

Fatherhood and Equality: Reconfiguring Masculinities

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I. INTRODUCTION

Work-family policy debate in the United States has focused on work and the workplace, and has presumed its primary beneficiaries are women.¹ Women's increased participation in the workplace brought the conflict between work and family sharply into view, and generated solutions geared toward assisting women.² An underlying assumption has been that men would change at home by taking on a fair share of family work and care, consistent with norms of equality and gender neutrality.³ Consistent with these norms, if equality were

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1. See 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, 82 (2003); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1224 (1989); Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 456-57 (2001); Peggine R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodation*, 2001 WISC. L. REV. 1443 (2001).

2. Deborah Dinner presents this history comprehensively in *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011). Marleen O'Connor traces this trend from a different perspective in her recent work advocating rethinking corporate law and governance to encompass children's needs. See Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1287 (2004); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family*, 112 YALE L.J. 1943, 1951, Sec. III B. (2003).

3. See *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

The impact of the discrimination targeted by the FMLA is significant. Congress determined: "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those

defined as co-equal shared parenting to balance dual wage-earning, equality would generate a revolutionary shift in fatherhood.

Recalibration toward equality, however, has not taken place. Women continue to not only do wage work but also do a “second shift” of household and family work.⁴ Most men are not coequal caregivers; at best, they are secondary caregivers, at worst, uninvolved with their children.⁵ “New census data on family living arrangements suggest that fewer fathers may be participating in their children’s lives than in any period since the United States began keeping reliable statistics.”⁶ The persistence of inequality is linked to

perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id. (quoting The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor–Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong., 2d Sess. 100 (1986)). Congress’s goals were evident in the findings of the FMLA.

Congress believed that the FMLA was a valid exercise of its Section 5 authority. It announced that the purpose of the FMLA was

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for . . . the care of a child, spouse, or parent who has a serious health condition;

. . . .

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Post & Siegel, *supra* note 2, at 1948.

4. ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* 2-10 (1999). More recent data confirms the inequality identified by Hochschild and Machung. According to one study, when both husband and wife worked full-time jobs, the wife did twice as much household work as the husband, and regardless of work status, the wife did five times as much child care. Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES MAG., (June 15, 2008), <http://www.nytimes.com/2008/06/15/magazine/15parenting-t.html>.

5. “[O]n average, mothers spend much longer than fathers in absolute time caring for children, whether that time is calculated as a primary activity, as either a primary or a secondary activity, or as all time in the company of children.” Lyn Craig, *Does Father Care Mean Fathers Share?: A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children*, 20 GENDER & SOC’Y 259, 269-70 (2006). Craig found that mothers spent double or more the time with children compared to fathers; that mothers spent nearly one-third of their time as the sole parent, whereas fathers only did so thirteen percent of the time; and mothers spent four times as much time on communication and travel related to children, as compared to fathers. *Id.* at 271-74. Data from this Australian study are consistent, with some variation, with data from other studies throughout the world. The variations indicate differences in the amount of increases of family work, but the persistence of inequality in the share of household work, averaging two-thirds of the work done by women, one-third of the work done by men, whether married or not. Jennifer L. Hook, *Care in Context: Men’s Unpaid Work in 20 Countries, 1965-2003*, 71 AM. SOC. REV. 639, 639, 645, 649 (2006); see also Ariane Pailhé & Anne Solaz, *Time with Children: Do Fathers and Mothers Replace Each Other When One Parent Is Unemployed?*, 24 EUR. J. POPULATION 211, 222-223 (2006).

6. CATHERINE S. TAMIS-LEMONDA & NATASHA CABRERA, *HANDBOOK OF FATHER INVOLVEMENT:*

the minimal scope of the United States' work-family policy as well as ongoing employment discrimination against women despite their increased presence in the workplace.⁷ Beyond the lack of supportive policy and persistent discrimination, however, is the slow pace of change at home. The dramatic change in the position of women with respect to wage work—albeit still unequal to men—has not been matched by a similar change in men's role and work at home. While the ideal of care has changed, the reality has shifted only slightly.⁸ What is the reason for this asymmetric pattern? The answer, I suggest, lies in the construction of masculinities.⁹ If we want to achieve a different reality of men's care, then we must reconstruct masculinities. In order to have a better father, you must have a better man.

I argue that the primary barriers to increased child care by men—what I call

MULTIDISCIPLINARY PERSPECTIVES 52 (2002).

7. For full-time, year-round workers in 2010, women's median annual earnings were 77.4% of men's annual earnings. Ariane Hegewisch, Claudia Williams & Anlan Zhang, *The Gender Wage Gap: 2011*, INST. FOR WOMEN'S POL'Y RES. (Mar. 2012), <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2011>; see also *Statistical Overview of Women in the Workplace*, CATALYST (June 2012), <http://www.catalyst.org/publication/219/statistical-overview-of-women-in-the-workplace>. Discrimination is particularly harsh for mothers. See generally Shelley Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007). For a recent example of this, in a case involving a claim of class-based sex discrimination, the following comment was made in response to a female employee's news that she was pregnant: “[k]ill it!” and regarding women who took maternity leave, “[g]et rid of these pregnant bitches.” The head of global human resources stated that mothers “belong at home” and “women do not really have a place in the workforce.” Joan Williams, *Bloomberg Case: Open Season to Discriminate Against Mothers?*, HUFFINGTON POST (Aug. 26, 2011, 12:07 PM) http://www.huffingtonpost.com/joan-williams/bloomberg-case-open-seaso_b_934232.html. In her study of the patterns of men's unpaid family work, Jennifer Hook found both a “stalled revolution” and some convergence of men and women's work-family patterns. That is, a significant increase has occurred in men's participation in unpaid family work over the forty years covered by her study. At the same time, in no country has men's share of family work gone past thirty-seven percent. She links this to the pattern of parental leave (taken largely by women) and women's pattern of part-time work. Hook, *supra* note 5, at 654-55; see also EMP'T MKT. ANALYSIS & RESEARCH, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2010, (Peter Moss ed., 2010) [hereinafter EMAR, INTERNATIONAL REVIEW], available at http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2010_annual_review.pdf. This comprehensive review of policies puts the United States at the bottom of available benefit structures. Sheila B. Kamerman & Jane Waldfogel, *United States*, in EMAR, INTERNATIONAL REVIEW, *supra* at 240-43. On the importance of supportive policies, and the lack of U.S. policy, see JANE WALDFOGEL, WHAT CHILDREN NEED (2006).

8. See Hook, *supra* note 5, at 639, 645, 649; see also NANCY E. DOWD, REDEFINING FATHERHOOD (2000) [hereinafter DOWD, REDEFINING FATHERHOOD]; Nancy E. Dowd, *Redefining Fatherhood: From Genes and Dollars to Nurture*, in GENETIC TIES AND THE FAMILY (Mark A. Rothstein et al. eds., 2005) [hereinafter Dowd, *From Genes*]; Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1332-33 (2005) [hereinafter Dowd, *Fathers and the Supreme Court*].

9. NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 13-73, 105-123 (2010) [hereinafter DOWD, THE MAN QUESTION]; see also Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 430 (2010) [hereinafter Dowd, *Asking the Man Question*]; Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 248 (2008) [hereinafter Dowd, *Masculinities*]; cf. MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds., 2012) [hereinafter MASCULINITIES AND THE LAW]. For an in-depth discussion of masculinities scholarship, see *infra* notes 64-103 and accompanying text.

“father care”—that are grounded in masculinities are: (1) the male breadwinner norm, which constructs wage work as excluding care; (2) the requirement that men avoid all things deemed feminine or associated with women, which includes care-giving; and (3) the pervasiveness of hierarchy, which translates into the lack of a norm of collaborative relationships, both between men and women, and among men.¹⁰ In this essay, I explore each of these barriers.

Masculinities analysis suggests that to address these barriers, the need is not only for structural support, but also for cultural change. Both of these components must be inclusive of all fathers. Cultural change that shifts the balance of child care between mothers and fathers is challenging because cultural change requires consensus about men’s role in care that may or may not exist.¹¹ This by no means is an issue unique to the United States. Cross-cultural evidence suggests that fathers’ use of available benefits, entitlements, and policies to engage in care is low.¹² To significantly change fathers’ engagement in care, we must recast masculinity norms. I suggest that we must explore more precisely what affirmative elements must be present to encourage care-giving. On the basis of that analysis, I argue we should embark on a public-health approach to fostering father care. This would mean supporting a change in norms grounded in knowledge of conditions that will facilitate and encourage more care by men, as well as using what we know about risk and protective factors to support such care, and engaging in primary, secondary, and tertiary interventions.¹³

10. See DOWD, THE MAN QUESTION, *supra* note 9, at 57-65 (analyzing core characteristics of masculinities scholarship).

11. “The idealization of the mother-child bond continues.” Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 193 (2000). Research on stay-at-home dads indicates social ambivalence and stigma remain even as their numbers grow. See, e.g., Gabriela Montell, *In Support of Academic Dads*, CHRON. OF HIGHER EDUC. (Feb. 17, 2009, 11:15 AM), <http://chronicle.com/blogs/onhiring/in-support-of-academic-dads/883>; Kay Randall, *Honey, I’m Home: Stay-at-Home Dads’ Psychological Well-being Gauged in New Study*, UNIV. OF TEX. AT AUSTIN (Jan. 7, 2008), <http://www.utexas.edu/features/2008/01/07/fathers/> (research by Dr. Aaron Rochlen). On engaged fathering and the role of culture in supporting fathers, among other things, see generally GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES (Alan Hawkins & David C. Dollahite eds., 1997); DOWD, THE MAN QUESTION, *supra* note 9. Stay-at-home dads are treated like heroes, while stay-at-home moms are dubbed dropouts from the workforce. See generally Beth Berkstrand-Reid, “Trophy Husbands” and “Opt-Out” Moms, 34 SEATTLE U. L. REV. 663 (2011). The strength of the mother-care assumption is evident in the way many statistics are gathered about child welfare and the reality that children’s outcomes are linked to the well being of mothers. See SAVE THE CHILDREN, CHAMPIONS FOR CHILDREN: STATE OF THE WORLD’S MOTHERS 2011, available at http://www.savethechildren.org/atf/cf%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/SOWM2011_FULL_REPORT.PDF. The United States ranks thirty-first of the countries surveyed. *Id.* at 5. This ranking is linked to the high rate of maternal mortality, the high rate of child poverty, and the lack of universal work family policies.

12. Recent fatherhood work concerns the low rate of take-up of father benefits. See Barbara Hobson & David Morgan, *Introduction: Making Men into Fathers*, in MAKING MEN INTO FATHERS: MEN, MASCULINITIES AND THE SOCIAL POLITICS OF FATHERHOOD 1-21 (Barbara Hobson ed., 2002); Hook, *supra* note 5, at 639. See generally EMAR, INTERNATIONAL REVIEW, *supra* note 7.

13. For a comprehensive treatment of fathers and how we might support them, see THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael Lamb ed., 5th ed. 2010). Primary interventions are preventive and

I use vulnerability analysis to explore how this might be accomplished, by changing men's relationship to their own vulnerability as foundational to their caring for others.¹⁴ Vulnerability analysis is grounded in the recognition that all of us are vulnerable; vulnerability is an attribute of the human condition.¹⁵ The resources that we bring to confront our vulnerability include physical, human, and social assets; the strength of those assets is powerfully affected by state policies, laws, and institutions that affect asset building, and therefore individual resilience in the face of vulnerability.¹⁶ The patterns of state action are therefore critical to social justice and equality. The state may foster or inhibit, or distribute equally or unequally, asset-building resources. Vulnerability analysis uncovers the patterns of state support, or lack of support, and questions whether state support, and the support of some but not others, can be justified.¹⁷

Children are vulnerable because they need care. Those who provide care are vulnerable because their care may diminish their economic self-sufficiency and the ability to support their children. Dependency thus creates vulnerability both directly and derivatively.¹⁸ The existing asymmetric pattern of care between women and men makes the vulnerability of caregivers highly gendered.¹⁹ I suggest in this essay an additional aspect of vulnerability that is implicated in the asymmetry of care. Vulnerability is a positive characteristic of human development that is essential to care-giving.²⁰ I argue that it is particularly important to foster this vulnerability in men in order to surmount the cultural barriers to father care rooted in masculinities. This requires building human and social assets for men. My focus in this article is on that process, as a critical component of work-family policy in addition to efforts to challenge and reshape state responses to provide better balance between work and family for all those who provide care.

universal; secondary interventions focus more narrowly on at-risk individuals; and tertiary interventions focus on situations of negative outcomes and seek to prevent future harm or worsening of the circumstances.

14. See generally Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) [hereinafter Fineman, *Responsive State*]. For an overview of vulnerability work, see *Resources: Vulnerability and the Human Condition*, EMORY UNIV., <http://web.gs.emory.edu/vulnerability/resources/index.html> (last visited Sept. 14, 2012).

15. See Fineman, *Anchoring Equality*, *supra* note 14, at 1.

16. *Id.* at 13-14.

17. *Id.* at 15.

18. Martha Fineman has developed this dependency analysis, and the existence of both direct and derivative dependency. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005); MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* (1995).

19. Fionnuala Ni Aoláin, *Women, Vulnerability, and Humanitarian Emergencies*, 18 MICH. J. GENDER & L. 1, 4 (2011).

20. See *infra* notes 173-183 and accompanying text for discussion of vulnerability.

The article unfolds as follows. First, I explore the patterns and trends of fatherhood, men, and care. Second, I use masculinities scholarship to discuss three barriers to father care: the breadwinner norm, the avoidance of doing things associated with girls and women, and the centrality of hierarchy (men over women, and men in relation to other men). Third, I evaluate the United States' current policy in light of masculinities analysis. Finally, I suggest a direction for future policy, focusing on the need for policies that promote cultural change. In particular, I suggest the need to develop foundational capability for care by supporting boys and men in developing their own healthy vulnerability. This reconfigured masculinity is essential to expanding the number of men who are significantly engaged in the care of children.

II. PATTERNS AND TRENDS: MEN AND CARE

Fatherhood trends expose the connection between fathers, work, and care. The overall pattern is modification, but persistence, of the traditional configuration of breadwinner fathers who engage in significantly less care of children than do mothers.²¹ Modification is linked to an emerging ideal of a "new father" who is significantly more engaged in care, ideally coequal with the mother.²² Men have increased their time doing unpaid family work, as well as the amount of time that they take from work for personal or family reasons.²³ In addition, there are higher numbers of stay-at-home fathers and fathers who are primary parents.²⁴ These increases, while important, nevertheless remain a minority trend.²⁵ For example, fathers constitute slightly less than twenty

21. See DOWD, REDEFINING FATHERHOOD, *supra* note 8, at 21-33.

22. DOWD, THE MAN QUESTION, *supra* note 9, at 105; see also Richard S. Collier, *The Fathers' Rights Movement, Law Reform, and the New Politics of Fatherhood: Some Reflections on the UK Experience*, 20 U. FLA. J.L. & PUB. POL'Y 65, 110 (2009). There is no debate about the correlation of father involvement and positive outcomes for children. For reviews of the literature, see SARAH ALLEN & KERRY DALY, THE EFFECTS OF FATHER INVOLVEMENT: AN UPDATED RESEARCH SUMMARY OF THE EVIDENCE (2007), available at http://www.fira.ca/cms/documents/29/Effects_of_Father_Involvement.pdf; *Outcomes of Father Involvement*, FATHERHOOD INSTITUTE (Apr. 18, 2005), <http://www.fatherhoodinstitute.org/2005/outcomes-of-father-involvement/>; Robby D. Harris, *A Meta-Analysis on Father Involvement and Early Childhood Social-Emotional Development*, N.Y. UNIV., http://steinhardt.nyu.edu/opus/issues/2010/spring/father_childhood_development (last visited Sept. 14, 2012).

23. SLOAN WORK & FAMILY RESEARCH NETWORK, QUESTIONS AND ANSWERS ABOUT FATHERS, CAREGIVING, AND WORK, https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/FactSheet_Fathers.pdf (last visited Sept. 14, 2012) [hereinafter Q. & A. ABOUT FATHERS].

24. See Berkstrand-Reid, *supra* note 11, at 664. One in five fathers provides primary care for his child under age five. SLOAN WORK AND FAMILY RESEARCH NETWORK, QUESTIONS AND ANSWERS ABOUT CHILD CARE, <https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/childcare.pdf> (last visited Sept. 14 2012) [hereinafter Q. & A. ABOUT CHILDCARE].

25. Despite the increases, this remains a small proportion of all care. Stay-at-home fathers are 2.7% of stay-at-home parents; triple the number ten years prior. Katherine Shaver, *Stay-at-Home Dads Forge New Identities, Roles*, WASH. POST, June 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061601289.html>. Fathers that provide primary care have been little studied and might increase these figures, but there is not accurate data. See Berkstrand-Reid, *supra* note 11, at 666-68.

percent of the caregivers for preschool children, a smaller percentage than grandparents.²⁶ What continues as the dominant caretaking pattern is mothers performing a significant disproportion of care work.²⁷ So while some fathers reflect the coequal caregiver ideal of the “new father,” or are moving in that direction, most do not. Most commonly, they are secondary caregivers, although their degree of engagement can vary considerably.²⁸

The gendered nature of care and household work is apparent from virtually all data.²⁹ It begins with marriage or cohabitation, even without children. “Upon marriage or cohabitation, the average woman increases her household work by 4.2 hours, while the average man decreases his household work by 3.6 hours.”³⁰ Although men do more than their fathers with respect to child care and housework, women still do a disproportionate share.³¹ Not only do women do more, but they also take care of a broad range of responsibilities, as well as physical tasks.³² As Naomi Cahn has pointed out, the gendered division of family work is supported by practices rooted in history, socialization, and individual self image; additionally, it preserves a domain of power for women.³³ The pattern of family work is the opposite of the pattern of wage work. A 2008 Bureau of Labor Statistics report found that of a sample of married parents with children under eighteen, almost twice as many fathers as mothers worked full-time, and fathers on average worked an hour longer per day than did mothers.³⁴ Child care was nearly the reverse: seventy-one percent of mothers provided care on a daily basis as compared to fifty-four percent of fathers, but mothers provided nearly three times the care of fathers, measured by time.³⁵ Men spend less time in sole charge of children, of the time that they do provide care.³⁶ Even when both parents are employed full time, mothers do

With respect to the division of household work, men’s share has been increasing, but is not equal. Hook, *supra* note 5, at 639.

26. Q. & A. ABOUT CHILD CARE, *supra* note 24, at 3.

27. Cahn, *supra* note 11, at 181-84.

28. DOWD, REDEFINING FATHERHOOD, *supra* note 8; DOWD, THE MAN QUESTION, *supra* note 9, at 106-07.

29. Hook, *supra* note 5; Cahn, *supra* note 11, at 181-85. See generally SCOTT COLTRANE, FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY (1996); Julie E. Press & Eleanor Townsley, *Wives’ and Husbands’ Housework Reporting: Gender, Class, and Social Desirability*, 12 GENDER & SOC’Y 188 (1998); Sarah Thébaud, *Masculinity, Bargaining and Breadwinning: Understanding Men’s Housework in the Cultural Context of Paid Work*, 24 GENDER & SOC’Y 330 (2010); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

30. Cahn, *supra* note 11, at 181-82.

31. *Id.* at 182.

32. *Id.*

33. *Id.* at 189-99.

34. Bureau of Labor Statistics, *Married Parents’ Use of Time Summary*, U.S. DEP’T OF LABOR, May 8, 2008, available at <http://www.bls.gov/news.release/atus2.nr0.htm> [hereinafter *Use of Time Summary*].

35. *Id.*

36. Q. & A. ABOUT FATHERS, *supra* note 23, at 1.

twice the amount of housework.³⁷

The impact of children on the differentiation of family work is significant. Andrea Doucet calls the birth or adoption of children an event of “gender magnification,” an event that can set or reinforce gender differentiation and asymmetrical parenting as the norm.³⁸ Doucet focuses on the importance of the first year of a child’s life to parenting patterns. Using the concept of embodiment, Doucet examines the experience of fathers as compared to mothers during the first year of the child’s life, using her empirical work with fathers. She notes how differently mothers and fathers see themselves, are seen by society, and act or “perform” as parents with respect to six dimensions: (1) connection to pregnancy and birth; (2) the relationship between mothers and infants; (3) play; (4) community networks; (5) “habitus” (the taken-for-granted way of behaving); and (6) the relationship between fathers and infants.³⁹ In each of these domains, there is a strong sense of difference, that men and women are not interchangeable: “[F]athers and mothers are embodied subjects who move through domestic and community spaces with intersubjective, relational, ‘moral,’ and normative dimensions framing those movements.”⁴⁰ The result is that many fathers believe in the primacy of the mother-child bond and have a more difficult time establishing their relationship with the child, especially as an infant, in comparison to taking greater comfort in being a support to the mother or to an older child.⁴¹ Doucet argues it is essential to recognize these differences in a model of equal parenting; that is, if there is to be equality, it will be grounded in difference. She also concludes that it is critical to involve fathers from the outset in significant care of children.⁴²

In addition to their gendered, asymmetric pattern of care when they engage in care, men’s parenting generally is serial instead of linear. Many fathers disconnect with their children when they do not cohabit with their children. They parent the children with whom they live, rather than continuously parenting their children over the life course.⁴³ Because of the importance of

37. *Use of Time Summary*, *supra* note 34. The distribution of housework, as one researcher points out, does not fit a model of economic bargaining, but instead seems to reflect the embeddedness of gender norms, and for men, the strong deterrent to gender nonconformativity or deviance. Thébaud, *supra* note 29, at 349-50.

38. Andrea Doucet, *Dad and Baby in the First Year: Gendered Responsibilities and Embodiment*, 624 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 93 (2009) [hereinafter Doucet, *Dad and Baby*]; see also ANDREA DOUCET, DO MEN MOTHER?: FATHERING, CARE, AND DOMESTIC RESPONSIBILITY (2006) [hereinafter DOUCET, DO MEN MOTHER?].

39. Doucet, *Dad and Baby*, *supra* note 38, at 84-91.

40. *Id.* at 91.

41. *See id.*

42. *See id.* at 92-93.

43. DOWD, REDEFINING FATHERHOOD, *supra* note 8, at 82. One in three American children lives in a home without his or her biological father. *The Father Factor: Data on the Consequences of Father Absence*, NAT’L FATHERHOOD INITIATIVE, <http://www.fatherhood.org/media/consequences-of-father-absence-statistics> (last visited Sept. 14, 2012). Michael Lamb notes that even though fathers’ time has increased compared to mothers’ time (from 20-25% of mothers’ time in 1987 to 43% by the 1990s), at the same time, more than half

cohabitation—and of men’s relationship to the mother—to men’s parenting, family trends are a critical factor in the father care pattern. Those trends include more cohabitation, less marriage, high rates of divorce, more nonmarital childbearing, and the predominance of mother care when mothers and fathers do not cohabit.⁴⁴

While unmarried fathers’ connection with their children generally declines dramatically when they stop living with the mother,⁴⁵ recent research indicates a more nuanced picture in at least two respects.⁴⁶ First, the pattern may be one

of all children spend some time in a fatherless household. Michael E. Lamb, *The History of Research on Father Involvement: An Overview*, in FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES 23, 32-34 (H. Elizabeth Peters et al. eds., 2000). The most important factors for involvement are co-residence and the quality of relationship. Marcia J. Carlson & Sara S. McLanahan, *Early Father Involvement in Fragile Families*, in CONCEPTUALIZING AND MEASURING FATHER INVOLVEMENT 210, 232 (Randal D. Day & Michael E. Lamb eds., 2004).

44. One-quarter to one-third of families globally are headed by single mothers; the United States has the highest percentage of single-parent families (thirty-four percent in 1998), a dramatic increase beginning in the 1960s. The largest group of single mothers is divorced or separated, followed by never-married mothers. The United States also has a high divorce rate, although it has declined from its peak in the mid-1980s. *Single-Parent Families—Demographic Trends*, MARRIAGE & FAMILY ENCYCLOPEDIA, <http://family.jrank.org/pages/1574/Single-Parent-Families-Demographic-Trends.html> (last visited Sept. 14, 2012). This predominance of mother-headed, single-parent families has an impact on the pattern of disproportionate mother care of children. A recent report by the University of Virginia National Marriage Project argues cohabitation is bad for children, as compared to marriage. Cohabiting families have increased twelve times since the 1970s. By the age of twelve, forty-two percent of kids have lived in a cohabiting household. Katherine Bindley, *National Marriage Project: ‘Why Marriage Matters’ Study Says Cohabiting Parents Do Kids Harm*, HUFFINGTON POST (Aug. 20, 2011, 2:04 AM), http://www.huffingtonpost.com/2011/08/20/national-marriage-project_n_931974.html. A dialogue among experts about the report argues whether structure alone explains the data. *Should Parents Marry for the Kids?*, N.Y. TIMES, Aug. 30, 2011, <http://www.nytimes.com/roomfordebate/2011/08/30/shotgun-weddings-vs-cohabitating-parents>. Nonmarital births have continued a steep increase, especially among women in their twenties or older. In 2007, nearly four in ten births were to unmarried women; in 2009, that number remained the same. Of those births, less than one-quarter were to teenage women, while forty percent were births to cohabiting couples. Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NAT’L CTR. FOR HEALTH STATISTICS, 6 (2009), <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>; see also *Births to Unmarried Women: Indicators on Children and Youth*, CHILD TRENDS DATA BANK, (2012), http://www.childtrendsdatabank.org/sites/default/files/75_Births_to_Unmarried_Women.pdf [hereinafter *Births to Unmarried Women*]. Nonmarital births are more common to lower-income women, but increasingly more nonmarital births are to cohabiting parents, with some estimates as high as fifty percent. *Births to Unmarried Women*, *supra*. The percentage of adults who are married continues to decline, and stood at 54.1% in 2010. Press Release, *U.S. Census Bureau Reports Men and Women Wait Longer to Marry*, U.S. CENSUS BUREAU, Nov. 10, 2010, available at http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html. Men and women also are continuing to delay marriage to later in their twenties. *Id.* For a nuanced look at family trends, see NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010).

45. Carol Bruce & Greer Litton Fox, *Accounting for Patterns of Father Involvement: Age of Child, Father-Child Coresidence, and Father Role Salience*, 69 SOC. INQUIRY 458, 460-61, 470-71 (1999); Laura Tach, Ronald Mincy & Kathryn Edin, *Parenting as a “Package Deal”: Relationships, Fertility, and Non-Resident Father Involvement Among Unmarried Parents*, 47 DEMOGRAPHY 181, 197-202 (2010) (adding nuances to drop-off pattern).

46. See, e.g., Kathryn Edin, Laura Tach & Ronald Mincy, *Claiming Fatherhood: Race and the Dynamics of Paternal Involvement Among Unmarried Men*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 149,

of both disengagement and reengagement, as the father or the mother begins another relationship. The father may be disengaging with children in one household while establishing and strengthening his engagement in another. The mother may also engage in a new relationship, and discourage the father while encouraging her new partner. Second, the pattern of continued connection is higher for African-American fathers than for fathers of other races. They remain engaged by negotiating with the mother of their children even when they do not co-reside.⁴⁷ For low-income fathers who do co-reside with their children, higher involvement is linked to higher motivation and sometimes also to the father's own unemployment that forces him into a greater caretaking role.⁴⁸

Marriage is a factor that generally positively affects the amount of time fathers engage in care. For example, married fathers of preschoolers were more likely to engage in caring for their children as compared to unmarried fathers.⁴⁹ Conversely, divorced fathers exhibit a pattern of disconnection similar to unmarried fathers who stop cohabiting with the mothers of their children. A substantial majority of divorced fathers sustain only minimal contact with their children.⁵⁰ Two years after divorce, many children see their fathers very infrequently.⁵¹

Cumulatively, the patterns of fatherhood suggest that co-equal caring is the exception, not the rule. Increases in equality may have come as much, ironically, from women's *reduction* in family time as from men's increase in their contribution. When women work longer hours, they reduce the hours spent on household work and care.⁵² Greater equality is the result of reducing women's contribution, not increasing men's contribution. In addition, to the extent economic factors drive patterns of care, the persistence of income

171 (2009); Maureen R. Waller, *Family Man in the Other America: New Opportunities, Motivations, and Supports for Parental Caregiving*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 156, 167-69 (2009) [hereinafter Waller, *Family Man*]; Maureen R. Waller, *Viewing Low-Income Fathers' Ties to Families Through a Cultural Lens: Insights for Research and Policy*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 120 (2010) [Waller, *Viewing Low-Income Fathers*]. See generally Heather Juby et al., *Nonresident Fathers and Children: Parents' New Unions and Frequency of Contact*, 28 J. FAM. ISSUES 1220 (2007).

47. See generally Edin, Tach, & Mincy, *supra* note 46.

48. See generally Waller, *Family Man*, *supra* note 46; Waller, *Viewing Low-Income Fathers*, *supra* note 46. This also is linked to issues of criminal justice involvement, disproportionate by race. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

49. Q. & A. ABOUT CHILD CARE, *supra* note 24.

50. DOWD, *REDEFINING FATHERHOOD*, *supra* note 8, at 59-65; see also Cynthia R. Mabry, *Disappearing Acts: Encouraging Fathers to Reappear for their Children*, 7 J.L. & FAM. STUD. 111, 114-115 (2005); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 924-25 (2005). For a comparison of unmarried and divorced fathers, see Glendessa M. Insabella et al., *Individual and Coparenting Differences Between Divorcing and Unmarried Fathers*, 41 FAM. CT. REV. 290 (2003).

51. DOWD, *REDEFINING FATHERHOOD*, *supra* note 8, at 60.

52. Lamb, *supra* note 43, at 32.

inequality may undermine men's care.⁵³ If men can earn more than women, then they may spend more time working, and have less time for care. And if higher wages are equated with less responsibility for doing care, then even if men's hours are not disproportionate, their higher wages will translate into less care.⁵⁴

Indeed, most fathers engage in work differently than mothers, generally earning more, working longer hours (including more overtime), and less frequently working part-time or taking time away from work in order to engage in child care.⁵⁵ Fathers are more likely to care for children when they are unemployed.⁵⁶

The work-family patterns of fathers seem to indicate that economic breadwinning contributes to men's patterns, along with men's superior opportunities and pay for engaging in wage work. But more precisely, *how* breadwinning is constructed *for men* may be the issue.⁵⁷ Breadwinning for men

53. In 2009, median income of full-time, year-round workers was \$36,278 for women and \$47,127 for men, for a ratio of 0.77. MAJORITY STAFF OF JOINT ECON. COMM., 111TH CONG., INVEST IN WOMEN, INVEST IN AMERICA: A COMPREHENSIVE REVIEW OF WOMEN IN THE U.S. ECONOMY 9 (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c. While men as a group continue to earn more than women as a group, shifts and trends suggest that this is changing. The most recent data would indicate that, in general, the wage gap is reduced, particularly for younger workers, and workers without children. That is, young men and women are closer to wage equality. Parenthood differentially affects women and men; motherhood triggers a significant wage penalty for women, but fatherhood does not trigger a similar wage penalty for men. Overall employment data, however, also indicate that men have higher unemployment than women, and have suffered greater job loss in the recession, because job cuts have been greatest in male dominated jobs. Katharine B. Silbaugh, *Deliverable Male*, 34 SEATTLE U. L. REV. 733, 736-37 (2011). Overall wages for male-dominated jobs continue to be higher than overall wages for female-dominated jobs. *Id.*

54. Lynne M. Casper & Martin O'Connell, *Work, Income, the Economy, and Married Fathers as Child-Care Providers*, 35 DEMOGRAPHY 243, 244, 248 (1998).

55. For men's work patterns, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-35, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 14-17 (2003).

56. See Q. & A. ABOUT CHILD CARE, *supra* note 24; see also LYNNE M. CASPER, U.S. CENSUS BUREAU, MY DADDY TAKES CARE OF ME!: FATHERS AS CARE PROVIDERS 3 (1997), <http://www.census.gov/prod/3/97pubs/p70-59.pdf>; Noelle Chesley, *Stay-at-Home Fathers and Breadwinning Mothers: Gender, Couple Dynamics, and Social Change*, 25 GENDER & SOC'Y 642, 645 (2011).

57. The origin of the word is an interesting piece of this construction. The word is of British origin, and first came into use between 1810 and 1820 in the United Kingdom. It combined *bread*, literally meaning food to eat, with *win*, in the sense of obtaining food. It was used also to mean the "skill or art by which one makes a living." *Breadwinner Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/breadwinner> (last visited Sept. 14, 2012). It is notable also that "bread" as slang for money is not used until the 1940s. "In Old English bread was not the standard term for the familiar food. That was loaf, which has since become restricted to a lump of bread. Bread was such an important part of the diet in the past that it came to stand for food in general. That is why the old translation of the Lord's Prayer says 'give us this day our *daily bread*'. It also lies behind the word *breadwinner* for the person whose income feeds the family . . ." Julia Cresswell, *Bread Definition*, OXFORD DICTIONARY OF WORD ORIGINS, in OXFORD REFERENCE ONLINE, <http://www.oxfordreference.com/view/10.1093/acref/9780199547920.001.0001/acref-9780199547920-e-685?rskey=MXA1rI&result=677&q=> (last visited Sept. 14, 2012). For examples on the use of the word, see *Bread Definition*, OXFORD ENG. DICTIONARY, <http://oed.com/view/Entry/22888> (last visited Sept. 14, 2012).

traditionally has been defined *as care* for one's family: care is bringing in resources.⁵⁸ In this role, care defined as hands-on parenting as well as intellectual and social engagement in the life of children, is not included. Breadwinning as practiced by men may excuse men from care or prevent men from engaging in care. Indeed, engaging in the nurture of children might even be viewed as gender betrayal and be deemed unmanly.⁵⁹ Men who stay home to care for a sick child are often asked why their wife is not the one to stay home.⁶⁰ Breadwinning, so defined, makes wage work essential, definitive, and primary. Ironically, being the breadwinner privileges, but it also subordinates.

This definition of male breadwinning is constructed. An alternative definition is present in the conduct of women, as well as the expectations and stereotypes of female breadwinning. Plenty of women are breadwinners and perform care in conjunction with breadwinning.⁶¹ The labor and household work statistics make this clear.⁶² At the same time, the expectation that women will do care often underlies discrimination against women in wage work.⁶³

58. Jessie Bernard, *The Good Provider Role: Its Rise and Fall*, 36 AM. PSYCHOLOGIST 1, 4 (1981).

59. See generally JEREMY ADAM SMITH, *THE DADDY SHIFT: HOW STAY-AT-HOME DADS, BREADWINNING MOMS, AND SHARED PARENTING ARE TRANSFORMING THE AMERICAN FAMILY* (2009) (interviews with stay-at-home dads include discomfort and lack of social acceptance in role of caretaker).

60. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 32-33 (2005); see also Linda Haas & Phillip Hwang, *Company Culture and Men's Usage of Family Leave Benefits in Sweden*, 44 FAM. REL. 28, 29 (1995) (citing earlier research in Sweden on workplace culture and low use of leave).

61. See Silbaugh, *supra* note 53, at 736-40. Silbaugh points to this successful, even if imperfect, pattern of women combining work and family, and the closing of the wage gap among younger women and men who do not have children. She attributes the closing of the wage gap to women's overachievements in education and skills development, and their success in a different pattern of work and family to the decline in male dominated sectors of the economy. All data indicate that women continue to do care work even when they do wage work. In 2007, 26% of wives in dual-income households earned more than their husbands, (up from 17.8% 20 years ago). Alison Linn, *Rising Number of Women Earn More than Mates*, NBCNEWS.COM (Nov. 11, 2009, 1:29 PM), www.msnbc.com/Id/33196583/nd/business-careers/t/rising-numbers-of-women-earn-more-than-mate. In 2002, seventy percent of women in dual-earner couples took on more of the child care responsibility. *The Way Women Work*, NEW AMERICA FOUNDATION, March 4, 2004, http://newamerica.net/publications/policy/the_way_women_work. Even when both partners work full time, mothers still do more care than fathers. *Mothers Matter and Caregivers Count*, NAT'L ORG. FOR WOMEN, <http://www.now.org/issues/mothers/background.html> (last visited Sept. 14, 2012). While it is more common now for a higher proportion of women to make more than their partners do, the pattern of a stay-at-home father and a breadwinner mother is rare. Chesley, *supra* note 56, at 644-45.

62. See *supra* notes 21-56 and accompanying text.

63. See Williams & Segal, *supra* note 1, at 77-78. Joan Williams has developed the concept of the "maternal wall": that discrimination is strongest when directed toward working mothers. *Id.* "Motherhood is one of the key triggers for gender stereotyping." Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/LIT 333, 354 (2007); see also Susan E. Huhta et al., *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL'Y J. 303, 306 (2003). See generally JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*]; Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287 (2003).

Thus, breadwinning is affirmatively defined by, and negatively defined for, women. But linking women's practice and discriminatory stereotypes is the combination of wage work with care. It is possible to find within the lived example of women's wage work and care, an essential balance of work and family that redefines the very concept of breadwinner. The difference in the construct of breadwinning for women and men suggests that its meaning for masculinity is critical.

In the next section, I explore more fully the argument that beyond the definition of breadwinner, the very construction of what it means to be a man contributes significantly to the persistence of a disappointing level of father care. In the section that follows, I consider how barriers rooted in the construction of masculinities are reinforced by the incorporation of masculinities in structural discrimination and cultural expectations.

III. MASCULINITIES NORMS: BEING A MAN AND (NOT) DOING CARE

Masculinities are a complex interaction of qualities, norms, and characteristics that define not only the dominant norm for men—hegemonic masculinity—but also shape alternative masculinities, even resilient-revolutionary masculinities.⁶⁴ Distilled from the work of masculinities

64. Masculinities scholarship originated outside of legal scholarship, most notably in sociology and psychology, as an outgrowth of feminist and queer theory. See generally R.W. CONNELL, GENDER (2002); R.W. CONNELL, MASCULINITIES (2d ed. 2005) [hereinafter CONNELL, MASCULINITIES]; MICHAEL S. KIMMEL & MICHAEL A. MESSNER, MEN'S LIVES (9th ed. 2012); MICHAEL S. KIMMEL, THE GENDERED SOCIETY (4th ed. 2009); MASCULINITY STUDIES AND FEMINIST THEORY (Judith Kegan Gardiner ed., 2002); THE MASCULINITY STUDIES READER (Rachel Adams & David Savran eds., 2002); JOSEPH H. PLECK, THE MYTH OF MASCULINITY (1983); THEORIZING MASCULINITIES (Harry Brod & Michael Kaufman eds., 1994); Michael Bach, *Uncovering the Institutionalized Masculine*, in MEN AND MASCULINITIES 37 (Tony Haddad ed., 1993); R.W. CONNELL ET AL., Introduction to HANDBOOK OF STUDIES ON MEN & MASCULINITIES 1 (Michael S. Kimmel et al. eds., 2005); R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829 (2005); Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 FEMINIST THEORY 49 (2004); Jeff Hearn & David H.J. Morgan, *Men, Masculinities and Social Theory*, in MEN, MASCULINITIES AND SOCIAL THEORY 1 (Jeff Hearn & David H.J. Morgan eds., 1990); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in TOWARD A NEW PSYCHOLOGY OF GENDER: A READER 223 (Mary M. Gergen & Sara N. Davis eds., 1997) [hereinafter Kimmel, *Homophobia*]; Stephen M. Whitehead & Frank J. Barrett, *The Sociology of Masculinity*, in THE MASCULINITIES READER 1 (Stephen M. Whitehead & Frank J. Barrett eds., 2001). Angela P. Harris integrated masculinities into her intersectional analysis in a landmark article. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 781-88 (2000). Other legal scholars at the forefront of the application of masculinities scholarship to law include Ann McGinley and Frank Rudy Cooper, who are the editors of a reader on masculinities. See MASCULINITIES AND THE LAW, *supra* note 9; see also Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257 (2007); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004). See generally Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431 (2010); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); Gail Dines, *The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J.L. & FEMINISM 283 (2006); Anna Gavanas, *Domesticating Masculinity and Masculinizing*

scholars, there are a number of critical characteristics of masculinity, which I have described in my prior work.⁶⁵ Most significant for fathers and work-family policy are three core characteristics of manhood: the breadwinner norm; the negative definition of manhood which requires neither being nor doing things defined as feminine or associated with women; and the hierarchical imperative of masculinity to subordinate women as well as to dominate other men.⁶⁶ These three characteristics create a cultural matrix that has an enormous impact on men in their role as fathers. These characteristics are reinforced and sustained by the United States' existing work-family policy.

Masculinities scholarship exposes how the shape of manhood includes both privilege and subordination, so that frequently, privilege comes with a price.⁶⁷ Nowhere is this more evident than with respect to the breadwinner norm. The breadwinner norm defines men's identity, and their success or failure, by their wage work. This refers to the ability to support a family, to be a "family man," as well as to excel in work that is valued as men's work. A "family man" historically is one who has a partner and children, and can provide for his family without assistance; he is the singular or primary economic support for the family.⁶⁸ Unlike prior historical periods where a man's position was

Domesticity in Contemporary U.S. Fatherhood Politics, 11 SOC. POL. 247 (2004); Olga Giller, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659 (2004); Raymond Gunn, *Inner-City "Schoolboy" Life*, 595 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2004); Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002); Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661 (2004); Michael Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181 (1997); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127 (2002); Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003); Corey Rayburn, *Why Are You Taking Gender and the Law?: Deconstructing the Norms that Keep Men out of the Law School's "Pink Ghetto"*, 14 HASTINGS WOMEN'S L.J. 71 (2003); Sherene Razack, *"Outwhiting the White Guys": Men of Colour and Peacekeeping Violence*, 71 UMKC L. REV. 331 (2002); Rachel L. Toker, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577 (1999); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68 (2002); Stephen H. Webb, *Defending All-Male Education: A New Cultural Moment for a Renewed Debate*, 29 FORDHAM URB. L.J. 601 (2001); Fadi Hanna, Comment, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005).

65. See generally DOWD, THE MAN QUESTION, *supra* note 9; Dowd, *Asking the Man Question*, *supra* note 9; Dowd, *Masculinities*, *supra* note 9.

66. For a discussion of the core insights of masculinities scholarship, see DOWD, THE MAN QUESTION, *supra* note 9, at 57-65.

67. *Id.* at 58.

68. One researcher calls this "the full package": marriage, fatherhood, and work, with work being sufficient to support the family on the man's income alone. See NICHOLAS W. TOWNSEND, THE PACKAGE

dictated by birth, the family man gains his status from being a breadwinner, a status conferred by work and therefore inherently unstable.⁶⁹ The privilege conferred by the breadwinner norm is reflected in the construction of the workplace to support that norm, in a way that elevates men's work over women's work by defining particular work as male and more highly compensated, and by defining expectations in a way that requires a primary devotion to work over family.⁷⁰ This serves the capitalist system by providing a reliable workforce committed to work first, supported by the unwaged family work of spouses who also care for any children.⁷¹ The primacy of the work orientation, however, subordinates men while privileging them: men must subordinate their families and their relationship with their families as the price for breadwinner privilege. Their family contribution is money, not nurture. "Breadwinner" is defined in a way that excludes care as a part of their lives and thus requires no accommodation in the workplace. For fathers, care is more typically constructed as voluntary and optional, rather than integral to being a man.⁷² Men therefore may choose not to engage in an equal amount of

DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN'S LIVES 30-31 (2002). The erosion of men's wages has required many wives to work to maintain or increase family income, forcing some modification of the family man definition. "Family wage" is a term still used to dignify a wage capable of singularly supporting a family, and still seems to have a gender specific connotation, that is, a wage sufficient for a *man* to support the family. See, e.g., Stephanie Coontz, *Cohabitation Doesn't Cause Bad Parenting*, N.Y. TIMES, July 13, 2012, <http://www.nytimes.com/roomfordebate/2011/08/30/shotgun-weddings-vs-cohabitating-parents/cohabitation-doesnt-cause-bad-parenting>.

But of course we should be concerned about the number of children whose parents cycle in and out of relationships. Several things might help lower that number: available, affordable contraception and education to help young people delay childbirth until they have a reliable partner and/or the educational, emotional and social resources to raise a child; a revival of family-wage jobs for less-educated individuals, to increase the pool of marriageable men and decrease the number of women who feel compelled financially to stay with an unreliable man; and relationship counseling both before and after young people enter cohabiting relationships.

Id.

69. WILLIAMS, UNBENDING GENDER, *supra* note 63, at 25.

70. *Id.* at 65; JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 77-108 (2010) [hereinafter WILLIAMS, RESHAPING].

71. I am indebted to Ann McGinley for suggesting the link between capitalism and masculinities. She is the foremost scholar on masculinities as expressed at work. See ANN C. MCGINLEY, MASCULINITIES AND THE LAW AT WORK: INTERPRETING EMPLOYMENT DISCRIMINATION LAW (forthcoming 2013). The essential support of workers with a flow of family work has been developed by Joan Williams. WILLIAMS, UNBENDING GENDER, *supra* note 633, at 31.

72. DOWD, THE MAN QUESTION, *supra* note 9, at 106-10. This is consistent with the breadwinner emphasis on the economic role of husbands and fathers:

The good-provider role, as it came to be shaped . . . was thus restricted in what it was called upon to provide. Emotional expressivity was not included in the role. One of the things a parent might say about a man to persuade a daughter to marry him, or a daughter might say to explain to her parents why she wanted to, was not that he was a gentle, loving, or tender man but that he was a good provider. He might have many other qualities, good or bad, but if a man was a good provider,

housework and child care because they can; their identity as men permits it.⁷³ At the same time, those men who would choose to care more, to engage more with their families, may worry about the perception that they are not serious or devoted to work, or that their interest in care makes them less manly (and by definition, less of an ideal worker).⁷⁴

There is no doubt that the breadwinner norm powerfully infuses the structure and culture of the workplace.⁷⁵ It just as strongly affects how men function at home, as partners and fathers. Particularly as fathers, it both releases them from doing care, and creates boundaries for doing care. Nowhere is this more clear than in the literature on stay-at-home fathers, who articulate the challenge of not doing wage work at all or the need to do some wage work, lest they lose their identity.⁷⁶ The breadwinner norm of masculinity, in sum, defines

everything else was either gravy or the price one had to pay for a good provider. . . .

. . . Loving attention and emotional involvement in the family were not part of a woman's implicit bargain with the good provider.

. . . .

. . . . To be a man one had to be not only a provider but a *good* provider. Success in the good-provider role came in time to define masculinity itself. The good provider had to achieve, to win, to succeed, to dominate. He was a *breadwinner*. . . . The good provider became a player in the male competitive macho game. What one man provided for his family in the way of luxury and display had to be equaled or topped by what another could provide. . . .

The psychic costs could be high.

Bernard, *supra* note 58, at 3-4. Even in more egalitarian times, research shows greater marital satisfaction when a man is a superior provider. See W. Bradford Wilcox & Steven L. Nock, *What's Love Got to Do with It?: Equality, Equity, Commitment and Women's Marital Quality*, 84 SOC. FORCES 1321, 1322 (2006).

73. See generally Scott Coltrane, *Elite Careers and Family Commitment: It's (Still) About Gender*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 214 (2004); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208 (2000).

74. DOUCET, *DO MEN MOTHER?*, *supra* note 38, at 122; see also Randall, *supra* note 11.

75. MCGINLEY, *supra* note 71; WILLIAMS, *RESHAPING*, *supra* note 70.

76. See Andrea Doucet, *"It's Almost Like I Have a Job, But I Don't Get Paid": Fathers at Home Reconfiguring Work, Care, and Masculinity*, 2 FATHERING 277, 278 (2004). "As a man you have no status at all if you don't work." *Id.* Men, nevertheless, benefit from being home with their children, and many shift in their perception of fatherhood and their interaction with their partners. Chesley, *supra* note 56, at 661-63. By contrast, when women leave wage work, this is constructed as a positive choice that is strongly reinforced:

The idea that women are autonomous, unsituated actors fully responsible for their secondary position in the workforce has also received a great deal of recent attention in the media. Lisa Belkin reported in the *New York Times Magazine* in 2003 that highly educated women are part of an "Opt-Out Revolution": "Why don't women run the world? . . . [B]ecause they don't want to." According to the article, women's relative absence in senior positions in corporations and law firms is explained by their preferences for motherhood and homemaking. Similarly, in late 2005, a front-page *New York Times* story reported that sixty percent of female students at Yale planned to retreat from promising careers and become stay-at-home mothers once they had children. Even former Harvard University President Lawrence Summers suggested last year that women prefer motherhood over the demands of "high-powered intense work." These popular depictions of women construct the glass ceiling and pink ghetto as the product of women's personal choices.

Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family*

fatherhood as economic, and affects both fathers and mothers in the gendered construction of work and family.⁷⁷ It may explain why we always put “work” first in the work-family equation.

A second characteristic of masculinities that impacts men’s ability to care and their actions of care is the powerful negative command of masculinity: to be a man means *not* doing, being, or being taken as, *a girl or a woman*.⁷⁸ “[O]ne categorical imperative outranks all the others: [D]on’t be a girl.”⁷⁹ To throw like a girl, to cry like a girl, to be emotional like a girl, to dress like a girl—all of these things are insults, instantly recognizable as transgressing what constitutes manhood. This command is further reinforced by the requirement that men not be gay.⁸⁰ Calling a boy or man “gay” is less an accusation of sexual orientation than a parallel means to limit boys and men, to confine them to masculine norms.⁸¹ Caring and nurturing are deemed quintessential female actions. Doing care, therefore, violates this fundamental command of what it means to be a man. To care or do care is perceived as soft, vulnerable, weak—all characteristics associated with women and again, to be rejected, at whatever cost by men.⁸² The primary cost for boys and men is in the content of their emotional lives, and in their relationships. The limitations generated by this factor are very strong. While the image and expectations of fatherhood have changed, so that the current generation of young men expects to do more hands-on-care, the data on actual care suggest this conflict with masculinity norms persists. While men are equally capable of care work, many men do so not by choice but only when they are forced into becoming a caregiver because of divorce, unemployment, or the death of a spouse.⁸³ Data also indicates that men feel more comfortable doing certain kinds of care, particularly play, rather than other kinds of care, like emotional care or planning activities.⁸⁴ Some

Conflict, 34 PEPP. L. REV. 313, 320-21 (2007) (citations omitted). See generally PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007).

77. Dowd, *From Genes*, *supra* note 8, at 81-82.

78. See DOWD, THE MAN QUESTION, *supra* note 9, at 62.

79. KENNETH L. KARST, LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 32 (1993).

80. See DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS 80-82 (1999). This is particularly strongly enforced at adolescence. *Id.*

81. See generally C.J. PASCOE, DUDE, YOU’RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL (2012).

82. See DOWD, THE MAN QUESTION, *supra* note 9 at 105; see also John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 486-88 (2010). David Leverenz calls the avoidance of humiliation the core command of masculinity. David Leverenz, *Manhood, Humiliation, and Public Life: Some Stories*, 71 SOUTHWEST REV. 442, 442-62 (1986). Joseph Pleck argues that men are constantly dealing with gender role strain, that is, conforming their conduct to prescribed gender roles, and any nonconformity is more harshly sanctioned for men than for women. Joseph Pleck, *The Gender Role Strain Paradigm: An Update*, in A NEW PSYCHOLOGY OF MEN 11, 12 (Ronald F. Levant & William S. Pollack eds., 1995); see also Ronald F. Levant & William S. Pollack, *Introduction*, in A NEW PSYCHOLOGY OF MEN, *supra*, at 3 (1995).

83. DOWD, THE MAN QUESTION, *supra* note 9, at 62-64.

84. *Id.* at 108-09; see also DOUCET, DO MEN MOTHER?, *supra* note 38 at 122; Cahn, *supra* note 11, at

studies indicate it is important for men to “masculinize” care in order to feel more comfortable doing care.⁸⁵ Masculinizing care means differentiating particular actions of care in a way that makes them distinctive when men do the same task as women. It also means adding value to the task when it is “male.” For instance, men’s care is characteristically more active, and permits more risk taking by the child.⁸⁶ Distinguishing men’s care as more “rough,” “challenging,” or “active” suggests that they do care differently because of some inherent “male” way of being. This style or difference in care may be valued because it is male, because it encourages male-associated characteristics like bravery or strength that are valued, and/or because male care is still not normative.⁸⁷

This is a tricky space in reconceptualizing fatherhood: masculinization of care could encourage more fathers to do care, because it is “manly.” When men do more care, men’s practice might be the basis to reframe and change the meaning of masculinity. Nevertheless, masculinization might be a way to sustain difference, with difference being essential to hierarchy. It might sustain men’s privilege and dominant role in the gender hierarchy by maintaining their separation from care as practiced by women, and father care also might be seen as better than mother care. The difference in the treatment and perception of women doing what men do, as opposed to men doing what women do, is quite striking.⁸⁸ By way of illustration, women’s increasing engagement in wage work, in what historically was thought of as men’s sphere, has been largely perceived as women’s embrace of something valuable: becoming as good as men, doing men’s work, and becoming equals.⁸⁹ Doing women’s work of care-giving, on the other hand, has been perceived either as strange and diminishing, as disempowering men, or as an extraordinary sacrifice.⁹⁰ Aversion or

181-86.

85. See Trent W. Maurer & Joseph H. Pleck, *Fathers’ Caregiving and Breadwinning: A Gender Congruence Analysis*, 7 *PSYCHOL. OF MEN AND MASCULINITY* 101, 101 (2006). See generally Berit Brandth & Elin Kvande, *Masculinity and Child Care: The Reconstruction of Fathering*, 46 *SOC. REV.* 293 (1998); DOUCET, *DO MEN MOTHER?*, *supra* note 38; DOWD, *THE MAN QUESTION*, *supra* note 9.

86. DOWD, *THE MAN QUESTION*, *supra* note 9, at 113-14.

87. This links to seeing men’s parenting as distinctive, not as men mothering. See DOUCET, *DO MEN MOTHER?*, *supra* note 38, at 122.

88. See Berkstrand-Reid, *supra* note 11, at 664-65. “Fathers are portrayed as heroes for being at home, while women are dropouts or even, in their own words, traitors for turning their backs on the feminist revolution that enabled them to work in the first place.” *Id.* As she notes, however, these media portrayals may also include masculinity concerns, that is, if these are still “real” men. *Id.* at 670-71.

89. Both reports and scholarship that herald women’s achievements and those that caution that equality has not yet been achieved see wage-work as valuable, and that achieving success in those spheres where men have been better paid or the only occupants of jobs is necessary to equality. See, e.g., INST. FOR WOMEN’S POL’Y RES., <http://www.iwpr.org/initiatives> (last visited Sept. 14, 2012); WOMEN & WORK, <http://womenandwork.org/> (last visited Sept. 14, 2012); CTR. FOR WOMEN & WORK, <http://smlr.rutgers.edu/cww/> (last visited Sept. 14, 2012).

90. Joan Williams has argued men are slow to change because they cannot afford it and more importantly, it is so tied to their identity. WILLIAMS, *UNBENDING GENDER*, *supra* note 63, at 59-60. She gives

discomfort is more common than embrace. Embracing something identified as female is devaluing, triggering the need to reject doing care or to recast care by framing or transforming what is being done as “male,” distinctive and not transgressive of the boundaries of masculinities. The underlying resistance to care work could remain, as well as the sustaining of male hegemony, by valuing masculinized care over mother care.⁹¹

A third aspect of masculinities’ construction of identity that affects father care is the importance of hierarchy.⁹² By definition, men are privileged in relation to women, which relates to the prior core command not to become or behave like a woman and thereby be demoted in the hierarchy. But in addition, masculinity is defined by each man’s relationship to other men. Indeed, many masculinities scholars would argue that each man’s position in relation to other men is most critical, more important than a man’s relationship to women.⁹³ Significantly, each man’s position in relation to other men is never secure, and it must be proved constantly.⁹⁴ The definition of masculinity as thinking and

the following example of how difficult it is to change or “bend” gender: “Picture a man in a skirt. One sees them in gay rights parades but never on the bus, for a simple reason: They would stand in serious danger of getting beaten up. This is a simple but pointed example of gender pressures on men.” *Id.* at 245. Recent stories suggest alarm over men’s declining place in the workplace. Silbaugh, *supra* note 53, at 746-48; Andrew Romano & Tony Dokoupil, *Men’s Lib*, NEWSWEEK, Sept. 20, 2010, <http://www.thedailybeast.com/newsweek/2010/09/20/why-we-need-to-reimagine-masculinity.html>; Hanna Rosin, *The End of Men*, THE ATLANTIC, July/Aug 2010, <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/>.

91. Silbaugh suggests that changes in men’s labor force patterns, particularly in the recession, combined with continued calls for greater engagement in family work, lead to the potential for change in masculinities that might go in two directions that echo the sameness-difference debate in feminism. Silbaugh, *supra* note 53, at 741. That is, one route would be “a cultural component aimed at helping men invent a wider range of masculinities.” WILLIAMS, RESHAPING, *supra* note 70, at 91. Silbaugh characterizes this as:

a call to go through the painful process of revising masculinity such that men can succeed in a woman’s world by acquiring the skills and attitudes that have propelled women into the place they now find themselves at school, work, and home. It resembles assimilationist or sameness feminism but in reverse: men adapt to what’s working for women.

Silbaugh, *supra* note 53, at 741. The alternative is “something more like difference or reconstructive feminism: preserving what is valued in conventional masculinity and trying to harness it for the goals of feminism’s political and policy agenda.” *Id.* Silbaugh argues for men embracing “the study and emulation of [women’s] success formula, not the guarding of male traditions” but concedes the challenge: “[t]he strategic question is whether that can be done without embarrassing them My concern is that anything that celebrates traditional masculinities runs perilously close to a celebration of . . . defeatist thinking.” *Id.* at 747.

92. DOWD, THE MAN QUESTION, *supra* note 9, at 57, 62-63.

93. “[A]lthough men may be *in* power everywhere one cares to look, individual men are not ‘in power,’ and they do not *feel* powerful.” KIMMEL, *supra* note 64, at 93. R.W. Connell identifies the benefit men receive from their dominance over women as the patriarchal dividend, but also notes that few men achieve the actual benefit of men’s dominance. CONNELL, MASCULINITIES, *supra* note 64, at 77. Manhood is seen as something difficult to attain and continually tested. DAVID D. GILMORE, MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY 77 (1990). Most importantly, it is measured and achieved in relation to other men. Kimmel, *Homophobia*, *supra* note 64, at 223.

94. DOWD, THE MAN QUESTION, *supra* note 9, at 31.

functioning hierarchically, while at the same time never achieving the stability of manhood, but always having to prove manhood, radically undermines collaborative parenting between fathers and mothers, and between men who might collectively care for children (but who are not partners), such as an ex-husband and a stepfather.⁹⁵

Co-parenting is not about hierarchy; it is about sharing and equally valuing a role. Connection, negotiation, and sharing of parenting all are values that recognize the value of care as well as the value and equality of the caregivers. Masculinities' hierarchical orientation undermines those possibilities. The increasing likelihood of a scenario where a child might have multiple parents is a challenge to our notion that every child has only two parents.⁹⁶ How multiple parenthood might function is particularly complicated by the hierarchy norm of masculinities.

In its most extreme form, the hierarchical orientation of masculinities is expressed in the association between masculinity and violence.⁹⁷ One's place is gained or sustained by force. The persistence and pervasiveness of intimate violence is an ongoing challenge to men's nurture of children because such violence impacts both partners and children. Nearly one in four women in the United States reports experiencing domestic violence in her lifetime.⁹⁸ Women constitute eighty-four percent of the victims of violence from spouses and partners; roughly three-quarters of batterers are male.⁹⁹ A significant rate of domestic violence occurs during pregnancy.¹⁰⁰ Violence between partners undermines collaborative parenting during and after the relationship between partners. Witnessing violence or being a direct target seriously harms children.¹⁰¹

The association of masculinities with violence also affects men's ability to co-partner with other men, as demonstrated by the triggering of extreme acts of

95. Given family patterns, such a configuration is quite common. *See supra* note 44.

96. *See generally* Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007).

97. On men and violence, see JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY (1993); PRISON MASCULINITIES 3-6 (Don Sabo et al. eds., 2001); James W. Messerschmidt, *Masculinities, Crime, and Prison*, in PRISON MASCULINITIES *supra*, at 67-68; James W. Messerschmidt, *Men Victimized Men: The Case of Lynching, 1865-1900*, in MASCULINITIES AND VIOLENCE 125 (Lee H. Bowker ed., 1998).

98. *Get the Facts: The Facts on Domestic, Dating and Sexual Violence*, FUTURES WITHOUT VIOLENCE, http://www.futureswithoutviolence.org/content/action_center/detail/754 (last visited Sept. 14, 2012) [hereinafter *Get the Facts*]; *see also Domestic Violence Statistics*, AM. BAR ASS'N, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html#prevalence (last visited Sept. 14, 2012).

99. *Get the Facts*, *supra* note 98.

100. Rebekah Kratochvil, Note, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 Hous. J. HEALTH L. & POL'Y 63, 64-70 (2009).

101. Linda Quigley, Note, *The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 WM. & MARY J. WOMEN & L. 867, 871-72 (2007); NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND SEXUAL ASSAULT FACT SHEET, http://www.nnedv.org/docs/Stats/NNEDV_DVSA_factsheet2010.pdf (last visited Sept. 14, 2012).

violence when women become involved with another man after leaving an abusive relationship.¹⁰² This is not to deny that women commit acts of violence or that violence exists between same-sex partners.¹⁰³ Rather, it is to recognize the association between masculinities and violence, its connection to the importance of hierarchy to masculinities, and the barrier this creates to nurture and care by fathers.

These three elements of masculinities—the breadwinner norm, the avoidance of things female in order to be a man, and the importance of hierarchy to manhood—generate significant barriers to men engaging in the nurture and care of children. In the following section, I describe existing work-family policy in the United States, and suggest how that policy structurally incorporates masculinities norms that undermine significant father care.

IV. MASCULINITIES, FATHERHOOD, AND POLICY: HOW CURRENT POLICY IN THE UNITED STATES UNDERMINES CARE AND REINFORCES HEGEMONIC MASCULINITIES

Work-family policy in the United States is insufficient and unsupportive of all parents.¹⁰⁴ For fathers, one could argue either that it is counter-productive and counter-intuitive, or that it makes complete sense as an expression of traditional masculinities norms. Extreme among industrialized nations, United States' policy provides for only limited and mostly unpaid family leave; no

102. Two psychologists have described two patterns of male batterers: “pit bulls” who act aggressively to defend themselves against others who threaten “their” women, and “cobras” who in effect are sociopaths who feed on control. Pit bulls in particular strike out both at partners (or former partners) and new relationships. The quintessential case involved O.J. Simpson. NEIL JACOBSEN & JOHN GOTTSMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS (1998). The commonness of batterers being triggered by post-separation relationships makes this part of the list of risks after a victim leaves her batterer. See, e.g., *Domestic Violence: Post-Separation Violence*, ABUSEWATCH.NET, http://www.abusewatch.net/DV_post.php (last visited Sept. 14, 2012).

103. For data on same-sex domestic violence, which occurs at the same rate as in heterosexual relationships, see Patricia Tjaden, *Extent and Nature of Intimate Partner Violence as Measured by the National Violence Against Women Survey*, 47 LOY. L. REV. 41, 54 (2001); see also DIANE R. DOLAN-SOTO & SARA KAPLAN, NEW YORK LESBIAN, GAY, TRANSGENDER AND BISEXUAL DOMESTIC VIOLENCE REPORT 9 (2005), available at <http://www.avp.org/publications/reports/2005nycdvrpt.pdf>. For data on male victims of domestic violence, who are victimized at a significantly lower rate than female victims, see CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, NCJ 197838, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001, 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9-11 (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

104. For overviews of work-family policy, or the lack of it, in the U.S., see WALDFOGEL, *supra* note 7; WILLIAMS, *RESHAPING*, *supra* note 70; Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policy*, 73 U. CIN. L. REV. 433, 449-52 (2004); Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989) [hereinafter Dowd, *Envisioning*]; Nancy E. Dowd, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219 (2004); Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict Is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593 (2010).

maternity leave or health care support for pregnancy; no universal child care or preschool infrastructure; limited support for child care expenses; no leave to provide care for illness unless it is for a sick or seriously ill child, as well as no leave entitlement for the worker's own sickness or disability; no universal health care; and no universal family support benefits.¹⁰⁵ The United States' system is a patchwork of federal and state laws, thus leading to differentials dependent on location rather than universal benefits.¹⁰⁶

The United States provides only limited parental leave related to birth, adoption, and the serious illness of a child under the federal Family and Medical Leave Act (FMLA).¹⁰⁷ Under the FMLA, leave is limited to twelve weeks annually, unpaid, and covers only roughly half of all workers.¹⁰⁸ The statute limits coverage to employers with fifty or more employees, does not cover part-time workers, and requires that employees have worked for the statutory period to qualify for leave.¹⁰⁹ Some states provide greater leave entitlement under state law, but only three states—California, Washington and New Jersey—provide paid leave.¹¹⁰ Similarly, there is no universal child care support or provision of child care services, and only limited tax benefits that take into account some child care expenses for people below a certain income threshold.¹¹¹ Preschool is voluntary, as opposed to an entitlement of all children.¹¹² Sick leave and disability leave are not federally required, and vary considerably by state.¹¹³ Unless an employer voluntarily adopts a policy

105. Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 323-27 (2004); Julie C. Suk, *Are Gender Stereotypes Bad for Women?: Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 7-24 (2010).

106. Sheila B. Kamerman & Jane Waldfogel, *United States*, in EMAR, INTERNATIONAL REVIEW, *supra* note 7, at 240-43.

107. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, §§ 2, 101, 102, 104, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601, 2611, 2612, 2614 (2006)). For a comparison of the United States with other countries, see Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185 (2009).

108. 29 U.S.C. § 2601 (2006); Kaminer, *supra* note 105, at 324-29.

109. Family and Medical Leave Act § 101 (codified as amended at 29 U.S.C. § 2611). See generally JANET WALSH, HUM. RTS. WATCH, FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US, (2011), available at <http://www.hrw.org/sites/default/files/reports/us0211webwcover.pdf>.

110. See CAL. UNEMP. INS. CODE §§ 3300-05 (2012). California's legislation provides six weeks' paid leave (i.e., wage replacement of up to 55% of salary and a maximum of \$738 per week) to employees to care for an ill child, spouse, parent, or domestic partner, or to care for a child after birth or adoption. CAL. UNEMP. INS. CODE § 3301(a)(1) (2012); see also N.J. STAT. ANN. §§ 43:21-4, 43:21-7 (2012); WASH. REV. CODE ANN. § 49.86.005 (2012).

111. See Dowd, *Envisioning*, *supra* note 104, at 315. For discussion of child care policy, see Dinner, *supra* note 2, at 457-64. For a broader look at tax policy and equality issues, focused primarily on women, see generally Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996).

112. See generally James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49 (2006). Ryan states twenty-five percent of children ages 3-5 attend public preschool, twenty-five percent attend private preschool, and fifty percent do not attend preschool. *Id.* at 49.

113. See Suk, *supra* note 105, at 9-11. Suk outlines the development of pregnancy discrimination

permitting parents to use sick leave to care for an ill child, parents have no entitlement to stay home to care for children during normal childhood illnesses, but only for seriously ill children under the limited leave available under the FMLA.¹¹⁴ Tax policy continues to disproportionately impact secondary incomes in two-income households, in effect penalizing the lower-income spouse, typically the wife.¹¹⁵

The common critique of this federal policy, minimal as it is, is that it reinforces gendered patterns of care.¹¹⁶ Ongoing wage discrimination coupled with the lack of paid benefits transforms gender-neutral policies into gendered ones that predictably result in more women taking leave and for longer periods than men.¹¹⁷ Failure to cover all workers forces similar economic calculations that affect the allocation of family work and care, as does lack of coverage for part-time workers, who are disproportionately female.¹¹⁸ Existing policy also has a class impact, because the lack of wage replacement especially undermines the ability of low-wage workers and single parents to take leave.¹¹⁹

Paid leave might change the gendered pattern of parental leave. The experience of other countries, however, suggests change in leave patterns is a more complex matter. After finding that leave available to mothers and fathers was overwhelmingly taken by mothers, a number of European countries began to provide gender-specific benefits to encourage fathers to take leave.¹²⁰ Dutch fathers have been attracted by part-time schedules in a tight labor market, so that one in three men either works part time or works full time in four days,

litigation designed to treat pregnancy as a disability to be covered the same as sick leave or disability leave. *Id.* But as Suk notes, neither form of leave is universally mandated. *Id.* Efforts to expand parental or maternity leave have suffered, she argues, from this connection to a more universal approach, and fears of the cost of universal entitlement. *Id.*

114. Dowd, *Envisioning*, *supra* note 104, at 311-48.

115. See generally EDWARD MCCAFFERY, *TAXING WOMEN: HOW THE MARRIAGE PENALTY AFFECTS YOUR TAXES* (1997).

116. See generally WILLIAMS, *RESHAPING*, *supra* note 70; Dowd, *Envisioning*, *supra* note 104; Suk, *supra* note 105.

117. According to one report, the gender distribution of those who took FMLA leave was fifty-eight percent men, forty-two percent women. See *FMLA: Facts and Statistics*, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/act/laf/library/fmlastatistics.cfm> (last visited Sept. 14, 2012) (citing JODY HEYMANN ET AL., *THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP?* (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007.pdf>). Regarding the costs of pregnancy and child rearing for single women, see generally Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011); Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010).

118. Dowd, *Envisioning*, *supra* note 104, at 325-26.

119. See WILLIAMS, *RESHAPING* *supra* note 70, at 44-45; Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMPL. & LAB. L. 1, 45 (2007); Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 460-61 (2007); Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 807 (2011).

120. Eugenia Caracciolo di Torella, *New Labour, New Dads—The Impact of Family Friendly Legislation on Fathers*, 36 INDUS. L.J. 318, 323 (2007).

with the weekly “daddy day” becoming a norm.¹²¹ In Sweden, the number of daddy days is now sixty days, and couples can take more leave if fathers use leave benefits.¹²² The result has been that eighty percent of fathers take some leave, for a total of twenty-five percent of all leave days.¹²³ The high participation is interesting, but the persistence of gender asymmetry even in these high use patterns also is striking.¹²⁴ Julie C. Suk argues that gender-specific benefits might be a policy to consider and questions whether gender neutrality is the road to equality.¹²⁵ Michael Selmi, however, emphasizes that the barriers are not exclusively structural, as the European examples demonstrate.¹²⁶ Selmi points out that no empirical data support the common explanations for lack of father involvement in care or leave. These explanations include the demands on men to bring in income, and that employers discourage or penalize leave taking.¹²⁷ Rather, Selmi argues, it is the strength of cultural norms that explains the lack of change, even when policies confer benefits on men.¹²⁸ This explanation is supported by Ann McGinley’s work on the reinforcement of traditional masculinities norms at the workplace in ways that limit men’s ability to do care-giving and to do work other than according to prescribed norms.¹²⁹

Consistent with Selmi’s observation is the workplace norm of the “ideal worker.” Joan Williams has detailed this norm in depth, persuasively arguing that the hallmark of the workplace is a system of domesticity, peopled by ideal workers who have three core characteristics: the ideal worker does not have family commitments; the ideal worker is male; and family work, and the primary family worker (typically women) are devalued.¹³⁰ In her most recent work, Williams calls the workplace a primary gender factory.¹³¹ The workplace is dominated by masculine norms, she argues, that limit men to be breadwinners and disproportionately disadvantage women because by

121. Katrin Bennhold, *Working (Part-Time) in the 21st Century*, N.Y. TIMES, Dec. 29, 2010, <http://www.nytimes.com/2010/12/30/world/europe/30iht-dutch30.html>.

122. Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html>.

123. For a detailed look at the evolution of Sweden’s framework, see ASA LUNDQVIST, *FAMILY POLICY PARADOXES: GENDER EQUALITY AND LABOUR MARKET REGULATION IN SWEDEN 1930-2010* (2011).

124. Bennhold, *supra* note 122.

125. See Suk, *supra* note 105, at 60-63; see also Jessica A. Clarke, *Beyond Equality?: Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1234-37 (2011). For another comparison to other countries, see generally MAKING MEN INTO FATHERS: MEN, MASCULINITIES AND THE SOCIAL POLITICS OF FATHERHOOD (Barbara Hobson ed., 2002).

126. See Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 573-98 (2007).

127. *Id.* at 586-95.

128. *Id.* at 573-98.

129. Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703 (2011); see also MCGINLEY, *supra* note 71.

130. WILLIAMS, *UNBENDING GENDER*, *supra* note 63.

131. WILLIAMS, *RESHAPING*, *supra* note 70, at 1-2.

definition they are presumed to be unable to meet the (unencumbered) male norm. Williams's goal is reform of the workplace toward a norm of balanced work and family commitments.¹³² She envisions a mix of policies including public supports (child care, paid parental leave, national health insurance) and workers' rights (vacation time, proportional pay, and benefits for part-time work, and the right to request flexible schedules).¹³³ Williams's analysis is consistent with the view that masculinities are at the core of achieving greater father care. Her vision of a redefined ideal worker is much like the argument of a redefined concept of a breadwinner: a de-gendered norm. That norm, I would argue, requires both the concrete structural changes she suggests, as well as policies to deal with the cultural change that Selmi identifies as critical.

Achieving structural and cultural change cannot be limited to work law. Family law, in significant ways, continues to frame fathers as breadwinners, emphasizing the importance of their economic role but not their care role.¹³⁴ Support of the social relationship between fathers and their children would seem to be advanced by family law norms of shared parenting. Yet in practice this is formal equality only. The asymmetry of father care by nonmarital, noncohabiting fathers and divorced fathers is a complex subject.¹³⁵ Both fathers and mothers accuse the system of bias.¹³⁶ The pattern of predominant mother custody and the decline in father connection with children is troubling, linked to the overwhelming concentration on economic fatherhood, and the lack of policies and supports for collaborative, egalitarian parental care, and for men's integration with mothers' subsequent partners.¹³⁷ Nonmarital fathers, while formally equal to divorced fathers, remain even less supported in reality. Indeed, as one scholar has pointed out, nonmarital fathers are pursued for purposes of child support on the basis of biology alone, while being required to meet a higher standard of "biology plus" (some level of social parenting) to claim fatherhood status and to be entitled to parenting time to care for their child.¹³⁸

Support for care is also linked to notions of fatherhood as a singular,

132. *Id.* at 106-07.

133. *Id.* at 2.

134. DOWD, REDEFINING FATHERHOOD, *supra* note 8; Dowd, *From Genes*, *supra* note 8.

135. DOWD, REDEFINING FATHERHOOD, *supra* note 8, at 58-65; Richard Collier & Sally Sheldon, *Fathers' Rights, Fatherhood and Law Reform—International Perspectives*, in *FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE* 1-27 (Richard Collier & Sally Sheldon eds., 2006).

136. See DOWD, REDEFINING FATHERHOOD, *supra* note 8, at 136.

137. See generally Insabella et al., *supra* note 50; Mabry, *supra* note 50; Maldonado, *supra* note 50; Graeme B. Wilson, *The Non-Resident Parental Role for Separated Fathers: A Review*, 20 INT'L J.L. POL'Y & FAM. 286 (2006).

138. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 129 (2004); Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 102 (2006).

biological role (and preferably a marital father). Social fatherhood, which may or may not coexist with biological fatherhood, is not strongly valued within the family law system.¹³⁹ Moreover, there is little recognition of the possibility of multiple fathers co-parenting, despite the reality of cohabitation, divorce, and stepparenthood.¹⁴⁰ With the increased likelihood of stepparents and cohabitants, collaboration also requires male-male collaboration, not simply male-female.

The most visible policy with respect to fatherhood is not shared parenting, but the pursuit of child support, locking in a definition of fatherhood as economic support. Although formally gender neutral, child support is understood as a legal structure primarily aimed at men.¹⁴¹ Paternity establishment—and disestablishment—feeds this norm of economic fatherhood, because the goal is identifying who has financial responsibility for children.¹⁴² Child support is particularly targeted at low-income men. Federal programs aimed at low-income fathers are intended to assist fathers in finding work so that they can pay for support; there are no equivalent programs to encourage or support care-giving. Low-income fathers, contrary to popular mythology, engage in significant care.¹⁴³ They do so in spite of, not because of, existing policy. In addition, welfare policy may discourage cohabitation because of its impact on how family income is calculated, thus discouraging paternal involvement.¹⁴⁴

The pursuit of child support has both a disproportionate class impact and a disproportionate racial impact due to the racial configuration of low-income families.¹⁴⁵ Many African-American fathers nevertheless sustain a strong connection to their children.¹⁴⁶ Their maintenance of connection suggests more nuance in the patterns of fatherhood that particularly challenge the myth of “hit and run” fatherhood that characterizes the stereotype of low-income Black fatherhood.¹⁴⁷

Domestic violence law, as a subset of family law, is the final area that should be considered in the work-family equation. The continuing high rate of domestic violence warps efforts to support nurturing fatherhood. While

139. See DOWD, REDEFINING FATHERHOOD, *supra* note 8, at 173-80; see also Dowd, *Fathers and the Supreme Court*, *supra* note 8.

140. See *supra* note 44 and accompanying text.

141. See Ann Cammett, *Deadbeats, Deadbrokes and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 133, 135-36, 139 (2011).

142. See Parness, *supra* note 138, at 60 n.1, 61.

143. See Waller, *Family Man*, *supra* note 46, at 161, 166, 170; Waller, *Viewing Low-Income Fathers*, *supra* note 46, at 112-13.

144. See Waller, *Family Man*, *supra* note 46, at 171-73.

145. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); MARGARET C. SIMMS ET AL., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES (2009), available at <http://www.urban.org/urfcfm?ID=411936>; *The Fragile Families and Child Wellbeing Study*, PRINCETON UNIV., <http://www.fragilefamilies.princeton.edu/collaborative.asp> (last visited Sept. 14, 2012).

146. See Waller, *Viewing Low-Income Fathers*, *supra* note 46, at 110, 113.

147. *Id.*

responses to domestic violence have dramatically improved, they remain inadequate.¹⁴⁸ Continued high rates of violence impinge on any changed policy toward work-family issues. A next step forward would require dismantling the violence norm of masculinity and the link to hierarchy as integral to manhood. Little attention to the subject of domestic violence is evident in debates on work-family policy.

In sum, formal work-family policy in the United States expressed in employment law and family law has done little to confront masculinities or recognize how strongly they permeate existing law. To the contrary, domestic policy reinforces stereotypes that limit or undermine father care. Stereotypes function at an individual level, but also at a social/cultural and structural level.¹⁴⁹ This affects how individual fathers are perceived and self regulate, through norms of masculinities that infuse and are created by social and cultural beliefs, but it also affect things structurally. Stereotypes function as limitation, repression, and harm because the individual is treated by a group trait rather than as an individual.¹⁵⁰ “Naming a gender stereotype and identifying its harm is critical to its eradication.”¹⁵¹ Current law and policy at best functions to support fathers as breadwinners, and at worst fails to confront men’s violence. Law and policy also reinforces hierarchies among fathers, particularly by class and race, and between men when they co-parent. Prevailing legal standards have fueled fathers’ rights groups by articulating a norm of gender-neutral equality, but ironically have not led to greater father care.

The state has an affirmative duty both to eliminate stereotypes present in its laws, and to affirmatively enact laws to overcome or remedy pervasive social stereotypes.¹⁵² What is needed is a public-health approach toward cultural change in our norms of masculinities. Such an approach would treat the absence of father care as a public-health issue that affects children, fathers, and mothers, and identify the need for change as both structural and cultural. In addition, any new approach must include all fathers, not just some fathers. In

148. See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 779-81 (2005) (Stevens, J., dissenting). See generally NAT’L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2010 (2011), available at http://www.nnedv.org/docs/Census/DVCounts2010/DVCounts10_Report_BW.pdf. Jessica Gonzales subsequently brought an action against the United States in the Inter-American Commission on Human Rights. See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011), available at www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc. The Commission released its report, finding that the United States violated Gonzales’s human rights and the rights of her children by its inadequate protection of her children from domestic violence and enforcement of her domestic violence injunction. See *id.* at ¶ 5; see also *Jessica Gonzales v. U.S.A.*, AM. CIVIL LIBERTIES UNION, Oct. 24, 2011, <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa>.

149. See generally REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010).

150. See *id.* at 9.

151. *Id.* at 3.

152. See *id.* at 36-37.

the next section I explore these two needed changes.

V. POLICY SUGGESTIONS: INCLUSIVE FATHERHOOD AND CULTURAL CHANGE

Structural support to better facilitate the balance of work and family, and to encourage greater father care, is critical.¹⁵³ Structural support alone, however, is not enough. Two other changes that are needed in United States' policy in order to increase father care, driven by a recognition of the impact of masculinities norms on care, are first, an inclusive policy that considers the impact of policy on all men, and rejects hierarchies among fathers; and second, an affirmative focus on cultural change, enacting policies geared to foster reshaping fatherhood to make care central.

The first critical change, creating an inclusive policy, means a focus on several factors. First, it requires shifting from the assumption of marital fatherhood as the focus of policy, to including nonmarital fathers, cohabiting fathers, and both noncohabiting and divorced fathers. Remaining wedded to a marital norm of fatherhood as an assumption of policy means ignoring the life realities of a significant proportion of fathers, and of their children. It is also important to recognize some fathers are not marital or biological fathers, but they, nevertheless, are caring for children as social fathers. Connected to this broader focus is the necessity of resolving and articulating a vision of multiple, collaborative fatherhood.¹⁵⁴ Sustaining parental bonds generally is better for children than disrupting bonds. New relationships, however, can positively contribute to their lives as well. Conceptualizing and supporting fathers in both roles is worth exploring from the perspective of children's best interests.¹⁵⁵

153. Numerous models exist based on the policies and experience of other countries, on both gender neutral work-family policies and specific policies geared to fathers. See generally WALDFOGEL, *supra* note 7; Shirley Gatenio Gabel & Sheila B. Kamerman, *Investing in Children: Public Commitment in Twenty-One Industrialized Countries*, 80 SOC. SERV. REV. 239 (2006).

154. See Dowd, *supra* note 96, at 232; Melanie B. Jacobs, *Why Just Two?: Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 339 (2007). An alternative would be a vision of serial fatherhood for children, that is, their "father" would be the man who has a social relationship with them and their mother. Serial fatherhood, however, remains unsupported empirically as being in the best interests of children. That is, it has not been demonstrated that successive fathers are preferable for children. A serial-fatherhood model would mean supporting the father who is present in the lives of children. A traditional-family model would mean supporting the identified, sole father, preferably biological and marital, but at a minimum biological. Currently, family law predominantly supports a traditional-family model, modified to include nonmarital fathers, but does so primarily to achieve economic support of children. At the same time, social fathers are not legally supported at all unless they attain the status of legal fathers under paternity laws.

155. One recent example of the potential for positive, multiple, nontraditional concepts of fatherhood is present in the lives of children conceived prior to the tragedies on September 11, 2001 who lost their fathers in that tragedy. In some of those families, a stepparent has joined the family and serves as the only parent known to the child, while at the same time their biological parent is remembered and honored within the family. In some of these families, older siblings have a social and experiential relationship with their father who perished in the tragedy of September 11th, and with their stepfather. These stories capture some of the possibilities of fatherhood. See Elizabeth McNeil, *Legacy of Love: The Children of 9/11*, PEOPLE MAG., September 12, 2011,

Finally, an inclusive policy must focus more affirmatively and realistically on low-income fathers. It is nothing short of startling, and indeed disturbing, that the strong caring patterns of low-income fathers are ignored in place of stereotypes that feed class and race assumptions. At the same time, the pattern of serial fathers for children, as a response to the existing structure, requires unpacking and evaluating the meaning of this pattern for low-income children, just as society has been concerned with this pattern for middle- and upper-income children. Policy must be sensitive to differences among fathers, especially the fathers who are part of the most fragile families, low-income families.

The means to achieve inclusiveness might come from a variety of methods. Attentiveness might be increased by explicitly bringing the margin to the center. This would mean making it an articulated policy norm to consider at the center of policy construction the needs of the most disadvantaged fathers, those with the greatest challenges to achieving an ethic and practice of care. Instead of policy being driven by the privileged, this would ensure that policy includes and assists those at the margin.

A second critical piece of policy is cultural change. To re-envision fatherhood, we must re-envision manhood. This requires an affirmative policy of cultural change, similar to the shift in womanhood that has accelerated during the past several decades. A comparable shift in manhood is needed, in order for father care to be an integral, embraced part of masculinities. To accomplish this cultural change, we need to explore what is needed in order for men to engage in care and understand what blocks such care. I argue here that a critical piece of this understanding is allowing, and supporting, men to be vulnerable. Vulnerability is an essential component of the ability to care, yet it is a characteristic that is strongly suppressed by the construction of masculinities. Cultural change, I argue, should aim to reverse existing masculinities norms about vulnerability, as a foundation to encouraging men's engagement in care.

The relationship of masculinity to care is to reject care because of its connection with femininity. According to masculinities research, shaming boys and men to achieve identity is critical to defining and policing masculinity.¹⁵⁶

at 63, 63-77.

156. See Kimmel, *Homophobia*, *supra* note 64; Matthew Jakupcak et al., *Masculinity, Shame, and Fear of Emotions as Predictors of Men's Expressions of Anger and Hostility*, 6 *PSYCHOL. MEN & MASCULINITY* 275, 275-76 (2005). Pollack points out that this process begins very young:

Researchers have found that at birth, and for several months afterward, *male infants are actually more emotionally expressive than female babies*. But by the time boys reach elementary school much of their emotional expressiveness has been lost or has gone underground. . . .

Recent research points to two primary causes for this change . . . [*t*]he first reason is the use of *shame* in the toughening-up process by which it's assumed boys need to be raised. Little boys are made to feel ashamed of their feelings, guilty especially about feelings of weakness, vulnerability,

In contrast to the expansion of boundaries for girls, boys continue to be limited by the negative definition of gender identity. The gender tags of “girl,” “female,” “woman,” “gay,” or “fag” identify and limit what boys and men can do and be.¹⁵⁷ Hierarchy gives them position and value for gendered choices. Fundamental to this limitation process is shame.

Shame as a means of imposing limits on boys and men is particularly linked to vulnerability, and vulnerability must be suppressed at all costs.¹⁵⁸ Vulnerability, as I am using it here, is not the state of being susceptible to economic or physical harm, but rather is the name for the emotional and psychological state of uncertainty, risk, and fragility. In this sense, vulnerability is critical to, and a positive foundation for, love, care, and connection. How men, and masculinities, currently conceptualize vulnerability requires rigid suppression and denial. This creates a barrier to connection, and to care. Reframing vulnerability is critical to reframing masculinities.

fear, and despair.

....

The use of shame to “control” boys is pervasive

WILLIAM POLLACK, REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD 11 (1998); *see also* Leah C. Funk & Cherie D. Werhun, “You’re Such a Girl!” *The Psychological Drain of the Gender-Role Harassment of Men*, 65 *SEX ROLES* 13, 13-15 (2011).

157. *See generally* PASCOE, *supra* note 81.

158. This is particularly critical when vulnerability is linked with fear, and might be identified as cowardice.

If the quintessential virtue of manliness is physical courage, as I have claimed, then soldiers in combat are best suited to afford testimony about its meaning. What they reveal is an uncannily paradoxical view of manliness where courage, the defining male virtue, is often impelled by the feminine vice of cowardice. . . .

....

Not every man cares about being manly, nor does every man who wishes to be manly believe that he is so, at least not all of the time. But every man knows that he lives in a world where he is expected to adhere to an ideal of manliness in which courage is the foremost virtue. I have suggested, however, that there is a paradox that underlies and complicates this expectation. Men often behave with manifest valor because they are terrified of seeming afraid. Cowardice, a feminine vice, thus often tends to propel the manly virtue of courage.

John Kang, *Manliness’ Paradox*, in *MASCULINITIES AND THE LAW*, *supra* note 9, at 140, 144 (internal citations omitted). Kang collects many examples both historical and current of how this paradoxical interconnection functions. *See also* John M. Kang, *Manliness and the Constitution*, 32 *HARV. J.L. & PUB. POL’Y* 261 (2009). One very “public” example is the use of public humiliation during World War I in Great Britain, through the use of the White Feather Campaign. When the military was an all-volunteer army, women were encouraged to confront young men who failed to do their duty by presenting them—publicly—with a white feather. This public shaming proved very effective. *See* Peter J. Hart, *The White Feather Campaign: A Struggle with Masculinity During World War I*, *STUDENT PULSE*, (2010), <http://www.studentpulse.com/articles/151/the-white-feather-campaign-a-struggle-with-masculinity-during-world-war-i#>. Another place where shame functions strongly for men is in the interaction of honor and shame. David Leverenz, *Honor*, in *MEN AND MASCULINITIES: A SOCIAL, CULTURAL, AND HISTORICAL ENCYCLOPEDIA* 398-400 (Michael Kimmel & Amy Aronson eds., 2003).

Brené Brown's work offers important insights on the role of vulnerability to psychological health.¹⁵⁹ Her work links shame, vulnerability, wholeheartedness, and connection. Each step of her analysis is helpful to understanding the fundamental barrier that masculinities as currently constructed poses for care, and particularly the link between vulnerability, connection, and care.

Brown defines shame as "the intensely painful feeling or experience of believing we are flawed and therefore unworthy of acceptance and belonging."¹⁶⁰ According to Brown, shame is a core emotion, which everyone experiences. Shame is therefore unavoidable. What drives shame is expectations, and those expectations are organized by gender.¹⁶¹

What we do with shame, however, differs. According to Brown, shame is linked to "the fear of disconnection."¹⁶² We are wired for connection; that which disconnects us, then, is what does us harm.¹⁶³ Brown theorizes that what is needed for connection is not avoiding shame, but rather allowing for "excruciating vulnerability," that is, allowing for the discomfort by accepting and allowing oneself to be seen as one's real, imperfect self. The key to the exposure of self, what she calls authenticity, is to confront shame with resilience.¹⁶⁴ Brown links fostering resilience to vulnerability.

What fosters resilience in this context is empathy, courage and compassion.¹⁶⁵ Brown's work explores the characteristics shared by those who have a sense of belonging, connection to others, and self-worth, versus those who continue to think that they are not good enough. The shared characteristic of those who have a sense of belonging is what she calls "wholeheartedness."¹⁶⁶ She identifies the elements of wholeheartedness as courage and vulnerability. Courage is linked to authenticity: the courage to be who you really are and accept yourself, as a precondition to connection with others. Vulnerability is necessary to connection. Instead of shutting down, hiding, or denying vulnerability, Brown argues, it must be embraced, as this embrace is fundamental to connection. Suppressing vulnerability leads to disconnection and self-harm.¹⁶⁷

This understanding of the links between, and definition of, courage, vulnerability, and connection is profoundly different from masculinities'

159. See generally BRENÉ BROWN, I THOUGHT IT WAS JUST ME (BUT IT ISN'T): TELLING THE TRUTH ABOUT PERFECTIONISM, INADEQUACY, AND POWER (2007).

160. *Id.* at 5.

161. *Id.* at 18.

162. *Id.* at 20.

163. BROWN, *supra* note 159, at 268-269.

164. *Id.* at 31.

165. *Id.* at 42.

166. Brené Brown, *The Power of Vulnerability* (Jun. 2010), http://www.ted.com/talks/brene_brown_on_vulnerability.html (transcript on file with *Suffolk University Law Review*).

167. See *id.*

definition of courage and vulnerability. Under Brown's definition, courage is not defined as a denial of weakness or imperfection; vulnerability is not defined as something to be avoided. Rather, courage is about being your real self; vulnerability is the foundation of connection. And connection is about equality, valuing relationships, and accepting both ourselves and those for whom we care and provide care, as well as other caregivers. Connection is fundamental to care.

Masculinities researchers confirm the connection between masculinities and shame, and between masculinities and *invulnerability*. This is not an affirming, positive connection.¹⁶⁸ Moreover, a core piece of masculinities is the constant need to prove oneself and to compare oneself to other men. Both of these factors foster the view of vulnerability as a negative. The male definition of courage fosters disconnection and shame instead of connection and care.¹⁶⁹

One of the definitions of weakness articulated by one of Brown's male research subjects was "when people think you're soft. It's degrading and shaming to be seen as anything but tough."¹⁷⁰ Another was "[o]ur worst fear is being criticized or ridiculed—either one of these is extremely shaming."¹⁷¹ These definitions bode ill for men and care. A redefinition of masculinities requires a different kind of courage than that traditionally associated with masculinity.¹⁷²

168. See Kimmel, *Homophobia*, *supra* note 93. See generally Rocco L. Capraro, *Why College Men Drink: Alcohol, Adventure, and the Paradox of Masculinity*, 48 J. AM. C. HEALTH 307 (2000); Glenn E. Good et al., *Men and Therapy: Critical Concepts, Theoretical Frameworks, and Research Recommendations*, 61 J. CLINICAL PSYCHOL. 699 (2005); Steven Krugman, *Male Development and the Transformation of Shame*, in A NEW PSYCHOLOGY OF MEN 91-126 (Ronald F. Levant & William S. Pollack eds., 1995); Fred Wright, *Men, Shame, and Group Psychotherapy*, 18 GROUP 212 (1994).

169. See Jakupcak, *supra* note 156, at 275-76.

Men may come to fear tender or vulnerable emotional states, in part because of masculine gender norms that prohibit this aspect of emotionality. . . . Thus, boys and men may come to associate their masculine identity with extreme stoicism, such that experiences of strong emotions may cause men to feel intense shame.

. . . "Rather than being able to tolerate and modulate shame states, males are likely to react with avoidance, compensatory behaviors, and primitive fight-flight responses." These primitive fight-or-flight responses have been observed in men prone to violence. . . .

The shame men might experience in response to their own emotional reactions can lead to a fear and avoidance of emotionality.

Id. Frank Cooper has analyzed how vulnerability and hierarchy function in police stops to escalate outcomes. See generally Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1 (2010); Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Policy Training*, 18 COLUM. J. GENDER & LAW 671 (2009). The consequences of shame for masculinities norms also contribute to domestic violence. For an overview of this complex subject, see generally Linda G. Mills, *Shame and Intimate Abuse: The Critical Missing Link Between Cause and Cure*, 30 CHILD. & YOUTH SERVICES REV. 631 (2008).

170. BROWN, *supra* note 159, at 280.

171. *Id.* at 280-81.

172. *Id.* at 285.

Brown's work suggests the importance of driving down to the heart of the beliefs that create barriers to care, and the need to restructure those beliefs, not because of an ideological norm, but because of their importance to individual self-worth, as well as to foster the care and connection that children need. Her work is not necessarily the only work that is insightful to this process, but it exposes how gender norms function on a very personal, individual level. How to translate this into policy is challenging but not impossible.

One way is suggested by the work that has begun by various scholars around the concept of vulnerabilities. Martha Fineman, among others, has argued that thinking in terms of vulnerabilities is a better way to analyze structural and substantive equality and the role of the state.¹⁷³ As Fineman notes, vulnerability traditionally has been viewed negatively. "Vulnerability is typically associated with victimhood, deprivation, dependency, or pathology."¹⁷⁴ Her goal is to tease out a more nuanced and affirmative meaning.¹⁷⁵ "I want to claim the term 'vulnerable' for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."¹⁷⁶ Fineman's concept, "understood as a state of constant possibility of harm,"¹⁷⁷ focuses on shared vulnerability as a defining, universal characteristic of the human condition, and examines the state's and society's response to our vulnerabilities.

While vulnerability is universal, it is by no means experienced similarly either by different people or over the life course, and the capability to respond to vulnerability varies. It is linked to embodiment, that is, to our bodies and their vulnerability, which makes it a shared condition; but everyone is individual in his or her vulnerabilities.¹⁷⁸ It is also critically affected by the assets that we bring to bear on vulnerability, which allow us at best to respond with resilience.¹⁷⁹ Those assets are strongly affected by the state's and society's impact on asset-building. Fineman divides assets into three types: physical (wealth and material goods), human (innate or developed human capital), and social (networks and relationships providing support).¹⁸⁰ State institutions, policies, and laws may facilitate asset-building that supports resilience in the face of vulnerability.¹⁸¹ Conversely, the lack of state action may intensify vulnerability, or negative policies may exacerbate or create more

173. Fineman, *Responsive State*, *supra* note 14, at 269-73. See generally Marion Crain, *Afterword: The American Romance with Autonomy*, 10 EMP. RTS. & EMP. POL'Y J. 187 (2006).

174. Fineman, *Responsive State*, *supra* note 14, at 269-73.

175. *Id.* at 167-68.

176. *Id.* at 8-9.

177. *Id.* at 12.

178. Fineman, *Anchoring Equality*, *supra* note 14; Fineman, *Responsive State*, *supra* note 14.

179. Fineman, *Anchoring Equality*, *supra* note 14, at 13-16.

180. *Id.* at 13-15.

181. *Id.* at 14.

intense vulnerability. How the state responds to vulnerabilities is the core inquiry, as well as whether state institutions act fairly and equitably.

Because vulnerability is universal, it suggests both the potential for alliances across identity characteristics such as race, class, and gender, and the promise of reaching more deeply into social and economic inequalities that persist under classic discrimination analysis. It focuses on where the state provides assistance to increase resilience. In addition, as Fineman points out, it requires evaluating the systems “of power and privilege” that create inequalities with respect to vulnerabilities. The responsive state responds to vulnerabilities with egalitarian support or has compelling reasons to treat persons differently. “[I]f the state confers privilege or advantage, it has an affirmative obligation either to justify the disparate circumstances or remedy them.”¹⁸²

Fineman’s primary focus is shared vulnerability in the sense of conditions requiring support from a more responsive state, as well as exposing the inequities in current state policy that result in persistent, and worsening, social inequalities. Using Brown’s work emphasizes the value of vulnerability as a positive emotional or psychological characteristic that is critical to self-development. It is an asset that fits within both human and social asset categories, building self-development essential to connection with and care for others. It develops human capital and provides a basis for family and social networking that supports children and their caregivers. This positive vulnerability, if supported as essential to care, is like assets of education and employment that contribute to the development of human potential. The state supports the individual in a way that benefits individuals and society.

Incorporating Brown’s vulnerability analysis into Fineman’s model underscores the link between structural reforms and cultural change. Structurally, we have to support care with policies that make it possible to do care work, that value care, and that enable and promote care without gender, race, or class divisions. Culturally, we have to support an ethic of care by fostering affirmative models and tackling stereotypic ways of thinking as well as envisioning a new norm. We have examples of this connection between structural and cultural change. Workplace antidiscrimination statutes that reframed the structure of work have also linked with affirmative action, diversity training, and sexual-harassment training to reorient work culture.¹⁸³

182. Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47-61 (Martha Albertson Fineman ed., 2011).

183. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (codified at 42 USC § 2000e) (2006). As a result of court cases under Title VII, employers have engaged in sexual harassment training and diversity training, as well as affirmative action in hiring and promotion, as ways to proactively avoid liability under the statute and achieve a more diverse workplace and equitable workplace culture. Similar affirmative efforts have occurred as the result of the prohibition against gender discrimination in educational institutions, revolutionizing women’s opportunities in sports and addressing sexual harassment. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373 (codified at 20 U.S.C. §

Reframing the legal response to domestic violence has included both structural change and public education about the realities and unacceptability of intimate violence.¹⁸⁴ Public health issues such as smoking, drunk driving, school violence, and bullying have coupled stronger consequences with affirmative efforts to educate and change the culture.¹⁸⁵ These examples, and many more, combine rights or consequences of acts with proactive encouragement and new models of thinking and behavior.

VI. CONCLUSION

Just as we have opened, reoriented, and expanded women's sense of self by policies as diverse as fostering women's place in education and sports, domestic violence reforms, and employment discrimination laws, so too we must foster the emotional health and vulnerability of men as a foundation to a norm of fathers as caregivers. This cultural shift, inclusive of all fathers, is essential to change the patterns of fatherhood, and achieve work-family equality. In combination with structural reform, it will contribute to the revolution in fatherhood that promises so much to children, men, and women.

1681) (2006); *see also* 34 C.F.R. § 106 (2006) (promulgating regulations according to Title IX).

184. Domestic violence has shifted from being an ignored, privatized harm to a civil rights and public health issue that has generated significant legal and social change. *See generally Office on Violence Against Women*, U.S. DEP'T OF JUSTICE, <http://www.ovw.usdoj.gov/> (last visited Sept. 14, 2012).

185. There have been many examples of proactive efforts that complement legal penalties or rights. *See, e.g.,* CAMPAIGN FOR TOBACCO FREE KIDS, <http://www.tobaccofreekids.org/> (last visited Sept. 14, 2012) (smoking); *Mass Media Campaigns Are Effective in Preventing Alcohol-Impaired Driving*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/MotorVehicleSafety/Impaired_Driving/massmedia.html (last visited Sept. 14, 2012) (drunk driving); *Prevention of Bullying-Related Morbidity and Mortality: A Call for Public Health Policies*, WORLD HEALTH ORGANIZATION, <http://www.who.int/bulletin/volumes/88/6/10-077123/en/> (last visited Sept. 14, 2012) (bullying).