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WHO CARES? THE CONUNDRUM FOR GENDER EQUALITY IN LEGAL PRACTICE*

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Although women comprise the majority of practitioners in legal practice in Australia, the question of who cares remains an enduring challenge for gender equality. Against the backdrop of social and policy changes resulting from the feminisation of labour, this article pays particular attention to the role of flexible work in legal practice. It draws on two empirical projects – one involving corporate law firms and the other involving NewLaw firms. As the results were somewhat ambivalent, the article then turns to the feasibility of shared parenting regimes by drawing on studies from Scandinavia. These studies show that the unencumbered worker ideal is nevertheless resistant to sustained absences from work even though the norms of fatherhood are changing. The competing narratives of the 'new father' and the unencumbered worker who devotes himself to work therefore produce a paradox that underscores the ongoing elusiveness of gender equality in legal practice.

I INTRODUCTION: MORE THAN NUMBERS

When women sought to be admitted to the practice of law in the late 19th century, they encountered sustained resistance.[1] In addition to specious arguments regarding their intellectual ability and the likely negative impact of

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1 Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart Publishing, 2006); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) ('*Dissonance and Distrust*').

higher education on their reproductive capacity,[2] courts even went so far as to hold that women were not persons for the purposes of admission.[3] The animus towards women persisted long after they were grudgingly admitted, and their numbers remained small until the 1970s when growth in the economy and the impact of the women's movement encouraged them to enrol in law schools in substantial numbers.[4] Today, women comprise 50% of lawyers in Australian private practice, a proportion that will soon be exceeded as the female rate of admission is increasing faster than the male rate.[5]

Despite the rapid change in the gender composition of the legal profession, the seeds of invidiousness continue to cling to the feminine, particularly in relation to authoritative positions. Women tend to be clustered at the lower echelons of the typical law firm hierarchy and the percentage of women partners remains less than 25% in both common law and civil law countries.[6] Even if women are promoted, they are more likely to be assigned to less prestigious salary or non-equity partnerships. The masculinised nature of senior leadership positions not only creates an environment in which it is difficult for women to progress,[7] but also enables men to extract an increasing share of surplus labour from women.[8] The dichotomy is built upon a deeply embedded substructure of gender difference that is by no means peculiar to law.[9]

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2 See, eg, Herbert Spencer, *The Principles of Biology* (Williams and Norgate, 1867) vol 2 512–13;

3 Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Free Press, 1978). For an Australian example of a 'persons case', see *Re Edith Haynes* [1904] 6 WALR 209; Margaret Thornton, 'Challenging the Legal Profession a Century on: The Case of Edith Haynes' (2018) 44(1) *University of Western Australia Law Review* 1.

4 Thornton, *Dissonance and Distrust* (n 1).

5 In the decade to 2016, this figure was 54.6% compared with 36.5% for men: see Law Society of New South Wales, *National Profile of Solicitors 2016* (Report, 24 August 2017) 16 <https://www.lawsociety.com.au/sites/default/files/2018-04/NATIONAL%20PROFILE%20OF%20SOLICITORS%202016.compressed.pdf>.

6 Jane Ellis and Ashleigh Buckett, *Women in Commercial Legal Practice* (Report, December 2017) 20. The United States figure is 30% (but only 20% of AmLaw 200 firms): see Meghan Tribe, 'New Report Finds Female Path to Law Firm Partnership a Sluggish Crawl', *The American Lawyer* (online, 10 October 2018) <https://www.law.com/americanlawyer/2018/10/10/new-report-finds-female-path-to-law-firm-partnership-a-sluggish-crawl/?slreturn=20190211235254>. The UK figure is 33% (29% in large firms): see Solicitors Regulation Authority, 'How Diverse Are Law Firms?' (Web Page, 2017) <https://www.sra.org.uk/sra/equality-diversity/archive/law-firms-2017/>. The 2018 Australian figure is 27%: see Michael Pelly and Edmund Tadros, 'Legal Partnership Survey 2018: Herbert Smith Freehills' Perfect Record on Women', *Australian Financial Review* (online, 5 July 2018) <https://www.afr.com/news/legal-partnership-survey-2018-herbert-smith-freehills-perfect-record-on-women-20180625-h11uif>.

7 Law Council of Australia, *National Attrition and Re-engagement Study* (Report, 14 March 2014) <https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>. Cf Roberta D Liebenberg and Stephanie A Scharf, *Walking out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice* (Report, 2019). This study documents the disproportionately high attrition rate for senior women lawyers in the United States together with the adverse experiences to which they are subjected.

8 Sharon C Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession' (2007) 41(1) *Sociology* 47, 60.

9 Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (1990) 4(2) *Gender and Society* 139.

Nevertheless, if feminisation is understood in terms of numerosity alone, it appears that gender equality has been achieved, and the masculinist subtext is ignored – but 'fixing the numbers' is only the first stage towards gender equality, as Londa Schiebinger points out.[10] The next stage she identifies is 'fixing the institutions' (effecting structural change), which is followed by 'fixing the knowledge' (integrating gender-based knowledge into research). Because of the durability of gendered institutions,[11] it is apparent that we are still wrestling with structural change. Formal equality has focused on 'letting women in' to workplaces as they are because of the dominant view that gender is irrelevant to the way they are constituted.[12] This has proven to be particularly problematic for those with caring responsibilities and it continues to be the case despite the extensive research on the 'work-family interface'.[13]

Women have conventionally been expected to take responsibility for the demands of the private sphere for love – as they have always done – caring for children, the aged, people with disabilities and the sick, as well as running households and looking after grown men 'perfectly capable of looking after themselves'.[14] At the same time, women are expected to compete with those same men in the workplace. In view of the unequal distribution of caring responsibilities, it is perhaps unsurprising that women report greater work effort than their male colleagues.[15] Indeed, I suggest that the question of 'Who cares?' represents the last bastion of the struggle for gender equality in the legal workplace.

Despite the fact that gender equality in the legal profession has been an issue of concern for decades, it is somewhat surprising that gender-neutral modes of caring have been accorded comparatively little attention. The focus of attention is invariably skewed towards what is viewed as a woman's problem, with motherhood positioned as the key factor.[16] A paradox therefore arises because the realisation of gender equality is predicated on gender specificity. It was only with the millennial turn that the emphasis began to shift and men's parenting practices began to be questioned, which led to modest changes in public policy. With the possible exception of the work of Richard Collier in the United Kingdom

10 Elsevier, *Gender in the Global Research Landscape: Analysis of Research Performance Through a Gender Lens Across 20 Years, 12 Geographies, and 27 Subject Areas* (Report, 6 February 2017) 74–6.

11 Cf Joyce S Sterling and Nancy Reichman, 'Overlooked and Undervalued: Women in Private Law Practice' (2016) 12 *Annual Review of Law and Social Science* 373.

12 Robin J Ely and Debra E Meyerson, 'Advancing Gender Equity in Organizations: The Challenge and Importance of Maintaining a Gender Narrative' (2000) 7(4) *Organization* 589, 604.

13 Joan C Williams, Jennifer L Berdahl and Joseph A Vandello, 'Beyond Work-Life "Integration"' (2016) 67 *Annual Review of Psychology* 515, 516.

14 Cf Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (University of Minnesota Press, 1989) 148.

15 Elizabeth H Gorman and Julie A Kmec, 'We (Have to) Try Harder: Gender and Required Work Effort in Britain and the United States' (2007) 21(6) *Gender and Society* 828, 844.

16 Richard Collier, 'Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance in Large Law Firms' (2013) 13(2) *Nevada Law Journal* 410, 417 ('Rethinking Men and Masculinities').

('UK'),[17] there is a dearth of scholarship on the role of fatherhood in the legal profession, which is marked in the Australian context.

In this article, I address the question of 'Who cares?' in light of its significance for women's equality in the Australian legal workplace. Rather than continuing to devise more creative ways for women to accommodate caring responsibilities in their working lives, it is argued that gender equality in the legal profession is unattainable unless men share equally in caring responsibilities.

In order to give the reader a sense of why we seem to have reached an impasse in the struggle for gender equality, I first overview the main measures introduced by the state to accommodate caring responsibilities as women began to be recognised as economic actors. Secondly, drawing on interviews with lawyers in corporate firms, I analyse the efficacy of flexible work. While this was thought to be the way forward, it was found to incur a stigma when undertaken by men. Thirdly, I draw on supplementary interviews with lawyers in NewLaw firms, in which both technology and flexibility are central. Perhaps, unsurprisingly, these studies did not rebut the presumption in favour of women as primary carers. Fourthly, I turn to a brief consideration of the experience of the Nordic countries to consider the pros and cons of a stronger interventionist stance on the part of the state to encourage fathers to take time off work to share in caring responsibilities, although studies of lawyer fathers are sparse, as they are elsewhere. Fifthly, as the success of such initiatives has been limited, I explore the reasons why lawyer-fathers are resistant to spending time as full-time carers, despite the contemporary rhetoric that a 'good dad' should not be an absent father. I conclude that it is apparent that male lawyers, like professional men generally, remain committed to their careers and are prepared to make no more than a token contribution to caring, such as taking one or two weeks' paternity leave after the birth of a child.

As Acker has argued, those with the greatest commitment to the workplace are deemed more suited to responsibility and authority, whereas those with divided commitments are consigned to the lower ranks.[18] Hence, while models of fatherhood are slowly changing, they fall short of the shared parenting ideal, which I suggest is the essential prerequisite to gender equality in the legal workplace.

II TOWARDS FIXING THE INSTITUTIONS

A Accommodating the Feminisation of Care

When women were first 'let in' to the legal profession, they were expected to choose between a career and motherhood. Marriage was customarily a signal for

17 Ibid. See also Richard Collier, *Masculinity, Law and the Family* (Routledge, 1995); Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing, 2008); Richard Collier, *Men, Law and Gender: Essays on the 'Man' of Law* (Routledge, 2010).

18 Acker (n 9) 149.

women to leave the workforce and assume unpaid responsibilities in the private sphere. This was legitimised by the Australian Public Service requirement that, until 1966, a woman had to resign on marriage.[19] Ingrained within the culture was the idea that a 'good mother stays home and a good man goes to work and is a full-time breadwinner'.[20] It was assumed that the lawyer mother would be unable to show concern for her children and focus on work. This understanding was influenced by many prominent thinkers of the Western intellectual tradition, such as Rousseau[21] and Freud,[22] who propounded the view that there was a *natural* association between women and the private sphere. This contrasted the image of the paradigmatic male worker, the unencumbered monad of liberalism, who was deemed to be able to slough off responsibility for the private sphere once he left home.[23] It was assumed that he had an 'economically inactive wife'[24] who would take responsibility for caring and housework.

The feminisation of labour refers to the worldwide movement of women into full-time employment that occurred in the late 20th century.[25] It directly challenged the liberal separation between public and private spheres. As women became an indispensable source of labour during post-war economic growth, both governments and employers were compelled to adapt to the fact that society also expected women to continue to take primary responsibility for the care of families and the running of households.

To accommodate the increasingly significant role of women as economic actors, initiatives gradually emerged in the mid-20th century at the international level and were implemented in domestic legislation. The most significant instrument was the United Nations Convention on the Elimination of All Forms of Discrimination Against Women,[26] accompanied by a raft of other International Labour Organisation conventions and recommendations.[27] All these instruments

19 *Public Service Act (No 2) 1966* (Cth). See also Marian Sawer (ed), *Removal of the Commonwealth Marriage Bar: A Documentary History* (Centre for Research in Public Sector Management, University of Canberra, 1996).

20 Calla Wahlquist, 'Gender Bias Still Rife in Legal Profession Despite Rhetoric, Says Kate Jenkins', *The Guardian* (online, 2 June 2017) <https://www.theguardian.com/world/2017/jun/02/gender-bias-still-rife-in-legal-profession-despite-rhetoric-says-kate-jenkins>.

21 Jean Jacques Rousseau, *Émile*, tr Barbara Foxley (Dent, 1974).

22 Sigmund Freud, 'Some Psychical Consequences of the Anatomical Distinction between the Sexes' in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (Hogarth Press, 1961) vol 19, 248.

23 See, eg, Mallory Ricci, 'Diary of a Pregnant Lawyer First Blogmester: Planning for Pregnancy and First Trimester', *FOCUS: Women Leaders in the Workplace* (Blog Post, 20 December 2016) <https://www.constangy.com/focus-women-leaders/diary-pregnant-lawyer-first-blogmester-planning-pregnancy-first-trimester>.

24 Guy Weir, 'The Economically Inactive Who Look After the Family or Home' (2002) 110(11) *Labour Market Trends* 577.

25 Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press, 2009) 133.

26 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

27 See, eg, *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, ILO No. 156 (entered into force 11 August 1983); *Part-Time Work Convention*, opened for signature 24 June 1994, ILO No. 175 (entered into force 28 February 1998); *Maternity Protection Convention (Revised)*, opened for signature 28 June 1952, ILO No 183 (entered into force 7 February 2002).

implicitly recognised that the public and private spheres could no longer be treated as discrete, as had traditionally been the case in the Western intellectual tradition. As a result, pregnancy, potential pregnancy, breastfeeding and family responsibilities were expressly included as sub-sets of sex discrimination legislation in employment.[28] From the 1970s, maternity leave was introduced, which allowed a woman to retain her job after return to work. Initially unpaid, a period of paid leave subsequently became the norm. The gender-specific language of 'maternity leave' eventually morphed into 'parental leave', but it continued to be aimed principally at mothers,[29] although two weeks paid paternity leave was made available to fathers.[30] The gender-neutral language of 'parental' leave also occludes the tension between employment and welfare that underpins the history of parental leave policies in Australia and the UK, with 'employment' having a masculinist bias and 'welfare' carrying feminised overtones.[31]

Despite these public policy initiatives, pregnancy and childcare have continued to be persistent sources of less favourable treatment for women in the workplace,[32] signalling the difficulty of effecting a transition of the materiality of care from the home to the environment of paid work. In fact, 49% reported in a 2014 national survey that they experienced discrimination in the workplace during pregnancy, parental leave or on return to work on at least one occasion.[33] 32% of 'professionals' surveyed (of 595 in total) reported experiencing discrimination either when requesting parental leave or during parental leave, and 35% reported experiencing discrimination on return to work.[34] This included being made redundant, having their position restructured, being dismissed or not having their contract renewed. As is the case with most national surveys, this survey did not provide disaggregated figures for lawyers. However, a national survey by the Law Council of Australia, also conducted in 2014, found that a very high 55% of women lawyers who were primary carers were likely to experience discrimination.[35] These studies reveal a significant gap between the

28 See, eg, *Sex Discrimination Act 1984* (Cth). Detailed guidelines have been prepared for employers: see Human Rights and Equal Opportunity Commission, 'Pregnancy Guidelines' (Guideline, March 2001).

29 For a detailed history and analysis of policies, see Marian Baird and Margaret O'Brien, 'Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes' (2015) 18(2) *Community, Work and Family* 198. See also C Starla Hargita, 'Care-Based Temporalities and Parental Leave in Australia' (2017) 26(4) *Griffith Law Review* 511.

30 See, eg, *Paid Parental Leave Act 2010* (Cth). Over a quarter (27%) of fathers and partners (of 1,001 in total) surveyed for the National Prevalence Survey 'reported experiencing discrimination when requesting or taking parental leave or when they returned to work', despite the short period (less than four weeks) usually sought. Only 2% of the men affected lodged a complaint with a government agency: Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, 2014) 48, 53 <https://www.humanrights.gov.au/sites/default/files/document/publication/SWP_Report_2014.pdf>.

31 Baird and O'Brien (n 29) 206.

32 Law Council of Australia (n 7) 23–4.

33 Australian Human Rights Commission (n 30) 26.

34 Ibid.

35 Law Council of Australia (n 7) 34. See also Monica Campo, Lynda Memery and Nina Ulasowski, 'Starts with Us: Sexism and Gender Inequality in the Victorian Legal and Justice Sector' (Discussion Paper, 2019) <https://www.womenslegal.org.au/files/file/Starts%20With%20Us%20discussion%20paper.pdf>.

legal framework and the reality, which underscores the residual animus towards motherhood at work.

In contrast, fatherhood is construed positively in the legal workplace because of the higher status associated with being a good provider than with active caring. Kay, Alarie and Adjei found that the more children a male lawyer had, the more secure was his position in the firm, whereas the 'hazard ratio' for women associated with leaving private practice increased with each child.[36] Indeed, the 'absent father' is the paradigmatic unencumbered subject of liberalism. He is the 'ideal worker' who continues to work 'full time and overtime and takes little or no time off for childbearing or child rearing'.[37] In the process, the actual parenting practices of men tend to fade from view so that they become degendered, embodying 'a form of "bleached out" legal professionalism'.[38] To spend time as a primary carer carries a stigma that may be even more marked for men than for women. The failure to pay heed to this factor causes the gender inequality gap to widen.[39] However, employers prefer to champion the 'ideal worker' norm that is dependent on the full-time labour availability of men.[40]

B Flexible Work

While the feminisation of labour resulted in positive initiatives for women workers, they were still expected to assume responsibility for the primary care of children while conforming to the demands of the standard working day. The irreconcilable tension between these competing ends resulted in a high rate of attrition of women from full-time work, including legal practice.[41] In an endeavour to stop the haemorrhage, the Australian government created a right for workers to request flexible working hours and modified arrangements rather than adhere to a rigid schedule, such as nine to five.[42] Flexible work can take a range of forms, such as part-time work, job sharing, working from home and adjusting the hours of the working day.[43] While flexible work policies are couched in gender-neutral terms, this has not altered the feminised identity of the primary

36 Fiona M Kay, Stacey Alarie and Jones Adjei, 'Leaving Private Practice: How Organizational Context, Time Pressures, and Structural Inflexibilities Shape Departures from Private Law Practice' (2013) 20(2) *Indiana Journal of Global Legal Studies* 1223, 1251. Cf Scott Coltrane et al, 'Fathers and the Flexibility Stigma' (2013) 69(2) *Journal of Social Issues* 279, 281.

37 Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford University Press, 2000) 1.

38 Richard Collier, 'Fatherhood, Gender and the Making of Professional Identity in Large Law Firms: Bringing Men into the Frame' (2019) 15(1) *International Journal of Law in Context* 68, 71–2 ('Fatherhood, Gender and the Making of Professional Identity').

39 Linda Haas and C Philip Hwang, 'Workplace Support and European Fathers' Use of State Policies Promoting Shared Childcare' (2019) 22(1) *Community, Work and Family* 1, 2.

40 Ibid 7.

41 See, eg, Fiona M Kay, Stacey L Alarie and Jones K Adjei, 'Undermining Gender Equality: Female Attrition from Private Law Practice' (2016) 50(3) *Law and Society Review* 766. Cf Liebenberg and Scharf (n 7).

42 *Fair Work Act 2009* (Cth) ss 65–6.

43 Margaret Thornton, 'The Flexible Cyborg: Work-Life Balance in the Legal Profession' (2016) 38(1) *Sydney Law Review* 1 ('The Flexible Cyborg').

carer.[44] Indeed, a statistical overview of family employment patterns in Australia over the last two decades reveals that while mothers' employment changed considerably after having a child, fathers' employment showed little change.[45] Indeed, only one in 20 fathers in the general population take primary parental leave.[46]

The resistance by employers towards their employees working flexibly was borne out by an online Australia-wide survey (of 424 in total) and follow-up interviews (of 54 in total) undertaken by the author that involved male and female lawyers in corporate law firms in 2012–14: *Balancing Law and Life*.[47] The aim was to establish lawyers' own perceptions and experiences of the impact of work/life balance, wellbeing and family harmony in light of competition policy that had been accepted in the legal profession as a result of the conjunction of the *Competition Policy Reform Act 1995* (Cth) and the liberalising measures effected in the Australian legal profession since the millennial turn.[48]

While a survey of Australian law firms conducted by *Lawyers Weekly* found that a very significant 89% supported flexible work,[49] numerous respondents in the *Balancing Law and Life* study noted that there was a marked gap between the rhetoric and the reality.[50] A high level of productivity was not enough to dispel the flexibility stigma associated with a lawyer (invariably the mother) working part-time, leaving the office early to pick up children from school or working from home for, say, one day a week.[51] Flexible work also exerted a negative effect on the quality of the lawyers' assignments and their future careers.[52] The masculinist norms of an unbroken career pattern and being seen ('presenteeism')

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44 A respondent to the National Prevalence Survey who was in a same-sex relationship objected to the term 'primary carer' on the basis that 'we are both primary, we are equally important parents': see Australian Human Rights Commission (n 30) 89.

45 Jennifer Baxter, 'Fathers and Work: A Statistical Overview' (Research Summary, Australian Institute of Family Studies, May 2019) <https://aifs.gov.au/aifs-conference/fathers-and-work>.

46 Parents at Work, *Advancing Parental Leave Equality and Introducing Shared Care in Australia: The Business Case for Action* (White Paper, 2018) 4 <https://parentsandcarersatwork.com/wp-content/uploads/2018/08/PAW_White-Paper-Parental-Leave-Equality.pdf>.

47 Australian Research Council DP 1020104785 (*Balancing Law and Life*). Law societies and women lawyers associations assisted with the distribution of the survey. The anonymity of subjects was guaranteed as a condition of ethics approval, which was obtained from the Human Research Ethics Committee of the Australian National University in 2012. The questionnaire was completed by lawyers in corporate law firms, with a gender breakdown of 25% male and 75% female, with roughly equal numbers of men and women in the follow-up interviews. For detailed analyses of this study, see Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23(1) *International Journal of the Legal Profession* 13 ('Work/Life'); Thornton 'The Flexible Cyborg' (n 43); Margaret Thornton, 'Squeezing the Life out of Lawyers: Legal Practice in the Market Embrace' (2016) 25(4) *Griffith Law Review* 471.

48 Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35(1) *Sydney Law Review* 27.

49 John MacLean, 'Closing the Gender Gap', *Lawyers Weekly* (online, 16 October 2014) <https://www.lawyersweekly.com.au/careers/15824-closing-the-gender-gap>.

50 Thornton, 'Work/Life' (n 47) 23–4.

51 Ibid 25–6.

52 Stephanie Bornstein, 'The Legal and Policy Implications of the "Flexibility Stigma"' (2013) 69(2) *Journal of Social Issues* 389, 392; Iain Campbell, Sara Charlesworth and Jenny Malone, 'Part-Time of What? Job Quality and Part-Time Employment in the Legal Profession in Australia' (2011) 48(2) *Journal of Sociology* 149, 158–9.

continued to be accepted as evidence of serious commitment to one's career and presumptive eligibility for partnership.[53] This pressure to be seen has been internalised by lawyers in accordance with the Foucauldian idea of governing the self.[54] Several male interviewees mentioned that they barely saw their children during the week as they left home early in the morning and did not arrive home until late at night.[55] If a male lawyer wished to work flexibly, he tended to move from a corporate law firm to a workplace with regular hours, or set up as an independent contractor.[56]

It is apparent that few Australian fathers are as heavily involved in the care of their children as their mothers, despite the widespread view that they should be.[57] Indeed, in the case of a heteronormative lawyer couple with young children, it is deemed to be economically rational for the female partner to take time off to look after the children or to work part-time as she tends to be paid less than her spouse.[58] It could be some years before she returns to work full-time, in which case it is very difficult to make up for lost time.[59] She may choose to pursue an alternative form of work that is less demanding, or to work part-time or casually, rather than struggle to rebuild her career. In the meantime, her partner's 'unbroken' career path may have flourished, resulting in a partnership, which is likely to elude her permanently, although she may have a chance in a small firm.[60] The financial benefit associated with his success in the 'tournament' for partnership[61] may act as a further disincentive for her to persevere with a legal career, which confines her to a 'managed' position and endorses the gendered hierarchy within law firms.

Corroborated by studies in the United States ('US'),[62] *Balancing Law and Life* found that the stigma associated with working flexibly was even more marked for men, although less so if they worked flexibly to accommodate a non-caring activity, such as sport.[63] However, men acting as primary carers are rated

53 Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45(4) *Osgoode Hall Law Journal* 773.

54 Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Govermentality* (Harvester Wheatsheaf, 1991) 87.

55 Thornton, 'Work/Life' (n 47) 31.

56 *Balancing Law and Life* interview data (copy on file with the author). Thornton and Bagust (n 53) 308.

57 Hargita (n 29) 516.

58 Linda Haas and C Philip Hwang, 'The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships with Children: Lessons from Sweden' (2008) 11(1) *Community, Work and Family* 85, 91 ('The Impact of Taking Parental Leave on Fathers').

59 Cf Ashly H Pinnington and Jörgen Sandberg, 'Lawyers' Professional Careers: Increasing Women's Inclusion in the Partnership of Law Firms' (2013) 20(6) *Gender, Work and Organization* 616.

60 Jerome Doraisamy, 'Women May Be Better Off in "Small Law"', *Lawyers Weekly* (online, 12 March 2019) <https://www.lawyersweekly.com.au/sme-law/25237-women-may-be-better-off-in-small-law>.

61 Marc Galanter and Thomas M Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press, 1991).

62 Laurie A Rudman and Kris Mescher, 'Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?' (2013) 69(2) *Journal of Social Issues* 322; Joan C Williams, Mary Blair-Loy and Jennifer L Berdahl, 'Cultural Schemas, Social Class, and the Flexibility Stigma' (2013) 69(2) *Journal of Social Issues* 209.

63 Joseph A Vandello et al, 'When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility' (2013) 69(2) *Journal of Social Issues* 303, 304.

higher on feminised traits as being weak, naïve, insecure and emotional in a way that is deemed to detract from their manhood.[64] This stigma contributes to the fact that flexibility programmes are under-utilised by men everywhere,[65] despite the desire expressed by individual lawyer fathers that they want to be 'good dads', not just breadwinners.[66] While they might aspire to a more active role with their children than that of their own fathers,[67] the focus on work intensification and profit maximisation that was exacerbated by the global financial crisis[68] accentuated the importance of career success for men.

One female interviewee surveyed the male lawyers in her former international firm to ascertain the extent of support for part-time work and parental leave. She found that the men were unanimously opposed to working less than full-time because 'they didn't want to take a step down in their career'.[69] While Australia's preparedness to implement flexible work has led some to claim that it is closer to achieving equality in the legal profession than other countries,[70] such a claim discounts the feminisation of flexible work and the stigma that attaches to it, particularly when undertaken by men.

Thus, despite the widespread advocacy of flexible work, the ideal worker continues to be constructed as the stereotypical unencumbered monad of liberalism. This means that the worker who works flexibly, including part-time or casually, in order to manage family responsibilities is more likely to be female and is deemed to be a less-than-ideal worker. The intractability of the gendered dichotomy at work operates to preserve the gendered division of labour within the family.[71] Women lawyers are expected to be grateful for being able to combine parenting with work they care about, albeit in a subordinate role. While they may be commended socially for placing their family first, they will not be rewarded in career terms.[72]

Even in 2019, a panel of senior legal practitioners at a Sydney roundtable were reported as unanimously expressing the opinion that 'for a female lawyer to achieve a senior role, she must either delay having a family, return to work very soon after giving birth to prove her commitment to the firm or find a new pathway to achieve her goals'.[73] The four lawyers on the panel were of the view

64 Rudman and Mescher (n 62) 329, 332.
65 Vandello et al (n 63) 304.
66 Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38) 74–7.
67 Ibid; Collier, 'Rethinking Men and Masculinities' (n 16) 424; Jamie Atkinson, 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co-parents?' (2017) 13(3) *International Journal of Law in Context* 356.
68 Hilary Sommerlad, '"A Pit to Put Women in": Professionalism, Work Intensification, Sexualisation and Work-Life Balance in the Legal Profession in England and Wales' (2016) 23(1) *International Journal of the Legal Profession* 61, 65.
69 *Balancing Law and Life* data (copy on file with the author).
70 See, eg, Alix Friedman, *Women in the Law: An Australian Perspective* (Report, December 2017) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d9ace039-55f0-4923-b2db-0847564bf770>.
71 Rosabeth Moss Kanter, *Work and Family Life in the United States: A Critical Review and Agenda for Research and Policy* (Russell Sage Foundation, 1977) 15.
72 Thornton and Bagust (n 53).
73 Doraisamy (n 60).

that Small Law, particularly starting one's own practice, was a more attractive option for many women in law than Big Law, despite the fact that Big Law firms were striving for, and sometimes reaching, gender parity targets.[74]

Such statements make it clear that responsibility is still being placed on women to adapt to the prevailing masculinist norms of the workplace, with the result that the rhetoric of work/life balance sounds increasingly hollow. If they received a request from a client at five o'clock on Friday, they had to stay back and work, regardless of how inconvenient. Indeed, a number of respondents to the *Balancing Law and Life* study expressed the view that any reference in their firm to work/life balance amounted to no more than window dressing, as such a balance was impossible given the demands placed on them by the firm.[75] The notion of part-time work in corporate firms tended to be just as hollow, as women lawyers who were paid for a four-day week were often expected to be available on the fifth day for telephone calls and emails.

C Flexible Law

'NewLaw' is the generic descriptor given to a cluster of innovative ways of practising law in which flexible work is central.[76] It is a business model where labour arbitrage (in which an advantage is taken of a price difference between two or more markets) is used in the delivery of legal services. It represents a radical change from a full-time office presence as it is dependent on technology, which may mean never coming to the office at all.[77] This may include not meeting with clients face-to-face when email, video conferencing and automated platforms will suffice. As the literature on NewLaw is scant, and to ascertain the possibility that it might dispel the likelihood of overcoming the femininity stigma associated with flexible work in traditional legal practice, the author conducted a small follow-up study to *Balancing Law and Life*,[78] involving 38 interviews (30 in Australia and another eight in the UK) in 2018.[79] Potential interviewees were identified with the assistance of law societies and websites; anonymity was a condition of ethics approval (The Australian National University Ethics Protocol 2017/597).

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74 Ibid.

75 *Balancing Law and Life* data (copy on file with the author). See also Thornton, 'Work/Life' (n 47) 23–4.

76 The term is believed to have been coined by Eric Chin in 2013: see 'Interview with Eric Chin, the Man Who Coined the Phrase "NewLaw"', *Josef* (Blog Post, 9 April 2019) <https://joseflegal.com/blog/interview-with-eric-chin-the-man-who-coined-the-phrase-newlaw>. See also Joan C Williams, Aaron Platt and Jessica Lee, 'Disruptive Innovation: New Models of Legal Practice' (2015) 67(1) *Hastings Law Journal* 1.

77 The examples of Hive Legal and Marque Lawyers are discussed in Friedman (n 70).

78 An extension to Australian Research Council DP 120104785 (n 47) was obtained to conduct this study.

79 The lawyers in NewLaw firms accorded little significance to place, for reliance on the internet facilitated a global clientele. A number of the larger firms operated in both the UK and Australia. For a comprehensive analysis of the findings of this study, see Margaret Thornton, 'Towards the Uberisation of Legal Practice' (2019) 1(1) *Law, Technology and Humans* 46. For a review of this article, see Francesca Bartlett, 'Happiness in NewLaw: Assessing the Lifestyle Claims of Alternative Legal Practices in Australia', *JOTWELL: The Journal of Things We Like (Lots)* (Blog Post, 5 May 2020) <https://legalpro.jotwell.com/happiness-in-newlaw-assessing-the-lifestyle-claims-of-alternative-legal-practices-in-australia/>.

As a small qualitative study, the findings of this study do not purport to be representative of all lawyers engaged in NewLaw, particularly young lawyers, whose positions are less secure.[80] Because minimal oversight is associated with working away from the office, NewLaw prefers lawyers with a minimum of two to four years' experience in elite private practice, whereas other firms, especially those with a corporate clientele, specify at least 10 years' post-qualification experience.[81]

Few NewLaw lawyers worked full-time in an office, unless they worked on secondment for corporate clients. The majority were able to choose where they worked, when they worked and how much they worked so that they could integrate the practice of law with other aspects of their lives. This integration contrasted significantly with the *Balancing Law and Life* study, where a strict boundary existed between work and family, as borne out by the antipathy towards lawyers working flexibly.[82] If lawyers were engaged in caring activities, they did not feel that they had to disguise it:

> I can say to a client, "I pick up my children from school on Monday, but I can do the job for you on Tuesday", which I think people like. They want to know that you're human' (Principal, Fem, UK).

Another principal rejected the idea of a fixed routine altogether, fitting work around the needs of her family. She was not afraid to act unconventionally:

> Today, I'll go and pick up my daughter at three o'clock and then I'm having a meeting with one of my team members at the park from 3.00 'til 5.00 so that my daughter can play in the park, my six-month-old can sit next to us, and we can discuss some of the projects that [my team member] is working on (Principal, Fem, Aust).

Several lawyers interviewed – all women with young children – worked as independent contractors at beachside locations in Australia, hundreds of kilometres from the city and the principals to whom they reported. Contractualism maximised their autonomy, enabling them to work for as little as 10 hours per week if they wished. As 'working mums', some of these women nevertheless suspected that they were vulnerable to exploitation in negotiating terms of employment because they were unable to work full-time in an office.

The flexibility of NewLaw enabled fathers to participate in active parenting without the stigma it attracted in corporate law firms.[83] Fathers could easily spend a day or more a week engaged in childcare, if they wished, without drawing attention to it; or, if employed, they could negotiate longer periods off. Independent contractors were free to choose whatever suited them. Baxter's study of Australian fathers' work arrangements reveals an increase in flexible work by fathers with children under 12,[84] but few fathers in the NewLaw study reported working part-time to care for young children, despite the fact that it could be accommodated relatively easily. Men appeared to be more interested in

80 Thornton, 'Towards the Uberisation of Legal Practice' (n 79) 57–8.
81 Ibid 53.
82 Thornton, 'Work/Life' (n 47) 24.
83 Ibid 31–3.
84 Baxter (n 45).

using their flexible schedules to advance their paid work interests, as Brandth and Kvande found in the case of Norwegian fathers, whereas mothers used their flexible schedules to achieve a work/family balance.[85]

All the lawyers – male as well as female – interviewed for the NewLaw project in both the UK and Australia were very satisfied with their experience. This was the case whether they were principals of firms, employees or independent contractors. This satisfaction contrasted markedly with the *Balancing Law and Life* study conducted in traditional law firms.[86] The NewLaw interviewees found working flexibly to be relatively stress-free, frequently describing themselves as 'happy', a descriptor rarely invoked by the interviewees in corporate law firms who struggled to satisfy the competing demands in their lives. The NewLaw interviewees loved the autonomy that NewLaw afforded them, as well as the freedom that allowed them to choose when to work, where to work and how much to work. They particularly appreciated the opportunity to set up their own firm free of the constraints associated with traditional law firms.

While NewLaw is presently in its early stages, it is growing rapidly as lawyers embrace opportunities for innovation, as well as being attracted by the allure of flexibility, autonomy and control. Total mobility has meant that lawyers are able to dispense with hard copy and filing cabinets as all documents can be stored on the Cloud and accessed anywhere at any time. 'Disruptive innovation', the phrase coined by Clayton Christensen to capture radically new ways of working,[87] encapsulates not only the idea of the creation of new markets, such as working in-house for corporate clients, but also the impact of NewLaw on existing markets. Hence, traditional firms are now more willing to accept flexible work, at least to a limited extent, particularly when their senior lawyers begin to leave, taking their clients with them. However, is NewLaw the answer to the caring conundrum that lies at the heart of gender inequality in the legal profession?

Flexible work enables work and family life to be managed, although it has been shown to have negative consequences for professional workers more generally because of the need to 'be seen'. The Australian Human Rights Commission National Prevalence Survey on pregnancy and return to work found that there was a common perception in the workplace that those who worked part-time or flexibly lost professional standing and experienced a reduced likelihood of attaining a senior management position.[88] The long experience of northern European countries attests to this problem that besets the caring conundrum, as I will show in the next section. While the Scandinavian initiatives are held up as a model throughout the world, a 'Nordic Gender Equality Paradox' nevertheless exists because the very policies that encourage long breaks from

85 Berit Brandth and Elin Kvande, 'Fathers and Flexible Parental Leave' (2016) 30(2) *Work, Employment and Society* 275, 278.

86 Ellis and Buckett (n 6) 24.

87 Clayton M Christensen, *The Innovator's Dilemma: The Revolutionary Book That Will Change the Way You Do Business* (Collins Business Essentials, rev ed, 2003).

88 Australian Human Rights Commission (n 30) 91–2; cf Brandth and Kvande (n 85) 277.

work prevent women from reaching the most senior positions.[89] The result is a Nordic glass ceiling, with the proportion of women in senior positions being disappointingly low.[90]

III THE NORDIC EXPERIENCE

Although the precise details may vary between the Nordic countries, they all have a common goal of ensuring that fathers share parental leave in the interests of realising a 'gender-egalitarian society based on the dual-earner/dual-carer family model' that accords with a generous social welfare philosophy.[91] The most distinctive feature of the Nordic parental leave policies is the 'use it or lose it' principle, involving father and mother-specific non-transferable leave entitlements. The Scandinavian research shows that fathers are much more likely to take leave when it is a right, rather than an entitlement shared with mothers.[92] The second significant aspect of the framework is the provision of an earnings-based wage replacement.[93] It is apparent that a change in the gendered nature of parental leave may be affected only if there is well-compensated non-transferable fathers' leave, but this poses a difficulty for the public purse when incomes in private legal practice are likely to be high. Low replacement compensation makes it economically rational for the parent earning less, invariably the mother, to take any shared entitlement.[94] A low take-up rate by fathers serves to entrench the masculinist non-caring norm. While free choice accords with liberal values, it invariably leads to women assuming the preponderance of responsibility for parental leave, which interrupts their career prospects and confirms their secondary role in the legal labour market.[95]

The Swedish Government is aware that couples are more likely to share parental leave when fathers' compensation levels are higher.[96] As well as promoting gender equality, it is recognised that parental leave for fathers has a positive effect on their relationships with their children.[97] Sweden provides 480 days of subsidised parental leave per child, which either parent may take, but at least three months must be allocated to each parent on a 'use-it-or-lose-it' basis.[98]

89 Nima Sanadaji, 'The Nordic Glass Ceiling' (Policy Analysis No 835, 8 March 2018) 12.
90 Ibid.
91 Linda Haas and Tine Rostgaard, 'Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave' (2011) 14(2) *Community, Work and Family* 177, 192.
92 Ibid 186.
93 Ibid 186–7.
94 Ibid 187.
95 Carmen Castro-García and Maria Pazos-Moran, 'Parental Leave Policy and Gender Equality in Europe' (2016) 22(3) *Feminist Economics* 51, 55.
96 Haas and Hwang, 'The Impact of Taking Parental Leave on Fathers' (n 58) 91.
97 Anna-Lena Almqvist and Ann-Zofie Duvander, 'Changes in Gender Equality? Swedish Fathers' Parental Leave, Division of Childcare and Housework' (2014) 20(1) *Journal of Family Studies* 19, 20.
98 'Dads in Sweden Took More Paternity Leave Than Ever in 2017', *The Local* (online, 17 January 2018) <https://www.thelocal.se/20180117/dads-in-sweden-took-more-paternity-leave-in-2017>. A government inquiry proposed that the period of non-transferable leave be increased to five months, but the recommendation has not yet been acted upon.

After 40 years, this intervention appears to be making inroads into the stereotypical feminisation of care. Indeed, the Swedish Social Insurance Agency reported that in 2017 fathers claimed 27.9% of parental leave.[99] Although well short of 50%, it represents a step towards de-gendering parental leave and is far ahead of most other countries.

In a comparative study of 21 European countries, the examples of Norway, Sweden and Iceland show that quotas are the only effective way to mainstream men's acceptance of their entitlements,[100] and that granting leave without pay is ineffective. This study revealed that the highest percentage of men's use of non-transferable parental leave occurred in the countries with the highest rates of pay: Spain (80% of take-up, 100% pay); Denmark (89% take-up, 90% pay); Sweden (90% take-up, 80% pay); and Iceland (91% take-up, 80% pay).[101] The duration of leave was also not a token one or two weeks as in Anglophone countries, but extended to more than eight weeks.

The contrast in European countries between non-transferable and transferable leave is striking, as women overwhelmingly take the latter. Castro-García and Pazos-Moran show that the proportion of women to men taking up transferable leave ranged from 96%/0.6% in the case of Austria, to 90%/18% in Sweden.[102] The authors devised a Parental Leave Equality Index based on the promotion of co-responsibility, in which the leading countries were Iceland, Norway, Portugal and Sweden. Countries in the second group, considered to be 'incidental collaborators in childcare', included France and Germany, which offered a few weeks of non-transferable highly paid parental leave. The third group, which included Austria, Italy, Ireland and the Czech Republic, did not consider men to be 'even marginally responsible for childcare'.[103] These countries left the responsibility to the mother and were deemed to be the most likely to reinforce the gendered division of labour, even if they offered short periods (one or two weeks) of (unpaid) paternity leave following the birth of a child.

Although informative, these European studies of parental leave did not focus on male lawyers, in respect of which studies are scant. Choroszewicz and Temblay, together with Choroszewicz and Kay, have compared male lawyers in Helsinki and Montreal.[104] Although the number of subjects is also small, such studies nevertheless establish a link between lawyers' professional ethos and male lawyers' attitudes towards fatherhood that are supportive of the *Balancing Law and Life* findings. These authors found that only seven of the 38 lawyer interviewees in their common study used their statutory leave while working in

99 Ibid.
100 Castro-García and Pazos-Moran (n 95) 57.
101 Ibid 60.
102 Ibid 63.
103 Ibid 67.
104 Marta Choroszewicz and Diane-Gabrielle Tremblay, 'Parental-Leave Policy for Male Lawyers in Helsinki and Montreal: Cultural and Professional Barriers to Male Lawyers' Use of Paternity and Parental Leaves' (2018) 25(3) *International Journal of the Legal Profession* 303; Marta Choroszewicz and Fiona Kay, 'The Use of Mobile Technologies for Work-to-Family Boundary Permeability: The Case of Finnish and Canadian Male Lawyers' (2019) 73(10) *Human Relations* 1388.

private practice.[105] This was despite the fact that both the Finnish and the Quebecois fathers were eligible for a period of non-transferable paternity leave.[106] Even then, the female spouse tended to assume primary responsibility for childcare, taking from a year to a year and a half of maternity and parental leave.[107]

It is also notable that despite access to paternity leave, the Quebecois interviewees preferred to use holiday leave rather than paternity leave. Like the lawyers interviewed for *Balancing Law and Life*,[108] Finnish and Quebecois male lawyers were fearful that leave associated with caring for young children would stigmatise them and jeopardise their careers.[109] The male lawyers tended to accept the conventional gendered organisation of family life, particularly as their spouses received more generous maternity leave. Paternity leave was generally less stigmatised in Finland due to its longer tradition and national outreach,[110] but only one Finnish male lawyer in the study was fully compensated for part of his paternity leave.

Choroszewicz and Kay focused on the use of mobile technologies to assess the degree of permeability in the work-to-family boundary of Finnish and Canadian male lawyers.[111] Although the Finnish lawyers more readily embraced family responsibilities, which they had done since the birth of their children, the male breadwinner model remained strong in both countries. Mobile technologies reinforced a gendered professional norm that demanded lawyers prioritise career over family life and allow work demands to cross over into family time.[112] What is significant, despite the rhetoric, is that the pressure on male lawyers to be available to clients 24/7 signalled the social disregard for their caregiving responsibilities.[113] Thus, even in jurisdictions that appear progressive, men's commitment to work and careers are prioritised over family. Fathers will not use shared leave entitlements when it is a matter of choice.[114] While the father's quota is the only way to ensure paternal participation, the leave will not be taken up if it is dependent on financial compensation from the state, as this is likely to be only a fraction of what the typical lawyer earns in private practice. The men who took short stints of parental leave struggled with the tension in their roles between the 'new involved father' and the 'ideal worker'.[115]

While Australia's 12 to 24 months' 'Dad or Partner Leave' undoubtedly represents an important symbolic step towards cultural change in the gender of caring, its unpaid character is likely to induce few well-remunerated male lawyers to avail themselves of it unless their law firms are prepared to step into

105 Choroszewicz and Tremblay (n 104) 308.
106 Ibid 305.
107 Ibid.
108 Thornton, 'Work/Life' (n 47).
109 Choroszewicz and Tremblay (n 104) 309.
110 Ibid 314.
111 Choroszewicz and Kay (n 104).
112 Ibid 21.
113 Ibid 22.
114 Haas and Rostgaard (n 91) 193.
115 Brandth and Kvande (n 85) 286.

the breach. However, it is not only a question of male lawyers wishing to be paid more, but also the need for organisational and peer support.

IV TOWARDS REFASHIONING FATHERHOOD

Research on men and masculinity has expanded considerably since the 1970s, largely in response to feminist scholarship.[116] However, as Hearn observes, it was not as though men were not studying men before then; it was just that they 'call[ed] it "History", "Sociology", or whatever'.[117] Similarly, the study of law and lawyers also had a masculinist focus which presented itself as the universal, a standard that has been extensively critiqued by feminist legal scholars.[118]

Raewyn Connell's theory of hegemonic masculinity has been one of the most influential theories, and it throws light on the resistance towards men as carers. Influenced by Marx[119] and Gramsci,[120] Connell defines hegemonic masculinity as 'a social ascendancy achieved in a play of social forces that extends beyond contests of brute power into the organisation of private life and cultural processes';[121] that is, ideas emanating from the dominant social class come to be taken for granted by virtue of its status and similarly accepted by others without coercion. While the theory of hegemonic masculinity may perhaps be losing something of its popularity,[122] the seeds of invidiousness linger on, which help to explain the deep-seated resistance on the part of law firms towards male lawyers assuming caring roles. Caring, together with maternity leave, flexible work and work/life balance, has been conventionally marked as a 'women's issue',[123] and is therefore regarded as marginal to legal practice. Hence, the formal changes to public policy in respect of parental leave that have been documented above will not suffice to effect an instantaneous change to values that are buried deep within the social psyche. In traditional law firms, a partnership is still regarded as the pinnacle of a successful legal career,[124] although it has become more elusive as a result of globalisation and the emergence of mega-firms. Billable hours, the generation of profits, the long-hours culture and competition policy lie at the

116 Ann C McGinley, 'Introduction: Men, Masculinities, and Law' (2013) 13(2) *Nevada Law Journal* 315, 318.

117 Jeff Hearn, 'From Hegemonic Masculinity to the Hegemony of Men' (2004) 5(1) *Feminist Theory* 49, 49.

118 See, eg, Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs* 635, 638–9.

119 Karl Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers, 1970) 19.

120 Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, ed and tr Quintin Hoare and Geoffrey Nowell-Smith (Lawrence and Wishart, 1971).

121 RW Connell, *Gender and Power: Society, the Person and Sexual Politics* (Allen and Unwin, 1987) 184.

122 Kalle Berggren, 'Is Everything Compatible? A Feminist Critique of Hearn's Composite Approach to Men and Masculinity' (2018) 33(97) *Australian Feminist Studies* 331, 340–1.

123 Choroszewicz and Tremblay (n 104) 310; Thornton and Bagust (n 53) 787–800.

124 Choroszewicz and Tremblay (n 104) 311.

heart of the modus operandi of these firms. Such characteristics are the indicia of success to which a lawyer who wishes to 'get on' has to pay heed.[125]

When children are young, they are in need of constant care, but this is usually the stage that ambitious [male] lawyers feel the greatest pressure to work the longest hours in order to succeed. As mentioned in the introduction, Richard Collier is one of the few legal scholars to have addressed the often contradictory elements of identity besetting male lawyers; that is, the problem of simultaneously being a 'family man', a 'good dad' and a 'good lawyer'.[126] As Collier points out, it is often only when the children have grown up that there is an appreciation of what might have been 'lost'.[127] Although the multiple meanings that attach to masculinity are acknowledged,[128] the workaholism that is associated with 'success' is resistant to the idea of a flexible workplace that takes account of caring for children and family members.[129] In the past, the workaholic father consoled himself with the belief that he was a good provider for his family, an assumption that is now passé, certainly so far as those committed to the pursuit of gender equality are concerned. Nevertheless, just what variables constitute a good lawyer father continue to be beset with uncertainty.[130]

Today, there is a growing interest in 'New Fatherhood',[131] which focuses on the active involvement of men in the care of their children based on what it means to be a 'good dad' in a way that was not expected of professional men in the past.[132] Despite this cultural shift, however, the vexed issue that remains at the heart of the caring conundrum is that men are fearful of the impact on their careers of taking caring leave. Men in the US, where there is no national paternity leave policy, have reported that they do not take leave, even if eligible, for fear it may hurt their careers.[133] Caregiving is antipathetic to the hypermasculinist norms associated with a successful career in law – the long-hours culture, 24/7 availability, 'rainmaking' (bringing new business to the firm) and the generation of significant income.[134] Whereas the idea of men as good providers for their families dovetails with the idea of profit maximisation that is valued highly by the firm, hands-on caregiving necessarily disrupts it. The potential collision of values between transnational hypermasculinity and the 'New Fatherhood'[135] is highly problematic. As Wald notes, the hypercompetitive

125 Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38) 70.
126 Collier, *Masculinity, Law and the Family* (n 17) 215–18 ff; Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38) 74 ff.
127 Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38) 81.
128 Collier, 'Rethinking Men and Masculinities' (n 16) 437.
129 Thornton and Bagust (n 53) 804–5.
130 Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38) 73–4.
131 Collier, 'Rethinking Men and Masculinities' (n 16) 423.
132 Ibid 424.
133 Lenna Nepomnyaschy and Jane Waldfogel, 'Paternity Leave and Fathers' Involvement with Their Young Children' (2007) 10(4) *Community, Work and Family* 427, 429.
134 Eli Wald, 'Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms' (2010) 78(5) *Fordham Law Review* 2245; Margaret Thornton 'Hypercompetitiveness or a Balanced Life? Gendered Discourses in the Globalisation of Australian Law Firms' (2014) 17(2) *Legal Ethics* 153, 156.
135 Collier, 'Rethinking Men and Masculinities' (n 16) 423 ff.

culture requires a 24/7 commitment in which there is little room for flexibility in order to accommodate caring.[136]

Williams, Berdahl and Vandello identify the contemporary workplace as the cause of the problem. They acknowledge that a change has occurred on the part of fathers in how they relate to their children, but the workplace has not kept up with social trends.[137] As discussed above in the context of flexible work in corporate law firms, a stigma attaches to lawyers who work flexibly, which discourages them from doing so. The American studies that Williams, Berdahl and Vandello reviewed identify a range of material disincentives to which those working flexibly have been subjected. They include slower wage growth, fewer promotions and fewer performance reviews. In particular, those who worked flexibly were generally perceived to be less dedicated than those who conformed to the unencumbered 'ideal-worker template'.[138]

In a further American study coordinated by Williams, the authors argue that work is a 'masculinity contest' in which men set out to prove themselves.[139] They argue that this 'masculinity contest' generates behaviour that includes toxic leadership, bullying and sexual harassment. Law, with its extreme work hours and cut-throat competition, was one of the workplace types giving rise to this type of unedifying behaviour. Far from masculinity being a biological given, they argue that gender 'represents a socially created, enforced, and reproduced axis of power and inequality'.[140] They draw on the theory of hegemonic masculinity[141] to argue that masculinity is not fixed, but adapts according to context. However, by transgressing gender boundaries, masculinity moves to the status of devalued femininity,[142] which signals the resistance experienced by male lawyers who take carer's leave.

As Williams, Berdahl and Vandello note, it is easier to change workplace norms that do not threaten the identities of the 'mostly' men at the top of organisations.[143] This tends to favour the status quo, with women continuing to be the primary carers. While this does not necessarily mean relegating women to full-time caring once more, it does mean that any accommodation of caring in the workplace continues to be feminised and demeaned. It follows that caring leave of any kind, including flexible or part-time work, is going to be stigmatised when undertaken by men, thereby ensuring that the gendered organisational pyramid remains intact, with men dominating the apex, the site of power and prestige, and women the pyramidal base as secondary or even dispensable workers, which replicates the well-established pattern.

136 Wald (n 134) 2263.
137 Williams, Berdahl and Vandello (n 13) 516.
138 Ibid 525.
139 Jennifer L Berdahl et al, 'Work as a Masculinity Contest' (2018) 74(3) *Journal of Social Issues* 422.
140 Ibid 425.
141 Connell (n 121); James W Messerschmidt, *Hegemonic Masculinity: Formulation, Reformulation, and Amplification* (Rowman & Littlefield, 2018).
142 Berdahl et al (n 139) 428.
143 Williams, Berdahl and Vandello (n 13) 532.

V CONCLUSION: COMPETING NARRATIVES

Degendering the identity of the primary caregiver and moving to a shared parenting regime are essential prerequisites to gender equality – but, as Collier observes, such a change will not occur in the legal profession unless there are organisational solutions that make men feel more comfortable about taking parental leave.[144] They need significant incentives to enable them to do so, which cannot be said to be the case with present Australian government policy. In addition to 18 weeks of paid maternity leave for the birth mother and two weeks of paid 'Dad and Partner Leave' (at the minimum wage), the *Fair Work Act 2009* (Cth) enables either parent to take 12 months unpaid parental leave,[145] which may be extended for another 12 months.[146] While such reforms are ostensibly designed to alter the gendered division of labour in the public sphere, they tend to preserve the gendered division of labour in the private sphere, as it is almost always mothers who undertake parental leave available to either parent.[147] While fathers are likely to be responsive to family emergencies or to be amenable to a short period of paternity leave, they are unwilling to take up a caregiver role if it is financially detrimental for them. McCurdy's study reveals that 86% of fathers indicated that they would be likely to take paid parental leave if paid at a replacement rate, compared with only 10% if paid at the Australian Minimum Wage.[148]

In discussing the *Balancing Law and Life* project, advertence was made to the feminised stigma associated with working flexibly that disproportionately impacted male lawyers. However, even men in NewLaw firms, where flexibility was the norm, tended to minimise their caring time in order to devote more time to work. 'Success' in the market has conventionally been associated with the unencumbered lawyer, a model that is counterpoised by a residual animus towards caring buried deep within the social psyche. As the burden of caring has historically fallen on women, this role has served to normalise their subordination in the legal workplace.

While the dominant ideas of masculinity have been challenged by numerical feminisation, as this article has suggested, numerosity has not sufficed to effect substantive change. We must be wary of liberal progressivism; that is, the idea that things are always inexorably moving forward. The rhetoric of the 'good dad' has undoubtedly begun to make inroads into conventional norms as to 'who cares', but it has made no more than a few dents in ancillary norms such as

144 Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38); cf Choroszewicz and Tremblay (n 104).

145 *Fair Work Act 2009* (Cth) s 70.

146 *Fair Work Act 2009* (Cth) ss 75–6.

147 Castro-García and Pazos-Moran (n 95) 55, 65.

148 Samone McCurdy, 'Fathers, Work and Care: Opt Out or Lock Out?' (Research Results, Monash University, 2017) <https://www.monash.edu/__data/assets/pdf_file/0020/1474220/resultsoverviewbrochure-2-3.pdf>.

conventional indicia of success, including highly paid partnerships in global firms that appear in published league tables.[149]

As the prevailing workplace culture constitutes a formidable barrier to fathers' leave, 'structural change', as Schiebinger advocates,[150] cannot be effected by means of a simple policy change. In the past, different theories around women and femininity have been in the ascendancy in an endeavour to address the underrepresentation of women in male-dominated occupations, such as law. These include 'fixing' the numbers, valuing the feminine, and reducing bias, but they have failed to alter the norms and values of the workplaces, such as the long-hours culture and the sometimes fierce competition.[151] The narrative of the 'good dad' does not mesh with these values. The 'good dad' is one who plays an active caring role with his children; he eschews the model of the absent father typical of the previous generation.

A more interventionist role on the part of the state in accordance with the Nordic model is superficially appealing, but the studies comparing Finnish and Quebecois male lawyers suggest that this is likely to be only partially successful, as few men take other than a brief period of paternity leave on the birth of a child.[152] Furthermore, based on the two-week 'Dad and Partner Leave', any compensation would be likely to be at the rate of the basic wage in Australia, which would invariably fall far short of the typical level of a lawyer's remuneration. Even then, the lack of visibility that would ensue from a protracted workplace absence would be a disincentive for men strongly invested in their careers.

While it may well be more cost-effective for firms to pay lawyer fathers to go on parental leave than to lose them,[153] only a minuscule number of prominent law firms are reported to have introduced gender neutral policies to date.[154] As Australia was resistant to the introduction of paid maternity leave until as recently as 2011,[155] even greater resistance could be expected in the case of extended paid leave for fathers, as intimated by the Nordic example.

Nevertheless, legal and policy discourse has tentatively begun to move away from an exclusive focus on mothers as primary carers to shared parenting. In 2006, for example, the *Family Law Act 1975* (Cth) was altered to include a

149 Mahlab Recruitment, *Mahlab Report 2019: Private Practice* (Report, 2019) 8–12 <https://www.mahlab.com.au/wp-content/uploads/2019/08/7093_Mahlab-Report_FA-Private-Practice-PRINT.pdf>.

150 Elsevier (n 10) 74–6.

151 Berdahl et al (n 139) 440–2.

152 Choroszewicz and Tremblay (n 104); Choroszewicz and Kay (n 104).

153 Parents at Work (n 46).

154 Grace Ormsby, 'Fatherhood and BigLaw', *Lawyers Weekly* (online, 23 November 2018) <https://www.lawyersweekly.com.au/biglaw/24524-fatherhood-and-biglaw>; Jerome Doraisamy, 'Allens Launches "Comprehensive" New Parental Leave Policy', *Lawyers Weekly* (online, 20 October 2019) <https://www.lawyersweekly.com.au/biglaw/26745-allens-launches-comprehensive-new-parental-leave-policy>; Jerome Doraisamy, 'Advancement of Women Must Involve Better Workplace Support for Men', *Lawyers Weekly* (online, 5 November 2019) <https://www.lawyersweekly.com.au/biglaw/26851-advancement-of-women-must-involve-better-workplace-support-for-men>.

155 *Paid Parental Leave Act 2010* (Cth).

presumption in favour of 'equal shared parental responsibility'.[156] Despite these incipient changes within legal discourse, however, which clearly show that shared parenting is not far-fetched, it is not carrying over into the legal workplace itself, other than rhetorically. In the popular imagination, the language of 'primary carer' also continues to be construed as feminine.[157]

The major obstacle to effecting social change is the devotion of male lawyers to work and their unwillingness to take other than a brief period of paternity leave. What lawyers (and other professional men) seem to fear is a variation of the 'Nordic Gender Equality Paradox',[158] in which extended periods away from work could deleteriously affect their careers, despite the desire to be a good father. I am therefore not optimistic about the likelihood of change in the short term, although it is apparent that shared caring is the essential prerequisite to gender equality for women in the legal profession.

Until the idea of equal shared parental responsibility at work is accepted – substantively, not just rhetorically – gender equality in the legal profession will necessarily remain elusive. Hence, it is not the 'Woman Question' on which we should be focusing – but the 'Man Question',[159] or really the 'Man at Work Question'.

156 *Family Law Act 1975* (Cth) s 61DA(1).
157 Atkinson (n 67) 367.
158 Sanadaji (n 89) 12.
159 Cf Collier, 'Fatherhood, Gender and the Making of Professional Identity' (n 38).