, *supra* note 18, at 44–47 tbl.16, 109–11 tbl.32; U.S. DEP'T OF LABOR, *supra* note 26, at 64–67 tbl.17, 128–30 tbl.33; Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 7 (2007) [hereinafter *Left Out Workers*].

<sup>121</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 7 tbl.1.1; Bond & Galinsky, *supra* note 27, at 7 tbl.3.

<sup>122</sup> See Henly et al., *supra* note 17, at 610–12; Susan J. Lambert, *Making a Difference for Hourly Employees*, in WORK-LIFE POLICIES 169, 182 (2009).

<sup>123</sup> *Passing the Buck*, *supra* note 13, at 1205.

<sup>124</sup> See, e.g., Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 215 (2013) [hereinafter *Cultural Schemas*].

this environment, caregiving needs endanger the increasingly precarious employment that is the new normal for most working families.

### B. *The Limits of Antidiscrimination Law*

When these seismic social shifts began, there were few legal options for responding to these monumental changes in work and family. Existing law primarily gave women equal access to the full-time, well-paid employment and accompanying benefits that characterized the Fordist economy. Title VII was the federal statutory vehicle for obtaining equal access.<sup>125</sup> For example, landmark early Title VII cases sought access to state and employer disability insurance plans for pregnant women on an equal basis with workers who were disabled by conditions other than pregnancy.<sup>126</sup> Later cases, however, grappled with the problem that most women needed at least a brief period of disability leave for childbirth, but some employers did not provide disability benefits to anyone.<sup>127</sup> Even though conceptually Title VII's disparate impact theory required employers to provide minimal pregnancy disability benefits if lack of leave had a disproportionate negative effect on women, courts were reluctant to interpret Title VII in this way.<sup>128</sup> At one point, Title VII's formal equality approach even threatened to preempt California's more generous pregnancy disability leave law.<sup>129</sup> Over its fifty-year history, then, the Civil Rights Act amassed a decidedly mixed record helping workers manage caregiving challenges.

The early work-family cases seeking access to disability benefits for pregnant women ran into interpretive roadblocks around the meaning of gender equality. In *General Electric Co. v. Gilbert*,<sup>130</sup> the Supreme Court held that discrimination on the basis of pregnancy did not constitute gender discrimination under the Civil Rights Act, and therefore employers could legally exclude pregnant women from disability benefits provided to other employees.<sup>131</sup> Congress overrode this decision with the Pregnancy Discrimination Act of 1978 (PDA), which defined discrimination "because of sex" to include discrimination on the basis of pregnancy for "employment-related

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<sup>125</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

<sup>126</sup> See *infra* notes 133–135 and accompanying text.

<sup>127</sup> See *infra* notes 138–42 and accompanying text.

<sup>128</sup> See *Institutional Inequality*, *supra* note 42, at 1143–51.

<sup>129</sup> See generally *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (rejecting a claim that California's more protective maternity leave legislation was preempted by Title VII's requirement of formal equality).

<sup>130</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>131</sup> *Id.* at 136–41. *Gilbert* followed the precedent of *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Supreme Court upheld California's decision to exclude pregnant women from the state temporary disability program (SDI), which covered workers' short-term disability from illness or injury, but excluded disability accompanying normal pregnancy and childbirth. *Id.* at 485. The Supreme Court rejected an equal protection challenge to this exclusion, relying on the infamous distinction between "pregnant women and nonpregnant persons" to find no invidious gender classification. *Id.* at 496 n.20.

purposes, including receipt of benefits under fringe benefit programs” such as temporary disability plans.<sup>132</sup> Under the PDA, pregnant women are entitled to the same leave and paid disability benefits “as other persons not so affected but similar in their ability or inability to work.”<sup>133</sup>

The PDA gave pregnant women access to pregnancy disability benefits if they were otherwise eligible for their employers’ general disability plans. But this victory had little real impact on low-wage workers, who typically worked for employers that did not provide disability benefits.<sup>134</sup> Equal access to nothing was still nothing. A more promising approach employed the new disparate impact theory articulated in *Griggs v. Duke Power Co.*<sup>135</sup> to contend that inadequate leave for pregnancy and childbirth had a disproportionately negative impact on pregnant women and therefore violated Title VII.<sup>136</sup> Consistent with this argument, the EEOC took the position early on that failure to provide adequate leave for pregnancy and childbirth violated Title VII.<sup>137</sup> Nevertheless, federal courts have not been consistent about whether an employer’s failure to provide leave to pregnant women constitutes sex discrimination. Several early cases held that failing to provide minimal disability leave could present a viable disparate impact claim under Title VII.<sup>138</sup> More recently, courts have found discrimination when employers penalize pregnant workers solely on the status of being pregnant, but have allowed employers to take negative employment actions based on the *consequences* of pregnancy, including needing time off for childbirth or pregnancy disabil-

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<sup>132</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

<sup>133</sup> *Id.* Although this language appears straightforward, courts have struggled to apply it in practice. For example, just this term the Supreme Court considered how to interpret this language in the PDA. *Young v. United Parcel Serv., Inc.*, No.12-1226, slip. op. at 21 (S. Ct. Mar. 25, 2015) (applying the usual burden-shifting framework from Title VII and holding the plaintiff can survive summary judgment “by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.”) It remains to be seen what this new standard will mean for accommodations such as leave.

<sup>134</sup> See *Left Out Workers*, *supra* note 120, at 31.

<sup>135</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971).

<sup>136</sup> See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 651–55 (N.D. Ill. 1991) (holding the employer’s policy of not providing sick leave to first-year employees had a disparate impact on women because of their ability to become pregnant, and therefore violated the PDA).

<sup>137</sup> 29 C.F.R. § 1604.10 (1972); *Left Out Workers*, *supra* note 120, at 21.

<sup>138</sup> See *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) (holding that plaintiff’s allegation that employer’s policy of denying sick leave to attend to medical needs of family members stated a cause of action under Title VII’s disparate impact theory); *Warshawsky*, 768 F. Supp. at 651–55 (holding the employer’s policy of not providing sick leave to first-year employees had a disparate impact on women because of their ability to become pregnant, and therefore violated the PDA); *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (“An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have.”). At least one recent decision, however, categorically rejects such a claim, *even if* the employer’s restrictive policy has a demonstrable disparate impact on pregnant women. *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) (rejecting a disparate impact claim even though the court acknowledged that the employer’s restrictive attendance policy had a disparate impact on pregnant women).

ity.<sup>139</sup> In these later cases, courts focus on whether employers treat pregnant women equally within the existing structure of work, rather than examining whether employers' restrictive leave policies are truly necessary to the job.<sup>140</sup>

When courts considered whether equal treatment requires accommodating caregiving beyond pregnancy, the limitations of formal equality theories became even more apparent. For example, courts have held that Title VII does not require parental leave to care for new children once the mother is no longer physically disabled,<sup>141</sup> nor does it require employers to provide flexible schedules for workers' caregiving responsibilities, even if employers are able to do so.<sup>142</sup> Yet of course someone must be available to care for children after they are born. Market solutions to providing this care are prohibitively expensive for many families, and the state provides very little in the way of support for childcare, particularly compared to other industrialized countries.<sup>143</sup> Families were, and to some extent still are, left to absorb

<sup>139</sup> As a result, in most instances, employers cannot fire workers who tell their employers they are pregnant but do not ask for family leave just because the employer anticipates that they will need time off, but in one circuit, an employer has successfully refused to employ workers who indicate they are pregnant and also ask for family leave so long as the employer would refuse to employ any worker who needed leave. *Compare Maldonado v. U.S. Bank*, 186 F.3d 759, 762, 766–67 (7th Cir. 1999) (“[A]n employer cannot discriminate against a pregnant employee [who did not ask for leave] simply because it believes pregnancy *might* prevent the employee from doing her job.”) *with Marafino v. St. Louis Cty. Circuit Court*, 707 F.2d 1005, 1006 (8th Cir. 1983) (holding that the failure to hire a pregnant woman as a staff attorney because she would require a leave of absence was lawful because the employer would not have hired *anyone* who required a leave of absence).

<sup>140</sup> See *Institutional Inequality*, *supra* note 42 at 1142–43.

<sup>141</sup> See, e.g., *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 444–45 (7th Cir. 1991) (holding leave policies that disproportionately impact women who “forego returning to work in favor of spending time at home with [their] newborn child” do not violate Title VII); *EEOC v. Sw. Elec. Power Co.*, 591 F. Supp. 1128, 1130, 1135 (W.D. Ark. 1984) (holding that firing a woman who requested six rather than four weeks of leave after giving birth did not violate Title VII where the worker’s doctor said she physically could go back to work after four weeks but he recommended the extra time in part to bond with her child); *Roberts*, 947 F. Supp. at 288 (noting that “parental leave claims—claims of leave that are not directly attributable to pregnancy, childbirth, or related medical conditions—are not covered under Title VII” and collecting district court cases that support this proposition). In some cases it seems clear that the key distinction for courts is “legitimate” physical incapacity compared to the “choice” of individuals physically able to work to care for new children in the family. See *Barrash v. Bowen*, 846 F.2d 927, 931–32 (4th Cir. 1988) (“One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.”).

<sup>142</sup> See *Spina v. Mgmt. Recruiters of O’Hare*, 764 F. Supp. 519, 529, 536 (N.D. Ill. 1991) (holding employer was not obligated to provide part-time work to “rescue [an employee] from a predicament for which it was not responsible,” i.e., health complications following pregnancy, even where male employees with health problems were given leave (quoting *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir. 1986)); *Haas v. Phoenix Data Processing, Inc.*, No. 89-C-0305, 1990 WL 44515, at \*6 (N.D. Ill. Apr. 5, 1990) (holding Title VII did not prohibit terminating pregnant employee who refused to work overtime due to pregnancy and child-care issues because employer had a legitimate expectation that the employee would work overtime).

<sup>143</sup> See *OECD*, *supra* note 24.

this cost on their own with shrinking real wages, no full-time caregiver at home, and little access to time off from work, paid or unpaid.

As the negative decisions regarding pregnancy and caregiving accumulated, it became apparent that formal equality theories would not be enough to protect workers with caregiving responsibilities. Title VII provides only equal access to work as it has historically been structured around the breadwinner/homemaker model, the hollow protection of equal access to a structure that assumes that all workers have a full-time caretaker at home. Whether a given worker actually has homemaker support at home is irrelevant; the taken-for-granted schedule of work and the lack of disability leave or other protected time off assumes that she does. Formal equality approaches neither challenge these deep structural assumptions about work and family, nor do they address how major changes in social conditions undercut those assumptions. Formal equality approaches provide no substantive protections to help men or women in their roles as parents and caretakers.<sup>144</sup> The result is to force families to bear the costs of lost employment associated with childbearing and caregiving rather than interpreting Title VII to prohibit restrictive leave policies that are not necessary to the job.

Title VII was the available legal framework for responding to major shifts in work and family arrangements as women entered the workforce in record numbers. Title VII's antidiscrimination lens on work-family conflict, however, narrowed the focus to gender equality, rather than family or labor policy, and diverted attention from the broader seismic shifts contributing to work-family conflict. The anti-discrimination approach framed the question as how *women* would manage work and family, rather than viewing it as a growing social problem that most workers with families must solve. In this way, managing work and family remained a private matter for individual women, not a substantive public concern of the state or employers beyond the narrow requirement of equal treatment.

What Title VII framed as a problem for women, however, can be understood as a much larger structural shift in social conditions. Those changing social conditions dramatically reduced family wage jobs and breadwinner/homemaker families. Nevertheless, existing welfare policies continued to rely on an employment-based private benefits system that depended on the very structures that were disappearing.<sup>145</sup> Policymakers did little to update public policy despite these significant social changes and the accompanying rise in economic insecurity, leaving families to absorb the shock as best they could.

The result is what Jacob Hacker calls “drift” – changes in the operation or effect of public policies that occur without significant changes in the

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<sup>144</sup> See *Left Out Workers*, *supra* note 120, at 10, 28.

<sup>145</sup> See Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 245 (2004).

structure of those policies.<sup>146</sup> Hacker notes that “[t]he major cause of drift in the social welfare field is a shift in the social context of policies, such as the rise of new or newly intensified social risks with which existing programs are poorly equipped to grapple.”<sup>147</sup> Drift makes increasing social insecurity seem natural or inadvertent, rather than the consequence of failing to update existing social policies when they become ineffective; this naturalization also tends to suppress political demands for change.<sup>148</sup> Title VII helped obscure this failure to update social policy as social conditions changed by framing the problem narrowly in terms of gender equality.

### C. *The Shift toward Paid Family Leave*

Antidiscrimination approaches provided only limited protection—equal access to a workplace that assumed someone else met workers’ care needs at home. As the limitations of antidiscrimination approaches became clear, California and a few other states moved toward broader substantive protections for workers with caregiving responsibilities.<sup>149</sup> In California, early protections included statutory requirements that employers “temporarily transfer pregnant workers to a less strenuous or hazardous position for the duration of her pregnancy if she so requests.”<sup>150</sup> California also required

<sup>146</sup> *Id.* at 246.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; see also LEVITSKY, *supra* note 39, at 5–9 (noting how U.S. social welfare policies reproduce expectations that families will shoulder long term care for their members, which helps minimize public demand for new social policies to address changing social conditions that make private care untenable).

<sup>149</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 33 tbl.2.1. For a discussion of unpaid pregnancy disability leave legislation in Montana, see generally Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983). As Krieger and Cooney note, some formal equality theorists took the position that gender equality required only that the state and employers treat women the same as men, the approach taken by federal law. *Id.* at 518. In their view, substantive accommodations to pregnancy and caregiving needs risked stereotyping women as primarily mothers and caregivers. *Id.* at 562. Critics contested substantive protections for pregnancy, childbirth, and caregiving by pointing out how historically, protectionist legislation justified by women’s childbearing capacity prevented women from advancing economically and socially. *Id.* at 515. A historical perspective on the class-based origins of accommodationist arguments, however, significantly complicates this criticism. Historically, advocates proposing protective labor legislation for women were not necessarily trumpeting a gender-essentialist celebration of women’s caregiving nature. See *Left Out Workers*, *supra* note 120, at 11–13. Rather, accommodationist proponents were struggling to hold on to the vestiges of protective labor legislation for all economically vulnerable workers in the aftermath of *Lochner v. New York*, 198 U.S. 45 (1905). *Id.* Accordingly, accommodationist arguments can be understood as arguments for work-family policies framed not only in terms of gender, but also with class-based concerns in mind.

<sup>150</sup> CAL. GOV’T CODE § 12945(a)(3)(C) (West 2012). Transfer is required for any employer “who has a policy, practice, or collective bargaining agreement requiring or authorizing” transfers to less hazardous or strenuous work. *Id.* § 12945(a)(3)(B). Where employers have no such practice, transfer is nevertheless required if it “can be reasonably accommodated.” *Id.* § 12945(a)(3)(C). This provision was particularly important to preg-

employers to grant up to four months of job-protected, unpaid leave to employees who were disabled on account of pregnancy, childbirth, or related medical conditions.<sup>151</sup> As a result, even women with normal pregnancies, which typically involved approximately six weeks of temporary disability, were entitled to job-protected leave regardless of whether their employer provided leave for any other reason.<sup>152</sup> Working women covered by California's State Disability Insurance (SDI) program were also entitled to disability pay during their pregnancy disability leaves.<sup>153</sup> Thus, by the early 1980s, California offered far more protection and support for pregnancy and childbirth than any other jurisdiction in the nation.

These new substantive leave rights protected women in low-wage jobs that lacked benefits such as family leave or disability pay—precisely the working mothers left behind by Title VII.<sup>154</sup> But as time passed, it became apparent that working families faced challenges beyond the immediate needs of pregnancy and childbirth, including caring for children after they are born and caring for seriously ill or aging family members.<sup>155</sup> It also became clear that caregiving challenges burdened working mothers *and* fathers because it was increasingly common for both parents to contribute to financial support

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nant women working in positions that required manual labor or involved exposure to hazardous chemicals. Without it, pregnant women in positions such as these risked termination if their doctors warned them to avoid lifting or exposure to chemicals, common restrictions during pregnancy. *See, e.g., Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309 (11th Cir. 1999) (discussing employer's termination of nurse's assistant who requested help lifting a particularly heavy patient during her pregnancy).

<sup>151</sup> § 12945(a)(1).

<sup>152</sup> This provision thus went far beyond the formal equality requirements of Title VII. The divergent federal and California approaches came into conflict in *California Federal Savings and Loan Association v. Guerra* through a preemption challenge to California law. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 279 (1987). The employer in *Guerra* argued Title VII preempted California's law mandating disability benefits for pregnant workers, and that if it provided disability benefits to pregnant workers but not to other workers it would violate Title VII's requirement of equal treatment. *Id.* The Supreme Court rejected that challenge, holding that the PDA, which amended Title VII, provides "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.* at 285. Accordingly, the Court held, Title VII *permits* states and employers to provide benefits to pregnant women that they did not extend to other disabled employees, even if it does not *require* them to do so. *See id.* at 286–88. That, however, was as far as the Court was willing to go absent a legislative mandate from Congress, leaving the provision of family leave up to the states and private employers. For low-wage workers in California, *Guerra* was a victory. It let stand state law that imposed affirmative obligations on employers to support workers with families. Nevertheless, federal law still did not require either the states or employers to provide support for caregiving. Federal family leave policy would not be enacted for more than a decade. Still, *Guerra* opened legislative space for even more expansive California law that was to follow.

<sup>153</sup> California amended the State Disability Insurance program (SDI) to give workers disabled by pregnancy, including normal pregnancies, the same benefits as workers disabled by other conditions. *See MILKMAN & APPELBAUM, supra* note 19, at 33 tbl.2.1; CAL. GOV'T CODE § 12945 (West 2012).

<sup>154</sup> *See Left Out Workers, supra* note 120, at 16–38.

<sup>155</sup> *See Institutional Inequality, supra* note 42, at 1151–53.

and to caregiving.<sup>156</sup> In addition, as the economy shifted toward more precarious work, fewer workers had access to sick leave or vacation.<sup>157</sup> Thus, more workers faced wrenching choices between holding on to the precarious jobs that supported their families and caring for their family members.

California responded to these changing social conditions by enacting family leave legislation, the California Family Rights Act (CFRA). CFRA gave working families gender-neutral substantive leave rights that were not limited to leave for pregnancy and childbirth. Under CFRA's current provisions, eligible California workers (both men and women) are entitled to 12 weeks of job-protected unpaid family leave to care for a newborn or newly adopted child, or for a seriously ill family member.<sup>158</sup> This leave runs consecutively, not concurrently, with pregnancy disability leave under California's prior legislation, so that time off for pregnancy disability does not reduce time off to care for newborn children or other caregiving needs.<sup>159</sup> CFRA also requires employers to continue health insurance coverage during this unpaid leave, a vital protection for families struggling to care for new children or seriously ill relatives.<sup>160</sup> Not long after California enacted CFRA, Congress enacted the federal FMLA, which tracked CFRA's gender-neutral, substantive approach.<sup>161</sup> These new substantive leave rights relieved some workers from a forced choice between caring for family members and keeping their jobs. Still, families without access to employer-provided paid leave continued to absorb the financial burden of lost wages during these unpaid leaves, and many families were not covered by the state and federal legislation at all.

Leave laws represented a new policy approach for addressing the caregiving crisis. They moved away from a gendered framing of care toward an egalitarian sharing of caregiving responsibility and more substantive support for caregiving.<sup>162</sup> Both CFRA and FMLA, however, provided only un-

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<sup>156</sup> SUZANNE M. BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 44, 55, 63–65 (2006); *see also* PEW RESEARCH CTR., FIVE FACTS ABOUT TODAY'S FATHERS (2015) <http://www.pewresearch.org/fact-tank/2015/06/18/5-facts-about-todays-fathers> [<http://perma.cc/LT6M-PRC7>]; PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY (2013), <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/> [<http://perma.cc/P234-E4W5>].

<sup>157</sup> *See* Fligstein & Shin, *supra* note 11, at 401–02.

<sup>158</sup> CAL. CIV. CODE § 12945.2(a) (West 2012).

<sup>159</sup> *Id.* § 12945.2(s).

<sup>160</sup> *Id.* § 12945.2(f).

<sup>161</sup> 29 U.S.C. §§ 2601–2654 (2012).

<sup>162</sup> Indeed, in some ways, the substantive approach of these laws created incentives for egalitarian caregiving that surpassed the more generous policies of other industrialized countries. For example, CFRA and FMLA's gender-neutral entitlement provides each eligible employee with up to 12 weeks, which creates an incentive for men to take their "use it or lose it" entitlement to leave. 29 U.S.C. § 2612(a). In contrast, most other industrialized countries provide a family grant of leave, to be divided between the parents as they see fit. *See, e.g.*, OECD, PF2.4: PARENTAL LEAVE REPLACEMENT RATES (2015), [http://www.oecd.org/els/family/PF2\\_4\\_Parental\\_leave\\_replacement\\_rates.pdf](http://www.oecd.org/els/family/PF2_4_Parental_leave_replacement_rates.pdf) [<http://perma.cc/5VX9-7NV4>].

paid time off.<sup>163</sup> The lack of paid family leave remains the largest divide between the United States and other industrialized countries in terms of family policy.<sup>164</sup>

That divide has begun to give way since California enacted paid family leave legislation (PFL) nearly a decade ago.<sup>165</sup> PFL extends paid leave under the State Disability Insurance (SDI) program to workers who take time off to bond with a new child or to care for a seriously ill family member.<sup>166</sup> PFL provides modest benefits of 55% wage replacement with a capped ceiling on weekly benefits.<sup>167</sup> Although benefits are limited in terms of duration and pay, paid leave is gender neutral and extends to a wide array of family members.<sup>168</sup> California's law also covers a larger proportion of the California workforce than does the FMLA because workers are eligible if they are employed or looking for work, unable to work for at least eight days due to caregiving or bonding, have lost or will lose wages because of caregiving or bonding, and earned at least three-hundred dollars in the previous period from which SDI deductions were made.<sup>169</sup> Unlike CFRA or FMLA, PFL does not provide job protection, nor does it require employers to continue employer-provided benefits like health insurance during the leave period. Still, CFRA, FMLA, PFL, and the recently proposed federal paid family leave legislation modeled on PFL all reflect a move away from a formal equality approach toward more substantive protections and support for families around caregiving needs.

California's move toward universal substantive benefits is more in tune with the root of the problem, namely the disintegration of both the secure family wage job and the breadwinner/homemaker family structure. By pro-

<sup>163</sup> 29 U.S.C. § 2612(c) (2012); CAL. CIV. CODE § 12945.2(d) (West 2012).

<sup>164</sup> See OECD, *supra* note 24, at 2.

<sup>165</sup> CAL. UNEMP. INS. CODE § 3301 (West 2014).

<sup>166</sup> *Id.* § 3301(a)(1). Eligible workers may take a maximum of six weeks of paid leave provided no other family member is "ready, willing, and able and available" to provide care. *Id.* § 3303.1(a)(4).

<sup>167</sup> CAL. UNEMP. INS. CODE § 2655(d)(1) (West 2007). The maximum amount was \$1075 per week for 2014. Other industrialized nations are far more generous. For example, Estonia, Portugal, Poland, and Spain provide 100% or more of previous earnings to mothers on maternity leave, while fathers on paternity leave are paid at least 50% of their previous earnings in Norway, Finland, Iceland, and France. OECD, *supra* note 24.

<sup>168</sup> Legal scholars have critiqued family law for ignoring the complex realities of caregiving. Family law defines caregivers almost exclusively as parents, which ignores the web of non-parental caregivers who parents enlist to provide care (e.g., extended family members or friends). See generally Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (discussing trends in how the law addresses or fails to address caregiving by extended family).

<sup>169</sup> CAL. UNEMP. INS. CODE § 2652 (West 1957); CAL. UNEMP. INS. CODE § 3303 (West 2004). In contrast, the FMLA only covers workers who work for employers with fifty or more employees, have worked for that employer for at least twelve months, and have worked at least 1250 hours in the previous year. 29 U.S.C. § 2611(2) (2012). These requirements limit the FMLA's coverage to approximately 60% of the workforce. See RESHAPING THE DEBATE, *supra* note 25, at 8.

viding significant state-administered support for families facing caregiving needs, California law implicitly acknowledges that most workers no longer fit the male breadwinner-female homemaker model, and that few jobs in the post-Fordist economy offer benefits such as paid family leave to compensate for these changing social conditions. In this way, PFL shifts some of the risk of caregiving off the backs of working families. Even so, PFL is hardly a comprehensive social safety net given the fundamental changes to both families and work. The program is paid for entirely by workers with no contributions from employers or the state beyond administration of benefits, and it provides only minimal wage replacement and no job protection.<sup>170</sup> These limitations call into question the usefulness of PFL, particularly among low-wage, precarious workers who arguably need paid leave the most. Indeed, early research on PFL shows limited uptake among low-wage workers,<sup>171</sup> and so questions remain about how well the new paid leave law actually works in practice. These questions are especially pressing for low-income working families who generally lack sick leave or vacation<sup>172</sup> and therefore are vulnerable to lost wages and job loss when they take time off.<sup>173</sup> We turn to these questions below.

### III. BARRIERS TO TAKING PAID FAMILY LEAVE

Our analysis so far laid out the changing structural conditions that caused caregiving needs to grow and family resources to meet those needs to shrink, producing the current caregiving crisis. Although public policy lags far behind these major changes in social conditions, California recently adopted paid family leave as one possible solution. In this part, we report our findings about how California's paid family leave program works in practice. Here, we investigate a central puzzle: low-wage workers without access to employer-provided paid time off disproportionately do not take paid family leave even though California's wage replacement program should offset a substantial part of their lost wages.<sup>174</sup> Following the large body of empirical research about how cultural schemas shape workplace practices, interactions, and social meaning,<sup>175</sup> we set out to investigate the social dynamics at

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<sup>170</sup> CAL. UNEMP. INS. CODE §§ 2652, 3303.

<sup>171</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 14–15.

<sup>172</sup> In 2005, 75% of low-income workers did not have any sick leave at all, and about 40% of low-income working parents had no paid leave of any kind, including sick pay, vacation pay or personal days off. *Left Out Workers*, *supra* note 119, at 7.

<sup>173</sup> Low-wage workers with less than a high school education are three times more likely to be fired and two and a half times more likely to quit their jobs upon the birth of their first child than other workers. *Id.*

<sup>174</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 14–15.

<sup>175</sup> See, e.g., MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 7 (2009); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 24 (2000) [hereinafter *UNBENDING GENDER*]; Albiston, *Bargaining in the Shadow of Social Institutions*, 39 L. & SOC'Y REV. 11, 30–40 (2005) [hereinafter *Bargaining*]; Joan Acker, *Hierarchies, Jobs, Bodies: A*

work around family leave and caretaking responsibilities and how those dynamics might affect low wage workers.

To understand the social reality of California's Paid Family Leave program, we conducted in-depth, semi-structured interviews with a representative sample of California residents who needed but did not take leave. These individuals were identified through the 2007 Golden Bear Omnibus (GBO) Survey, which surveyed a representative sample of 1186 English or Spanish-speaking adult residents of California.<sup>176</sup> We followed up with all respondents from the GBO Survey who indicated that they needed time off from work to care for a new child or sick family member but did not take it.<sup>177</sup> We excluded self-employed respondents from this group because we focus on the social dynamics between respondents and their employers and coworkers that might discourage workers from taking leave. These criteria yielded a sample of 133 possible respondents for the follow-up interviews, which were conducted by the University of Wisconsin Survey Center.<sup>178</sup> We obtained follow-up qualitative interviews with thirty-one of the 133 eligible GBO respondents, with a response rate of approximately 23% that is consistent with response rates for surveys of this kind.<sup>179</sup>

The semi-structured qualitative follow-up interviews<sup>180</sup> focused on the reason(s) respondents needed to take family leave and whether they asked

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*Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 149 (1990); Mary Blair-Loy, *Cultural Constructions of Family Schemas: The Case of Women Finance Executives*, 15 GENDER & SOC'Y 687, 689 (2001); see generally Erin A. Cech & Mary Blair-Loy, *Consequences of Flexibility Stigma Among Academic Scientists and Engineers*, 41 WORK & OCCUPATIONS 86 (2014); Joan C. Williams, Mary Blair-Loy & Jennifer L. Berdahl, *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 211 (2013).

<sup>176</sup> The GBO survey was administered by the Survey Research Center at the University of California, Berkeley using random digit dialing of cell phone and landline numbers. Excluding ineligible phone numbers, the response rate was 15.9%. This response rate is in line with response rates to random digit dial surveys more generally, which have been falling dramatically in recent years. See *Pollsters Face Challenges in Getting Survey Respondents*, PEW RESEARCH CTR. (May 24, 2012), <http://www.pewresearch.org/daily-number/pollsters-face-challenges-in-getting-survey-respondents/> [<http://perma.cc/3LZY-JPUW>]. Respondents were eligible to participate in the study if they were Spanish or English-speaking adults, age 18 or older, who resided within the state of California in households with telephones. Because some groups are more or less likely to have access to cell phones or landlines, and to respond to surveys, the survey administrator provided a post-stratification weight that adjusts the sample's age, education, race, and gender in quantitative analysis so that it is representative of the state of California.

<sup>177</sup> We identified respondents who needed to take family leave in the five years leading up to the GBO survey but did not take it, or who reported that their work hours made it impossible for them to care for a sick child.

<sup>178</sup> The interviews were conducted from 2012 to 2013.

<sup>179</sup> See *Pollsters Face Challenges in Getting Survey Respondents*, *supra* note 176. The higher response rate for the BFL study is likely due to the precontact we had with respondents. Research shows precontact leads to slightly higher response rates. Colleen Cook, Fred Heath & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUC. & PSYCHOL. MEASUREMENT 821, 831 (2000).

<sup>180</sup> The interviews included both close-ended and open-ended questions. The interviews were recorded and transcribed. Quantitative data from the closed-ended questions were analyzed using the statistical software packages SPSS and STATA. Qualitative data

their employer for a formal leave or an informal working arrangement such as an adjustment to their schedule or work location. To investigate how cultural schemas shaped respondents' decisions around taking leave, we asked respondents how their employers and coworkers reacted to their need for formal leave or informal adjustments to working arrangements. We also asked respondents to tell us about any stories their employers and coworkers told about people who needed leave, any mixed messages they received from their employers about taking leave, and whether their employers treated some workers who needed leave differently than others.<sup>181</sup>

Unlike most existing studies, these qualitative interviews provide rare and valuable representative data about how workplace environments and interactions deter workers from taking leave. Most existing qualitative studies of barriers to leave-taking are of single workplaces<sup>182</sup> or other non-representative samples,<sup>183</sup> and recent research tends to focus on relatively highly paid professional workers, particularly professional women.<sup>184</sup> Although valuable, studies that rely on samples drawn from one workplace tell us little about broad, cross-workplace trends or experiences common to many workers. Non-representative samples from several workplaces help show that patterns are not confined to a single workplace. At the same time, workplace-centered studies may suffer from selection bias because the experiences of workers who left the workplace, perhaps in response to a hostile organizational climate, are excluded. Work-family research also tends to focus on broad cross-workplace practices and cultures that affect professional work-

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transcribed from the interview recordings were analyzed using the qualitative analysis software NVivo.

<sup>181</sup> We purposely avoided asking whether employers treated women differently than men because we did not want to prejudge which dimensions of inequality mattered for access to family leave. Although gender is obviously culturally relevant to these decisions, we suspected that other aspects of inequality also might contribute to dynamics around leave.

<sup>182</sup> See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 7–10 (1st ed. 1997) (studying the culture of one company); MINDY FRIED, *TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE* 2–7 (1998) (focusing on the culture of one company); Mary Blair-Loy & Amy S. Wharton, *Employees' Use of Work-Family Policies and the Workplace Social Context*, 80 *SOC. FORCES* 813, 814 (2002) (studying managerial and professional workers at one financial services company); Amy S. Wharton et al., *Use of Formal and Informal Work-Family Policies on the Digital Assembly Line*, 35 *WORK & OCCUPATIONS* 327, 329 (2008) (studying two call centers from the same financial services company).

<sup>183</sup> See, e.g., *Bargaining*, *supra* note 175, at 21 (studying workers experiencing problems with family and medical leave who called a legal help line).

<sup>184</sup> See, e.g., *COMPETING DEVOTIONS*, *supra* note 175, (studying women executives); CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER* (2014) (studying lawyers); Cech & Blair-Loy, *supra* note 175, at 94 (studying STEM faculty at a top-ranked research university); Pamela Stone & Lisa Ackerly Hernandez, *The All-or-Nothing Workplace: Flexibility Stigma and "Opting Out" Among Professional-Managerial Women*, 69 *J. SOC. ISSUES* 235, 239–240 (2013) (studying upper middle class, college-educated married mothers who had previously worked in a professional or executive capacity).

ers, rather than workers at the bottom of the economic ladder.<sup>185</sup> By contrast, this study avoids these limitations because it relies on a state-wide representative survey of respondents to identify California workers who needed paid family leave but did not use it. It therefore captures workers' experiences across a range of workplaces, life circumstances, and reasons for needing leave, rather than focusing on professional workers, and professional women in particular, who may be exceptional in some ways. It also captures the experiences of workers who may have left their workplaces because of work-family conflict.

In the remainder of this section, we investigate the social dynamics around paid family leave in California. After initially comparing workers who do and do not use leave, we investigate more closely factors beyond lost wages that discourage California workers from taking family leave. We examine how workers understood the meaning of taking paid family leave within their workplaces, and the likely implications of taking leave for their long-term economic security. In addition, we analyze how workplace dynamics around taking leave may recreate inequality, and consider the consequences of not taking leave for our respondents. We then situate these findings within the broader empirical research about how cultural schemas shape workplace practices, interactions, and social meaning around family leave and caretaking responsibilities.

#### A. *Precarious Jobs and Limited Resources*

California's Paid Family Leave program was designed to close the socioeconomic gap in access to and use of paid family leave.<sup>186</sup> Yet, early research on California's Paid Family Leave program shows that uptake remains least prevalent among low-income workers.<sup>187</sup> This trend is unexpected because the capped partial wage replacement through PFL is proportionally more valuable to low-income working families than to more affluent working families. Why are the workers who stand to benefit the most from partial wage replacement not making use of PFL? To understand this paradox better, we examined whether workers who needed leave but did not take it are different from those who took leave, and what those differences might

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<sup>185</sup> Sociologist Susan Lambert argues that work-life scholars have overwhelmingly focused on privileged workers because "a major motivation has been to convince business leaders that work-family supports make good business sense and business leaders care most about workers at the core of their enterprise." Susan J. Lambert, *Lower-Wage Workers and the New Realities of Work and Family*, 562 ANNALS AM. ACAD. POL. & SOC. SCI. 174, 177 (1999). As a result, scholars know comparatively little about the work-life struggles of low-income families. See *id.*

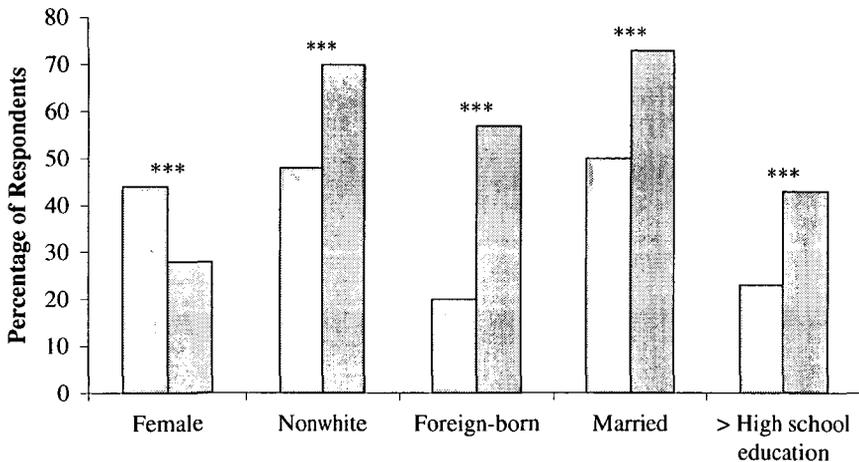
<sup>186</sup> See MILKMAN & APPELBAUM, *supra* note 19, at 85.

<sup>187</sup> See *id.* at 14–15.

tell us about the shortcomings of both California's Paid Family Leave law and the proposed federal legislation, which is modeled on California's law.<sup>188</sup>

We began by comparing respondents to the GBO survey who needed but did not take leave<sup>189</sup> with respondents to the GBO survey who took leave. With regard to personal characteristics, respondents who needed but did not take leave tended to come from more socially disadvantaged backgrounds (see Figure 1). For example, they tended to be nonwhite, older, foreign-born, and they had less education.<sup>190</sup> They were also more likely to be married.<sup>191</sup>

FIGURE 1: COMPARISON OF THOSE WHO TOOK A LEAVE WITH THOSE WHO NEEDED BUT DID NOT TAKE A LEAVE ON PERSONAL CHARACTERISTICS



□ Took a leave in the last year   □ Needed, but did not take a leave in last five years

Source: 2007 Golden Bear Omnibus Survey.

\*\*\* $p < .001$ ; \*\* $p < .01$ , \* $p < .05$

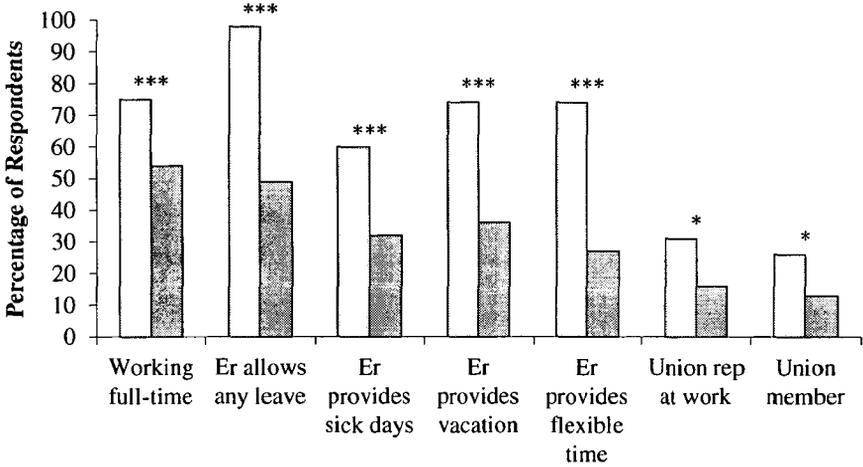
<sup>188</sup> Among the GBO respondents, forty individuals both wanted but did not take a leave in the last five years and took a leave in the last year; they are coded as having taken a leave.

<sup>189</sup> These respondents were the sampling frame for our follow-up survey, the Barriers to Family Leave survey.

<sup>190</sup> Respondents who took leave were, on average, thirty-six years old. Respondents who needed, but did not take leave were forty-three years old, on average (difference statistically significant at  $p < .001$ ).

<sup>191</sup> Difference significant at the  $< .001$  level.

FIGURE 2: COMPARISON OF THOSE WHO TOOK A LEAVE WITH THOSE WHO NEEDED BUT DID NOT TAKE A LEAVE ON WORK CHARACTERISTICS



□ Took a leave in the last year    ■ Needed, but did not take a leave in last five years

Source: 2007 Golden Bear Omnibus Survey.

\*\*\*p<.001; \*\*p<.01, \*p<.05

Job quality also emerged as a distinguishing characteristic of respondents who needed leave but did not take it (Figure 2). Respondents who needed leave but did not take it were much less likely than respondents who took leave to be working in full-time positions. They also tended to work for employers who provided very little or no support for taking time away from work for any reason. For example, workers who needed leave but did not take it were less likely to have jobs that provided leave for family caregiving or personal health reasons, paid sick or vacation days, or flexible work hours compared with respondents who took a leave in the last year. Our findings are consistent with other research showing workers in better-paying jobs have access to these benefits,<sup>192</sup> suggesting that workers who are already employed in decent, full-time jobs are taking advantage of PFL whereas workers employed in non-standard, precarious jobs are not.<sup>193</sup>

<sup>192</sup> See ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970s–2000s*, at 9, 127 (2011); JAMES T. BOND & ELLEN GALINSKY, *FAMILIES & WORK INST., WORKPLACE FLEXIBILITY AND LOW-WAGE EMPLOYEES 6–8* (2011).

<sup>193</sup> This finding may be due in part to the fact that employers who already provide leave—especially those who provide paid leave—have a greater incentive to educate and encourage their employees to draw on their PFL benefits because PFL helps offset their own labor costs. As a result, low-income workers are unlikely to know about or be encouraged to take PFL. See MILKMAN & APPELBAUM, *supra* note 19, at 93–94.

GBO respondents who needed a leave but did not take it were also less likely than leave-takers to have union representation in the workplace or belong to a union themselves (Figure 2). That union presence and membership matters for leave-taking is not all that surprising given that union representation increases knowledge of family leave rights and access to formal, family-friendly benefits.<sup>194</sup> Union representation tends to be associated with wage premiums and other employment benefits,<sup>195</sup> suggesting that leave-takers tend to be relatively privileged compared with the respondents in our follow-up sample.

We expected, based on these findings, that GBO respondents who needed leave but did not take it would be concentrated in lower-paying jobs because professional and managerial jobs are more likely to provide benefits like leave, sick time, vacation, and flexible work accommodations.<sup>196</sup> Comparing household income confirmed our hunch; workers who needed but did not take leave were concentrated in lower household income brackets relative to workers from the GBO survey who took leave (see Figure 3). For example, over 60% of respondents who needed but did not take leave had household incomes less than \$35,000 a year compared with just 32% of respondents who took a leave.

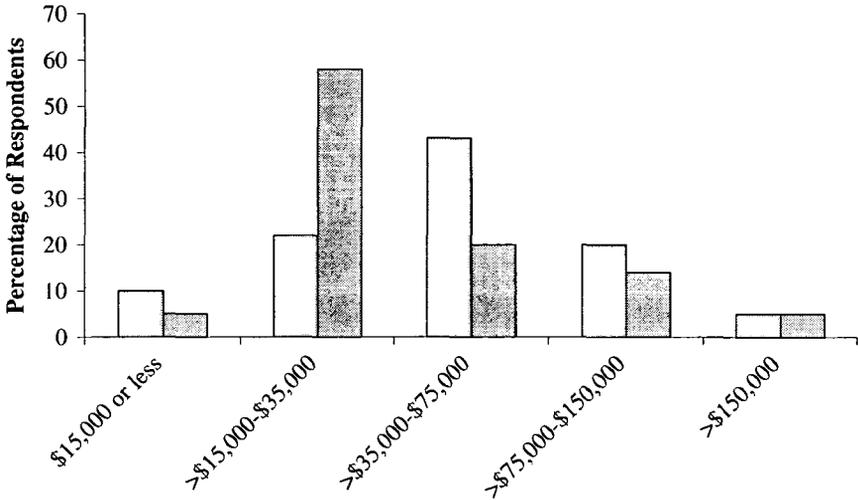
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<sup>194</sup> See, e.g., John W. Budd & Angela M. Brey, *Unions And Family Leave: Early Experience Under the Family and Medical Leave Act*, 28 LAB. STUDIES J. 85, 102 (2003); Jennifer Glass & Tetsushi Fujimoto, *Employer Characteristics and the Provision of Family Responsive Policies*, 22 WORK & OCCUPATIONS 380, 398 (1995); Amit Kramer, *Unions as Facilitators of Employment Rights: An Analysis of Individuals' Awareness of Parental Leave in the National Longitudinal Survey of Youth*, 47 INDUSTRIAL RELATIONS: J. ECON. & SOC. 651, 656 (2008).

<sup>195</sup> See LAWRENCE MISHEL, JOSH BIVENS, ELISE GOULD & HEIDI SHIERHOLZ, *THE STATE OF WORKING AMERICA* 269-72 (12th ed. 2012).

<sup>196</sup> See BOND & GALINSKY, *supra* note 27, at 7 tbl.3.

FIGURE 3: PERCENTAGE OF RESPONDENTS IN EACH INCOME CATEGORY BY WHETHER THEY NEEDED BUT DID NOT TAKE A LEAVE OR TOOK A LEAVE



□ Took a leave in the last year    ■ Needed, but did not take a leave in last five years

Source: 2007 Golden Bear Omnibus Survey.

<sup>a</sup> Pearson Chi-Square test for differences in all household income levels for those who needed but did not take leave and those who took leave was significant at  $p < .001$ .

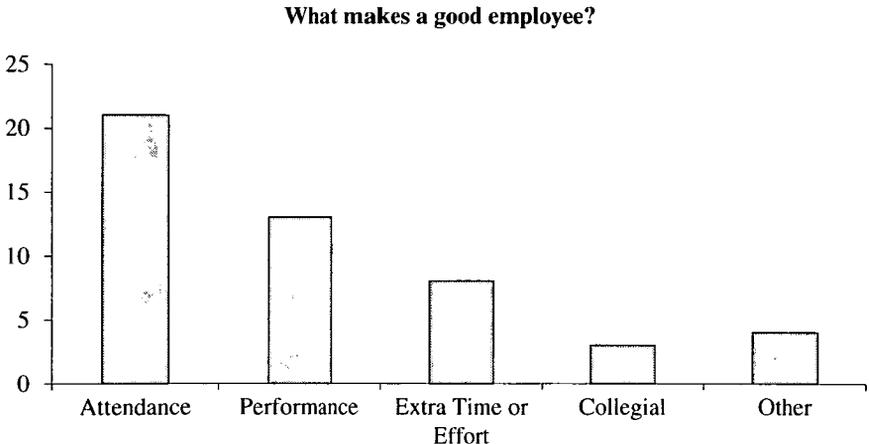
In short, GBO respondents who needed but did not take leave tended to be concentrated in low-paying jobs that provided few options for even limited paid time off such as sick days or vacation time. From an economic perspective, it is puzzling that low-wage workers do not take paid family leave under the state program given that California's wage replacement program should offset a substantial part of their lost wages. One interpretation that is consistent with, but not yet confirmed by these data is that workers avoid using leave not only because they cannot afford it but also because their employers discourage them from taking even unpaid time off. We investigate that possibility further below.

### B. *The Ideal Worker for Less than Ideal Work*

For the workers in our follow-up sample, work tended to be a precarious, poorly paid affair. What were the work expectations around work effort and time off for employees in these precarious jobs? To examine work expectations for our respondents in the Barriers to Family Leave (BFL) survey, we asked them to describe what made someone a good or bad employee in

their workplaces. BFL respondents consistently described expectations for being a “good employee” at their workplace that tracked the ideal worker norm of the Fordist industrial bargain. Control over the schedule of work and over workers’ time was a hallmark of industrial work control systems, which used the time clock to discipline labor for the mass production methods of the assembly line.<sup>197</sup> Even in today’s world of just-in-time labor and extreme flexibility, our respondents explained that hours worked and consistent attendance remained central to employers’ conceptions of the good worker. As Figure 4 illustrates, respondents most frequently identified consistent attendance as an indicator of being a good worker; even respondents who mentioned good performance as a component of being a good worker almost always also mentioned reliable attendance.

FIGURE 4: FREQUENCY OF MENTIONS OF CHARACTERISTICS OF A GOOD EMPLOYEE AT RESPONDENT’S WORKPLACE



Source: Barriers to Family Leave Survey ( $n=31$ )

In addition, respondents reported that their employers especially valued workers who put work before other obligations, sacrificed for the employer, and were willing to put in extra time on the job.

They basically looked at how much time you worked and whether you, you know, sacrificed on behalf of the company . . . they were

<sup>197</sup> The classic source on the history of time discipline is E. P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, PAST & PRESENT 56–97 (1967); see also RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 148–50 (1979); MONTGOMERY, *supra* note 58, at 178–80, 220–21, 234–35.

very concerned about the amount of time that somebody worked.<sup>198</sup>

Giving 200 percent and being there all the time.<sup>199</sup>

Always coming to work and never. . . ask for anything off. Stay over when you might have other obligations or plans or responsibilities. Just come in on your day off, whether you're in the state of California or not. Just be at their complete beck and call. That makes a good employee.<sup>200</sup>

A good employee, somebody who's there at work every day on time, stays when overtime is needed, I guess. Doesn't have any problems with nobody, doesn't have conflicts with no one. A bad employee, someone who gets there late or calls in sick, wants to go home early, never wants to stay overtime and do a little extra work, you know?<sup>201</sup>

Although few of these employees earned enough to support a stay-at-home partner or purchase care services on the market, the ideal worker norm did not seem to bend for workers with care responsibilities. Instead, the expectation was that workers who could not put in *extra* effort because of conflicting care obligations were not good workers.

[E]ven on my days off, I would be out there spending my time taking care of my mother, and if they called me and, "Hey, we need you to come in. . ." Sorry, can't be there. And when I got back to work the following day I was scheduled, it was kinda, "Thanks. We really could have used ya. We know we can't count on you now." That kind of attitude, you know?<sup>202</sup>

These findings are consistent with a growing body of empirical research that examines how cultural schemas shape workplace practices, interactions, and social meaning around family leave and caretaking responsibilities.<sup>203</sup> Many of these prior studies identified a widespread ideal worker norm. The ideal worker norm is a set of beliefs and expectations that workers should devote intensive, uninterrupted time to paid work, prioritizing employers' interests ahead of personal ones.<sup>204</sup> The ideal worker norm calls for long work hours, around-the-clock availability, and extra time and effort whenever the em-

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<sup>198</sup> Interview with white male, age 66 (Interview No. 1092).

<sup>199</sup> Interview with white female, age 66 (Interview No. 1097).

<sup>200</sup> Interview with white female, age 62 (Interview No. 1061).

<sup>201</sup> Interview with hispanic male, age 28 (Interview No. 1023).

<sup>202</sup> Interview with mixed-race male, age 47 (Interview No. 1093).

<sup>203</sup> See COMPETING DEVOTIONS, *supra* note 175; Cech & Blair-Loy, *supra* note 173; Stone & Hernandez, *supra* note 182.

<sup>204</sup> See, e.g., COMPETING DEVOTIONS, *supra* note 175, at 7; PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 82–83 (2007); UNBENDING GENDER, *supra* note 175, at 24; Acker, *supra* note 175, at 149.

ployer needs it.<sup>205</sup> Sociologist Mary Blair-Loy describes this cultural pattern as the work devotion schema: “the moralized and institutionalized cultural mandate that work demands and deserves total allegiance.”<sup>206</sup> Workers themselves buy in to the ideal worker norm, believing that single-minded devotion to work and excessive work hours are signs of their moral and personal worth and necessary requisites of their jobs.<sup>207</sup>

Prior studies suggested that work devotion was a workplace norm that prevailed primarily among relatively highly paid professional employees, those who might be expected to be able to afford substitute care.<sup>208</sup> By contrast, our findings suggest that employers expect the cultural ideal worker norm even for workers in less than ideal jobs. The moral imperative of work and the ideal worker norm have their roots in the industrial social bargain of well-paid steady work in exchange for worker commitment and effort.<sup>209</sup> One might expect employers to have lower expectations for workers in contingent jobs who no longer receive well-paid steady work. After all, some flexibility about unpaid time off is a relatively costless concession in exchange for the willingness to work at less than ideal jobs. Instead, our findings are consistent with other recent accounts that suggest that employers expect even low-wage workers to conform to the work devotion norms of the mid-century worker even though employers no longer provide good wages, benefits, and secure employment in exchange.<sup>210</sup>

Sociologist Allison Pugh calls this a one-way honor system or covenant that requires a strong work ethic from employees but not much of anything from their employers in return.<sup>211</sup> She finds that not only employers but also workers often accept without question the moral work ethic and loyalty even when receiving little security in exchange. Similarly, we find that a few of our respondents reluctantly sympathized with their employers, citing employers’ need to deny time off to maintain the bottom line.

Well, I think, as an employer. . . if I was an employer, I would expect my employees to be there and to do their job. I do understand things happen, cuz they happened to me, and you can only be away from a job for so long.<sup>212</sup>

<sup>205</sup> See, e.g., UNBENDING GENDER, *supra* note 175, at 5, 71.

<sup>206</sup> Cech & Blair-Loy, *supra* note 175, at 87.

<sup>207</sup> See COMPETING DEVOTIONS, *supra* note 175, at 189; Stone, *supra* note 204, at 83.

<sup>208</sup> See, e.g., COMPETING DEVOTIONS, *supra* note 175, at 11; UNBENDING GENDER, *supra* note 175, at 71.

<sup>209</sup> See EDWARDS, *supra* note 197, at 148–50.

<sup>210</sup> ALLISON J. PUGH, THE TUMBLEWEED SOCIETY: WORKING AND CARING IN AN AGE OF INSECURITY 9, 110–11 (2015).

<sup>211</sup> *Id.*; see also COOPER, *supra* note 50, at 45 (describing how beginning in the 1970s, “employers reword the social contract to increase their own flexibility and demand greater risk bearing by workers”).

<sup>212</sup> Interview with black female, age 44 (Interview No. 1071).

Pugh argues that these cultural schemas about the rights and duties of employers and workers make employers' decisions to deny even minimal time off or schedule accommodations seem natural and justified, rather than exposing how the transition to a contingent workforce shifts risk onto employees and confers more power on employers even as it shrinks employers' obligations to their workers.<sup>213</sup> Relying on the cultural frameworks of the ideal worker norm relieves employers of any apparent obligation to facilitate caregiving even though employers no longer meet their side of the family wage bargain on which ideal worker norms are premised. It also disguises how the costs of care remain privatized within individual families.<sup>214</sup> In the absence of legal regulation, employers have little incentive to pick up these costs because they can rely on ideal worker norms to discipline workers even though they no longer pay a family wage.

Numerous studies have shown how workplace practices, interactions and social meanings stigmatize taking leave.<sup>215</sup> These practices include norms around face time, constant availability, and total commitment to the job, all of which are common in professional settings.<sup>216</sup> Workers who are unable or unwilling to adhere to these norms are perceived to be uncommitted or incompetent.<sup>217</sup> These perceptions can have devastating material consequences for workers. Workers who take leave or use employer-provided flexible work arrangements to attend to family caregiving are more likely to be passed over for promotions, given less desirable work assignments, and paid less than otherwise comparable workers who have not taken leave or who have used flexible work arrangements for purposes other than family caregiving.<sup>218</sup> Taking leave can also put workers at risk of losing their jobs.<sup>219</sup> These norms are so ubiquitous that workers who simply *request* leave or a

<sup>213</sup> See PUGH, *supra* note 210, at 16, 32, 41.

<sup>214</sup> See *id.* at 16.

<sup>215</sup> See RIGHTS ON LEAVE, *supra* note 35, at x–xi, 167–74.

<sup>216</sup> See EPSTEIN ET AL., *supra* note 184, at 19–25; JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 51–53 (2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf> [<http://perma.cc/MD4G-9VY5>]; Leslie A. Perlow, *Putting the Work Back into Work/Family*, 20 GROUP & ORG. MGMT. 227, 231 (1995); Joan C. Williams, Mary Blair-Loy & Jennifer L. Berdahl., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 211–215 (2013).

<sup>217</sup> See, e.g., HOCHSCHILD, *supra* note 181, at 92, 106.

<sup>218</sup> See Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mother's Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 387 (2004) (discussing theories and evidence indicating using work family policies negatively affect wages and other workplace rewards); Michael K. Judiesch & Karen S. Lyness, *Left Behind? The Impact of Leaves of Absence on Managers' Career Success*, 42 ACAD. MGMT. J. 641, 648 (1999) (same).

<sup>219</sup> See *generally* Bargaining, *supra* note 175, at 21; OXFAM AMERICA, *supra* note 19, at 4.

flexible work accommodation for family caregiving are viewed more negatively than workers who do not make such requests.<sup>220</sup>

We found a similar pattern among our less economically privileged respondents. Workers acknowledged the ideal worker norm had teeth given the precariousness nature of their jobs.

Good employees came to work every day. Bad employees took time off.

INTWR: Is there anything more? Can you give me anymore examples?

All I know is that, you know, they were trying to lay off some people, and they were laying off the people who took time off.<sup>221</sup>

Taking family leave was a risky choice in such an environment, one that could evoke retaliation from the employer that threatened respondents' livelihoods.

[I had seen other employees have problems with] [r]eduction in hours, transferred out of a department they were in, the job they were doing, and put into something they didn't want to do with hours they didn't want. Hours that they couldn't reasonably work with if they had childcare, you know, obligations if they had to get home. They would schedule them when they had to be in school or they had to take their children or something. They made it so you would quit. They just made it miserable for you.

INTWR. Could you give me an example, including who it was that took leave and for what reason?

Well, I would say that woman. I guess her daughter's 8 years old, and she has . . . I guess before I ever worked there, the daughter had cancer, and I guess she had gone into remission, and then I guess it came back. And at first she was taking a few days off here and there, and then I guess she . . . she was always working . . . they consider anything over 30 hours full-time. She was working, I'd say, 38 hours a week. And then finally, she disappeared, and I remember, "Oh, L's taking personal leave, family leave." And she just came back last week, and she went from 38 hours to 12. And the department she had been working in, they now have somebody else doing it, and they have not given her job back.

INTWR. How did this influence what you decided to do in your situation?

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<sup>220</sup> See Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. Soc. ISSUES 322, 330 (2013).

<sup>221</sup> Interview with black female, age 51 (Interview No. 1018).

It terrifies me. I've seen that as long as I've worked in retail. Since I was 21 years old. You just don't do it. You can do it, but you're gonna risk your job. Your job is never gonna be the same again.<sup>222</sup>

These negative consequences for workers who did not live up to the ideal worker norm deeply affected how respondents thought about paid family leave. Several respondents noted how using leave, even when it was explicitly permitted, resulted in harmful perceptions that they were undependable or not committed to the job, and respondents were motivated to avoid those perceptions.

[W]hen I had originally applied for the position, for the first round, when it was advertised, they said, "Oh, you have a very low leave balance, so we really need someone with a higher leave balance, because that reflects that you're responsible and we can depend on you." And so that was in my mind, that if I took leave, I would appear, somehow, less committed or less responsible, and . . . having just been promoted to that position, I didn't want to prove them wrong.<sup>223</sup>

The consequences of taking leave included not only negative evaluations of workers, but also material penalties in terms of pay and hours.

Just that I had witnessed other people take time off for various reasons and seeing their schedules go ahead and decline, as far as the amount of hours they were given. They were harassed at points. Well, what I would call harassed. And some were pretty much pushed to the decision to where they either quit, or some were actually fired. . . . When I said that I needed to go ahead and swap a schedule with somebody, it was, like I said, they would comment that they didn't have anybody to take the shift, so if I didn't wanna be there, maybe I should reevaluate my priorities.<sup>224</sup>

Subtle comments by employers and stories about coworkers' bad experiences made clear what behavior is encouraged and what behavior is discouraged in these workplaces.

I listened to the things that were said after. I know what they were saying to the employee, like, "Yeah, you can take the time off." But then as soon as they would leave, the general manager was like, "She's taking too much time off for this and that, and now she wants to take the time off for a baby."<sup>225</sup>

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<sup>222</sup> Interview with white female, age 62 (Interview No. 1061).

<sup>223</sup> Interview with white female, age 43 (Interview No. 1046).

<sup>224</sup> Interview with mixed-race male, age 47 (Interview No. 1093).

<sup>225</sup> Interview with black male, age 40 (Interview No. 1024).

These dynamics help explain why many respondents did not seek out leave from their employers even though their caregiving circumstances made them eligible for California's Paid Family Leave program. Strong norms about the ideal worker result in penalties for workers who make use of leave, penalties that persisted long after the leave was over. As workers learned about the consequences to fellow employees of taking leave, they became leery of even asking about leave themselves.<sup>226</sup>

### C. *Inequality and Access to Family Leave*

Post-Fordist employment relations are increasingly informal and relatively unregulated by law. As a result, sociologists argue, work is more susceptible to being shaped by social institutions and norms. Deregulation of work "allow[s] market power and status-based claims to become more important in local negotiations [about the labor relation]."<sup>227</sup> Following this theory, we were interested in how workers' economic and social status mediated access to paid family leave in their particular workplaces.

#### 1. *Gender*

We anticipated that when it came to family leave, employers might have different expectations and judgments about men and women workers because of the historically gendered relationship between caregiving and work. The facially gender-neutral ideal worker norm reflects a gendered post-war social bargain in which employers exchanged a family wage for compliant labor and workers supported homemakers to meet their families' care needs. Historically, women filled that homemaker role. Indeed, many social welfare provisions presumed this gendered arrangement until advocates legally challenged these gender-stereotyped presumptions in the 1970s.<sup>228</sup> Because institutions change slowly, it seemed possible that workplace interactions about caregiving would track the gendered family wage ideal leftover from this old industrial economy.

Consistent with these predictions, we found that respondents faced decidedly gendered expectations about who should care for their families even though gender-neutral paid family leave was now available.

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<sup>226</sup> Of our thirty-one respondents, just nine asked their employer for a formal leave, while an additional seven asked for an informal arrangement like taking an extended lunch break or leaving work early to attend to caregiving responsibilities; nearly 40% of our sample ( $n=12$ ) asked for neither.

<sup>227</sup> *Precarious Work*, *supra* note 9, at 12.

<sup>228</sup> *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (overturning a rule based on the assumption that because "aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent.").

It was fairly prescribed. It was that the women were out on maternity leave for up to three months, and men took two weeks, maybe two weeks immediately and then two weeks after family help had left, something like that, but that was about all. So there was definitely a gender difference there. I don't know of any male who stayed home. . . who took paternity leave like a woman would take maternity leave. And there was one case of a guy who had twins, so they really did need help, but he couldn't afford to stay out. . . . It's just culture. I don't know any male who was pushing to stay home with that baby. None of the ones I knew of were sick. Although, the twins definitely needed care, and I don't know how they did that. But the overall culture said, women take three months maternity leave, and men take two weeks.<sup>229</sup>

Of course, women can be able to take the leave, because. . . I don't know, for anything. You know, if they having bad days or problems at home, they can take the day off or take some time off or short days, but as far as the guys, you had to just finish out your day and go home.<sup>230</sup>

Although pregnancy disability leave is gender-specific, family leave, including leave to bond with new children, is gender neutral. Yet respondents, both men and women, did not think that the paid family leave nominally available to men was a viable option. Even though legally, paid family leave is an individual benefit rather than family benefit to allow workers to participate more fully in family caregiving, respondents found that in their workplaces gendered expectations that husbands will be breadwinners and wives will be homemakers still defined when and for whom it was appropriate to take leave.

Well, I heard a couple times, where. . . they didn't get mad, but "Why doesn't his wife take care of it?" You know, or something like that. . . . Especially when we knew the wife didn't work.<sup>231</sup>

These findings echo a well-documented set of workplace cultural norms around the family wage ideal. The family wage ideal is the widely accepted cultural presumption that families are, and should be, organized around a male breadwinner and a stay-at-home wife who is supported principally from the man's earnings in the labor market.<sup>232</sup> Several scholars analyze how workplace schedules and structures are organized around a male breadwinner with a stay-at-home wife who tends to children and home, even though

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<sup>229</sup> Interview with white female, age 63 (Interview No. 1012).

<sup>230</sup> Interview with black male, age 40 (Interview No. 1024).

<sup>231</sup> Interview with hispanic male, age 42 (Interview No. 1072).

<sup>232</sup> See Fraser, *supra* note 23, at 591–92.

most families no longer fit this model.<sup>233</sup> Although these structures do not explicitly state which parent should provide care, the family wage ideal on which these structures were built prescribes that mothers, rather than fathers, should provide care, and that fathers, rather than mothers, should financially support the family. It is also presumed that if one parent is at all available, the other parent should not participate in care, even if the caregiving need is dire.<sup>234</sup> The worker and caregiver roles are culturally constructed to be separate and mutually exclusive so that it seemed unimaginable that a man who is the presumptive breadwinner would take time off to care for his child. In this way, workplace structures built around the family wage ideal naturalize and normalize a gendered division of labor between care and work.

Because these gendered expectations are normative as well as descriptive, mothers and fathers who violate those expectations are judged harshly and experience workplace penalties.<sup>235</sup> Across a variety of studies, mothers and caretakers experience wage, promotion and hiring disadvantages in the workplace.<sup>236</sup> In experimental studies, merely the status of being a mother,

<sup>233</sup> See RIGHTS ON LEAVE, *supra* note 35, at 62–68; Acker, *supra* note 174, at 149; Fraser, *supra* note 23, at 591–92.

<sup>234</sup> Cf. *Mora v. Chem-Tronics*, 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998) (interpreting the meaning of “needed to care for” in the FMLA). The court in *Mora* explained:

The term “needed to care for” is statutorily defined and does not require an employee to demonstrate that no other caretakers be available before obtaining leave. Under the FMLA an eligible employee “shall be entitled to . . . leave . . . in order to care for . . . a son [who] has a serious health condition.” One of the progressive aspects of this law is that it permits either parent to take FMLA leave to care for a sick child and thus recognizes and validates the importance of both fathers and mothers to the lives of children. . . . [The employer] cannot dictate which parent should take leave to care for the child. And, as recognized by the C.F.R., an employee may take leave intermittently if care responsibilities are shared with another member of the family. Such is the case here, as Mr. Mora who did not assist in each daily task necessitated by the disease, was the pillar of emotional and psychological strength for his son. For example, when Bob Wind and Mike Corcoran of human resources asked Plaintiff why his wife could not care of his son Plaintiff explained that he was closer for his son, that his son wanted him, and that Mrs. Mora was not Javier, Jr.’s biological mother. . . . [U]nder the Defendant’s interpretation of the law a father would not be entitled to be with his child as s/he died, if that child’s mother, or any family member, was already present. Defendant’s argument suggests that any care can and should be substituted for the care of a parent before FMLA leave is granted. This position is grossly inconsistent with the letter and spirit of the law. There is no basis in the FMLA for Defendant’ [sic] position that because Javier, Jr.’s, stepmother may have not have been employed outside the home, or hospice care might have been available, that Mr. Mora was not entitled to take FMLA leave to support his dying child.

*Id.* (citations omitted).

<sup>235</sup> See Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 *HASTINGS L.J.* 1359, 1364–65 (2008); Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 *GENDER & SOC’Y* 616, 634 (2010).

<sup>236</sup> See Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 *INDUST. & LABOR REL. REV.* 273, 274 (2003); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 *AM. SOC. REV.* 204, 210–13 (2001); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 *AM. J. SOC.* 1297, 1320–23 (2007); Colleen

regardless of leave taking behavior, leads to lower pay, fewer promotions, and a lower likelihood of being hired compared to childless women.<sup>237</sup> These disadvantages result, in part, from stereotypical perceptions that mothers are less committed and competent workers, even when their characteristics are held identical to other workers by experimental design.<sup>238</sup>

Family wage norms also affect fathers. Employer resistance to men taking family leave reflects deeply entrenched expectations that men are workers and women are caretakers despite changing social conditions and gender-neutral leave laws.<sup>239</sup> For example, although both women and men who need work accommodations to attend to family caregiving responsibilities experience consequences such as lower pay and fewer promotions in experimental studies,<sup>240</sup> men who take leave suffer especially harsh stigmatization and penalties.<sup>241</sup>

Some workers in our study recognized that these cultural norms did not necessarily fit with family responsibilities or with changing norms and laws around family leave, particularly in other industrialized countries.

Flaherty Manchester et al., *Stop the Clock Policies and Career Success in Academia*, 100 AM. ECON. REV. 219, 221–22 (2010); Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mother's Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 369 (2004); Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, 118 MONTHLY LAB. REV. 14, 18 (1995); Michael K. Judiesch & Karen S. Lyness, *Left Behind? The Impact of Leaves of Absence on Managers' Career Success*, 42 ACAD. MGMT. J. 641, 647 (1999); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 216 (1997).

<sup>237</sup> See generally Benard & Correll, *supra* note 235; Correll et al., *supra* note 236.

<sup>238</sup> The status of motherhood signals lack of commitment even absent any change in behavior because the family wage ideal prescribes that mothers belong in the home and fathers belong in the workplace. See Benard & Correll, *supra* note 235, at 634–35; Correll, *supra* note 236, at 1306, 1332.

<sup>239</sup> See RIGHTS ON LEAVE, *supra* note 35, at 169–71; Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1993).

<sup>240</sup> See Tammy D. Allen & Joyce E. A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 177, 185 (1999); Julie Holliday Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 233 (2003); *Cultural Schemas*, *supra* note 124, at 210–11 (arguing that workers who use flexible work arrangements or take leave to care for family trigger flexibility stigma which results in “worse pay, lower performance evaluations, and fewer promotions”).

<sup>241</sup> See Allen & Russell, *supra* note 241, at 177, 185; see also Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013) (“Rather than a fatherhood benefit, we found a fatherhood penalty for dads who did relatively high amounts of childcare and domestic chores. These caregiving fathers experienced the most masculinity harassment and mistreatment among men. Thus, the fatherhood benefit appears to be limited to traditional fathers, who do relatively little caregiving in the home.”); Joseph A. Vandello et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303, 314 (2013) (suggesting men who take leave are seen as feminine and suffer workplace harassment for exhibiting the feminine characteristic of providing care); Wayne & Cordeiro, *supra* note 240, at 242 (finding male leave requesters are rated as less likely to help their coworkers, be punctual, work overtime, or have good attendance than other workers, including women who take leave or request similar flexible work accommodations in an experimental study).

I think most people think that paternity leave is kind of silly. . . . I've heard people scoff at it. Like, "He didn't have the baby. What does he need to stay home and relax for?" When, in fact. . . I mean, my son-in-law is on paternity leave right now. He lives in France, where they believe in things like that, and he's on paternity leave right now, and it's really about bonding with the child and helping the mother, but anyway.<sup>242</sup>

Another respondent noted that even when people worked on the same team, employers and coworkers still applied gendered expectations about which parent should take leave.

INTWR. In that workplace, how did coworkers react when men wanted time off to take care of a new baby in the family?

Not very favorably.

INTWR. Did they react the same way when women needed time off to care for a new baby?

No.

INTWR. Can you give me an example?

There is the example of an individual who requested paternity leave versus an individual on the same team that was going out for maternity leave, and, for whatever reason, there is just a. . . I think people are still trying to accept the fact that men are taking paternity leave.<sup>243</sup>

These respondents reported a pervasive gendered workplace culture that communicates the stereotype that women are caretakers, a stereotype that workers tried to avoid by not asking for leave:

[Being a woman made it difficult to ask because] it was for a parent and sometimes certain social stigmas about, you know, women having to take care of their family and their parents. I didn't want to subscribe to those stereotypes.<sup>244</sup>

These stereotypes not only disadvantage women by prescribing that they be the primary caretakers, they also disadvantage men who want to be involved in the day-to-day care of loved ones. In some instances, stereotypes that women should be the ones providing care made employers suspicious of men who wanted to care for their families.

Again, it goes back to credibility. I guess if a woman asks for time off with a child or something, they tend to believe it, but if a guy

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<sup>242</sup> Interview with white female, age 63 (Interview No. 1057).

<sup>243</sup> Interview with white female, age 49 (Interview No. 1067).

<sup>244</sup> Interview with white female, age 43 (Interview No. 1046).

says he has to do something, they don't say no, but they get even. . . . It just seems like with the women, including myself, they would be more accommodating. For the men, they would just make it that they would cut their hours so drastically. Also, if they wanted to get rid of somebody, they would just make it that it wasn't worth your while to even come to work. You know, if you've gone from 30 hours down to 6 or 8 or something. Just retaliation. . . . They would just retaliate through the schedule.<sup>245</sup>

Our findings show how different meanings attach to the same leave taking behavior depending upon the gender of the worker. Employers voiced these cultural schemas to discourage workers, especially male workers, from taking family leave.

These subtle positive and negative responses encourage behavior that conforms to gender norms and discourage behavior that violates gender norms, thus reproducing inequality by fostering stereotypically gendered behavior.<sup>246</sup> It was quite clear to these respondents that the norm at their workplaces was that men did not take leave because their wives would and should handle the caregiving needs. By 2013, however, the reality was that most families no longer had a stay-at-home adult to handle caregiving needs.<sup>247</sup> These norms also contradict the changing preferences of many women and men – particularly in the millennial generation – for a more equitable allocation of time between work and family compared with generations past.<sup>248</sup> These norms do, however, reflect expectations about work and caregiving that characterized the long gone work-family relations of the mid-century industrial economy.

## 2. *Differences in Leave Taking by Workplace Status*

Status differences beyond gender also mediated our respondents' access to paid family leave. Our respondents reported subtle biases that tracked workplace inequality in pay and tenure. Well-paid employees enjoyed more flexibility either because they were presumed to be strong performers or because they were exempt from wage and hour laws that require strict accounting of time.

The highest paid employees had already established themselves as highly performing people, who could get a job done no matter

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<sup>245</sup> Interview with white female, age 61 (Interview No. 1061).

<sup>246</sup> See Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109, 113–14 (2001).

<sup>247</sup> See *Economic News Release*, *supra* note 106, at 8 tbl.4.

<sup>248</sup> See AUMANN, GALINKSY & MATOS, *supra* note 117; KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* 110–12 (2009).

what the circumstances were. And the lower performing. . . or the lower paid people had either not had the opportunity to [establish themselves], or they were in positions where that wasn't the measure of their job.<sup>249</sup>

Well, the higher paid employees were either salary or full-time, and they had additional options available to them, as far as benefits. Whereas, the lower paid employees, the part-time and casual and seasonal, did not. So we were pretty much treated as, you know, you're either here or you're not.<sup>250</sup>

These responses suggest that employers measure the performance of high-wage and low-wage employees by different metrics. Because time is the primary metric for low-wage employees, they are vulnerable to workplace penalties for taking time off. In contrast, employers presume that well-paid salaried employees are strong performers, and this presumption helped insulate them from judgments that taking leave signals lack of commitment. These findings are consistent with a broader literature that suggests flexibility plays out differently at the top and bottom of the pay scale. Professional and managerial employees may have less job security than they used to, but they also have more control over their schedules and a greater ability to move on to better positions if their current jobs end than do lower-wage workers.<sup>251</sup> Our data also suggest that highly paid employees enjoy a presumption of commitment and dedication that may not extend to the lower-status ranks of workers.

I think, actually, that the highest-paid employees would get away with it easier, because they're, obviously, so dedicated, and that's why they're being paid more.<sup>252</sup>

A long tenure on the job also seemed to insulate workers from negative judgments for taking leave. In contrast, workers with shorter tenures in their jobs were more vulnerable.

Yeah, there's an employee that she was hired, and a month later, she was pregnant, and then she had to take off for two months. If she would have asked for the regular stuff of when you have a baby. . . if she would have asked for more, it would have really been frowned upon, since she was so new.<sup>253</sup>

<sup>249</sup> Interview with white female, age 63 (Interview No. 1012).

<sup>250</sup> Interview with mixed-race male, age 47 (Interview No. 1093).

<sup>251</sup> See, e.g., Erin L. Kelly & Phyllis Moen, *Rethinking the Clockwork of Work: Why Schedule Control May Pay Off at Work and at Home*, 9 *ADVANCES DEVELOPING HUM. RESOURCES* 487, 494 (2007).

<sup>252</sup> Interview with white female, age 63 (Interview No. 1057).

<sup>253</sup> Interview with white female, age 56 (Interview No. 1044).

It has gotten better, you know? I mean, at that time, I think it was. . . well, let me put it this way, now I work with. . . with the owners, I have worked for 15 years, and now I know that if I needed more leave, I could take it.<sup>254</sup>

Well, if someone had just started work, they were expected to be there, period. If someone had been there for quite some time, then, "Well, let's see if we can get you out early that afternoon," or something like that.<sup>255</sup>

Of course, life events such as having children or needing to care for ill family members do not wait to occur until after workers establish tenure on the job. Many workers have children relatively early in their working lives. Also, as the economy shifts toward more contingent, precarious jobs, fewer workers will be able to accumulate the long tenures or high pay that facilitate leave taking. Racial/ethnic minority and foreign-born workers are particularly disadvantaged by this economic transition since these workers tend to be overrepresented in contingent, precarious jobs.<sup>256</sup> Sociologist Harriet Presser finds that the concentration of racial and ethnic minorities in non-standard work can be explained in large part by occupational segregation by race, a structural disadvantage in the labor market.<sup>257</sup>

In short, seniority remains an important measure of worth and performance, perhaps reflecting the seniority systems that were institutionalized in union contracts during the industrial era. Together, these status differences suggest that despite legal reforms, some employers continue to view leave as a privilege for valued employees rather than a benefit for all workers.<sup>258</sup>

#### D. *The Costs and Consequences of Not Taking Leave*

As our respondents' experiences illustrate, caregiving responsibilities occur throughout workers' lives as new children arrive or parents fall ill.<sup>259</sup> When caregiving needs like these arise, someone must bear the costs. In the

<sup>254</sup> Interview with hispanic female, age 63 (Interview No. 1080).

<sup>255</sup> Interview with white female, age 66 (Interview No. 1097).

<sup>256</sup> See STEVEN HIPPLE, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *CONTINGENT WORK IN THE LATE 1990S*, at 8–9 (2001), <http://www.bls.gov/opub/mlr/2001/03/art1full.pdf> [<http://perma.cc/3THK-VL8K>].

<sup>257</sup> See Harriet B. Presser, *Race-Ethnic and Gender Differences in Nonstandard Work Shifts*, 30 *WORK & OCCUPATIONS* 412, 433–34 (2003).

<sup>258</sup> Jennifer Klein describes this as a pervasive feature of the American welfare state, in which social welfare benefits tend to be private, voluntary bestowals through employers rather than entitlements administered by the state. KLEIN, *supra* note 61, at 268.

<sup>259</sup> Respondents to the BLF survey most frequently needed family leave to care for a seriously ill parent; 45% of our respondents needed leave to care for a seriously ill parent ( $n=14$ ) compared with 35% who reported needing leave to care for a new or seriously ill child ( $n=11$ ). Caregiving needs extended beyond children and parents though with 19% of respondents needing leave to care for a seriously ill family member other than a child or parent, for example a grandparent or sister ( $n=6$ ).

absence of paid family leave, workers who take time off to care for family members pay those costs in lost wages. Social insurance schemes like California's Paid Family Leave system offset the devastating financial burdens that can accompany family caregiving crises by distributing those costs among the working population. What is less obvious, however, is that workers pay significant costs when they do *not* take family leave because they must pay for replacement care. No social insurance scheme offsets these costs, however, because our system of social welfare provision remains modeled on the Fordist economy of the past. It provides wage replacement when breadwinner workers are unable to work (e.g. paid family leave), but provides virtually no resources to pay for care for family members.

When employers deny workers time off, or penalize them for taking family leave, they force workers to absorb the costs of family caregiving emergencies because they effectively deprive workers of one of the few social welfare benefits available to address these costs: paid family leave. Research on family leave tends to focus on financial hardship from lost wages if workers take unpaid family leave,<sup>260</sup> but our respondents also suffered financial hardship when they did *not* take leave for fear of consequences at work. Some respondents were forced to cut back on expenses, put off paying bills, empty their savings accounts, or borrow money to make ends meet.

It cost us money . . . It was a financial burden.

INTWR: And how did you manage those consequences?

Well, my wife and I worked, and we set aside enough money to do that, to pay these people. We took . . . my mother had some income, and my brother and his wife took a third, and we took a third, and we paid these folks that came in during the day.<sup>261</sup>

Despite the structural constraints on their ability to take leave, many respondents felt extreme regret and guilt in not being available to provide the care they felt their family members needed and deserved. Scholars have shown that cultural norms around familial obligation, particularly with regard to care for aging or infirm parents, lead grown children to feel a sense of a duty and indebtedness to repay their family members for the care those family members provided to them when they were young.<sup>262</sup> In addition, research finds that younger cohorts of men want to be more involved with their chil-

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<sup>260</sup> See, e.g., EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POL'Y RESEARCH, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 13 (2011), <http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf> [<http://perma.cc/3THK-VL8K>]; Mark A. Schuster et al., *Awareness and Use of California's Paid Family Leave Insurance Among Parents of Chronically Ill Children*, 300 J. AM. MED. ASS'N 1047, 1053 (2008).

<sup>261</sup> Interview with white male, age 73 (Interview No. 1007).

<sup>262</sup> See LEVITSKY, *supra* note 39, at 5; Catherine H. Stein et al., "Because They're My Parents": An Intergenerational Study of Felt Obligation and Parental Caregiving, 60 J. MARRIAGE & FAM. 611, 619 (1998).

dren's lives than previous generations of men.<sup>263</sup> Consistent with this research, our interviews indicate that failing to live up these normative ideals resulted in psychological strain for our respondents. One respondent, who took three days off of work following the birth of his premature baby, explained:

[I]t was harder for my wife more than anything, because I wasn't there to help her. . . . Just, you know, she was trying to heal herself, and she had nobody to really help her. I couldn't afford to have her a nurse or a nurse for the baby, things like that. . . . We struggled. Got behind in our bills. You know, she pretty much just dealt with it on her own. Just piled through it, I guess. . . . I couldn't be there for my wife and my baby. . . my sick baby at the time. As a father, I wanted to be there more, and I couldn't.<sup>264</sup>

Respondents also reported guilt over having to outsource the care of their loved ones to hospice, nursing or convalescent homes, or to hired home healthcare providers. Although relying on paid care providers is increasingly common,<sup>265</sup> several respondents indicated they would have preferred to provide the care themselves. Having to outsource care was particularly troubling when it was against their family member's wishes or their best interest.

Well, it broke my heart. It made my mother really sad that she was unable to stay at home, and, you know, that makes you sad.

INTWR: And were there any other consequences?

I don't know if she died sooner than she would have or not. You always read that people, you know, let go quicker when they're not at home with their pets, and their stuff, and where they feel comfortable. I don't know that. Just that we all would have preferred if she could have stayed at home. That's what she wanted.<sup>266</sup>

Respondents reported other negative consequences when they were not able to take family leave, including their own poor health. This finding supports a large body of research which shows negative health outcomes, including stress, anxiety, depression, and a decline in healthy behaviors, from the conflict that arises out the clash between work and family responsibilities.<sup>267</sup>

<sup>263</sup> See, e.g., AUMANN ET AL., *supra* note 111; KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* 110–12 (2009).

<sup>264</sup> Interview with hispanic male, age 41 (Interview No. 1072).

<sup>265</sup> See ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF: WHAT HAPPENS WHEN WE PAY OTHERS TO LIVE OUR LIVES FOR US* 9–14 (2012).

<sup>266</sup> Interview with white female, age 63 (Interview No. 1057).

<sup>267</sup> See, e.g., Tammy D. Allen & Jeremy Armstrong, *Further Examination of the Link Between Work-Family Conflict and Physical Health: The Role of Health-Related Behaviors*, 49 AM. BEHAV. SCIENTIST 1204, 1204–06 (2006); Joseph G. Grzywacz & Brenda L. Bass, *Work, Family, and Mental Health: Testing Different Models of Work-Family Fit*, 65

Well, my dad had passed away on [date omitted], and, you know, I had to deal with that. He was very sick with cancer. I was going through a divorce. I'm an only child. No real relatives nearby, so it was kinda, basically, all on me. My daughter was in her senior year, graduating from high school, looking at colleges, going through the process of all that, and financially, we just could not afford a lot of the colleges. It's just everything was hitting all at once, and consequently, you know, I was breaking down left and right, crying hysterically at times, not being able to focus on my job. . . . So it was a very difficult time. It still is difficult now, but I just try to get through every day the best I can.<sup>268</sup>

In short, respondents suffered significant consequences no matter which choice they made regarding leave. Respondents' believed their work lives would suffer if they asked for schedule accommodations or leaves to care for family members. Drawing on their own experiences and the experiences of others who took leave, they came to be afraid that taking leave would stain their reputations, stifle their chances for promotion, or jeopardize their already precarious jobs. The consequences of not taking leave, however, were also grave as respondents reported guilt and stress over having to choose work over their family members and wondered whether outsourced care provided the best care for their family members. Foregoing leave is not costless, and the cost is borne primarily by the worker and her family, unsupported by national social policy on caregiving.

#### IV. PROTECTING WORKERS WHO TAKE PAID FAMILY LEAVE

On the surface, paid family leave programs seem to solve work-family conflict, but for some workers, especially those in precarious jobs, the choice to take paid family leave may not be viable without broader legal protections. For these workers, taking family leave risks evoking retaliation that threatens their livelihoods. Our respondents reported how their employers drew on cultural schemas about the characteristics of good workers and gendered responsibilities for providing family care to rationalize and justify penalties for taking leave. Even though our respondents struggled to provide care while meeting ideal worker norms, they also struggled to articulate alternative visions—one going so far as to reference the quite different laws in France. The taken-for-granted ideal worker norm excuses employers from creating a workplace in which workers feel free to utilize paid family leave. It justifies shifting the financial, emotional, and physical risks of caregiving onto families. And because the gendered underpinnings of that cultural ideal

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J. MARRIAGE & FAM. 248, 254–55 (2003); Phyllis Moen et al., *Changing Work, Changing Health: Can Real Work-Time Flexibility Promote Health Behaviors and Well-Being?*, 52 J. HEALTH & SOC. BEHAV. 404, 406 (2011).

<sup>268</sup> Interview with white female, age 58 (Interview No. 1058).

are implicit, workers do not question whether employers can legitimately demand constant availability and dedication when they fail to offer a family wage in return.

The ideal worker norm is intimately connected to time-oriented practices and control structures of workplaces that developed during the industrial era.<sup>269</sup> Since the advent of Taylorism, a nineteenth century system of factory management that relied on the time clock and stopwatch, management has used time as a metric for increasing productivity and worker control.<sup>270</sup> Industrial managers used the time clock, shift work, and absenteeism policies to intensify work effort.<sup>271</sup> Modern managerial control over workers' time evolved from a multi-decade struggle to convince labor to acquiesce to the discipline of the time clock and turn over control of production to industrial managers.<sup>272</sup> As workplace output has become harder to measure objectively, time has come to serve as a proxy measure of effort and productivity.<sup>273</sup> These norms have become deeply ingrained in our culture through nearly a century of institutionalization of modern work practices.<sup>274</sup>

The ideal worker norm reflects an older gendered economic order built around a (male) worker "whose life centers on his full-time, life-long job" while someone else (typically a woman) "takes care of his personal needs and children" so he can meet the time standards imposed at work.<sup>275</sup> In short, the ideal worker norm assumes as its counterpart the family structure of the breadwinner/homemaker family. As women with caregiving responsibilities began to enter the workforce, it became increasingly apparent how workplaces organized around this model were a barrier to their full equality. The current discussions over family leave, however, have not fully considered how this historical context contributes to the emerging caregiving crisis for *all* workers. Instead, they tend to focus on how women in the paid labor force struggle with work-family conflict and stereotypes that working

<sup>269</sup> See EDWARDS, *supra* note 197, at 147–52. Edwards argues that industrial systems of control "altered the attributes that the firm expects of, and rewards in, its workers." *Id.* at 147. Employers came to value "types of behavior deriving from the form of control, rather than from the content of job descriptions." *Id.* at 149. The image of the "good worker" thus valued attendance and punctuality, compliance with work rules, and habits of predictability and dependability. *Id.* at 149–50. All these attributes facilitate bureaucratic control over workers, and also manage intensification of work effort through time control. Incentives for complying with these behaviors "are designed to . . . elicit[ ] cooperation and even loyalty as evidence of the worker's ever-increasing reconciliation of the firm's power" and "provide[ ] a long-run framework for the exercise of power." *Id.* at 151.

<sup>270</sup> See MONTGOMERY, *supra* note 58, at 234–37; Thompson, *supra* note 197, at 86, 90–95.

<sup>271</sup> See Thompson, *supra* note 197, at 90–95.

<sup>272</sup> EDWARDS, *supra* note 197, at 48–52, 100–104, 113–15, 118–19, 147–150; MONTGOMERY, *supra* note 58, 221–23, 226; Thompson, *supra* note 197, at 90–95.

<sup>273</sup> See HOCHSCHILD, *supra* note 181, at 92; EDWARDS, *supra* note 197, at 149.

<sup>274</sup> See RIGHTS ON LEAVE, *supra* note 35, at 35–44; EDWARDS, *supra* note 197, at 147–52.

<sup>275</sup> See Acker, *supra* note 174, at 149.

mothers are transient and uncommitted participants in the workforce.<sup>276</sup> Commentators note that work-family conflict and stereotypes lead women to hit the “maternal wall”, slowing their advancement,<sup>277</sup> and women face significant motherhood wage penalties compared to fathers.<sup>278</sup> Advocates argue that paid family leave would increase women’s labor force participation and attachment and improve gender equity in pay and in caregiving within the family.<sup>279</sup>

Our findings indicate, however, that in the post-Fordist economy, where employment relations are contingent, informal, and relatively unregulated by law, gendered cultural schemas shape expectations about both men’s and women’s leave-taking. Employers still subject working women to expectations rooted in the old family wage ideal in which women were responsible for caregiving. But men are not immune to these expectations, nor do they

<sup>276</sup> See, e.g., Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 314 (2007) (“[What] I wish to do here is to contextualize the problem of work/family conflict within the larger issue of gender bias in the workplace.”); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J. L. & GENDER 1, 2 (2005) (“Paid family leave is particularly valuable, I argue, because other possible alternatives, such as daycare, cannot entirely replicate the value of personal time away from work to engage directly in family caregiving.”); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 16 (2010) (“Gender stereotypes include the assumption that women can no longer be good workers once they become mothers, or that men are not caregivers and are therefore lying if they demand the parental or family care leave to which they are statutorily or otherwise entitled.”); 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, 95 (2003) (“Though hostile prescriptive stereotyping is rare in contexts outside parenthood—most people know enough not to proclaim that ‘women don’t belong here’—some employers are not yet as savvy when it comes to family caregivers. More subtle patterns of hostile prescriptive stereotyping stem from perceived role incongruity that places women in a series of Catch-22’s.”).

<sup>277</sup> See Williams & Segal, *supra* note 276, at 79. Williams and Segal are careful to note that the maternal wall disadvantages workers who fill traditionally feminine caregiving roles, regardless of the worker’s gender. Thus, they argue, maternal wall penalties are gendered because caregiving roles are gendered. See *id.*

<sup>278</sup> Estimates of this penalty range from 5 to 13% for each child. Anderson et al., *supra* note 236, at 274; Budig & England, *supra* note 236, at 210–13; Shelly Lundberg & Elaina Rose, *Parenthood and the earnings of married men and women*, 7 LAB. ECON. 689, 705 (2000); Waldfogel, *supra* note 236, at 216.

<sup>279</sup> Critics have argued, for example, that unpaid leave exacerbates the problem of gender differences in caregiving the problem by encouraging mothers rather than fathers to take leave because families lose less income given that women typically earn less than men. See, e.g., Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 341–42 (1993); see also FAMILY Act, H.R. 1439, 114th Cong. § 2(10) (2015) (“[M]en continue to earn more than women, and, as a result, it often makes more economic sense for women in two-parent families to take unpaid leave and forgo their lower salary.”). Other arguments highlight that women who take paid family leave are more likely return to their previous employers and receive higher wages over time, bringing their wages closer to those of men as well as of women who do not have children. See Lester, *supra* note 276, at 2; Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?*, 16 J. LAB. ECON. 505, 534 (1998).

always benefit from them. For example, some men are viewed with suspicion if they ask for or take leave, and workplace expectations about appropriate leave use vary significantly for men and women even when leave is nominally available on a gender neutral basis. Thus, despite dramatic changes to the structure of work and family, workplace practices, interactions and social meanings continue to privilege breadwinner/homemaker arrangements and burden families that do not match this model.

In addition, among our respondents, gender was not the only status difference reproduced by these cultural frameworks. Well-paid workers and those with significant seniority and tenure had more room to violate ideal worker norms without incurring penalties, presumably because they had already proven themselves as “good workers.”<sup>280</sup> Highly skilled, well-paid employees are more difficult to replace, and therefore employers may be more tolerant of their leaves. In addition, research shows that workers who belong to work groups with more organizational clout are more likely to use family-friendly policies than those with less power, even controlling for individual-level factors like gender or caretaking responsibilities.<sup>281</sup> These status differences suggest that industrial era practices that privilege seniority and workplace hierarchy continue to shape workers’ access to leave.<sup>282</sup>

Based on the analysis and data above, we argue that growing work-family conflict is a symptom of a much larger problem of workplace control and changing economic and social structures. Framing paid leave as a women’s issue risks reinforcing gender stereotypes even as it obscures this larger context of state inaction in response to disintegrating institutions. Arlie Hochschild described the costs to families of this change as a second shift for working women,<sup>283</sup> but as working class parents increasingly work two and three jobs to make ends meet, even men’s full participation in caregiving cannot offset the growing load on families. Commentators compare the overall increase in hours in paid labor to maintain the same real income to a speed up in the assembly line through which employers utilize

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<sup>280</sup> Previous research suggests similar patterns in which a combination of workplace power, class, and gender affects workers’ ability to take leave. See Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege*, 21 *YALE J.L. & FEMINISM* 161, 174–75 (2009); *Cultural Schemas*, *supra* note 124, at 212–17 (discussing how professional workers are seen as trusted workers and given more flexibility over their schedules, whereas low-wage workers are more subject to time discipline).

<sup>281</sup> See Blair-Loy & Wharton, *supra* note 182, at 815, 830–35 (“Managerial and professional workers . . . may have more power than lower-status workers to promote change in organizational culture by embracing these policies.”); Gerstel & Armenia, *supra* note 280, at 174 (noting that the fact that male Emergency Medical Technicians were unionized may have helped them take leave without losing their employers’ support).

<sup>282</sup> See EDWARDS, *supra* note 197, at 151–52 (noting how rewarding seniority was a significant aspect of bureaucratic control in industrial workplaces).

<sup>283</sup> See generally ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989) (describing how working women come home to a second shift of housework and childcare in addition to paid labor).

the structure of work to demand more from their workers.<sup>284</sup> As one commentator put it, now for the working class “the majority of women *and* men are losing. Capital is the beneficiary.”<sup>285</sup>

Work-family conflict resulting from lack of paid family leave is not the special province of women; it is the reality faced by virtually every working family. Moreover, the caregiving burdens associated with changes in work and in families extend beyond gender to compound other dimensions of social inequality. Perhaps scholars frame paid family leave as a women’s issue because women in the paid workforce are the most visible stress indicator in these larger transitions, the proverbial canary in the coal mine. Women shouldered the majority of unpaid caregiving labor even as they moved into the paid labor force, absorbing most of the initial shock of changing family structures with little support from their employers, the state, or their spouses.<sup>286</sup> But to paraphrase an argument from Lani Guinier, the problem with thinking about paid family leave as a women’s issue is that it pathologizes the canary rather than inspecting the mine.<sup>287</sup> It assumes the problems surrounding caregiving lie with women, rather than heeding the warning that the mine is caving in as the mid-century bargain that supplied both economic support and care disintegrates.

The relative power imbalance between workers and their employers becomes all the more important as this great transformation progresses. As more workers have temporary and contingent jobs, a greater share of the workforce, especially low-wage workers, can easily be replaced. This reality encourages workers at risk to avoid any behavior that may threaten their job. It also enables employers to deter workers from taking paid family leave simply by expressing disapproval or making subtle threats. In this study, respondents learned informal rules around leave-taking through interactions with supervisors and coworkers, who told stories about workers who took leave in the past or who shared their true (usually negative) feelings about workers currently on leave. Workers make decisions about taking leave within a social context infused with these informal cultural rules about ideal workers and the allocation of carework, and the gender and status relations of the old Fordist industrial economy. Those cultural schemas privilege well-

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<sup>284</sup> See McDowell, *supra* note 28, at 416 (citing Elliott Currie, Robert Dunn & David Fogarty, *The Fading Dream: Economic Crisis and the New Inequality*, in *WOMEN, CLASS AND THE FEMINIST IMAGINATION: A SOCIALIST-FEMINIST READER* 319, 323 (1980)). Some married women entered the workforce out of economic necessity because the demise of the family wage meant two incomes were required to maintain their standard of living. Declining wages mean these families now received the same wage for doing three jobs instead of two: two in the paid labor force along with one unpaid shift at home. McDowell, *supra* note 28, at 415.

<sup>285</sup> See McDowell, *supra* note 28, at 416.

<sup>286</sup> See HOCHSCHILD, *supra* note 182, at 12–13.

<sup>287</sup> Lani Guinier, *The Miner’s Canary: Enlisting Race, Resisting Power, & Transforming Democracy*, 91 *LIBERAL EDUC.* 26, 26 (2005). Shelley Correll brought this metaphor to the authors’ attention in her remarks at the Work and Family Researchers Network meeting in New York on June 20, 2014.

paid professional workers and workers with seniority, and discourage men from using leave, thus reproducing the gender and status inequalities of the bygone industrial economy.

Our findings suggest that employers' near complete authority and control over work time is a central concern for workers who struggle to manage work and family. At one time scholars speculated that the emerging flexible scheduling economy might break the hold of employer time discipline and return control over the labor process to workers.<sup>288</sup> Instead, recent research suggests that low-wage employers have adapted the culture of managerial control over time to enforce the transition to contingent work and nonstandard schedules.<sup>289</sup> For example, Henly and colleagues find that low-wage employers develop a culture of open availability and nonstandard schedules early on by screening applicants based on availability, posting weekly schedules with limited advance notice, limiting employee input into or negotiation over scheduling, and rigorously enforcing no-fault attendance policies to limit absences.<sup>290</sup> This research and our findings suggest that even as workplace time standards change, the culture of employer control over time persists, constituting a new form of Taylorism oriented toward employee social control in the contingent labor economy.<sup>291</sup> The result is work intensification without an increase in workers' pay or job security, and without flexibility easing the strain on workers with caregiving responsibilities. What our findings add is how those pressures subtly reproduce gender, race, and class differences, even when paid family leave is nominally available to all.

The FAMILY Act may increase workers' access to paid family leave. For low-wage workers in precarious jobs, however, leave may remain only theoretically available until the law gives these workers more control over their ability to take time off. As our data and other studies indicate, employers continue to insist on constant availability and flexibility on demand.<sup>292</sup> The FAMILY Act as drafted does little to eliminate penalties associated with taking leave, or to give workers control over whether they can take time off. The Act protects workers from being fired *for applying for benefits*, but it does not explicitly state that workers cannot be fired *for taking family*

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<sup>288</sup> See Smith, *supra* note 8, at 315–16; Vidal, *supra* note 58, at 276–77; John Tomaneý, *A New Paradigm of Work Organization and Technology?*, in *POST-FORDISM: A READER* 157, 158–164 (1994) (discussing serious critiques of the flexible specialization thesis that post-Fordism would bring about more worker control over production).

<sup>289</sup> See, e.g., Martha Crowley et al., *Neo-Taylorism at Work: Occupational Change in the Post-Fordist Era*, 57 *SOC. PROBLEMS* 421, 440–41 (2010); Smith, *supra* note 8, at 332–34.

<sup>290</sup> See Henly et al., *supra* note 17, at 619–23. This focus on selection of employees for fit with bureaucratic control structures is a feature of Taylorist employment systems that Henley's research suggests is now being reproduced in the post-Fordist low-wage economy. See Crowley et al., *supra* note 289, at 423–24.

<sup>291</sup> See, e.g., Smith, *supra* note 8, at 321, 333–34; Crowley et al., *supra* note 289, at 434.

<sup>292</sup> See, e.g., Henly et al., *supra* note 17, at 619–23.

leave.<sup>293</sup> Even if the Act passes, the 40% of the workforce that is not covered by the FMLA will still not be protected from retaliation for taking family leave. Without these legal protections, employers have little incentive to allow workers time off to care for the older, sick, and young people in their families, and can continue to draw on familiar cultural schemas to justify penalizing workers who take family leave or dissuade them from taking time off. Thus, the FAMILY Act's enforcement provisions offer little comfort to the low-wage workers who remain vulnerable to retaliation for taking leave.

Three other pending federal legislative proposals speak to these issues, but these proposals do not resolve the problems we have identified. The Flexibility for Working Families Act<sup>294</sup> would authorize an employee to request from an employer "a temporary or permanent change in the employee's terms or conditions of employment if the change relates to: (1) the number of hours the employee is required to work, (2) the times when the employee is required to work or be on call for work, (3) where the employee is required to work, or (4) the amount of notification the employee receives of work schedule assignments."<sup>295</sup> Employers' near total control over time and the research showing that workers suffer penalties simply for asking for a schedule accommodation show why this so-called right to ask legislation is necessary,<sup>296</sup> yet the Flexibility for Working Families Act does not require employers to grant workers' requests, even if they are able to do so. Beyond prohibiting retaliation for asking, this legislation does little to provide workers with predictable work schedules or access to family leave.

A second, more comprehensive bill, the Schedules that Work Act, includes a similar right to ask for schedule adjustments.<sup>297</sup> The Schedules that Work Act *requires* employers to grant those requested adjustments if the employee requests the schedule change (1) because of a serious health condition, (2) due to the employee's responsibilities as a caregiver, (3) to attend a career-related training or education program, or (4) for a reason related to a second job, unless the employer has a bona fide business reason for denying the request.<sup>298</sup> The Schedules that Work Act also limits the ability of employers with fifteen or more employees to announce, change, or reduce schedules with little notice.<sup>299</sup> Even this more comprehensive proposal, however, allows employers to deny requests if they would impose "significant detri-

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<sup>293</sup> The FAMILY Act states, "[i]t shall be unlawful for any person to discharge or in any other manner discriminate against an individual because the individual has applied for, indicated an intent to apply for, or received family and medical leave insurance benefits." H.R. 1439, 114th Cong. § 5(h) (2015).

<sup>294</sup> Flexibility for Working Families Act, S. 777, 114th Cong. (2015).

<sup>295</sup> *Id.* § 4(a).

<sup>296</sup> *See, e.g.*, Christin L. Munsch, Disentangling Gender, Childcare, Flextime and Flexplace: Who Gets Penalized for Flexible Work?, Remarks at Am. Soc. Ass'n Annual Meeting (August 2014); Rudman & Mescher, *supra* note 220, at 324.

<sup>297</sup> Schedules that Work Act, S. 1772, 114th Cong. § 3(a) (2015).

<sup>298</sup> *Id.* § 3(c).

<sup>299</sup> *Id.* § 4(c).

mental effect on the employer's ability to meet organizational needs or customer demand," among other reasons.<sup>300</sup> This relatively vague and expansive standard allows employers to retain significant discretion to continue to deny employees' requests.

A third piece of pending federal legislation, the Healthy Families Act, would require employers with fifteen or more employees to provide one hour of paid sick time for every thirty hours worked to their employees.<sup>301</sup> Employers would also be required to allow their employees to use that sick time to: (1) meet their own medical needs; (2) care for the medical needs of certain family members (including a domestic partner or the domestic partner's parent or child); or (3) seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking.<sup>302</sup> The Healthy Families Act protects workers from interference with their rights under the Act.<sup>303</sup> Because this law ties eligibility to the increasingly less common full time schedule, however, it does little for workers in precarious jobs. For example, an employee who worked forty hours per week, fifty weeks per year, could earn a maximum of seven sick days per year under this law.<sup>304</sup> Workers with less regular or part-time schedules would earn even less sick time. By contrast, the FMLA provides up to twelve weeks of unpaid job-protected leave per year, and workers can use vacation and accrued sick time during that leave under certain circumstances.<sup>305</sup>

The federal FMLA provides a foundation on which to build the job protection low-wage workers need to make use of paid family leave.<sup>306</sup> The FMLA prohibits both interfering with a worker's right to leave and retaliating against workers who take leave.<sup>307</sup> Importantly, interference claims do not require proof of discriminatory intent and therefore do not suffer from the limitations of statutory protections based on formal equality theories, such as Title VII.<sup>308</sup> Simply put, employers who refuse to reinstate workers after a leave or who deny workers leave to which they are entitled violate the Act.<sup>309</sup> The implementing regulations also prohibit interfering with leave by

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<sup>300</sup> *Id.* § 2(1)(B).

<sup>301</sup> Healthy Families Act, S. 497, 114th Cong. § 5(a) (2015).

<sup>302</sup> *Id.* § 5(b).

<sup>303</sup> *Id.* § 7(a).

<sup>304</sup> *Id.* § 5(a)(1). The Act allows employers to choose a higher cap than seven if they wish, but even then an employee working a full time year round schedule would still earn less than nine days per year. *Id.*

<sup>305</sup> 29 U.S.C. § 2612(d) (2012).

<sup>306</sup> The percentage of workers with access to family leave significantly increased after the FMLA was enacted. *Institutional Perspectives*, *supra* note 21, at 401-02.

<sup>307</sup> 29 U.S.C. § 2615 (2012).

<sup>308</sup> *See, e.g.*, *Liu v. Amway Corp.*, 347 F.3d 1125, 1135 (9th Cir. 2003); *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997).

<sup>309</sup> *See Nero*, 167 F.3d at 927.

refusing to authorize leave, discouraging an employee from using leave, or using leave as a negative factor in hiring, promotions, or disciplinary actions.<sup>310</sup> In addition, FMLA leave may not be counted under no-fault attendance policies.<sup>311</sup> Thus, many of the more subtle penalties for using leave that emerged in our data, such as using leave as the basis to deny promotions or reduce hours, are prohibited by the FMLA.<sup>312</sup> In addition, qualitative evidence on workers' experiences negotiating FMLA rights suggests that the law provides a cultural counter-narrative for responding to the gendered stereotypes and schemas we have documented in this Article.<sup>313</sup>

Because the FMLA does not cover 40% of the workforce, many workers who need leave remain vulnerable.<sup>314</sup> Moreover, even the protections that do exist under the FMLA have begun to erode because the statute defines eligibility for its protections in terms of the full-time permanent worker of the bygone industrial economy. For example, to qualify for unpaid job-protected family leave under the FMLA, a worker must have worked at least twelve months for his employer and worked at least 24 hours per week for those twelve months, a threshold minimum based around a model of stable employment.<sup>315</sup> The accelerating shift to precarious labor, with little long-term job security, variable hours, and irregular scheduling means that over time, fewer workers will be able to meet these eligibility requirements if legal provisions remain the same.

Better coordination between the FAMILY Act and the FMLA would ensure low-wage workers with little bargaining power could access paid family leave. This coordination could be accomplished through two simple reforms. First, the FAMILY Act should be amended to protect individuals from interference or retaliation for any leave during which they received benefits under the FAMILY Act. By incorporating the interference and retaliation language from the FMLA, the FAMILY Act would also incorporate the FMLA's no-intent interference standard, which would protect workers

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<sup>310</sup> 29 C.F.R. § 825.220(a)(3)(iii)(b)–(c) (2015).

<sup>311</sup> *Id.* § 825.220(a)(3)(iii)(c).

<sup>312</sup> Courts have also held that employers may not terminate a worker who is not yet eligible for FMLA leave to prevent the worker from becoming eligible and taking leave in the future. *See Pereda v. Brookdale Senior Living Cmty.*, 666 F.3d 1269, 1276 (11th Cir. 2012). This important ruling solves the dilemma created by the FMLA's requirement that workers give notice of the need to leave and Title VII precedents, discussed above, which hold that employers may fire pregnant workers who indicate they plan to use leave in the future. *Compare* 29 U.S.C. § 2612(e) (2012) (requiring workers to give notice of foreseeable leave) *with* *Marafino v. St. Louis Cty. Circuit Court*, 707 F.2d 1005, 1006 (8th Cir. 1983) (holding employer did not violate Title VII by refusing to hire a pregnant employee who indicated she planned to take leave in the future). Without *Pereda*, pregnant workers would face a double bind. Pregnant workers who gave notice of the need for FMLA leave before they were covered by the FMLA might be at risk of being fired pursuant to the ruling in *Marafino*, while those who did not give notice of the need to leave in order to protect their current employment would not be eligible for FMLA leave.

<sup>313</sup> *See* RIGHTS ON LEAVE, *supra* note 35, at 28–29, 37–38.

<sup>314</sup> RESHAPING THE DEBATE, *supra* note 25, at 8.

<sup>315</sup> 29 U.S.C. § 2611(2) (2012).

from a variety of workplace penalties for time off covered by paid family leave. This amendment alone, however, would not give workers a right of reinstatement after their leaves, but would protect them against reductions in hours, being passed over for promotion, and other penalties once they returned to work.

A more extensive set of protections could be achieved by amending the eligibility requirements for job-protected leave under the FMLA to conform to the eligibility requirements for paid family leave under the FAMILY Act. In other words, the FMLA could be amended to cover all workers and to extend job-protected leave to part-time, low-wage and contingent workers.<sup>316</sup> This amendment would prevent the rising number of part-time and contingent workers from slipping below the FMLA's current eligibility requirements. The two amended statutes together, however, would ensure that job protection and wage replacement run concurrently for the twelve-week entitlement to leave under the FMLA by including within the FMLA's protection all workers also covered by the FAMILY Act. These changes also would benefit employers by coordinating administration of both programs.

In the rather stingy American realm of work-family policy, this modest proposal may seem quite radical. To the rest of the industrial world, however, it is not. Compared to other industrialized countries, American family leave policies can be accurately described as well outside the mainstream. The United States lags far behind most other industrialized countries in the support that it provides to workers for their caregiving needs and economic security in the globally emerging post-Fordist economy.<sup>317</sup> Mandatory job protection, substantial wage replacement, and relatively generous leave provisions are the norm, rather than the exception, in almost every industrialized country except the United States.<sup>318</sup> Some countries also offer transitional support for displaced workers including income support and job retraining to give employers labor flexibility without externalizing the costs of that flexibility onto workers.<sup>319</sup> Making a similar commitment to protecting the jobs of workers who provide care to their families thus is certainly within the realm of possibility. As President Obama said recently of childcare, "there are other countries that know how to do childcare well. I mean, this isn't rocket science."<sup>320</sup>

California's experience is instructive in this regard. When California's PFL amendments were proposed, business interests including the California

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<sup>316</sup> See FAMILY Act, H.R. 1439, 114th Cong. § 5(a) (2015).

<sup>317</sup> See, e.g., GORNICK & MEYERS, *supra* note 40, at 40–41; *Precarious Work*, *supra* note 9, at 15–16.

<sup>318</sup> See, e.g., GORNICK & MEYERS, *supra* note 40, at 124–27 tbl.5.1; OECD, *supra* note 24.

<sup>319</sup> See *Precarious Work*, *supra* note 9, at 15–16.

<sup>320</sup> Barack Obama, Remarks at the White House Summit on Working Families (June 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/23/remarks-president-obama-white-house-summit-working-families-june-23-2014> [<http://perma.cc/U6KC-EFN2>].

Chamber of Commerce expressed significant opposition,<sup>321</sup> but their concerns proved unfounded. Subsequent studies of the California system found that employers experienced little or no trouble implementing the new measures, and employers did not experience significant financial burdens as a result of the new law.<sup>322</sup> More than 90% of employers reported no incidents of abuse of paid family leave, and those few employers who were aware of any abuse reported it was a very rare occurrence.<sup>323</sup> Some employers reported that paid family leave improved profitability, employee morale, productivity and retention, suggesting that employers stand to gain from this new legislation.<sup>324</sup> These findings concur with a wider body of research associating work-family conflict with increased turnover intentions, absenteeism, and burnout, as well as reduced organizational commitment and self-reported job performance.<sup>325</sup>

Paid family leave also has positive effects on workers and their families. Caregivers who took advantage of California's PFL program felt their leave allowed them to provide better care than caregivers who did not use PFL.<sup>326</sup> These perceptions are consistent with research linking paid family leave with lower levels of infant mortality, post-neonatal mortality, healthy birth weight, longer periods of breastfeeding, and faster recovery from illness.<sup>327</sup>

Other critics might argue that these legal reforms are unlikely to change the behavior of workers or employers. But social norms and workers' expect-

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<sup>321</sup> Business interests expressed concern about the costs of the changes and the impact on businesses. Initial drafts of the legislation required employers and workers to split the costs of paid family leave, similar to the structure of unemployment insurance. Lobbying efforts by the California Chamber of Commerce resulted in revisions that changed the funding source of PFL to employee paid payroll taxes. Additional amendments reduced the benefit from twelve weeks in the original bill to six, and required employees to use up to two weeks of their paid vacation days before taking PFL. Even after these concessions, business interests expressed concerns that small business could not absorb the costs of PFL, including finding and training replacements while employees were on leave, and that employees would abuse the system through fraudulent care responsibilities. MILKMAN & APPELBAUM, *supra* note 19, at 36.

<sup>322</sup> *See id.* at 55–84.

<sup>323</sup> *See, e.g., id.* at 69. Prior research on the implementation of the FMLA is consistent with these findings. After the enactment of the FMLA, which also faced significant and vociferous opposition from business interests about the burden of unpaid leave on employers, studies also found little to no burden on employers from the new federal legislation. *See, e.g., Institutional Perspectives, supra* note 21, at 412; Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LAB. REV. 17, 18 (2001).

<sup>324</sup> *See, e.g., MILKMAN & APPELBAUM, supra* note 19, at 68 fig.4.3.

<sup>325</sup> *See* Tammy D. Allen et al., *Consequences Associated with Work-to-Family Conflict: A Review and Agenda for Future Research*, 5 J. OCCUPATIONAL HEALTH PSYCHOL. 278, 286–88 (2000); Scott L. Boyar, Carl P. Maertz, Jr., & Allison W. Pearson, *The Effects of Work-Family Conflict and Family-Work Conflict on Nonattendance Behaviors*, 58 J. BUS. RES. 919, 923 (2005).

<sup>326</sup> *See* MILKMAN & APPELBAUM, *supra* note 19, at 104 fig.5.8.

<sup>327</sup> *See* APPELBAUM & MILKMAN, *supra* note 260, at 14, 25–26; Sakiko Tanaka, *Parental Leave and Child Health Across OECD Countries\**, 115 ECON. J. F7, F7, F10–F11, F26, F28 (2005).

tations are changing even if the legal landscape and some workplaces are not. There has been a generational shift in men's desire to engage in caregiving such that younger men expect to be engaged in family caregiving and desire employment that is compatible with this engagement.<sup>328</sup> Young men want the "package deal"—of which a fulfilling career *and* emotional involvement with children are key elements.<sup>329</sup> Consistent with these trends, leave uptake among fathers in California has risen steadily since PFL was enacted.<sup>330</sup>

Some work redesign initiatives respond to these culture shifts and show that workplace culture change is possible. Important in light of our findings about the subtle interactions that dissuade workers from taking leave, some of these initiatives explicitly target and discourage the remarks coworkers use to denigrate one another for how they spend (or do not spend) their time.<sup>331</sup> Employer initiatives to create a culture in which flexible work schedules controlled by employees were not stigmatized have shown some success.<sup>332</sup> Most of these initiatives, however, have not been directed at the low-wage, precarious workers that are the focus of this Article and the most vulnerable in the absence of access to job-protected leave.<sup>333</sup>

<sup>328</sup> See AUMANN, GALINKSY & MATOS, *supra* note 117; GERSON, *supra* note 251, at 110–12.

<sup>329</sup> NICHOLAS TOWNSEND, PACKAGE DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN'S LIVES 78 (2002).

<sup>330</sup> MILKMAN & APPELBAUM, *supra* note 19, at 51–53.

<sup>331</sup> See generally Erin L. Kelly et al., *Gendered Challenge, Gendered Response: Confronting the Ideal Worker Norm in a White-Collar Organization*, 24 GENDER & SOC'Y 281, 285 (2010); Leslie A. Perlow & Erin L. Kelly, *Toward a Model of Work Redesign for Better Work and Better Life*, 41 WORK & OCCUPATIONS 111, 117 (2014).

<sup>332</sup> For example, Leslie Perlow had success with Predictable Time Off (PTO) at Boston Consulting Group (BCG). See generally LESLIE A. PERLOW, SLEEPING WITH YOUR SMARTPHONE: HOW TO BREAK THE 24/7 HABIT AND CHANGE THE WAY YOU WORK (2012). The premise of this work redesign initiative is that consultants coordinate with their team so that each team members gets a predictable night off a week. See *id.* at 20. This coordination occurs through a required weekly "pulse check" meeting in which consultants discuss how to achieve this goal. See *id.* at 21. Perlow reported, however, that "conversations routinely move from the specific goal of a predictable night off to broader conversations of what work was expected (by the client, by the team leader, or by the members themselves), whether each task or piece of work was needed, and how communication and coordination could be improved to get the work done more easily and with less stress." Perlow & Kelly, *supra* note 331, at 91. In short, the latent result of PTO was more efficient work processes that freed up workers' time and mental energy for the most important work tasks. See PERLOW, *supra*, at 6. In the end, PTO redesigned work processes which allowed workers better to combine their paid work and family responsibilities, and redefined a "good" worker as someone who worked smart—as opposed to around the clock—to achieve better work and life outcomes. See *id.* at 19.

<sup>333</sup> PTO, for example, was designed for consultants. Result Only Work Environment (ROWE), another successful work redesign initiative, was created and administered at Best Buy's headquarters for its corporate employees. See Erin L. Kelly et al., *Changing Work and Work-Family Conflict: Evidence from the Work, Family, and Health Network*, 79 AM. SOC. REV. 485, 509 (2014). Employers are less likely to provide these sorts of initiatives to low-wage, contingent workers because their turnover is less costly than that of professional workers. In fact, many flexible work arrangements—schedule arrangements to help working caregivers manage their work and family responsibilities (e.g.,

In contrast to these recent innovative approaches, employers more commonly provide select employees with one-off accommodations like family leave, reduced work hours, or flexible work options on a discretionary basis.<sup>334</sup> The chief disadvantage of this kind of accommodation, and one of the central concerns our respondents identified, is that workers avoid taking them because they are afraid of the negative career consequences for doing so. A second concern is that these discretionary accommodations tend to recreate inequalities within the workplace because they are reserved for well-paid, long-term, or professional workers, and leave low-wage, contingent workers out in the cold. Unlike individual accommodations, more broad-based work redesign approaches “disrupt the structure of work—that is to challenge the underlying cultural schema and the practices, interactions, and reward systems tied to that schema—rather than taking these ways of working as given” and therefore may be more successful in changing the underlying culture of the workplace that disadvantages caregivers.<sup>335</sup>

Building a work redesign approach into the law would help disrupt workplace norms that are taken for granted like the ideal worker norm and family wage ideal, and enable even low-wage workers in precarious jobs to make use of family leave without fear of retaliation.<sup>336</sup> In this sense, law matters not just as a set of legal penalties to discourage prohibited behavior, but also as an expression of normative values. Both legal scholars and sociologists have long argued that law affects society not only through punitive sanctions, but also through its symbolic or expressive effect on normative

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telecommuting or telework programs)—were originally implemented with professional women in mind to increase their retention. Employers of low-wage workers have little incentive to design flexible work arrangements or work redesign initiatives because they believe it is simply cheaper to replace rather than retain them. Bond & Galinsky, *supra* note 27, at 1. See also Glenda Strachan & John Burgess, *The “Family Friendly” Workplace: Origins, Meaning and Application at Australian Workplaces*, 19 INT’L J. MANPOWER 250, 253 (1998) (arguing “[e]mployers have assisted valuable employees (those who would be difficult or expensive to replace) to retain their employment by offering a variety of solutions to individual or group problems which arise”); Marjorie E. Starrels, *The Evolution of Workplace Family Policy Research*, 13 J. FAM. ISSUES 259, 265–66 (1992). Industry continues to follow this pattern. To take one recent example, Netflix announced it would offer its employees one year of paid maternity and paternity leave, but that only salaried employees would be eligible for this benefit. This announcement sparked a protest and petition from Netflix’s many hourly workers in the DVD division. Emily Peck, *Under Fire, Netflix Defends Lopsided Parental Leave Policy*, Huffington Post (Sept. 2, 2015), [http://www.huffingtonpost.com/entry/netflix-parental-leave-policy\\_55e7239ce4b0aec9f3556d1d](http://www.huffingtonpost.com/entry/netflix-parental-leave-policy_55e7239ce4b0aec9f3556d1d) [<http://perma.cc/45CB-96PB>].

<sup>334</sup> See, e.g., Leslie B. Hammer et al., *Development and Validation of a Multidimensional Measure of Family Supportive Supervisor Behaviors (FSSB)*, 35 J. MGMT. 837, 844–45 (2009).

<sup>335</sup> Perlow & Kelly, *supra* note 331, at 126.

<sup>336</sup> Similarly, Robin Ely and Debra Meyerson argue that organizations that want to eradicate gender inequality can do so through changes to the formal policies of organizations, informal work practices and norms, the language, narrative, and rhetoric used at work, and informal patterns of social interactions in the workplace. Robin J. Ely & Debra E. Meyerson, *Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change*, 22 RESEARCH IN ORG. BEHAV. 103, 113–14 (2000).

judgments.<sup>337</sup> They contend that law implies a social consensus that prohibited conduct is wrong.<sup>338</sup> This implied social consensus can change the meaning of a given behavior and, with it, individuals' normative evaluations of that behavior.<sup>339</sup> Moreover, social policies provide a resource and interpretive frame for constructing alternatives to existing social arrangements.<sup>340</sup> To the extent that strong protections for using paid family leave convey that caring for families is a publicly valued activity that is presumptively part of the experience of all workers, legal reforms can provide a new cultural narrative for challenging the lingering dead hand of Fordist industrial norms.<sup>341</sup> These gender-neutral rights and protections can help to dismantle the gendered structure that underwrote the organization of work in the past.

## V. CONCLUSION

The transformations we have discussed in this Article represent dramatic challenges for working families. They also, we argue, present an opportunity to rethink two of the major institutions that organize our lives – family and work. Certain social realities must be central to that rethinking. Precarious employment increasingly defines work throughout the post-Fordist economy, especially for low-wage workers. Breadwinner/homemaker families are largely a thing of the past. Given this reality, social welfare policies organized around breadwinner/homemaker families and industrial ways of working make little sense and will not provide much of a safety net to most working families. As the old gendered order of work and family disintegrates, law can offer a new framework for the relations among gender, work and family.<sup>342</sup> Without such an authoritative intervention, how-

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<sup>337</sup> See, e.g., Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 SOCIOLOGY 410, 412 (1967) (arguing that knowledge of the law and knowledge of a peer consensus led to greater shifts in judgment); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 41 (2002) (arguing that “[c]hanging social meaning will have an effect on the acts that members of society sanction and may also affect whether a preference for or against the regulated behavior becomes internalized and therefore subject to third order sanctions”); Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1689 (2000) (arguing that “the expressive effect matters because it predicts some compliance independent of sanctions, not because it predicts an efficient level of compliance without sanctions”); Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341 (2000) (arguing that “even purely symbolic government action can, by signaling attitudes, change behavior,” and that “if law has an expressive effect on behavior, then expressive law offers interest groups another tool for achieving their ends”); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027 (1996) (arguing that human behavior is sometimes a function of expressive considerations); Cass Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 910 (1996) (same).

<sup>338</sup> See Berkowitz and Walker, *supra* note 337, at 421–22.

<sup>339</sup> See Charles Stangor et al., *Changing Racial Beliefs by Providing Consensus Information*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 486, 488 (2001).

<sup>340</sup> LEVITSKY, *supra* note 39, at 117–18, 122.

<sup>341</sup> *Bargaining*, *supra* note 175, at 43–44.

<sup>342</sup> See *Bargaining*, *supra* note 175, at 43–44; Kelly et al., *supra* note 332, at 509.

ever, our findings warn that workplace practices threaten to re-inscribe gender, race and income inequality in the new economy.

This time of radical social change, then, presents both an opportunity for reducing inequality and a danger that new institutions will merely recreate old inequalities. There is a danger, for example, in framing the need for paid family leave as a “women’s issue” primarily focused on concerns of working women.<sup>343</sup> Framing family leave as a women’s issue risks reinforcing stereotypes that caring for families is solely the responsibility of women. It obscures the seismic shifts in labor, family structure, and the economy that justify a broader state response to these issues. It also risks undermining the much larger social coalition that might be built around paid family leave once the full extent of the problem is articulated and realized. Our findings suggest that conceptualizing paid family leave as a broader economic insurance program, as well as a gender equity policy, is necessary to develop laws that reduce, rather than widen the gap in access to paid family leave across social classes.

We have argued here that although proposed federal paid family leave legislation supports working families struggling to meet care responsibilities, it misunderstands the barrier to taking leave as one of short-term lost wages, rather than precarious work and unprotected workers. Current legislative approaches assume that workers do not take family leave because they cannot afford it, and women take leave more often because the opportunity cost of lost wages for women in most cases will be smaller given that men typically make more than women. Our findings indicate that this approach pays too little attention to the social and cultural barriers to taking family leave that operate in the workplace. It takes the framework of work as given and attempts to shape workers’ decisions by mitigating the cost of lost wages from taking leave through a public benefit structure. It does not require workplaces to provide leave, it does not ensure workers can return to their jobs, nor does it express a moral imperative that caring for families is as important as wage labor, and that workers should be entitled to—and encouraged to—engage in that care.

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<sup>343</sup> As President Obama noted in his call for paid family leave:

All too often, these issues are thought of as women’s issues, which I guess means you can kind of scoot them aside a little bit. At a time when women are nearly half of our workforce, among our most skilled workers, are the primary breadwinners in more families than ever before, anything that makes life harder for women makes life harder for families and makes life harder for children. When women succeed, America succeeds, so there’s no such thing as a women’s issue. There’s no such thing as a women’s issue. This is a family issue and an American issue – these are commonsense issues.

Press Release, President Barack Obama, Remarks by President Obama at the White House Summit on Working Families (June 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/23/remarks-president-obama-white-house-summit-working-families-june-23-2014> [http://perma.cc/UV8Q-HLWY].

The findings from this study vividly show how taking leave may impose not only financial costs, but also moral judgments and workplace penalties long after the leave is over. Short-term wage replacement cannot address these long-term effects. The cultural schemas that shape those judgments prescribe a narrow and gendered prescription for workplace and caregiving behaviors that are not compatible with the reality of modern families. Laws that do not directly address these forms of bias will likely do little to ameliorate the struggles of workers like our respondents, even if they mitigate the financial costs of taking leave. Unless paid family leave legislation takes into consideration these deeper connections, it will replicate the class, race and gender based burdens of caregiving entrenched in workplaces and the economy.

Equitable caregiving across the spectrum of social class requires that family leave be understood as a moral and legal right to provide care and be present for important and meaningful moments for families, rather than as a perk dependent on gender, pay scale, seniority, or economic privilege. In this sense, the legal reforms proposed here take a national stance on the moral worth of caring for families *in relation to* the importance of work. They recognize that the jobs of caregivers are worth protecting and that caregivers are an essential economic support – indeed, for many families headed by single women the only economic support – for their families. These legal reforms also push back against the presumption that all forms of economic risk, from market volatility to unpredictable illness, should be borne by workers alone. Such laws bring about change not only by prohibiting conduct, but also by providing a new narrative about work and family to counter cultural schemas like the ideal worker and the family wage ideal that justify bias against leave-takers. Thus, laws can change not only the costs, but also the meaning, of family leave, and with it the lives of workers caught between the demands of work and family.

