

Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family

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Male lawyers have always struggled to balance firm time with family needs. Unfortunately, for many men caught in the firm's time-demanding web, work necessities take precedence over home demands, as depositions are prioritized over diapers, settlements over soccer games.

In this note, Keith Cunningham analyzes the status of fathers within firms. The author begins by surveying the new generation of associates who state that their primary professional goal is attaining a "work-family balance." Firms have responded to these demands by implementing superficial "family-friendly" policies, such as paternity leave and part-time schedules, which have gone largely unused by male lawyers. Cunningham highlights the disconnect between policy and practice by analyzing the structural and cultural barriers within the legal workplace that keep men from going part-time. The male lawyers' "double-bind" is outlined, as are the gender effects suffered by women, who, in light of the male absence on the part-time front, have become the sole users of the firms' flexible work policies. Finally, Cunningham makes an economic case for modified work schedules and describes a model law firm that has made "family-friendly" a reality. Cunningham contends that elite firms must address all of these factors—workplace structure, firm culture, and recruitment/retention economics—if they are to move beyond gendered paradigms and genuinely support men in their roles as both lawyer and father.

Kevin Knussman was not asking for much. His wife was suffering medical complications from childbirth, and his newborn daughter needed his care. Knussman went to his employer and sought twelve weeks of paternity leave under the Family and Medical Leave Act (FMLA) of 1993.¹ The Maryland

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State Police, Knussman's employer, saw things differently. "Unless your wife is dead or in a coma," Knussman's supervisor said, "you could not be the primary provider."² His request for extended leave was denied, and he sued.

When Knussman became the first man to win a gender³ bias claim under the FMLA in 1999,⁴ he was depicted as a "poster dad" and "something of a folk hero" by an adoring national press.⁵ Unfortunately for Knussman, the battle did not stop there. Before he could return to work, his employer required him to take a psychiatric test.⁶ Although the state police claimed that the exam was "routine," the retributive message was clear: Any man who goes to such lengths to put family above work must have some sort of mental defect.⁷

The resistance Knussman encountered is emblematic of a larger struggle occurring within the American workforce. The balance of work and family, once an issue isolated to the "woman's domain," has found a place in the American male psyche; many of today's working men seek the dual objective of maintaining successful careers while being involved in their children's lives.⁸ However, the working father's appetite for time with his children is

1. 29 U.S.C. § 2601 (1993).

2. Diane E. Lewis, *When Dad Needs Time Off*, BOSTON GLOBE, Feb. 7, 1999, at G4; see also Jodie Morse, *Make Time for Daddy*, TIME, Feb. 15, 1999, at 61; Paul W. Valentine, *Trooper Testifies on Family Leave*, WASH. POST, Jan. 21, 1999, at B1.

3. Any analysis of issues involving sex and gender faces semantic challenges. In this note, I attempt to follow the lead of many contemporary feminists by using the term "sex" in reference to strict male and female biological differences and "gender" when referring to cultural constructs. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 5 (1989). Like Justice Ruth Bader Ginsburg, I generally prefer "gender." Unlike Ginsburg, whose phraseology on this topic has been labeled "more serendipitous than calculating," Anne M. Coughlin, *Sex and Self-Governance*, 29 MCGEORGE L. REV. 17, 18 (1997), I favor the term "gender" for its ability to highlight the interconnectedness of culture and biology. For example, a cursory definition of the different family leave policies that law firms offer fathers and mothers might use the term "sex-skewed" to describe the difference. However, by using the term "gender-skewed," I call attention not only to the rote sexual polarity within the policies but also to the gendered presumptions that underlie and reinforce them. For it is these cultural constructs, far more than the policies' basic physiological differentials, that inhibit male lawyers from adopting alternative schedules.

4. *Knussman v. Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999) (awarding Knussman \$375,000 for mental anguish caused by the denial of paternity leave).

5. Morse, *supra* note 2, at 61; Sarah Pekkanen, *The Good Father Is a Good Mother*, BALT. SUN, Jan. 9, 2000, at 3F.

6. *Winner of Discrimination Lawsuit Working in Office, Not as Paramedic: State Police Insisting on Psychiatric Exam Before Return to Old Job*, BALT. SUN, Feb. 18, 1999, at 5B.

7. *See Wrongful Retaliation: State Police: Trooper Who Won Case Against Agency Unfairly Blocked From Returning to His Old Job*, BALT. SUN, Feb. 27, 1999, at 14A (calling the exam "a blatant case of retaliation").

8. See JAMES A. LEVINE & TODD L. PITTINSKY, *WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY* 17 (1997) (reporting that men are equally split about whether the main focus of their life is their job or their family). See generally SUZANNE BRAUN LEVINE, *FATHER COURAGE: WHAT HAPPENS WHEN MEN PUT FAMILY FIRST* (2000) (outlining the challenges men and women face when redefining gender roles in parenting).

often trumped by the greater hunger of the robust American economy, which is in the midst of its largest expansion in history.⁹ With the country's unemployment rate at a thirty-year low,¹⁰ there is an ever-increasing demand for employees to stay at work longer, away from their families.¹¹ One economist estimates that today's workers spend a month longer at work each year than their parents did.¹²

As the hot U.S. economy swallows employees' time, no industry is hungrier than the carnivorous legal market. The unbounded nature of the law firm economic structure allows firms to grow exponentially.¹³ This growth potential, coupled with the economic boom of the late 1990s, has created a record demand for legal services¹⁴ and a dramatic rise in billable hour requirements;¹⁵ today's law firms are increasingly hard-pressed to attract and retain the best legal talent. As one industry journal reports: "[G]ood economic times have swung the employment pendulum in favor of the associates who are seeking jobs."¹⁶

At the same time, lawyers' dissatisfaction with their work has reached startlingly high levels.¹⁷ Lawyers have the highest job dissatisfaction rate

9. Kimberly Blanton, *As Expansion Continues, Economists Are Puzzled by What's Driving Productivity*, BOSTON GLOBE, Sept. 17, 2000, at G6; see also Randi Lowenthal, *Firms That Fail to Retain Associates Pay High Price*, N.Y. L.J., Sept. 22, 1998, at 5.

10. Alexis Herman, Regarding Labor Day (Aug. 31, 2000), in FDCH POL. TRANSCRIPTS.

11. See generally FAMILIES & WORK INST., NATIONAL STUDY OF THE CHANGING WORKFORCE: EXECUTIVE SUMMARY 7-13 (1997), available at <http://www.familiesandwork.org/nationalstudy.html> (demonstrating the high levels of work-family stress present in the U.S. workforce).

12. Deborah J. Swiss, *Good Worker or Good Parent: The Conflict Between Policy and Practice*, in SHARED PURPOSE: WORKING TOGETHER TO BUILD STRONG FAMILIES AND HIGH-PERFORMANCE COMPANIES 87, 90 (Maria G. Mackavey & Richard J. Levin eds., 1998); see also FAMILIES & WORK INST., *supra* note 11, at 8 (showing an increase in average worker hours over the past twenty years).

13. See, e.g., MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 87-109 (1991).

14. NALP FOUND. FOR RESEARCH & EDUC., BEYOND THE BIDDING WARS: A SURVEY OF ASSOCIATE ATTRITION, DEPARTURE DESTINATIONS & WORKPLACE INCENTIVES 34 (2000) (explaining that the "extraordinary market growth" of the burgeoning economy created "high demand for associates" such that "many law firms could not get enough quality lawyers"). NALP is the National Association for Law Placement.

15. Deborah L. Rhode, American Bar Ass'n, Commission on Women in the Profession, Lawyers and Balanced Lives 2, 7-8 (Jan. 29, 2001) (unpublished manuscript, on file with author).

16. Lowenthal, *supra* note 9, at 5.

17. See, e.g., AMERICAN BAR ASS'N, THE REPORT OF AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES (Apr. 5-6, 1991) (reporting the results of a 1991 survey indicating that dissatisfaction had increased throughout the profession since a 1984 survey); cf. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS' IDEALS/LAWYERS' PRACTICES:

among all major professional groups.¹⁸ Half of the lawyers in a Rand study said that, if given the chance, they would choose a different career.¹⁹

Given the state of the profession, it is little wonder that firms remain associate mills, churning in and spitting out a new crop of lawyers annually. The "normal" large law firm turnover rate of twenty percent is over double that of other industries.²⁰ Even one major firm's marketing director admits that attrition rates are "staggeringly high."²¹ By the end of their third year of employment, over forty percent of all associates have left their firm.²² Within eight years, the typical law firm has lost seventy-seven percent of its original associate class.²³ The ABA Young Lawyers Division reports that nearly one-third of lawyers under the age of thirty-six are "strongly" considering leaving their firm within the next two years.²⁴ Only ten percent of respondents say they "definitely" will *not* consider leaving their current firm in the next two years.²⁵

Faced with the stark view of what life in the law firm holds for them, many of today's law school graduates make employment decisions based not only on salary but also on quality-of-life considerations, such as a firm's personnel policies and work atmosphere.²⁶ In doing so, this "'life-centered' generation of talent"²⁷ approaches the legal job market with a value set quite distinct from their predecessors. The old notion that associates must "eat, breathe, and sleep" their work might not be as palatable to the new recruits as the old guard would like.²⁸ Over half of the college students responding to a 1999 survey

TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144, 144-73 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992) (analyzing the reported decline in legal professionalism to determine if there has been a steady decline or five separate "crises").

18. Kevin Lyskowski, *Conflicted Liberals and the Lure of Money*, NAT'L L.J., May 2, 1994, at A19.

19. *Is the Legal Profession on the Trash Heap?*, BUS. & SOC'Y REV., June 22, 1995, at 14.

20. Lowenthal, *supra* note 9, at 5.

21. Silvia L. Coulter, *Recruitment retire*, L. FIRM PARTNERSHIP & BENEFITS, Dec. 2000, at 3.

22. NALP FOUND. FOR RESEARCH & EDUC., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 54 (1998).

23. *Id.*

24. AMERICAN BAR ASS'N, ABA YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION 9 (1995).

25. *Id.*

26. See Coulter, *supra* note 21, at 3 (reporting that despite the 2000 salary wars, attrition rates remain "staggeringly high," suggesting that "it's not just about the money"); Julie Hyman, *Lawyers Push Firms for More Attractive Part-Timer Policies*, WASH. TIMES, Oct. 4, 2000, at B7 ("[S]alary increases at law firms in recent years are not enough to attract and retain good talent."); NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 62 (describing "a new generation of lawyers" who look beyond "standard perks and amenities" toward "quality of life" considerations).

27. NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 62.

28. See generally CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTÉ, THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND

identified "attaining a balance between personal life and career" as their primary professional life goal.²⁹ In a recent study of American workers, the job characteristic that was most often cited as being "very important" was "[h]aving a work schedule which allows me to spend time with my family."³⁰ "I think people coming out of law school feel that they are entitled to a lifestyle," says one legal recruiter who worked eight years at large law firms before transitioning to the career services industry. "When I got out of school, I didn't think I was entitled to a life."³¹ Law students' lifestyle considerations have been studied by psychologist Everett Moitza, who says, "Firms are speaking about the dilemma because the best and brightest associates come in with the attitude that they have a life, a profession and a family, and wish to negotiate the balance."³²

A rational economic model suggests that the greater clout law graduates and young associates hold in the job market should yield lifestyle-enhancing concessions by the firms. Firms openly state that recruitment and retention of associates are among their primary business goals.³³ To that end, law firms have instituted a wide set of policies to make the workplace more "family-friendly."³⁴ Explains one legal journal: "With young lawyers and even law

GENDER 12 (1999) ("Younger people are also questioning the all-encompassing work commitments usually required in professional life, because careers are not as certain as they were in the past and they believe that a good life is one that integrates work and family.").

29. Rhode, *supra* note 15, at 10.

30. RADCLIFFE PUB. POL'Y CTR, LIFE'S WORK: GENERATIONAL ATTITUDES TOWARD WORK AND LIFE INTEGRATION 3 (2000) (showing that seventy-nine percent of workers consider having a job that allows them to have family time to be "very important," compared to only thirty-seven percent of workers who consider having a high salary as being a "very important" job characteristic); *see also The Cutting Edge*, WASH. POST, Aug. 10, 1999, at Z5 (showing that ninety-five percent of workers are concerned about the amount of time they spend with their families, and ninety-two percent want work schedules that are flexible enough to address family needs).

31. Telephone Interview with Karen Pordum, Senior Vice President, Special Counsel (May 25, 2000). Pordum recalls a recent seminar on women in the legal profession where many of the panelists were female partners at large law firms and the audience was composed of mostly younger female associates. "One of the most shocking things to the female partners was that the audience didn't want to be them when they grew up," Pordum says. *See generally* Gary W. Loveman, *The Case of the Part-Time Partner*, HARV. BUS. REV., Sept.-Oct. 1990, at 12, 12 (outlining the hypothetical debate of a law firm promotions committee on the candidacy of a part-time associate brought up for partnership consideration).

32. Jill Schachner Chanen, *In the Family Way*, 81 A.B.A. J., 76, 76 (1995). *See generally* Sheila Nielsen, *Part-Time Work Arrangements Lead to Greater Satisfaction*, ILL. LEGAL TIMES, Nov. 1995, at 4 (suggesting steps lawyers can take, such as doing more pro bono work and transitioning to an alternative work schedule, in order to lead more balanced lives for long-term professional success).

33. *Large Firms Lead the Way, But All Have Upped the Ante*, COMPENSATION & BENEFITS FOR L. OFFICES, June 2000, at 1 (referring to the industry "buzz" that "recruitment, hiring, and retention [are] the key current concerns of law firm managers"); Lowenthal, *supra* note 9, at 5.

34. Bruce Balestier, *Paternity Leave Slowly Catches On: Fewer Men Fear Backlash*

students announcing family as a priority, firms have followed suit, making their [family-friendly] policies . . . a prominent selling point of firm brochures and Web sites."³⁵

However, beyond serving marketing goals, these programs have done very little to assist lawyers with attaining a work-family balance.³⁶ The fact remains that although these policies are facially supportive of a lawyer's familial commitments, structural deficiencies and cultural mores remain firmly in place to keep most lawyers, especially men, from taking advantage of the programs.³⁷

This note will consider the effect of law firm policy and culture on lawyers in general and on men in particular. Large law firms are the primary focus of this note because of their extraordinary influence on the national legal landscape. These firms leave an indelible mark on law and policy formation in this country by influencing legal precedent through high-profile litigation, as well as by contributing large sums of money to local and national political campaigns.³⁸

The first part of this analysis will provide an overview of the current state of law firm leave policies. Although law firms each possess their own unique culture and climate, some broad trends can be seen in the industry, which has adopted family leave policies that require men to prove they are the "primary caregiver," while forcing women into that default position. Part II will describe flexible work arrangements and the working man's low use of them. Part III will analyze the reasons male lawyers are particularly averse to alternative work schedules; this non-use by men reinforces stereotypes of women in the legal workplace, while keeping men from realizing their dual goals of family involvement and workplace commitment. Part IV will outline the efficiency gains of modified work schedules and will offer an example of a model law

for Taking "Family" Time, N.Y. L.J., June 23, 2000, at 24 ("[B]ig law firms have begun to make family-oriented policies like paternity leave a focus of their marketing efforts to law students.").

35. Bruce Balestier, "Mommy Track" No Career Derailment, N.Y. L.J., June 9, 2000, at 24.

36. See *Consider Offering Part Time*, LEGAL TIMES, Oct. 24, 2000, at 24 (noting that although firms have adopted quality-of-life policies to combat high associate turnover, these programs are not well publicized and go largely unused in most firms).

37. See generally EPSTEIN ET AL., *supra* note 28, at 39-45 (explaining that shifts in part-time policies at law firms have done little to increase the number of lawyers at law firms working modified work schedules).

38. Throughout the nineties, the legal sector was the top-contributing industry to both Republican and Democratic campaigns. Opensecrets.org, *Top Industries Through the Years*, at <http://www.opensecrets.org/pubs/whospay00/industrychange.asp>; see also Kevin Livingston, *Counsel with Cash*, RECORDER, Dec. 21, 1999, at 1 ("When former New Jersey Sen. Bill Bradley first announced that he would seek the Democratic presidential nomination, he immediately called Wilson Sonsini Goodrich & Rosati partner John Roos. When Texas Gov. George W. Bush threw his hat in the ring, the Bush campaign soon placed a call to Thelen Reid & Priest partner Stephan Minikes. The reason: money—lots of money.").

firm that has incorporated a family-friendly culture while still meeting the bottom line.

In any business setting, successful adoption of alternative work schedules will only occur once clear support of the policies is given from upper management, which in turn will lead to a critical mass of men using these programs. The lesson to large firms is unmistakable: Having a family-friendly policy on paper means nothing in an environment that fails to honor a man's simultaneous commitments as lawyer and father.

I. LAW FIRMS AND PARENTAL LEAVE

A. *The Family and Medical Leave Act of 1993*

On February 5, 1993 President Clinton made the FMLA his first bill to be signed into law.³⁹ The FMLA, which had been vetoed twice by President Bush in similar forms, entitles eligible employees to twelve weeks of unpaid, job-protected leave for family illness, childbirth, adoption, or elder care.⁴⁰ In its wording, the FMLA recognizes the national importance of allowing fathers and mothers time off to care for their infant children.⁴¹ However, beyond the symbolic wording of the Act lie serious limitations that prevent a great many workers from taking formal parental leave.

Before the FMLA's passage, the United States was one of only two industrialized countries that lacked a formalized parental leave policy.⁴² Yet, even after the FMLA's adoption, the United States still lags far behind European countries in the leave it offers parents.⁴³ Professor Carol Daugherty Rasnic's 1994 analysis of the parental leave policies in nineteen European countries⁴⁴ shows that the United States has not come close to matching the

39. Kyle B. Arndt & Christina A. Bull, *Recent Development: The Impact of the Family and Medical Leave Act of 1993 on the Legal Profession*, 3 UCLA WOMEN'S L.J. 77, 77 (1993).

40. Paul Richter & Gebe Marinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22.

41. 29 U.S.C. § 2601(a)(2) (2000) ("[I]t is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing . . .").

42. Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105, 105 (1994).

43. *But cf.* Stacy VanDerWall, *Paid Family Leave: At What Cost?*, HR MAG., June 1, 2000, at 246 (highlighting a report by the conservative Employment Policy Foundation, which argues that although European maternity leave is more generous than the FMLA, the United States should encourage workplace flexibility through private innovation rather than through costly paid leave legislation).

44. Rasnic, *supra* note 42, at 112 (outlining the leave policies of Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Greece, Hungary, Ireland, Italy,

family leave standard set by Europe.⁴⁵ All European countries surveyed provided statutory maternity leave with pay, and eleven of the countries provided paid paternity leave as well.⁴⁶ The European model is set among a backdrop of state-subsidized support for families with children, including national healthcare, cash benefits for families based on the number of children in the family, and guaranteed minimum child support payments for single parents.⁴⁷

Although it was touted as a monumental breakthrough in pushing employers to honor family commitments, the FMLA has considerable drawbacks that keep it from having a greater impact on the U.S. workforce because 1) the leave is unpaid, thus making it “largely a pipe dream” for parents with low wages,⁴⁸ and 2) the FMLA only applies to employees in companies with fifty or more employees; any person working for a small business is not covered. In sharp contrast, not one of the European countries limits an employee’s ability to take parental leave because of company size.⁴⁹ The result of the FMLA company size limit is that only two-thirds of U.S. workers are even eligible to take leave under the Act.⁵⁰

With regard to lawyers, most large law firms have already adopted formal policies that meet the FMLA’s minimum guidelines. As this note will demonstrate, however, most of these law firm policies are *not* gender-neutral; while women can take paid leave, male attorneys must meet a “primary caregiver” benchmark in order to enjoy the same benefits.⁵¹ At first glance the FMLA may appear to be more pertinent to small and mid-size firms, many of which do not have any family leave policies. However, because the Act requires a minimum of fifty employees, small firms may not be covered. Further, the FMLA only applies to “employees,” and incorporates the definition of “employee” set by the Fair Labor Standards Act (FLSA) of 1938.⁵² Courts have consistently stated that law firm partners are not employees, as defined by

Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, and Switzerland).

45. *See id.* at 112-32.

46. *Id.* at 133-34 (“Eight require the employer to pay the father during such leave (all to be taken after the birth unless otherwise indicated): Austria (time not specified); Belgium (two days after the birth of a child, with an additional ten days per year permitted generally); Finland (twelve days); France (three days); Poland (up to sixty days per year); Portugal (two weeks, only if the mother is incapacitated or has died); Spain (two days); and Switzerland (time is unspecified, presumably as long as necessary). Paternity leaves in Denmark (two weeks), Finland (six to twelve days), and Sweden (ten days) are compensated by the federal social security system. Italy has a modified system, whereby the paid maternity rights of the mother can be transferred to the father if the mother chooses not to take her paid leave.”).

47. SHEILA B. KAMERMAN & ALFRED J. KAHN, CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3S: POLICY INNOVATION IN EUROPE 15 (1991).

48. Holly Sklar, *Mom Needs a Raise*, KNIGHT RIDDER/TRIB., May 11, 2000.

49. Rasnic, *supra* note 42, at 135.

50. LEVINE & PITTINSKY, *supra* note 8, at 136.

51. *See* Part I.C. *infra*.

52. *See* 29 U.S.C. § 203(e) (1999).

the FLSA.⁵³ Because of this limitation, even partners with minimal equity or no controlling interest in the firm are excluded from the benefits of the FMLA. Given partners' exempt status, small to mid-size firms will have to achieve the fifty-person requirement entirely from associates and support staff. In essence, the Act has very little practical effect on law firms, because 1) the larger firms have already adopted similar, although gender-skewed, leave policies, and 2) the smaller firms will not meet the FMLA's size requirements.

B. *Paternity Leave Within the U.S. Workforce*

Even if companies were to adopt paternity leave policies that were more generous than the FMLA, men would still have to overcome the sizeable attitudinal barriers of upper management. When asked what is a reasonable amount of time for a father to take off from work upon birth or adoption of a child, sixty-three percent of 1,500 chief executive officers and human resource directors said "none."⁵⁴ Given this number, it is no wonder that only fifteen percent of eligible fathers take formal paternity leave, while most fathers use informal methods such as sick leave and vacation time to spend an average of five days with their newborns.⁵⁵

Even before the days of the FMLA, a father was very unlikely to take any formal leave when his newborn sprang into the world. One study conducted before the FMLA's passage by Catalyst, a nonprofit research group, found that men took paternity leave at only nine of 384 companies offering it.⁵⁶ Financially, it is often impossible for a man to take unpaid leave when the household has already lost the income of his spouse, who is more likely to take leave after the birth; a federal study conducted by the Commission on Family and Medical Leave found that the top reason parents avoid taking parental leave is fear of lost wages.⁵⁷ However, the low number of men taking

53. *E.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984) (Powell, J., concurring) ("The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates.").

54. Wade F. Horn, *Dad May Be Eligible for Leave at Baby's Birth*, WASH. TIMES, Sept. 21, 1999, at E2.

55. LEVINE & PITTINSKY, *supra* note 8, at 133; *see also* Deborah L. Rhode, *Ambisexual Bias*, RECORDER, July 14, 1999, at 5 (reporting that men constitute one quarter of those taking leave under the FMLA); *Talk of the Nation: Paternity Leave and the Kinds of Pressures Men Face When They Want to Take Time Off From Work to Be with Their Newborn Child* (NPR radio broadcast, Apr. 10, 2000).

56. Geneva Overholser, *So Where's the Daddy Track?*, N.Y. TIMES, Aug. 25, 1988, at A26.

57. *President Clinton Announces New Funds Enabling States to Provide Paid Leave to America's Working Parents*, FDCH FED. DEP'T & AGENCY DOCUMENTS, Feb. 12, 2000 ("A 1996 study by the Commission on Family and Medical Leave found that the most significant reason why parents did not choose to take some leave during the important days after the birth or adoption of a child was because of the expected loss of income."); *see also* Nat'l Partnership for Women & Families, *President's New Family Leave Initiative Is a Major Step*

advantage of the FMLA is not for a lack of paternal desire to spend time with their children. A host of research shows that, if made financially feasible, men would be coming home in droves to be with their families during the critical days and weeks that follow birth.⁵⁸

The financial barriers associated with leave affect men even more than women, given the overt workplace policy differentials that provide paid leave for mothers but force fathers to take time off without compensation. The Families and Work Institute, a nonprofit organization that addresses the changing nature of work and family life, surveyed U.S. businesses with over 100 employees and found that fifty-three percent of the companies offered time off for maternity leave with replacement pay, but only thirteen percent offered the same paid leave to men.⁵⁹ Like the majority of CEOs who say that men should take no time off for the birth of their children, corporate policies ingrain age-old attitudes about what a man's role, or lack thereof, should be in his newborn's life.

C. *Fathers, Firms, and the Double-Edged Sword of Paternity Leave*

Although law firms have slowly progressed beyond the expectation that new fathers should "just go to the hospital, take a look, and come right back to work,"⁶⁰ the pressures on men within the firm *not* to take time off when their babies arrive are extraordinary. Mirroring the larger U.S. workforce, most law firms have parental leave policies that treat male and female lawyers differently.⁶¹ A sample study of major law firms last year revealed that nine of ten firms had separate policies for male and female attorneys, either giving men less leave time off than women or requiring men to prove that they were the "primary caregiver" in order to receive parental leave benefits.⁶²

Forward for America's Working Families, at <http://nationalpartnership.org/news/pressreleases/2000/021200.htm> ("The bi-partisan Family Leave Commission found that lost wages are the number-one reason people do not take family leave. Nearly one in ten FMLA users is forced onto public assistance while on unpaid leave.").

58. E.g., Nat'l Partnership for Women & Families, *Americans Support Family Leave Benefits*, at http://www.nationalpartnership.org/workandfamily/fmleave/expansion/sum_surveys.htm (citing a recent poll in which eighty-two percent of working men and women supported extending the FMLA to provide paid leave); see also Lisa Belkin, *Bars to Equality of Sexes Seen as Eroding, Slowly*, N.Y. TIMES, Aug. 20, 1989, at A1 (reporting that forty percent of the men surveyed would like to quit their jobs to be with their families).

59. See FAMILIES & WORK INST., BUSINESS WORK-LIFE STUDY 21, 24 (1998).

60. LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN, AND TIME IN THE NEW CORPORATE WORLD* 23 (1993).

61. Robert J. Berkow & Laura E. Sejen, *Benefits: A New Focus on Families*, AM. LAW., July-Aug. 1991, at 49 (citing an Ernst and Young survey that showed sixty-six percent of corporate legal departments offered paid maternity leave, while only nineteen percent offered paternity leave).

62. See John Turrettini, *Mommie Dearest*, AM. LAW., Apr. 2000, at 19; see also Jill Schachner Chanen, *Daddy's Home: Paternity Leave Is Becoming a Viable Option for New*

Unsurprisingly, a survey of lawyers with children showed that while twenty-three percent of female lawyers had taken over three months of family leave, only five percent of men had taken that much.⁶³

A leave policy that differentiates between sexes, although perhaps a well-meaning attempt to assist female attorneys with work-family challenges, codifies gender roles for men and women at the firm. As one lawyer describes the difference in leave policies: “The intentions are good . . . but the results aren’t necessarily fair.”⁶⁴ By forcing men to prove they are primary caregivers in order to “earn” paternity leave, the law firm subverts the man’s already difficult struggle to obtain some semblance of work-family balance. A male associate who musters the courage to approach his managing partner and ask for time off to be with his family will have to overcome a policy that is predicated on the assumption that parental leave is woman’s work. This comes at a time in a man’s career when being successful both as a lawyer and as a father is particularly important for long-term success on both fronts.⁶⁵

An official policy breeds unofficial stigmatization that motivates male attorneys to stay within prescribed norms. Says one male partner at a large New York firm: “There are some things that are somehow more expected of women. It is not a macho thing to do. It’s a function of social roles.”⁶⁶

Similarly, female lawyers are hampered by a benevolent policy that automatically assumes they are the primary caregiver for a newborn. Women who do *not* take maternity leave may be viewed as suspect mothers; at the same time, women who take time off to be with their newborns face the opposite presumption that they are somehow less “committed” to the firm.

Firms claim that women “need” more time off than men because of their pregnancy “disability.” However, this excuse fails on a rudimentary medical

Fathers, 86 A.B.A. J. 90, 90 (2000) (“The majority of firms that offer [paternity leave] provide significantly less paid time off, like two weeks, or have an unwritten policy that allows men to take small periods of time away from the office with pay.”).

Firm	Women’s Leave	Men’s Leave
Akin, Gump	10 weeks paid; unpaid can be requested	Unpaid leave on request
Alston & Bird	3 months paid, up to 3 months unpaid	3 months paid if primary caregiver
Cravath, Swaine & Moore	4 months paid; unpaid can be requested	1 month paid; unpaid can be requested
Davis Polk & Wardwell	3 months paid; unpaid can be requested	1 month paid; unpaid can be requested
Fullbright & Jaworski	3 months paid; unpaid can be requested	3 months paid if primary caregiver
Hale and Dorr	3 months paid, up to 9 months unpaid	3 months paid, up to 9 months unpaid
Kirkland & Ellis	4-6 months paid; unpaid can be requested	3 months paid; unpaid can be requested
Morrison & Foerster	3 months paid, up to 3 months unpaid	1 week paid, up to 11 weeks unpaid
Skadden, Arps	4 months paid, up to 6 months unpaid	1 month paid; unpaid can be requested
Sullivan & Cromwell	3 months paid, up to 3 months unpaid	1 month paid

Turrettini, *supra*.

63. See *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 54 (1997).

64. Turrettini, *supra* note 62, at 19.

65. See EPSTEIN ET AL., *supra* note 28, at 11 (explaining that lawyers marry and begin having families during the period of their lives when critical professional passages occur).

66. Telephone Interview with Michael Wolfson, Partner, Brown & Wood (June 16, 2000).

level. Following the average childbirth, most mothers do not have a “physical need” for three months of recovery. The average hospital recovery time for an unassisted delivery in the United States is 2.1 days.⁶⁷ Assume, for example, that two married lawyers who work at Fulbright & Jaworski are expecting their first child. As per their firm’s policy, the mother would receive three months paid leave after birth, whereas the father, being unable to prove primary caregiver status, could not take any paid leave. If the mother recuperates within a week of delivery, she would have the remaining eleven weeks at home to form the strong bonds with her baby emblematic of a primary caregiver. The learning curve for the parent during these first days and weeks with the newborn is sharp. While the father is away from home all day at the law firm, the mother quickly learns the baby’s patterns and routines, thus making her the “expert” and the father her “assistant.”⁶⁸ Although the “physical need” justification for granting women extended leave is really a pretext for gendered presumptions of caregiver status, the policy becomes a self-fulfilling prophecy. The mother really *does* become the expert caregiver. A misleading perception is created whereby women just seem to be better nurturers and therefore better designees for more “generous” leave time. Bolstering cultural expectations, the perceptions created by the policy codify roles for both the mother and father.

A rather simple first step to remedying the problems faced by both sexes would be to make all language on parental leave gender-neutral. One New York firm did just that, offering both men and women one month paid leave after the birth of a child.⁶⁹ Since the policy’s 1993 inception, eighty percent of eligible men have taken paternity leave. The fact that the vast majority of firms have not taken these steps speaks to the age-old stereotypes that underlie these programs. This double-edged sword must be redefined if women are to obtain equal upward mobility in firms and if men are to play a more prominent role as fathers at home.

II. BEYOND LEAVE: MEN, LAW FIRMS, AND MODIFIED WORK SCHEDULES

A. *Overview of Low Usage of Part-Time Schedules Among Lawyers*

Although parental leave is an important aspect of family-friendly policies,

67. Richard Mahler, *While You Wait*, ELECTRONIC MEDIA, Dec. 30, 1991, at 1; see generally Suzanne Gordon & Timothy McCall, *Healing in a Hurry: Hospitals in the Managed-Care Age*, NATION, Mar. 1, 1999, at 11 (showing that the average length of a hospital stay for a childbirth dropped by fifty percent between 1970 and 1992).

68. See *Talk of the Nation*, *supra* note 55 (“[T]he balance of expertise and who’s in charge and whose style is going to predominate becomes set in place, and it’s very hard for a man to express himself as a parent . . .”).

69. Melinda Ligos, *The Fear of Taking Paternity Leave*, N.Y. TIMES, May 31, 2000, at G1 (describing Milbank, Tweed, Hadley & McCloy’s success with a gender-neutral leave policy).

there is a sort of media fixation with citing the low number of fathers who take parental leave as a proxy for a lack of paternal commitment. Viewing men's involvement as fathers solely through the lens of paternity leave presents an incomplete picture, and is what James Levine, Director of The Fatherhood Project, calls "paternity leave preoccupation."⁷⁰ Levine recalls when Bill Gates's daughter Jennifer was born in 1996 and a paternity-fixated journalist asked about Gates's decision to do what most American men do; Gates did not take an official leave from Microsoft, but instead took an informal, brief break from work to be with his wife and daughter. Levine said:

Please don't turn this into one of those stories that uses paternity leave at childbirth as the *only* way to explain whether fathers are *really* participating more in their children's lives [T]here are lots of years of childrearing ahead. It's going to be important for Bill Gates to be connected to his daughter everyday—on all the days that seem to blend into one another and on all the days that stand out as special. The media should be talking with Bill Gates a year from now when Jennifer is taking her first steps, three years from now when it's her first day of preschool, eight years from now when she's part of an after-school soccer league, fifteen years from now when she's going on her first date, and twenty-two years from now when she's about to take her first job out of college.⁷¹

Thus, winning the short-term parental leave battle does not solve the larger problems of work-family conflict that male and female lawyers encounter daily as parents. In order to promote a lasting balance that enhances men's job satisfaction, and thus their retention rates, firms must focus on the lawyer's long-term family needs.

If there is one thing Americans do not have enough of, it's time. The Families and Work Institute reports that seventy percent of employed mothers and fathers feel they do not have enough time to spend with their children.⁷² Sixty-four percent of workers say they would like to work fewer hours, a seventeen percent increase over five years.⁷³

For lawyers working in the age of the gargantuan billable hour, time with the family is an ever-diminishing commodity. The much-publicized salary hikes for first-year associates in 2000⁷⁴ upped the billable-hour ante once again

70. LEVINE & PITTINSKY, *supra* note 8, at 128.

71. *Id.*

72. See FAMILIES & WORK INST., NATIONAL STUDY OF THE CHANGING WORKFORCE 42 (1997).

73. See *id.* at 74 (tracking workers' responses from 1992 to 1997). See generally ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 124-25 (1997) (discussing the difficulty mothers and fathers have with limiting their work time).

74. *Large Firms Lead the Way, But All Have Upped the Ante*, *supra* note 33, at 1 (reporting that ninety percent of large law firms raised their first-year salaries during 1999-2000); NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 11 ("The seller's market of 2000, predicated by a vigorous economy producing an abundance of legal work for some firms, was a catalyst for dramatic escalation of entry-level associate salaries in virtually all

for lawyers.⁷⁵ But in the wake of the 2000 salary wars and their consequent increase in billing hours, an industry survey finds that "restlessness among associates is pandemic."⁷⁶ According to the ABA's State of the Legal Profession, the top two reasons for having negative experiences at a firm are "[n]ot much time for self" and "[n]ot much time for family."⁷⁷ Half of surveyed lawyers believe they do not have enough time for themselves or their families, and nearly three quarters of lawyers with children have difficulty balancing professional and personal demands.⁷⁸

Starved for meaningful interaction with their families, lawyers would presumably throng to part-time work arrangements. The reality, however, is that very few lawyers take advantage of the part-time policies firms have in place. The National Association for Law Placement reports that ninety-four percent of law firms allow part-time schedules, but only 2.9 percent of attorneys actually work part-time.⁷⁹ These numbers differ sharply from the U.S. workforce as a whole, where roughly sixteen percent of those employed in professional specialties had part-time schedules in 1998.⁸⁰

Truth be told, very few lawyers work part-time for fear of reduced compensation, decreased advancement opportunities, and diminished workplace reputation. Nearly half of surveyed lawyers do not believe that they can take advantage of flexible work arrangements without adverse professional consequences,⁸¹ and only forty-four percent believe their senior managers

firms.").

75. NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 35 (reporting that the average associate target billable hours increased during the same period that associate compensation was raised); *see also* Sheila Nielsen, *The Balancing Act: Practical Suggestions for Part-Time Attorneys*, 35 N.Y.L. SCH. L. REV. 369, 371 (1990) (discussing correlation between higher salaries and billable hours).

76. NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 11-12 ("But not surprisingly, on the heels of the salary adjustments renewed reports of associate restlessness circulated. Even in light of the most generous compensation and bonus packages in history, associates asked, 'Is this all there is?'").

77. AMERICAN BAR ASS'N, YOUNG LAW. DIV., *THE STATE OF THE LEGAL PROFESSION 1990*, EXECUTIVE SUMMARY 5 (1992).

78. Rhode, *supra* note 15, at 3.

79. Nat'l Ass'n for L. Placement, *Opportunities for Part-Time Schedules Rarely Used by Attorneys*, NALP NEWS RELEASE, Nov. 18, 1999, at 1 [hereinafter NALP Press Release]. Cities reporting 100 percent availability of part-time work were: Boston, Charlotte, Cincinnati, Cleveland, Denver, Irvine, Menlo Park, Palo Alto, Philadelphia, Phoenix, San Diego, San Francisco, and Seattle. Of those cities, Boston and Seattle had the highest percentages of attorneys actually working part-time (5.0 percent and 4.8 percent, respectively). Palo Alto and Hartford boasted the highest percentage of part-time partners at 3.8 percent. Entry-level lawyers' chances of part-time placement were considerably lower; fifty-seven percent of offices that offered a part-time option precluded entry-level associates from working part-time. Only six percent of offices had an affirmative part-time policy that made it available to all attorneys. *Id.* at 2.

80. *Id.*

81. Rhode, *supra* note 15, at 3.

support workplace flexibility.⁸² "Having a generous policy on part-time arrangements does not mean employees are comfortable using them," says Marcia Brumit Kropf, Vice-President of Research and Information Services at Catalyst.⁸³ Kropf's organization conducted an in-depth study of professional service firms and found that sixty-four percent of full-time lawyers described "long hours" as "a highly important part of performing well."⁸⁴ Says Kropf: "If you're in a law firm and all the powerful people are working 100 hours a week, then that's communicating something back about what's valued."⁸⁵

A policy not supported by senior management is a policy not utilized by lawyers within a firm.⁸⁶ In response to the growing demand and low supply of alternative work arrangements, the Association of the Bar of the City of New York chartered the Lawyers Advancing Alternative Work Schedules (LAAWS) network in 1993. Currently, the LAAWS network boasts a 200-person membership, comprised primarily of lawyers pursuing alternative work arrangements; the network meets monthly to discuss the issues of advancement, mobility, and business generation for part-time attorneys, as well as educating legal employers on the viability of part-time arrangements. According to LAAWS, despite the fact that most firms have part-time policies on the books, the demand for flexible work arrangements far exceeds the number of such jobs that firms actually offer.⁸⁷ This suggestion is bolstered by legal recruiters who report great difficulty in placing part-time lawyers at firms, regardless of whatever "official" abundance of part-time policies exists.⁸⁸

82. CATALYST, A NEW APPROACH TO FLEXIBILITY: MANAGING THE WORK/TIME EQUATION 37-38 (1997) (reporting on a comprehensive two-year study of a leading law firm, a Fortune 100 pharmaceutical company, a Fortune 100 technology company, and a leading consulting firm).

83. Telephone Interview with Marcia Brumit Kropf, Vice President of Research and Information Services, Catalyst (May 25, 2000).

84. CATALYST, *supra* note 82, at 37-38.

85. Telephone Interview with Marcia Brumit Kropf, *supra* note 83; *see also* Interview with Nora Plesent, cofounder, Lawyers Advancing Alternative Work Schedules (May 20, 2000). Plesent cited the difference between the high number of firms with a part-time policy and the low number of lawyers working part-time. Plesent said, "The important word is 'policy.' If you asked on the NALP form 'What are your part-time practices?' or 'How many people are currently working part-time at your firm?' you're going to get a very different number Even if it is a policy that says 'we offer part-time,' you need to look at the reality. What does that mean? . . . How committed are they to that? How do they respond when someone says they're [only] going to work three days?"

86. *See* Chanen, *supra* note 62, at 90 ("There is a huge gap between what these policies say on paper and what people feel free to use.").

87. Jolie Schwab, Association of the Bar of the City of New York, Committee on Women in the Profession, A Report on the Need for, Availability and Viability of Flexible Work Arrangements in the New York Legal Community 1 (1995) (unpublished report, on file with the Association of the Bar of the City of New York).

88. *E.g.*, Telephone Interview with Karen Pordum, *supra* note 31 (stating that fewer than one percent of her legal placements are for part-time work); Telephone Interview with Peter Talieri, Vice President of Business Development, Special Counsel (May 22, 2000) ("It is extraordinarily hard for me to find work for a person who wants to work part-time I

Although a lower percentage of small firms have official part-time policies, they report a larger proportion of lawyers actually working part-time.⁸⁹ These firms have made flexible schedules succeed, not through policy, but through a supportive partnership. Therefore, in order for larger firms to increase usage of these programs, upper management must better understand the need for alternative schedules in many lawyers' lives and the benefits that such schedules have on the bottom line.

B. *Modified Work Schedules Defined*

Although the term "part-time" usually denotes a workweek of less than forty hours, at most law firms "part-time" means working well over forty hours a week, but with some reduction in overall hours as compared to other equally situated lawyers at the firm. However, many lawyers seeking modified work schedules do so *not* with the goal of working *fewer* hours; these lawyers simply want to gain flexibility in their work lives. In fact most Americans would prefer to have *flexible* work hours, rather than *reduced* hours.⁹⁰ Thus, the term "modified work schedule" incorporates many different meanings and changes based on the individualized needs of each worker. The term, as developed by the Association of the Bar of the City of New York, includes:

Part-time: Working fewer hours per week or working on a project-by-project basis. For many lawyers part-time means working a full five-day week but with the opportunity to go home every night at a set time. For other lawyers, part-time schedules allow them to take one or two days off during the week. Most lawyers who identified themselves as "part-time lawyers" in one survey reported earning a fixed annual salary, without adjustments for a changed workload.⁹¹

Flex-time: Allows a lawyer to structure his or her workday to fit a changing schedule. Lawyers working flex-time usually maintain "core hours" and "flex hours." Core hours allow the full-time lawyers to know when the flex-time lawyer will be at the firm, thus enabling smooth conferencing and other scheduling to take place. Lawyers working flex-time usually bill a set number of hours equivalent to a full-time load.

Compressed Work Week: Composed of various arrangements, usually distinguished by longer, intense periods of work, separated by several off days. Lawyers may work "three on, four off" or for litigation may work extremely long hours during trial, with several days off afterwards.

Phased Retirement: A long-accepted type of modified work schedule at law

think that if a firm is busy enough to fill a position, it will fill it with a permanent position. Why use two people when they can use one?").

89. Schwab, *supra* note 87, at 2; *see also* Part IV.E. *infra* (discussing the model firm of Cohen & Fierman; two of Cohen's six lawyers work three-day weeks, with lawyers receiving four weeks paid vacation and ten sick days).

90. RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 5.

91. Schwab, *supra* note 87, at 3.

firms. Historically taken by aging male senior partners as a transition to retirement, phased retirement allows the lawyer to work reduced hours while remaining active in some of the firm's operations. Phased retirement has been an allowed "practice for many years, even at firms that express great reluctance to permit younger attorneys to work part-time."⁹² Strategically, it is crucial to categorize phased retirement as a modified work schedule, thereby encouraging otherwise reluctant senior partners to relate to and support other forms of modified work schedules.

C. *Common Obstacles Faced by Lawyers Pursuing Modified Work Schedules*

According to the U.S. Office of Personnel Management, the top three reasons federal agencies had not implemented certain family-friendly policies were 1) lack of employee interest, 2) lack of management support, and 3) the high cost of implementation.⁹³ Like the larger federal workforce, the objections of law firm partners to modified work schedules range from the visceral ("part-timers are less dedicated") to the economic ("clients will not tolerate a part-time lawyer").⁹⁴ Yet many of these fears can be allayed by hard data demonstrating that part-time lawyers are more dedicated to the firm in the long run, showing higher retention rates than their full-time counterparts. Furthermore, technology allows nearly constant client access, with the majority of part-time lawyers willing to let their faxes ring and their pagers buzz even while at home. What follows is a discussion of the most common objections to flexible work arrangements at law firms.

1. *Workplace reputation and the "uncommitted lawyer."*

Speaking at a roundtable of law firm leaders, one managing partner stated that in order to reach the pinnacle of the law firm pyramid (i.e. equity partner status), a lawyer must be "fully committed and fully involved," and that a part-time lawyer can be neither of these things.⁹⁵ So goes the typical misconception about part-time lawyering; wedded to the idea that long hours are a proxy for dedication, many managing partners refuse to see part-timers as anything but slackers.⁹⁶

92. *Id.* at 4.

93. See U.S. OFFICE OF PERS. MGMT, A REVIEW OF FEDERAL FAMILY-FRIENDLY WORKPLACE ARRANGEMENTS 13 (1998).

94. Schwab, *supra* note 87, at 11-15 (citing the top seven myths of flexible work arrangements (FWAs) in law firms: 1) FWAs are not profitable; 2) part-time lawyers are less committed; 3) client dissatisfaction; 4) FWAs are only for lawyers with young children; 5) FWA lawyers have diminished ability to do their job; 6) good lawyers live and breathe the law; 7) floodgates); see also David E. Dean, *Being There: Negotiating Part-Time Associate Status in a Traditional Law Firm*, 58 OR. ST. B. BULL. 31, 31 (1998) (citing partner objections to part-time lawyers as undermining "profitability, flexibility and fairness").

95. See *Partner Compensation: Splitting the Take*, ILL. LEGAL TIMES, Feb. 1995, at 1.

96. *E.g.*, Chanen, *supra* note 32, at 79 (quoting one female partner who says of part-

The reality, however, is that a part-time lawyer may be *more* committed to a firm because of its accommodations to the lawyer's outside demands. "My experience is people who really have found workable part-time arrangements . . . are more dedicated to the firm that has made an accommodation to their life," says Nora Plesent, cofounder of LAAWS. "In this market, part-time people are going to show the most loyalty to stay. They're going to be the most happy to get the positions. They're going to give the most of themselves."⁹⁷

Jolie Schwab, another LAAWS cofounder, bristles at the notion that the part-timer who works efficiently and leaves the firm by five o'clock is somehow less dedicated than the associate who chats around the water cooler until noon, hunkers down to his work at two, and stays at the office until midnight. "If you have a family and you're getting your three kids off to school, it takes a lot more effort to get to work than someone who just has to put a tie on," Schwab says. "Who is more committed?"⁹⁸

A male partner who went part-time last year after thirty-five full-time years concurs that one obstacle to making his part-time arrangement a reality was proving he was just as committed to his work, even if he was only billing eighty percent of the normal 2000 billable hour workload. "Historically there has been some sense that when you cut back it was difficult to maintain the intensity and commitment," he says. "For the most part, my colleagues were fairly supportive. To the extent that there was [a need for] convincing, it was the management committee."⁹⁹

The "uncommitted" label appears to derive directly from the firm fixation with face time. Even firm social gatherings, which a part-time lawyer with children is less likely to attend, are important indicators of commitment;¹⁰⁰

timer lawyers at her firm: "The firm says you are less committed. And you know what? You are, but that's life. There are times during your life that you have different commitments.").

97. Interview with Nora Plesent, *supra* note 85.

98. Telephone Interview with Jolie Schwab, cofounder, Lawyers Advancing Alternative Work Schedules (May 19, 2000); *see also* Laura Gatland, American Bar Ass'n, Commission on Women in the Profession, *The Top 5 Myths About Part-Time Partners*, PERSPECTIVES, Spring 1997, at 11 (describing the misconceptions about part-time lawyers, including their lack of commitment); Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375, 1380 (1996) (explaining that law firms, which are hard-pressed to find reliable evaluating factors for a lawyer's work, use long hours as a "proxy for ambition.").

99. Telephone Interview with Michael Wolfson, *supra* note 66.

100. Paula A. Patton, *Part-Time Lawyering Beckons, but Few Follow*, N.Y. L.J., Apr. 21, 2000, at 24; *see also Firm Feedback on Part-Time Lawyering*, 24 MASS. LAW. WKLY. 1676, 1676 (1996) (explaining the observations of one partner who found that part-time lawyers work more efficiently and intensely than their full-time colleagues, but that because part-timers socialize less than others in the firm, this may negatively impact their chances of advancement in the firm); NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 62 (explaining that the traditional law firm cultures "equate face time with commitment, use commitment as a measure of future potential, and expect employees to sacrifice personal lives for work").

these rules may be largely unwritten¹⁰¹ but are enforced through a culture that rewards *quantity* of time at the office. Says Schwab: "Law firms award inefficiency in the way they bill. A guy who can stick around till ten at night looks good . . . I never had a firm say, 'We should promote you because you were more of a *value* to the client.'"¹⁰² Billable hours have not only become a measure of commitment to the client, but increasingly associates view billable hours as the key to "success, promotion, and prestige" in a long-term career.¹⁰³ Shifting the firm's fiscal structure away from billable hours to other more value-based systems will enable a firm to replace the amorphous label of "committed lawyer" with the more fiscally sound "efficient lawyer."¹⁰⁴

2. *The demand for constant access.*

If a lawyer is not branded a slacker for adopting a modified work schedule, she is still likely to hear that her absence will hamper business. Clients, she will be told, need the ability to contact her continually; otherwise, they will go elsewhere. One legal consultant summarized this attitude saying, "While it may not be politically correct to say so . . . lawyers who are not full-time cannot make the same quality or quantity of commitment . . . The work-at-home option that seems so popular in all the computer magazines really has little application for lawyers who must work face-to-face to solve problems."¹⁰⁵ Anecdotal evidence suggests that this attitude is misguided. With the evolution of the "on duty" lawyer,¹⁰⁶ part-time workers are as accessible at home as their full-time counterparts. Even full-time lawyers rarely work on any one client's problem 100 percent of the time; if that were the case, the lawyer would have only one client. The reality is that while senior partners who are in the middle of a deposition are just as unavailable as a flex-time parent spending time with his child, it is the latter scenario that is somehow viewed as suspect. Says one partner at a major New York law firm: "There is still twenty-four/seven coverage by a part-timer, but taking a call from your living room is a hell of a lot better than having to be in the office every day."¹⁰⁷

101. See Rochelle Sharpe, *Family Friendly Firms Don't Always Promote Females*, WALL ST. J., Mar. 29, 1994, at B1 (reporting that companies with the best family-friendly policies have some of the lowest numbers of women in upper-management positions).

102. Telephone Interview with Jolie Schwab, *supra* note 98.

103. EPSTEIN ET AL., *supra* note 28, at 21; see also CATALYST, *supra* note 82, at 32 (showing that sixty-five percent of full-time lawyers describe long hours as "a highly important part of performing well").

104. See Part IV.B. *infra* (discussing the benefits of fixed-fee and value billing systems).

105. Wendy R. Leibowitz, *Making Part-Time Policies Work Full-Time*, AM. LAW., Nov. 1994, at 50.

106. EPSTEIN ET AL., *supra* note 28, at 23.

107. Telephone Interview with Douglas Bartner, Partner, Shearman & Sterling (May 25, 2000).

In fact, the access question may not be driven by clients at all. A study of U.S. corporations engaged in job sharing found that while a majority of clients were initially skeptical of working with a job-sharing team, once the team started working, the clients became "enthusiastic supporters of such an arrangement."¹⁰⁸ Similarly, the Boston Bar Association's comprehensive study of part-time arrangements reports that partners working with part-time lawyers believe that the "part-time status has little, if any, impact on client relations."¹⁰⁹ An industry publication that advises partners on how to efficiently manage their firms says that often "clients aren't even aware of the arrangements. If they get good, timely service, the rest of it is academic."¹¹⁰ Indeed, part-time lawyers often do not inform their clients of their status; if the work gets done, clients do not seem to care whether it is completed from the office or home.¹¹¹

If clients are not put off by part-time arrangements, especially once they have worked with a lawyer on a modified work schedule, then where does the demand for "face time" originate? It appears that partners are more concerned than the clients themselves about the part-timer's responsiveness.¹¹² While some types of practice areas (probate, tax, and real estate) might be more accommodating to a flexible schedule than others (litigation and corporate transactions),¹¹³ managing partners often dismiss flexible work schedules altogether, regardless of the feasibility of such an arrangement within the practice area.¹¹⁴

Of course, being 100 percent available for clients is a "Catch-22" for

108. CATALYST, FLEXIBLE WORK ARRANGEMENTS FOR MANAGERS AND PROFESSIONALS: FINDINGS FROM A CATALYST STUDY 29 (1990).

109. *Firm Feedback on Part-Time Lawyering*, *supra* note 100, at 1676.

110. *New Models for Part-Time or Flex-Time Partnerships*, COMPENSATION & BENEFITS FOR L. OFFICES, Jan. 1997, at 12; *see also Part-Time Partners*, AM. LAW., Apr. 1997, at 82 ("Interestingly, even the partners who are in the office do most of their work by phone—so they give their clients little real face time anyway. Clients can rarely tell if you are calling from home or office, and it makes no difference to them as long as you are responding to their needs.").

111. *E.g.*, Telephone Interview with Mary Murphy, Partner, Farella Braun & Martel (May 19, 2000) ("The issue is whether you are responsive. Can I get back to those people in a timely manner? I, as a woman with kids, am the same as the lawyer in a meeting in the boardroom.").

112. *See Part-Time Partners*, *supra* note 110, at 82 ("It sounds like 'face time' is more important to the folks in the office than the client . . .").

113. *E.g.*, *Firm Feedback on Part-Time Lawyering*, *supra* note 100, at 1676 (responding to a survey on part-time lawyering, partners "uniformly agree that part-time works better in some departments than in others"); Patton, *supra* note 100, at 24 (stating that litigation or trusts and estates may be more difficult practice areas in which to incorporate a flexible schedule). *But see* Interview with Nora Plesent, *supra* note 85. Plesent was a part-time litigator in New York, working three-day weeks before going into legal recruiting; she says the notion that a lawyer cannot litigate and work part-time is widespread and patently false.

114. *E.g.*, *Part-Time Partners*, *supra* note 110, at 82 ("The absent office syndrome is really internal—something that matters to the people at the firm—not external.").

lawyers who take on a modified work schedule to be with their families. Allowing clients to constantly contact the lawyer at home may defeat the entire purpose of working reduced hours.¹¹⁵ The new continual client connection has created a question for workers about “where to draw the line.”¹¹⁶ Although that line will be drawn in different places depending on the lawyer, most part-time attorneys seem perfectly willing to open their front doors to clients. Take, for example, Constance Fratianni, a flex-time partner at New York’s Shearman & Sterling. When most pregnant women know they are about to deliver, they call their doctor and start breathing. When Fratianni was about to go into labor, she called her law firm and negotiated a contract. As soon as she knew that her first baby was ready, Fratianni, then a seventh-year associate at Shearman & Sterling in the midst of an important mortgage deal, said to herself, “We have to get this done”¹¹⁷ She was referring to the negotiation, not the baby. “As long as you deliver and get the job done, it doesn’t matter where you do it from,”¹¹⁸ Fratianni says. She delivered in more ways than one. Before going to the hospital, Fratianni picked up the phone, called her office, and closed the deal first with her client and then with her obstetrician. According to this self-described “obsessive personality,” documents, depositions, and diapers can all be done in a day’s work. Fratianni, now a partner in Shearman & Sterling’s bank finance and bankruptcy group, says her secret to making it all fit is the flex-time schedule her firm allowed her to take when she had her fourth child in 1998.

For Fratianni, “flex-time” means getting to work by 9:30 a.m. and working “as late as I need to work.” Trying to get home in time for dinner with the kids, Fratianni gets on her laptop and answers emails at 9:30 p.m. once the children are put to bed. On the day of our interview, which was a Thursday, her reduced schedule day, Fratianni left the firm’s New York office by 2 p.m. to attend her daughter’s girl scout meeting in Long Island, for which she is a scout leader. After the meeting, she got on her cell phone to attend to emergencies. That evening, she was back on a train to Manhattan for a meeting with clients. Admits Fratianni: “It’s a crazy life We sell a product—our services—and we offer [it] twenty-four hours a day, seven days a week. We have to be accessible.”¹¹⁹

Her supervising partner calls Fratianni’s flex-time “a remarkable achievement of balance.”¹²⁰ But this balance came at a price for Fratianni’s

115. See CATALYST, *supra* note 108, at 34.

116. Maria G. Mackavey, *Not Business as Usual: Reassessing the American Dream*, in SHARED PURPOSE: WORKING TOGETHER TO BUILD STRONG FAMILIES AND HIGH-PERFORMANCE COMPANIES, *supra* note 12, at 23, 30.

117. Telephone Interview with Constance Fratianni, Partner, Shearman & Sterling (May 25, 2000).

118. *Id.*

119. *Id.*

120. Telephone Interview with Douglas Barner, *supra* note 107.

home life and career. It took Fratianni fifteen years to make partner, far from the seven- or eight-year norm at most firms.¹²¹ She also took a pay cut for working flex-time, even though she bills 2100-2200 hours each year, the equivalent of a full-time partner at her level. Only two of Shearman & Sterling's 190 partners work modified work schedules. These numbers are particularly troubling given that the firm has one of the most liberal part-time policies in the industry, allowing third-year associates to go part-time for any reason, without affecting their partnership chances.¹²² Other examples abound of part-time lawyers prostrating themselves for clients, whether at home or at work, often losing the home-life advantage they originally sought from an alternative arrangement.¹²³

3. *Fairness and floodgates.*

Lawyers requesting flexible schedules are not the only people at the law firm struggling to balance work and family. Managing partners who make the decision about whether or not to approve a modified work proposal often have a work-family imbalance themselves. A legitimate concern of many partners is that granting part-time status to one lawyer is unfair to other members of the firm who also grapple with finding time for family.¹²⁴ The fear of unfairness is twofold; either the approval of the part-time status will create more work for the remaining lawyers, or the arrangement is unfair because not every lawyer can be approved for part-time. The latter objection is an opening-the-floodgates fear that is often cited but never realized at firms. One partner combined the client-access and floodgates objection, saying, "We are also concerned that if the deal is too attractive, we may have a proliferation of requests for part-time status. I suspect we will get client backlash if we have too many part-time lawyers."¹²⁵ However, even firms that have liberal part-time policies with a supportive culture do not have excessive use. Many

121. *E.g.*, Telephone Interview with Mary Murphy, *supra* note 111. Murphy works a seventy percent schedule, billing 1500 hours each year. Working part-time as an associate handling real estate transactions, Murphy was placed on her firm's nonpartner track until 1998, when she raised the partnership question with her managing partner. In sum, Murphy worked eleven years before making partner.

122. *See Consider Offering Part Time*, *supra* note 36, at 24. In 1999, Shearman & Sterling adopted a very progressive part-time policy with the goal of improving associate retention. Any associate who has worked two years at the firm can switch to a part- or flex-time schedule. If the associate works part-time for two years or less, she will be considered for partnership at the same time as others in her class. *Id.*

123. *E.g.*, *Part-Time Partners*, *supra* note 110, at 83 (describing one law firm with a phone system that allows calls to be transferred from home to office to cell phone to voicemail, "allowing the client to track you down").

124. *E.g.*, Dean, *supra* note 94, at 33-34 (arguing that partners are unlikely to approve any proposal "they see as a threat to the precious time that they spend with their own families").

125. *Part-Time Partners*, *supra* note 110, at 82.

workers say they cannot afford reduced hours.¹²⁶ Given the extremely low number of lawyers currently working part-time,¹²⁷ the typical law firm resembles a parched landscape of overworked litigators more than a flooded field of lackadaisical lawyers; if anything, the floodgates are closed too tightly.

An equally common transmutation of the fairness argument coming from partners is that it just seems unfair for one attorney on a team to be given less work than his co-workers.¹²⁸ To avoid creating more work for other lawyers, the attorney who wants to adopt a flexible work schedule should write a focused proposal that explains how the transition from full-time to part-time can be achieved without disrupting other lawyers' work. Clear guidelines should be established at the time the lawyer and firm embark on a flexible work arrangement. If compensation is to be reduced proportionately with billable hours, the firm should be able to divide assignments among part-time lawyers or redistribute work to lawyers wanting to bill more hours.

The issue of fairness is especially thorny when the topic of partnership arises, with some partners claiming that only lawyers who have sacrificed as much as they have should be granted the golden keys to partnership.¹²⁹ Because it is already extremely common for *full-time* partners to squabble amongst each other over salaries and bonuses, finding an equitable compensation package is often the foremost source of contention in the part-time partner setting. Although most firms reduce a part-time partner's salary by the same proportion as the reduction in hours (e.g., a part-time lawyer billing seventy percent of normal hours gets seventy percent base salary), some firms give part-timers a less than fair "hair cut" in base salary, where the proportional reduction in salary is *greater* than the reduction in hours.¹³⁰ One part-time partner at a Washington, D.C. firm complains that in addition to her drop in pay, her fellow partners refused to raise her salary at the same time as full-time partners of similar seniority. She says, "When I was reviewed for compensation, they hit me again. That didn't make any sense to me."¹³¹ Although she still considers herself working a modified work schedule, she has

126. CATALYST, *supra* note 108, at 25. The study of part-time policies at corporations found that the floodgate concern was often mentioned by management, but at none of the companies was such excessive usage a problem. The most common reasons individuals left flexible work arrangements were financial. *Id.*

127. NALP Press Release, *supra* note 79, at 1 (reporting that only 2.9 percent of lawyers work part-time).

128. Jean Ohman Back, *Being There, Revisited: Part-Time Policies for Lawyers*, 59 OR. ST. B. BULL. 33, 33 (1998) (explaining that the most common objection raised by partners was fairness).

129. See Amy Gage, *Part-Time Partners "Sticky Issue": Law Firms Wrestle with Questions of Equity, Diversity, Financial Interests*, ARIZ. REPUBLIC, Apr. 16, 1997, at E1 (citing firm-wide "grumbings" over giving partnership to a part-time female lawyer).

130. E.g., Leibowitz, *supra* note 105, at 50 (discussing a litigation partner who bills eighty percent hours of normal hours at seventy-five percent pay and a fifth-year associate who receives reduced proportional compensation).

131. Telephone Interview with anonymous partner, Washington, D.C. firm.

returned to the firm five days a week, because without a daily physical presence in the office she was receiving lower-level assignments.¹³²

These examples suggest that when the issue of "fairness" comes up for a proposed modified work schedule, the door swings both ways. Not only do fellow attorneys have legitimate concerns about being overworked as a result of the modified work schedule, but the lawyer seeking flexible hours must also consider the effect such a move will have on her salary and long-term benefits.

III. GENDER EFFECTS: ABSENCE OF PART-TIME MALE LAWYERS CREATES FULL-TIME PROBLEMS FOR WOMEN

The great majority of lawyers who adopt modified work schedules are women.¹³³ This trend, while present in other labor sectors, is particularly prominent in law firms. However divergent the usage numbers between men and women are, they are interrelated figures. The low percentage of male lawyers working part-time creates a name game whereby modified work schedules are seen only as a "woman's issue." Once such a label has taken hold, modified work schedules receive less attention and support from predominately male senior partners who themselves have not dealt with work-family conflicts to the same degree as younger attorneys. The link between men's and women's usage of part-time schedules is what sociologist Arlie Hochschild calls the "stalled revolution."¹³⁴ In essence, the workplace revolution is stalled because of a one-dimensional approach to gender issues that focuses on female autonomy, while neglecting the role men play on the road to equality.¹³⁵ This narrow view of workplace norms also serves to codify misperceptions about responsibilities at home. If a man does not need to worry about balancing work and household duties, then it must be the woman's job to

132. *Id.* She feels that the pay structure and culture at her firm are less than friendly to part-time lawyers; however, she says, "I may make less money, but I'm spending more time with my kids. And I think the firm's attitude is generally very good, and it's getting better every day." *Id.*

133. CATALYST, *supra* note 82, at 12 (showing that law firms reported the lowest male usage of part-time policies, with two percent of male lawyers, compared to seventeen percent of female lawyers, working part-time).

134. ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 12-13 (1989). *Contra* LEVINE & PITTINSKY, *supra* note 8, at 23-26. Levine, while agreeing with Hochschild's conclusions about the interdependence between men's and women's usage of flexible work schedules, disagrees with some of Hochschild's methods of calculation; namely, *THE SECOND SHIFT* cites a then twenty-five-year-old study in which Alexander Szalai found that men spent an average of twelve minutes a day with their children, a figure repeatedly used in the popular media. The figure is misleading because Hochschild neglected to include Szalai's findings as to the amount of time men spent with their children on the weekends. Taken into account, the weekend time boosted the overall average time spent per day on household work and with children to ninety-one minutes per day.

135. See Linda Marks, *Alternative Work Schedules in Law: It's About Time!*, 35 N.Y.L. SCH. L. REV. 361 (1990).

do so. This section will address the unique challenges and double-binds that both sexes face with regard to flexible work schedules.

A. *Father Time: Male Attorneys' Reluctance to Work Part-Time*

Although an increasing number of mommies are seeking part-time schedules, it is still a rare day when daddy stops pulling his hair at the office to start pushing the stroller at home. Remarkably, a recent poll of working men and women conducted by the Radcliffe Public Policy Center showed that seventy percent of men ages twenty-one to twenty-nine said they would give up some of their pay for more time with their families.¹³⁶ In fact, men were more willing than women to trade salary for family time.¹³⁷ If so many men want to make this exchange, why do so few male lawyers work part-time? Although NALP's part-time statistics do not track sex, a comprehensive Catalyst study found that at one law firm two percent of men and seventeen percent of women were working part-time.¹³⁸ The aggregate percentage of part-timers at this firm is significantly higher than in NALP's overall data, suggesting that if anything, the Catalyst figure of two percent part-time male lawyers is skewed upward.¹³⁹

Despite the male lawyer's absence on the part-time front, men still demonstrate a great desire to be with and contribute to their families.¹⁴⁰ The difference between the number of hours mothers and fathers work at home has dropped significantly over the last several decades.¹⁴¹ In 1960, for every hour a

136. RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 3; *see also* Stephanie Armour, *More Dads Tap into Family benefits at Work: Fathers Today Say It's Important to Them to Spend Time with Children*, USA TODAY, June 16, 2000, at B1 (reporting on the Radcliffe findings that men are more willing than women to sacrifice pay for time with their families).

Willingness to give up some pay for more time with the family:

<u>Ages</u>	<u>Men</u>	<u>Women</u>
21-29	70%	63%
30-39	71%	68%
40-49	55%	52%
50-64	65%	57%
65+	26%	69%

Id.

137. RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 3.

138. CATALYST, *supra* note 82, at 12 (reporting that, on average, among all four types of service firms studied, four percent of men and eleven percent of women worked part-time).

139. *See id.* The Catalyst study notes that of the 1695 workers surveyed, part-time workers were more likely to be interested in the study's subject matter; therefore, in probability, a higher percentage of part-time workers responded to the questionnaire. *See id.*

140. S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1678-80 (pointing to men's increased desire to be more active in family life).

141. *See* FAMILIES & WORK INST., *supra* note 11, at 6 (reporting that the difference in

father worked at home, a mother worked four hours; in 1990, for every one hour he put in, she put in one and a half.¹⁴² Although women in dual-earner couples still do more of the housework (roughly fifty-five percent by one measure), men work longer wage hours.¹⁴³ When the number of hours spent at work and on household duties are combined, the amount of time dual-earner men and women spend is nearly equal. But the increase in time men spend with their families has come at the price of their own personal time. The Families and Work Institute reports that in 1977 fathers had 2.1 hours per day for themselves, whereas in 1997 they had 1.2 hours.¹⁴⁴ "The good news," says one commentator, "is that in dual-earner couples, women are no longer alone in working a second shift. The bad news is that everyone is working very long hours."¹⁴⁵ This suggests that although men say they are willing to sacrifice wages for family time, the reality is that men are sacrificing personal time for family time. This loss of time for self can only add to the already high levels of worker stress and job dissatisfaction that run rampant in the legal industry.¹⁴⁶

Pressures from the firm, family, and other outside forces all contribute to male lawyers' general aversion to flexible work arrangements. The first and most obvious cause of this reluctance to work part-time is rooted in the still strong cultural currents that define men as providers. Studies show that men, much more than women, describe parenthood in terms of breadwinning.¹⁴⁷ One survey found that although men and women generally agree that both parents should equally share childcare responsibilities, women are far more likely to expect their partner to earn an outside income.¹⁴⁸ The dichotomy in breadwinning expectations between men and women becomes even more apparent when children enter the picture. The more children men have, the more time they spend in paid labor, while for women the opposite is true.¹⁴⁹

Viewed in the light of alternative work schedules, this strong expectation of providership becomes the first obstacle to making the modified work

time that men and women spend on household chores "has narrowed quite substantially over the past 20 years").

142. LEVINE & PITTINSKY, *supra* note 8, at 26.

143. See ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF 177-78 (1996).

144. See FAMILIES & WORK INST., *supra* note 72, at 47. Women's time for themselves started low and remained low: In 1977 women had 1.6 hours per day for themselves, but in 1997 they had 0.9 hours for themselves. *Id.*

145. BARNETT & RIVERS, *supra* note 143, at 177.

146. See AMERICAN BAR ASS'N, *supra* note 17, at 3-4, 10.

147. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 108 (1995); RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 2 ("Men also rated a high salary as [a] very important [job characteristic] more frequently than women.").

148. RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 4 ("[W]omen are far more likely than men to expect their partner to work for pay (94 percent for women versus 66 percent for men).").

149. See BETH ANNE SHELTON, WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK, AND LEISURE 41 (1992).

schedule a reality for the male lawyer. If such schedules are seen as a threat to his breadwinner role, the lawyer might dismiss the option entirely. Thus, in order for male lawyers to view alternative work schedules as a viable option in their personal and professional lives, one of two shifts in perspectives will have to occur. The first possibility would be to remove the breadwinner burden from the male lawyer altogether, thereby reinventing the man's position within the firm and the family; this is no small task, given the cultural foundation on which the breadwinner burden lies. The second option is to structure the modified work arrangement in a way that enables the man to meet his providership expectation. Rather than reinvent gender roles, the second option is a more realistic solution in the short term that makes modified work schedules palatable to men by acknowledging the realities of family norms and allowing men to live up to them. In order for the modified work schedule to meet this goal, it must not cause a drastic loss in the man's salary or pose a serious threat to his career advancement. If such hazards were eliminated, male lawyers could begin to realistically consider work arrangements that deviate from the firm's current all-engrossing model.

Beyond normative pressures within American culture, men are also pulled by firm culture to stay at a full-throttle work pace. Catalyst reports that forty-four percent of male lawyers say that it is not acceptable for a man to work part-time.¹⁵⁰ With increasing billable hours and a culture that breeds an intra-firm competition for who can stay longer at the office, what may dissuade many male lawyers from going part-time is the fear of being perceived as "less dedicated."¹⁵¹ Men also do not want to be seen as less competitive or "wimp-like."¹⁵² Although these fears are not unique to men, they appear to play an even more prominent role in the psyche of a male associate considering a modified schedule.¹⁵³ Sixty-eight percent of employed men, compared to fifty-four percent of women, consider working long hours to be a sign of commitment.¹⁵⁴ As an associate gets closer to partnership, he is assessed on an increasingly subjective "dedication" scale; thus, the perception of not being committed to the firm can have very real long-term consequences for his career. In a male culture that still predominately defines success in terms of work, a hampered career presents profound psychological consequences for the

150. CATALYST, *supra* note 82, at 26. Among the four sectors surveyed, law firms had the highest disapproval rate for males working part-time; technology companies reported only ten percent of men saying it was unacceptable for men to work part-time; *see also* SHEILA M. NIELSEN, CONSULTING SERV., LARGE FIRM MANAGEMENT AND THE PART-TIME ISSUE: WHY LARGE FIRMS OFFER ATTORNEYS ALTERNATIVE WORK-TIME OPTIONS 2 (1992) (stating that there is a higher stigma attached to part-time lawyer dads than to part-time lawyer moms).

151. SWISS, *supra* note 12, at 91 (stating that fear has replaced loyalty at the office).

152. Overholser, *supra* note 56, at A26.

153. *E.g.*, Chanen, *supra* note 32, at 77 (reporting one consultant's view that part-time male attorneys are not as highly valued and that their commitment is questioned).

154. RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 5.

male lawyer. Furthermore, like their female counterparts, men face the greatest tension between work and family at a time when they are most likely to have children and when they are most likely to be associates striving for partnership.¹⁵⁵ The tension that develops between family and home can be a “recipe for stress” that leads to “guilt, depression, shoddy work . . . and divorce.”¹⁵⁶

This is not to say that men are always unable to take time off without avoiding reputational sanctions from the firm. Historically, older senior partners have often transitioned into retirement by going part-time or taking an “of counsel” position. Men who have had heart attacks or other health problems have been allowed to take time off without reproach. However, if a man reduces time at the firm for “family,” a different picture emerges. Most tellingly, Catalyst reports that the reasons men and women adopt a modified work schedule are quite distinct. Only six percent of part-time male workers, compared to eighty-nine percent of females, said they work part-time for childcare reasons.¹⁵⁷ The top three reasons men took part-time schedules were “[p]ersonal interests unrelated to family,” “[o]verwork,” and “[h]ealth.”¹⁵⁸ One fifth-year associate at a New York firm admits that part-time lawyering is viewed as “basically a pregnant woman’s arrangement,” but says he is happy to work a seventy percent load while pursuing other interests such as writing and teaching.¹⁵⁹ But, like most male attorneys who work part-time, this lawyer went part-time for non-family reasons. He also admits that the firm benefits from the professional writing he does.¹⁶⁰ Among the other part-time male associates at his firm, the reasons for going part-time included becoming a professional cyclist, working as a cartoonist, and starting a separate business. The only male associate who worked part-time for family-related reasons refused to discuss the situation, but assured me that his part-time status was only temporary.

Even among the few men who go part-time for family reasons, heavy pressure urges regression to previous normative rules. This observation was confirmed by sociology professor Cynthia Fuchs Epstein in her study of part-time lawyers. In the two cases of male lawyers who transitioned to a part-time schedule for family reasons, both men eventually returned to their full schedule, “leaving their wives to work part time.”¹⁶¹ Men who originally departed from the full-time firm mold espousing a political orientation longing

155. EPSTEIN ET AL., *supra* note 28, at 11; LEVINE & PITTINSKY, *supra* note 8, at 18.

156. Mary Beth Grover, *Daddy Stress*, FORBES, Sept. 6, 1999, at 202.

157. CATALYST, *supra* note 82, at 26.

158. *Id.*

159. Telephone Interview with Peter Johnson, Associate, Debevoise & Plimpton (May 22, 2000).

160. *Id.* (“There is a theory around here that the more writing and publishing you do, the more work comes in. It maintains visibility.”).

161. EPSTEIN ET AL., *supra* note 28, at 115.

for gender equity ended up regressing to the “primary breadwinner and primary caretaker” dichotomy they had hoped to avoid.¹⁶² The pressure on the men to end their part-time status not only came from the firm, but also from women who were uncomfortable with the men as primary caregivers. “For the men who took their kids out to the park, they were the subject of some negative sanctions by mothers in the neighborhood who found them suspect,” says Epstein.¹⁶³ “Men suffer more than women do when they go out of some normative roles. Somehow that cultural view is communicated to them.”¹⁶⁴ Ultimately, taking time off from the firm to be with the family “seems womanish.”¹⁶⁵

What also makes the dilemma of male lawyers somewhat distinct is their invisibility. Although high numbers of men report having work-family conflicts, very few want to discuss their situation. This holds especially true for the men who go a step further and adopt a flexible work schedule. Because men have been conditioned to be silent about their inner struggles, topics as deeply personal as work-family conflicts are rarely discussed. Michael Kimmel, a leading authority on men and masculinity, opines, “As a gender, we find it hard to admit when we’re lost driving on the freeway, so it’s especially difficult when we’re lost about one of the most important areas of our lives.”¹⁶⁶ This observation held true in the process of conducting research for this note. Although finding male lawyers who worked part-time was difficult, the majority of men working part-time at firms that I contacted would not discuss their situation on the record or did not return phone calls. This was not true of the women working a modified schedule. At one major San Francisco firm, where six of the thirteen part-time partners are men, female part-time partners made themselves available for interviews, whereas the men did not.¹⁶⁷ Note that this firm’s family-friendly policies are among the best in the nation, yet male silence and overall low part-time usage rates are similar to the national law firm average.¹⁶⁸ This silence, coupled with gender norms, keeps men’s part-time usage low and their work-family conflicts invisible.

162. *See id.* Epstein labels these men “ideological renegades” for their purposeful departure from gender roles; one man refers to the divided workload ideal as a “political issue” that is important to demonstrate in front of his children. He says, “It was important to us that [our children] . . . didn’t view the stereotyped roles for men and women in the household . . .” *Id.* at 114-15.

163. Telephone Interview with Cynthia Fuchs Epstein, Professor of Sociology, Graduate Center, City University of New York (May 19, 2000).

164. *Id.*

165. *Id.*

166. LEVINE & PITTINSKY, *supra* note 8, at 29.

167. Telephone Interview with anonymous source, Morrison & Foerster.

168. *See* Morrison & Foerster, Flexible Work Arrangement Program, (unpublished draft) (on file with author). The firm’s policy on flexible work arrangements allows any lawyer, regardless of sex, to adopt a reduced schedule; a flexible work arrangement is not limited to parenting reasons. Duration and eligibility are left open, to be constructed on a case-by-case basis. *Id.*

B. *The Two Sides of the Double-Bind*

The male silence on work-family issues is due in large part to the fact that men are not expected to have these conflicts. The term "working mother" connotes an obvious tension between home and the office. Yet the term "working father" seems awkward and redundant; the assumption is that fathers are always working and that tension with home life, if any, cannot be a man's primary focus. Yet this is simply not the case. Men report having strong conflicts balancing family time and time at work.¹⁶⁹ The double-bind, which has been accurately highlighted as hamstringing women, plays an equally prominent, although more concealed, role in men's work-family lives.

For female attorneys, the struggle is between being a good mother and a dedicated attorney. "People are afraid that they'll be stigmatized because they'll be perceived as not being a player," says June Eichbaum, a New York legal recruiter.¹⁷⁰ Eichbaum practiced law full-time for eleven years in Manhattan; when she switched to a flex-time schedule as a corporate associate, Eichbaum says she was taken off the "A Team" and given paralegal work. "The biggest potential problem is creating a kind of pink ghetto where people are able to work part-time but do so with the consequence of being taken off the partnership track."¹⁷¹ That infamous pink locomotive known as the "Mommy Track," although somewhat slowed in recent years, still churns its wheels in the minds of lawyers who would like to work part-time but fear the long-term consequences of such a decision.

The fact remains that among those few female partners who now work part-time, almost all of them went to a flexible schedule only after shedding much sweat as full-time associates. One part-time partner had her first child when she was an overdrive associate on the brink of partnership. "I knew if I wanted to make partner I had to work full-gear and make a lot of sacrifices," she says. When her daughter was an infant she returned as a full-time associate, getting home between 7:30 and 9:30 every night. "I was back on the partnership track immediately." Once she made partner and established herself as an asset to the firm, she mustered the courage to ask for part-time status. "I had proven myself," she says. "The bottom line is if you're good at what you do, people will accommodate you because they want you around."¹⁷²

Eileen Schwab, a part-time partner at Brown & Wood who calls herself "an

169. LEVINE & PITTINSKY, *supra* note 8, at 15; RADCLIFFE PUB. POL'Y CTR., *supra* note 30, at 4 (reporting that when asked what they would do if given an extra hour of time each day, fifty-nine percent of working men and forty-nine percent of working women said they would spend the extra hour with their families).

170. Telephone Interview with June Eichbaum, Partner, Heidrick & Struggles (May 26, 2000); *see also* Leibowitz, *supra* note 105, at 50 (interviewing several lawyers working flexible schedules, including Eichbaum, who says a part-timer runs the risk of becoming a "second-class citizen" within the firm).

171. Telephone Interview with June Eichbaum, *supra* note 170.

172. Telephone Interview with anonymous partner, *supra* note 131.

aging poster woman" for alternative work schedules, went part-time last year, taking Fridays off but still logging over forty hours at the office each week. As an associate, Schwab was pregnant on two separate occasions; both times she went into labor while working at the office. Labeling herself a "sick woman," Schwab says, "This is not something I advocate for anybody."¹⁷³ But it may take just that kind of dedication for an associate to go part-time without risking her future. Schwab worked twenty-nine full-time years before making the switch to part-time. She is one of two part-time partners at her firm.

Thus, for a woman, the double-bind is external and obvious; if she is a good lawyer, she must be a bad mother, or vice versa. She can only be a successful lawyer at the expense of her children, and she is often seen as failing on both fronts.¹⁷⁴ On the other hand, a man is either a complete "winner" as a provider/worker or he falls short at both ends. Being a good father comes from being a good worker; as he works longer hours, he provides more for his family and is therefore in a "win-win" situation, at least in theory. Of course, the "lose-lose" scenario is triggered when the man spends time away from work, making less money, and thus failing in his role as provider and lawyer. Thus, it is a mother's professional life that is considered harmful to her child, whereas for fathers, the destructive force is his reduced workload.

As previously noted, our cultural understanding of "fatherhood" is intimately wedded to the expectation of providership.¹⁷⁵ Men are equally divided about what "the main focus of their life" is, with roughly one-third of men saying "work," one-third saying "family," and one-third saying "both equally."¹⁷⁶ Surveyed mothers and fathers say that what makes a good father is first "being involved with my children's daily life," followed closely by "being able to support my family financially."¹⁷⁷ It is this "good-father, good-provider" dichotomy that constitutes the male double-bind. Although the male associate who works long hours, seeing his children on Saturday morning, appears to be serving his firm and supporting his family, the internal, unspoken trauma caused by his familial absence tells another story. The anxiety men experience from not spending enough time with their children is real and common. Seventy-eight percent of men, compared to seventy-six percent of

173. Telephone Interview with Eileen Schwab, Partner, Brown & Wood (May 26, 2000; June 20, 2000).

174. EPSTEIN ET AL., *supra* note 28, at 4 (citing the experiences of several female part-time lawyers who "face disapproval from colleagues who believe they 'are neither fish nor fowl': not good lawyers or good mothers"); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 40 (2000) ("[Women] who seem willing to sacrifice family needs to workplace demands appear lacking as mothers. Those who want extended leaves or reduced schedules appear lacking as lawyers.").

175. See notes 147-149 *supra* and accompanying text (outlining the providership expectation).

176. *Transition Time for Men: Will the 1990s Be a "Men's Decade?,"* PUB. PULSE, Feb. 1992, at 1.

177. LEVINE & PITTSKY, *supra* note 8, at 18.

women, report feeling guilty “often/always” or “sometimes” when they do not spend enough time with their family.¹⁷⁸ Says one male lawyer with children: “You work longer hours because of the fear that you’re not providing enough. Then there’s the guilt that you’re not spending enough time with your family. It goes around and around. You work harder for stability, and it gives you less stability than you think.”¹⁷⁹ This double-bind, long a problem in women’s lives, will only be resolved for male attorneys once the expectation of providership is lowered and the feasibility of modified work schedules is raised.

C. *How Male Reluctance Impacts Female Lawyers Working Modified Schedules*

The status of women in the legal profession is nothing for law firms to brag about. While progress in the number of female partners and female associates is slowly being made, women are still a minority at the firm. Less than fifteen percent of law firm partners are women, and female lawyers constitute thirty-seven percent of the associate ranks.¹⁸⁰ Although nearly half of all first-year law students are now women,¹⁸¹ women still have higher attrition rates¹⁸² and lower partnership promotion rates¹⁸³ than men at firms. On the policy level, firms are addressing these numbers by implementing family-friendly programs, such as leave and alternative work schedules. Unfortunately, most of these programs are gender-specific, either in name or in practice. For example, one

178. Jack L. Simonetti, Nick Nykodymn, Warren R. Nielsen, & Janet M. Goralske, *Counseling Employee Guilt: A Corporate Necessity*, 5 EMPLOYEE COUNSELING TODAY 3, 17-23 (1993), cited in LEVINE & PITTINSKY, *supra* note 8, at 21-22.

179. LEVINE & PITTINSKY, *supra* note 8, at 22.

180. EPSTEIN ET AL., *supra* note 28, at 6, 12; see also Deborah L. Rhode, American Bar Ass’n, Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession 6-7* (Jan. 17, 2001) (unpublished manuscript, on file with author) (“[W]omen are underrepresented at the top and overrepresented at the bottom. Women now account for almost 30% of the profession, but only 15% of federal judges and law firm partners, 10% of law school deans and general counsels, and 5% of managing partners of firms.”); NALP, *Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly* (Nov. 15, 2000), at <http://www.nalp.org/Trends/minwom00.htm>.

181. See AMERICAN BAR ASS’N, GUIDE TO APPROVED LAW SCHOOLS 454 (2001 ed.) (reporting statistics showing that 48.7 percent of the 1999-2000 first-year law student class at ABA-accredited law schools are women).

182. NALP FOUND. FOR RESEARCH & EDUC., *supra* note 22, at 54.

183. Cynthia Fuchs Epstein, Robert Sauté, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 358 (1995) (reporting on a study of promotion rates at eight New York law firms from 1973-1994, which found that nineteen percent of men, compared to eight percent of women, were elevated to partnership, and showing that rates of female partnership promotion dropped to five percent in the early 1990s); Deborah L. Rhode, *Occupational Inequality*, 88 DUKE L.J. 1207, 1210 (1988) (“For example, in the late 1980s, females were still only half as likely as males to be partners in law firms.”).

insider's report on law firms notes that Atlanta's King & Spalding allows for "unique arrangements" on an individual basis for *women*.¹⁸⁴ New York's Cadwalader, Wickersham & Taft "makes an effort to accommodate *women* associates who wish to create a family . . ."¹⁸⁵ At Chicago's Kirkland & Ellis "some *women* (usually the 'superstars') have to work out 'special deals'" in order to go part-time.¹⁸⁶ Even when the policies themselves are gender-neutral, part-time arrangements are still invariably linked to women. For example, at Hale and Dorr, both women and men can go part-time, but one associate notes that because the policy is "mainly used by women, there is some ghettoization."¹⁸⁷

Sticking the "part-time" tag exclusively on female lawyers works to heighten the marginalization of women in the legal profession. In one survey on part-time lawyering, many lawyers stated that the overlap between part-time issues and "women's issues" made it difficult to separate the two "when a large majority of part-timers are also women."¹⁸⁸ Why are flexible work policies automatically associated with female attorneys? One explanation has to do with the origin of such programs. Many family-friendly policies were instituted for a new generation of women emerging in the legal workforce. Often it was women who introduced and fought for these programs. The result of such origination is the common linkage of family-friendly policies with "women's issues."

Men's reluctance to utilize alternative work arrangements is partially attributable to the "woman" label being placed on anything family-friendly at the firm. One female lawyer recounts a deposition where both opposing male attorneys asked the female court reporter if she could come up with an excuse why she had to leave by 5:00 p.m. Both men had to pick up their kids but were too afraid to speak up for fear of losing a competitive edge among their colleagues.¹⁸⁹

Given the male absence in the flexible work culture, women who take advantage of these policies are separated from the "dedicated" group of men who toil long hours. Joyce K. Fletcher and Rhona Rapoport argue that creating an official policy aimed at helping women actually undermines their efforts at promotion.¹⁹⁰ "[C]areer [benefits] aimed at mothers . . . reinforce[] the notion that those who want to integrate work and family life are an aberrant subset of

184. *Consider Offering Part Time*, *supra* note 36, at 24 (emphasis added).

185. *Id.* (emphasis added).

186. *Id.* (emphasis added).

187. *Id.*

188. *Firm Feedback on Part-Time Lawyering*, *supra* note 100, at 1676.

189. Susan Vogel, *Babies and Briefs: Rhetoric Yields to Reality*, N.J. L.J., Jan. 30, 1995, at 25.

190. Joyce K. Fletcher & Rhona Rapoport, *Work-Family Issues as a Catalyst for Organizational Change*, in *THE WORK-FAMILY CHALLENGE* 143 (Suzan Lewis & Jeremy Lewis eds., 1996).

workers who are less promotable than those who choose to focus primarily on work."¹⁹¹ Family policies almost solely utilized by women become a non-option for both men and women who want to advance in their legal careers.¹⁹² Thus, men's lack of use of part-time policies and the stigma women suffer as a result of going part-time are closely connected. The integration of both sexes into family-friendly policies, therefore, must be the first step in transforming these programs into viable tools that can realistically assist lawyers with combating work-family imbalances.

IV. CREATING A REAL 'FAMILY-FRIENDLY' LAW FIRM

If there is a developmental process businesses must undertake in order to reach a "family-friendly" state, it appears that law firms remain in an embryonic state, unable to move beyond old notions of workplace structure. The Families and Work Institute reports that companies have three stages of growth in becoming genuinely "family-friendly."¹⁹³ The first stage begins with a "champion" who raises work-family issues within the company. The champion's demands are typically met with resistance and are assumed to be women's issues. During stage one, the champion makes a business case for the concessions and the company makes basic policy accommodations. In stage two, companies begin training middle management on how to recognize and legitimize work-family balance. Finally, in stage three, companies see the work-family balance as a continuous process, realizing that a changing workforce requires permanent adjustments in workplace structure.¹⁹⁴ By all indications, most law firms are woefully stuck at stage one of this process. Initiated by a growing number of women at the law firm, policy changes have been grudgingly adopted, without genuine backing from management. What follows are several solutions law firms should adopt in order to progress toward a more holistic work culture that celebrates the lawyer with a family. As previously discussed, these adjustments should be made with particular attention paid to male attorneys. Only when a substantial number of men joins the work-family-balance march will both sexes be enabled to adopt modified schedules without fear of professional sanctions.

A. *Partnership: The Brass Ring*

One very real solution firms can embrace immediately is promoting part-timers to partnership. That is the key to unlocking the full-time handcuffs, says

191. *Id.* at 143.

192. *See Note, supra* note 98, at 1377.

193. Ellen Galinsky, *Putting Ideas into Practice, in* WORK AND FAMILY POLICIES: THE NEW STRATEGIC PLAN 26, 26-27 (James L. Peters, Barbara H. Peters & Frank Caropreso eds., 1990).

194. *Id.*

Barbara Paul Robinson, former president of the Association of the Bar of the City of New York and partner at Debevoise & Plimpton. Debevoise currently has three partners and thirty-three associates who work modified work schedules. Half of Robinson's legal estates department works part-time. Robinson says these numbers are the product of a 1994 policy change at Debevoise that incorporated an affirmative statement declaring that part-timers will be considered for partnership. Before this shift, Robinson says, "We had lots of women and men working part-time and none of them stayed." Referring to the talent Debevoise has retained as a result of putting part-timers up for partnership, Robinson says, "We might have lost them had we not been able to say, 'We're not parking you in second-class citizenship. You are just like any lawyer. You can have a long-term career here.'"¹⁹⁵

Historically, part-timers were explicitly told that they were off the partnership track. Recently, firms have begun to say in name that part-time lawyers can still make partner. However, the reality is that among the handful of part-time partners, very few were promoted as part-time associates. One recent study of part-time lawyers found that only one percent of lawyers on reduced schedules were promoted to partnership.¹⁹⁶ Admits Brown & Wood's Michael Wolfson: "There are certainly opportunities for part-time associates, but at this time it is a non-partner track."¹⁹⁷ Associates are similarly pessimistic about the part-timer's partnership chances. "Part-time work will almost guarantee your removal from the partnership track," says one Cravath, Swaine & Moore lawyer.¹⁹⁸ A Hale and Dorr associate agrees, saying that part-timers "get derailed from the partnership track."¹⁹⁹

Law firms attract driven people who want to get ahead. With a clear message being sent that modified work schedules will destroy partnership chances, career-minded associates will continue to avoid using such policies. With regard to men, given the dearth of male partners working part-time, firms should publicize the few men who have adopted such an arrangement. In many firms, part-time male partners do not want to be identified as such.²⁰⁰ These men must become vocal models for their younger associates, demonstrating that a man can progress above the firm's rank and file without forgetting his family along the way.

195. Telephone Interview with Barbara Paul Robinson, Partner, Debevoise & Plimpton (May 19, 2000).

196. EPSTEIN ET AL., *supra* note 28, at 56.

197. Telephone Interview with Michael Wolfson, *supra* note 66.

198. *Consider Offering Part Time*, *supra* note 36, at 24.

199. *Id.*

200. See notes 167-168 *supra* and accompanying text (reporting on the silence of male part-time partners at Morrison & Foerster).

B. *Billing Structure*

With a focus on the sheer mass of hours billed by an associate, firms turn a blind eye to reports indicating that part-timers work more efficiently than their full-time counterparts.²⁰¹ The current model, which places associates in a “rat race equilibrium” where lawyers compete to bill more hours than their cohorts, has led some experts to call for maximum hour laws and bar association resolutions that set a ceiling on billable hours.²⁰² While such measures are beyond the realistic legal horizon, the fact remains that a billing structure rooted in a lawyer’s commodified time will always work against attorneys seeking reduced work schedules. Restructuring the firm’s billing methods to be more hospitable to lawyers on modified schedules may include transitioning to value billing or fixed-fee billing systems. Value billing is a subjective system whereby a client is billed based on the complexity of a particular case. Under value billing, lawyers are not encouraged to stretch their time on simple tasks that can be completed in a shorter period; the more efficiently the lawyer works, the less time she spends on the case, thereby raising her hourly rate and increasing firm revenue. Fixed-fee billing establishes a predetermined price for each element of the job; the client is told upfront how much depositions, document production, and other tasks will cost, thereby reducing ex-post sticker shock and encouraging the attorney to work efficiently.²⁰³ Firms can also lessen the tournament billing hour tension of associates by establishing a ceiling on the number of billable hours that will be considered in partnership decisions. Any one of these measures would do much to lessen the linkage between long hours and commitment, while raising the likelihood that lawyers will adopt flexible schedules and be rewarded for their efficiency.

C. *Profitability*

Focused on the almighty bottom line, management must be convinced that retention and profitability will not be harmed by a modified work policy. Firms should rethink their work-at-all-costs mentality if they are to remain competitive in a tight labor market. As Lotte Bailyn writes: “There is no escape from these problems; companies *must* include—explicitly, imaginatively, and effectively—the private needs of employees when reengineering their work. Only if they do so can they gain a competitive

201. See, e.g., EPSTEIN ET AL., *supra* note 28, at 47 (showing that part-time lawyers take “fewer breaks and less personal time while on the job” and have lower rates of absenteeism and turnover); see also Epstein, et al., *supra* note 183, at 421-22 (citing the experiences of several lawyers who believe that once they became parents they worked more efficiently and were less willing to “chit-chat”).

202. See Note, *supra* note 98, at 1380 n.38.

203. *Id.* at 1386.

edge.”²⁰⁴

The associate mill currently being churned by law firms is an economic nightmare. The price of recruiting and training a newly graduated law student is now well above the \$100,000 estimate the ABA offered in 1986.²⁰⁵ Others project that it costs 150 percent of an employee's annual salary to replace him or her.²⁰⁶ If law firms wish to acquire and retain talented lawyers in the emerging economy, they must look for ways such as modified work schedules to lure lawyers in and keep them from leaving. Thus, flexible work arrangements should be presented to upper-management not in terms of “morality” but rather in terms of “money.”²⁰⁷ In fact, the two reasons most frequently cited by partners for adopting modified work schedules are 1) to protect the firm's training investment and 2) to gain a recruiting advantage.²⁰⁸ This is a wise investment, given that among young lawyers who left their job, over a third did so because they wanted more time for themselves or with their family.²⁰⁹ Among those young lawyers who were currently dissatisfied with their job, over seventy percent said they did not feel their situation would improve in the near future.²¹⁰ With such high disillusionment, a meaningful attempt on the part of senior management to improve the work-family imbalance may strike a chord with lawyers, increasing retention and improving firm profitability. This is what Morrison & Foerster found when it adopted part-time, flex-time, and other modified work schedule policies. In 1999, Morrison & Foerster was the only law firm to make the *Working Mother* “100 Best Places to Work List.”²¹¹ Retention, said managing partner Penelope Prevolos, was a key benefit of the flexible work arrangements: “[W]e keep and retain people who we otherwise wouldn't be able to keep if we didn't have those policies.”²¹² In fact, NALP reports that firms with alternative work schedules retain associates at a higher rate than firms that do not offer flexible schedules.²¹³

204. BAILYN, *supra* note 60, at xii.

205. Sheila Nielsen, *Why Large Firms Offer Alternative Work-Time Options*, CBA REC., Oct. 1993, at 26, 28 (stating that the \$100,000 figure is outdated).

206. Schwab, *supra* note 87, at 9.

207. See Linda Himelstein, *Breaking Through*, BUS. WK., Feb. 17, 1997, at 64; see also CATALYST, *supra* note 82, at 18 (reporting that sixty-two percent of firms said retention of high-performing employees was the main motivation for adopting flexible work policies).

208. Chanen, *supra* note 32, at 79 (reporting that recruitment and retention are driving forces behind family-friendly accommodations); NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 65 (“[R]etention of legal talent may be the most compelling rationale for justification of part-time lawyer schedules.”); Nielsen, *supra* note 205, at 28.

209. AMERICAN BAR ASS'N, *supra* note 25, at 10 (stating that 33.6 percent of those who left said time for self or family was a “very important” factor in their decision to leave).

210. *Id.* at 15.

211. *MoFo Named*, NAT'L L.J., Sept. 13, 1999, at A15 (highlighting the tenth year the firm made the *Working Mother* list).

212. *Id.*; see also Chanen, *supra* note 32, at 76.

213. NALP FOUND. FOR RESEARCH & EDUC., *supra* note 14, at 19, 83.

Not only do such policies assist with the investment in younger associates, but family-friendly programs increase overall productivity at the firm. The link between job satisfaction and productivity has been demonstrated in several studies.²¹⁴ Workplace dissatisfaction is at its highest rates at firms that do not offer modified work schedules.²¹⁵ Employees experiencing work-family conflicts are three times more likely to consider quitting their jobs than workers who do not experience such friction.²¹⁶ Finally, Work/Family Directions reports that every dollar invested in family-friendly policies results in a two-dollar savings in direct costs.²¹⁷

Because part-time attorneys have lower turnover rates than full-time lawyers,²¹⁸ firms that make real concessions to families will see improvements in retention, recruitment, and productivity.²¹⁹ They will also see a drop in *client* attrition because by creating a hospitable work environment, firms will reduce lawyer defections and the consequent loss of clients that results from such departures.

Despite this wide body of evidence pointing to the economic gains to be had by flexible work policies, many partners still cite the "commitment" factor as their default excuse for not supporting such programs. Law firms will only be able to turn a blind eye to the economic model of modified work schedules for so long before their reluctance to support alternative work arrangements begins to affect their status within the legal marketplace.

D. *Workplace Culture*

Faced with overwhelming data demonstrating the profitability of modified work schedules, why do so many law firms remain reluctant to do more than

214. See CATALYST, *supra* note 108, at 20 (reporting that two-thirds of companies experienced an improvement in company morale as the result of adopting a flexible work arrangement); DANA E. FRIEDMAN, FAMILY-SUPPORTIVE POLICIES: THE CORPORATE DECISION-MAKING PROCESS 38 (1987) (citing a study by The Conference Board, a non-profit business information service, which revealed that flex-time schedules resulted in perceived productivity improvements by forty-eight percent of companies surveyed, and that two-thirds to three-quarters of the companies offering part-time policies obtained a ten to twenty-five percent savings in costs); LEVINE & PITTINSKY, *supra* note 8, at 19 (showing that a majority of businesses report constant or improved productivity because of flexible work arrangements).

215. Nielsen, *supra* note 205, at 28.

216. LEVINE & PITTINSKY, *supra* note 8, at 44.

217. See Swiss, *supra* note 12, at 93.

218. EPSTEIN ET AL., *supra* note 28, at 47.

219. See generally BARBARA SCHWARZ VANDERKOLK & ARDIS ARMSTRONG YOUNG, THE WORK AND FAMILY REVOLUTION: HOW COMPANIES CAN KEEP EMPLOYEES HAPPY AND BUSINESS PROFITABLE 56-64 (1991) (suggesting businesses that adopt family-friendly policies will become more productive, have lower rates of absenteeism, assure higher retention, and keep morale higher, in addition to broadcasting a strong "family-friendly" image to the public).

adopt hollow policies that go unsupported and unused? Why, if so many firms offer part-time work, do so few men work part-time? What drives much of this disconnect is law firm culture. Living within a gendered sphere, the law firm's power brokers are predominately older men who honed their professional success in a generation of divided labor. For most of these partners, work-family divisions were solved with stay-at-home spouses. These men are not driven by spitefulness toward their younger, balance-seeking associates;²²⁰ rather, they lack a reference point from which to evaluate associates' home needs and family-friendly policy proposals. This lack of understanding breeds a lack of support. For male associates, the disconnect between work and family demonstrated by their male role models in partnership creates an even greater pressure to avoid going part-time. As Deborah Swiss writes:

The majority of corporate leaders rely on a nonworking spouse to manage household and family responsibilities. For them, there is no reason to think about how to make the school conference or how to be in two places at once when a family member is sick. The unspoken view, from many who lead organizations, is that families are an encumbrance to the bottom line rather than an investment in the future.²²¹

Although that kind of attitude may be present among some attorneys within the law firm hierarchy, senior partners should be given the benefit of the doubt. Associates should strive for an open debate with management in creating real support mechanisms for lawyers with families. Other commentators have not been so optimistic, saying workers must wait a generation "for the old dogs to die" before substantive shifts in workplace policy will translate to developments in workplace culture.²²² But partners' inflexibility should not be presumed. With an eye on revenue and profits, partners can be convinced that modified work schedules are in the firm's fiscal interest.²²³ Partners have already caught wind of the demand for flexibility; a recent publication geared toward partners and profits remarks, "The most important part of getting the firm to accept a part-time or flexible partnership program isn't the logistics, the workload, or the different dealings (if any) with clients—it is changing the firm's culture to make it acceptable."²²⁴

Partners' reluctance to go beyond superficial policy support may again relate to the origin of most flexible work arrangements. Because systems such as flex-time, part-time, and family leave were adopted as *accommodations* for employees, they were never envisioned as part of a broader, long-term plan for

220. See generally Balestier, *supra* note 35, at 24 (describing a "generational shift in priorities as an engine for progress" whereby young lawyers have become increasingly more vocal in expressing their quality-of-life concerns).

221. Swiss, *supra* note 12, at 89.

222. Stratford Sherman, *A Brave New Darwinian Workplace*, FORTUNE, Jan. 25, 1993, at 50.

223. See generally *Part-Time Partners*, *supra* note 110, at 82 ("Once they can see the benefits to the bottom line . . . the 'new way' becomes more accepted.").

224. *New Models for Part Time or Flex-Time Partnerships*, *supra* note 110, at 13.

the firm. Seen from this vantage point, acceptance of modified work policies is not so much a battle of wills as it is a revelation process, whereby partners understand the business model behind such policies.²²⁵ Because partners are “the gatekeepers of change,” they must be convinced that “[l]ong hours correlate with long hours—not necessarily with higher output, efficiency, quality, or customer service.”²²⁶

Once they believe that modified work schedules are in the firm’s best interest, partners must step up to the plate and publicly support these policies. This should include using the policies themselves and recognizing associates who do so as well. That formula worked for one New York law firm where male partners took advantage of a new family-work policy, causing a groundswell of male associates to follow suit.²²⁷ Even Al Gore, in his report on the federal workplace, wrote that “support and recognition” from management are key to making these policies a reality.²²⁸ This hand-holding will be especially important for male lawyers who, without a critical mass of support, have lagged behind women in using modified work schedules. Law firm partners should follow the example of Hugh McColl, CEO of NationsBank, who publicly stood with the first man taking paternity leave and championed the employee’s decision, encouraging others to follow in his footsteps.²²⁹ NationsBank reports that its 35,000 employees who have taken advantage of its work-family balance programs have a fifty percent lower turnover rate than those who have not used the programs.²³⁰ It will take this kind of top-down effort before law firms catch up with their corporate clients²³¹ in creating a culture that supports and nurtures work-family balance.

E. *A Model Firm*

Janet Fierman has a piece of advice for overburdened associates tired of working at an inflexible firm: Get out of there and do it yourself! As a part-time associate at Boston’s Weston, Patrick, Willard & Redding, Fierman reached the boiling point when, after suffering complications from a miscarriage, her supervising partner asked, “Can’t you schedule your appointments on your days off?” Fierman, a mother of three, says, “I knew it

225. See BARNEY OLMSTED & SUZANNE SMITH, *CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT & MANAGE ALTERNATE WORK OPTIONS* 4 (2d ed. 1994).

226. *Id.* at 4-5.

227. Ligos, *supra* note 69, at G1 (quoting the personnel director at Milbank, Tweed, Hadley & McCloy who says, “A lot of firms offer some kind of leave policy, but their managers don’t walk the talk. Here, our male partners did . . .”).

228. AL GORE, *TURNING THE KEY: UNLOCKING HUMAN POTENTIAL IN THE FAMILY-FRIENDLY FEDERAL WORKPLACE* at ii (1997).

229. *Talk of the Nation*, *supra* note 55.

230. LEVINE & PITTINSKY, *supra* note 8, at 45.

231. Hyman, *supra* note 26, at B7 (“Law in many ways is behind the curve.”).

was possible to spend time with your family and practice good quality law. I was tired of being told it was not possible.”²³² Fierman picked up shop in 1983, left Weston, and started her own practice.

Learning of his mom’s new one-woman firm, Fierman’s eight-year-old son asked, “Does this mean the kids can come to the Christmas party now?” Fierman laments, “That’s how unfriendly my kids perceived firm life.”²³³

Together with partner Robert Cohen, Fierman started the family-friendly firm of Cohen & Fierman in 1996. Now a bustling six-lawyer firm handling real estate, complex litigation, and business transactions, Cohen & Fierman has two part-time associates (i.e., thirty-three percent of the attorneys) working three days a week. The firm gives all lawyers three to four weeks of paid vacation, ten paid sick days, and fourteen paid holidays each year. And the partners expect the associates to take all those breaks. “We occasionally have to tell people they haven’t had enough vacation,” Fierman says with a laugh.²³⁴

The first ten minutes of the biweekly firm-wide meeting are spent talking about everyone’s family. Pictures of kids are posted in offices, and children come to the firm to see their parents. Says Fierman: “Raising children is a process and flexibility is key.” That flexibility means rescheduling meetings for pediatrician appointments and working around school plays.

As for revenue, Cohen & Fierman represents McDonald’s, Cyrk, and Pharma Mar, a global biotech company. “We represent all kinds of national, international, big, small companies,” Fierman says. “None of this seems to have any impact on our ability to serve and maintain our relationships with these companies.”²³⁵

The key to making modified work schedules succeed, Fierman says, is creating a supportive workplace culture that backs part-timers. “I’d be happy to give big firms a checklist, [but] the larger the institution, the more difficult it is to have that flexibility.”²³⁶ Ironically, a large firm, with its vast reserves and large lawyer base, should be the most capable of filling in and adapting to a lawyer’s changing schedule.²³⁷ Small firms like Cohen & Fierman would seem to be the most strapped when a lawyer needs to take time off for a family commitment. But Cohen & Fierman has made family-friendly policies a reality because its partnership prioritized such an environment from the firm’s founding. With far more resources to successfully accommodate lawyers working modified schedules, large firms must adopt a similar long-term view in order to support their lawyers who are striving to correct work-family

232. Telephone Interview with Janet Fierman, Partner, Cohen & Fierman (May 25, 2000).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. See Balestier, *supra* note 34, at 24 (referring to the more extensive pool of resources large law firms can draw from when accommodating lawyers with family needs).

imbalances.

V. CONCLUSION: TOWARD A FATHER-FRIENDLY FIRM

The dilemma of fathers in law firms is as complex as it is solvable. Brought to the firm as driven associates, these men strive to prove themselves in a legal arena that measures dedication in terms of hours logged. In response to a new generation of lawyers demanding lifestyle concessions, firms have adopted leave and part-time policies. Men, for the most part, have been non-participants in these programs, continuing to climb the firm's time-demanding ladder.

To date, changes have stopped at the programmatic level. Without male participation in these flexible work policies, perceptions of female lawyers as second-rate parents and second-class practitioners continue. To avoid the isolation and marginalization that women and men who seek a firm-family balance currently face, drastic changes are still needed in workplace norms. Because the gatekeepers of change at law firms are still predominately older men who have not faced the same work-family challenges of this generation's associates, acceptance of part-time policies among the firm's hierarchy has been slow in coming. In spite of this reluctance, a powerful argument can be made for flexible work arrangements, using the models of efficiency and retention outlined above. This business model will have to be recognized and embraced by law firms who wish to prevent the best legal talent from defecting to other sectors. In order to translate policies from the superficial to the practical, partners must set the example for associates, thereby resetting firm-wide perceptions.

Management support will be especially important for men who, although torn by their absence at home, fail to work modified schedules. Just as the man who billed 2,600 hours last year is lionized as the model associate, so too should the firm recognize and celebrate the man who prioritized his son's Christmas play over the firm's Christmas party. Only once such an example is accepted and extolled by senior partners will other men follow in their march to be excellent lawyers and exceptional fathers.