

2022

## The Foundational Care Crisis

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Online ISSN: 2643-7759

### Recommended Citation

Stephanie M. Moore, *The Foundational Care Crisis*, 16 FIU L. Rev. 101 (2021).

DOI: <https://dx.doi.org/10.25148/lawrev.16.1.9>

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# THE FOUNDATIONAL CARE CRISIS

Stephanie M. H. Moore\*

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Every career has a defining moment. Mine happened the summer of 2001, weeks after I graduated from law school and delivered my first child—events that occurred within days of each other. I called Judge Monroe G. McKay of the Tenth Circuit Court of Appeals and told him I would not be able to fulfill my responsibilities as a clerk for the 2001-02 term because I could not leave my newborn baby.

In August 2000, I had just finished a summer clerkship at Hogan & Hartson, the largest law firm in Washington, D.C.—with an offer to return as an associate. I started my third year of law school, newly pregnant and very sick.

I had a difficult pregnancy, and my third year of law school was personally challenging. Relationships I had cultivated were strained, and, at the time, I was not well enough to invest in them. I graduated from law school on my due date and delivered my first child five days later.

Two weeks after the hospital discharged me, my husband and I moved across the country to Salt Lake City, Utah. He immediately began his residency, and I started looking for childcare. I still remember the pit in my stomach as I visited each seemingly identical nursery.

The childcare we could afford was unacceptable to me. We had no family—and no friends—within 1,400 miles, and, I could not leave my child with strangers. My reaction was completely unexpected—to myself and to everyone else who knew me well. As a teenager and young adult, I did not have an affinity for children. I expected to have my baby, put him in childcare, and continue building my career.

I was twenty-five. None of my friends were mothers. I thought I would have my baby and nothing would really change. Thinking about those early

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days, it is almost comical how shocking it was to me that I had to take this tiny person everywhere I went.

In some ways, this innocence served my son well. I continued living my life—and he came along. I talked to him like an adult. At age two, he spoke in paragraphs with an advanced vocabulary. In other ways, my cluelessness robbed us of necessary peace.

I had no idea—looking back—the reality of the situation. I only remember that my child cried all day, every day, for the first nine months. He did not sleep. I was alone because my husband essentially lived at the hospital, and, I was suffering from debilitating, undiagnosed post-partum depression. I was unwell. I was also about to start a new job as a federal law clerk for the Tenth Circuit Court of Appeals.

At seven months pregnant, I had flown to Salt Lake City to buy a house and interview for clerkships. Judge Monroe G. McKay hired me to be his law clerk to begin that fall.

In July, two months after we moved, in the throes of post-partum depression, I called the Judge and told him I would not be clerking. I explained that I could not leave my child. The Judge would not accept my withdrawal. Without hesitation, he told me that I would be clerking and that I would bring my child with me to chambers.

For the next four years, I brought one—and then two—children to the federal building and clerked for the Tenth Circuit Court of Appeals. I brought my children to oral argument in Denver and to visit at the Ninth Circuit. We dined with the other judges and clerks.

The environment in Judge McKay's chambers was supportive and collaborative. Clerks worked together to produce excellent opinions and to provide the judge with information and research.

Originally hired for a one-year term, Judge McKay asked me to stay on as a permanent clerk. I ultimately worked for him for four years—until my husband and I moved to Bloomington, Indiana.

Without the support of Judge McKay, I likely would never have worked again. I cannot imagine how I would have re-entered the workforce after quitting my clerkship before it even began.

I also learned so much about leadership, management, societal norms, and community. At twenty-five, those things were not on my mind at all—until they defined my life.

It is also a broader story in that we did amazing work those four years. We wrote solid opinions. We had an exceptional team within our chambers. We were “non-traditional,” but we were excellent.

Many years later, Judge McKay confided in me that he was not sure the arrangement would work past my child's infancy. I never knew of this hesitation. He gave me his full support, and I thrived under his guidance.

While I have many positive stories about Judge McKay and my co-clerks, we did not win everyone over with the baby-in-chambers. Judge McKay enjoyed his reputation as a renegade,<sup>1</sup> and so none of this bothered him. I felt constant pressure to be exceptional. Some of the other judges and clerks did not understand how I could possibly be doing my job and be dealing with a child in chambers. We had to continually win them over with our excellence.

After four years, my husband finished his residency. We moved to Bloomington. I took and passed the bar with two little ones. While I studied for the bar, one of my children almost burned down my house. I had hired a teenage girl to watch the boys while I studied—but Noah decided his stuffed cat needed warming on a lightbulb. As I studied, Meow Meow caught on fire.

That same summer, my father was diagnosed with stage four colorectal cancer—and I became pregnant with my third child. In a new town with three little ones six and under, I struggled to find an appropriate balance of mothering and working.

Through all of this, my husband was starting his practice here in Bloomington and was also very busy. In the early years of mothering, parenting, and career advancement, we—and I—did not find a healthy balance. As I reflect on it—a decade or so later—I mostly blame myself.

My own mother stayed at home and then worked only part-time for my entire childhood. She drove us to school or was there waiting when we got off the bus. She came to the class parties. It was formative and it mattered to me.

After I passed the bar, I busied myself with mothering, contract work, and various boards. When my youngest child entered kindergarten, I started teaching undergraduates at the Kelley School of Business.

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<sup>1</sup> One of eight children, Judge McKay grew up in Huntsville, Utah in a family of Shepherders. One of his favorite stories to tell clerks was how he learned to castrate sheep—with his teeth. As he told it, when he entered college, he was barely literate but went on to graduate from the University of Chicago Law School. As an adult, he served as a United States Marine, went on several missions with the Church of Latter Day Saints, and served as the Director of the Peace Corps in Malawi, Africa. He had a thriving law practice and joined the bench later in life at the age of 49. He was still actively hearing cases at the 10th Circuit when he died at the age of ninety-one. Avery Martinez, *Judge Monroe McKay Dies at 91*, L. WK. COLO. (Apr. 7, 2020), <https://lawweekcolorado.com/article/judge-monroe-mckay-dies-at-91/>; Michelle Quist, *Judge McKay Lived by Grace and Gave It Abundantly*, SALT LAKE TRIB. (last updated May 13, 2020, 10:55 PM), <https://www.sltrib.com/opinion/commentary/2020/04/09/michelle-quist-judge/>.

Along the way, the Judge and several other men supported my career—but it would be a mistake to miss the overall point that the broken system requires these gifts of decency to be successful as a mother, a professional woman, and an academic.

Judge McKay passed away last summer at the age of ninety-one. One of 2020's devastating losses, among many. We did not celebrate his life with a large funeral—though I suspect such a showing would have made him uncomfortable.<sup>2</sup>

## I. COVID-19 AMPLIFIED THE DEFECTS

The COVID-19 pandemic magnified the disparities in an already-stretched system. In the United States, women still make eighty-one cents for every dollar men earn, most primary care givers in the United States—both of children and adults—are women, and women in heterosexual relationships perform more domestic tasks overall.<sup>3</sup> COVID-19 exacerbated inequities—it did not cause them. Women have been hit harder by the COVID-induced economic crisis because stress on a broken system will crack it wide open.

The COVID-19 pandemic effect on unemployment hit women harder initially and then continued to consistently track below men for the rest of 2020. The unemployment rate pre-pandemic tracked women and men at a—relatively—slightly higher percentage than men.<sup>4</sup> While women were not paid equal wages, they were employed at equal rates.

Starting in April 2020, through the first few months of the pandemic, *the early pandemic*, women saw consistently higher unemployment numbers than men.

The initial drop was more significant—going from 4 percent for men and women age twenty and over in March 2020 to 13 percent for men and 15.5 percent for women in April for that initial plummet. After the original

<sup>2</sup> In August 2021, in true Judge McKay fashion, the Judge's children held a wake in his hometown park. They invited friends and family to gather informally to celebrate his life by sharing stories and reminiscing about the good old days. Guests were asked to bring their own food, drinks, and camp chairs. The perfect tribute.

<sup>3</sup> Kim Elsesser, *On Equal Pay Day, What Is the Real Gender Pay Gap?*, FORBES (Mar. 30, 2020, 02:59 PM), <https://www.forbes.com/sites/kimelsesser/2020/03/30/on-equal-pay-day-what-is-the-real-gender-pay-gap/?sh=7a91c04728ba>; *Age and Sex*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/topics/population/age-and-sex.html>; *Who Are Family Caregivers?*, AM. PSYCH. ASS'N (2011), <https://www.apa.org/pi/about/publications/caregivers/faq/statistics>; Megan Brennan, *Women Still Handle Main Household Tasks in U.S.*, GALLUP (Jan. 29, 2020), <https://news.gallup.com/poll/283979/women-handle-main-household-tasks.aspx>.

<sup>4</sup> *Women in the Labor Force: A Databook*, U.S. BUREAU LAB. STATS. (Apr. 2021), <https://www.bls.gov/opub/reports/womens-databook/2020/pdf/home.pdf>.

drop, women tracked consistently about a percent below men. By July, men were at 9.4 percent and women were at 10.5 percent.<sup>5</sup>

Black and Latina women have had the highest rates of unemployment. The rate of unemployment for Black and Latina women is higher than that of Black and Latino men, white women, and white men.<sup>6</sup> Black and Latinx workers and their families are more likely to face health risks from the coronavirus.<sup>7</sup> They also comprise a greater percentage of front-line workers, according to the Economic Policy Institute.<sup>8</sup>

When we look at industry specific data, we see that many pandemic-essential jobs like health care workers, cashiers at grocery stores, drugstore pharmacists, and teachers—are women.<sup>9</sup> Women are doing what we have deemed essential work, much of which has been historically underpaid and undervalued.<sup>10</sup> This is coupled with the fact that many other women are likely to hold jobs in the sectors that have been hit especially hard by the downturn, such as the service and retail sectors.<sup>11</sup> *We have two realities* where women make up the essential workers on the front lines—and where women—in what is perhaps unfairly being called nonessential work—were being laid off.

In December 2020, women lost another 156,000 jobs while men *gained* 16,000. Many news sites reported this information as an aggregate number—a *net* job loss of 140,000.<sup>12</sup> Others reported it as sex disaggregated and noted that men made gains while women bore ALL the losses.<sup>13</sup> Black and Latina women were the ones most significantly impacted—and they

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

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

<sup>7</sup> *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. DISEASE CONTROL & PREVENTION (last updated Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>; Elise Gould et al., *Latinx Workers—Particularly Women—Face Devastating Job Losses in the COVID-19 Recession*, ECON. POL'Y INST. (last updated Dec. 3, 2020), <https://www.epi.org/publication/latinx-workers-covid/>; Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECON. POL'Y INST. (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>.

<sup>8</sup> Elise Gould, *supra* note 7.

<sup>9</sup> *If You Are an Essential Worker, You Are Probably a Woman*, NONPROFIT Q. (Apr. 18, 2020), <https://nonprofitquarterly.org/if-you-are-an-essential-worker-you-are-probably-a-woman/>.

<sup>10</sup> *Id.*

<sup>11</sup> Susan Lund et al., *The Future of Work After COVID-19*, MCKINSEY GLOB. INST. (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19>.

<sup>12</sup> Jeffrey Bartash, *U.S. Loses 140,000 Jobs in December: First Decline in Eight Months Stems From Record Coronavirus Surge*, ECON. REP. (last updated Jan. 8, 2021, 9:37 AM), <https://www.marketwatch.com/story/u-s-loses-140-000-jobs-in-december-in-first-decline-since-onset-of-coronavirus-11610113382>.

<sup>13</sup> Maria Aspan, *Women Accounted for 100% of the 140,000 Jobs Shed by the U.S. Economy in December*, FORTUNE (Jan. 8, 2021, 5:55 PM), <https://fortune.com/2021/01/08/covid-job-losses-women-december-us-unemployment-rate/>.

disproportionately work in some of the hardest-hit sectors.<sup>14</sup> Further compounding the problem is that many of these positions do not have paid sick leave and/or these jobs do not allow working from home. With many schools online and care centers closed, these women could not maintain in-person jobs.<sup>15</sup>

By the end of 2020, unemployment leveled off a bit. But overall, women ended 2020 with 5.4 million fewer jobs than they had in February, before the pandemic. Meanwhile, men lost 4.4 million jobs in same period.<sup>16</sup> Again, it is important to note that men and women started 2020 on roughly equal footing—at least by the overall unemployment rates. The total aggregate unemployment rate in December 2020 was 6.7%.

So again, the impact on women was not shared equally. When we look at gender amplified by race, Latina and Black women experienced unemployment levels that were significantly higher than the women's overall unemployment rate (of 6.3%). In December, 9.2% of Latinas and 9% of Black women were unemployed, compared to 6% of white women and 6% of white men (ages 20 and over).<sup>17</sup>

These numbers are likely much higher—especially among women dealing with care issues—as these percentages only capture those actively seeking employment.<sup>18</sup> Unemployment only tracks people who are *actively seeking work* or on temporary layoff, so the early gap is likely even greater.<sup>19</sup> A temporary layoff is when an employer removes its staff employees from their jobs for a certain amount of time, so by definition it is not permanent.<sup>20</sup>

<sup>14</sup> Karen Rouse, *Women Account for 100% of Job Losses at the End of 2020, with Black and Brown Women Hit Hardest*, GOTHAMIST (Feb. 2, 2021, 1:06 PM), <https://gothamist.com/news/women-account-100-job-losses-end-2020-black-and-brown-women-hit-hardest>.

<sup>15</sup> Elise Gould et al., *Latinx Workers—Particularly Women—Face Devastating Job Losses in the COVID-19 Recession*, ECON. POL'Y INST. (last updated Dec. 3, 2020), <https://www.epi.org/publication/latinx-workers-covid/>; Elise Gould, *supra* note 7.

<sup>16</sup> *Unemployment Rates*, U.S. DEP'T. OF LAB. (2020), <https://www.dol.gov/agencies/wb/data/latest-annual-data/employment-rates>.

<sup>17</sup> *Id.*

<sup>18</sup> Rakesh Rochhar, *Unemployment Rose Higher in Three Months of COVID-19 than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>19</sup> Claire Ewing-Nelson, *Another 275,000 Women Left the Labor Force in January*, NAT'L WOMEN'S L. CTR. (Feb. 5, 2021), <https://nwlc.org/resources/january-jobs-day-2021/>; Courtney Connley, *Women's Labor Force Participation Rate Hit a 33-Year Low in January, According to New Analysis*, CNBC MAKE IT (Feb. 8 2021, 02:22 PM), <https://www.cnbc.com/2021/02/08/womens-labor-force-participation-rate-hit-33-year-low-in-january-2021.html>.

<sup>20</sup> *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 27, 2021), <https://www.bls.gov/cps/definitions.htm>.

According to the Bureau of Labor Statistics, among those not in the labor force in December, 4.6 million persons were prevented from looking for work due to the pandemic. This was up from 3.9 million in November. So, people—women and others—who are not able to work because of childcare or other care issues, for example, may not be factored in. If someone left the workforce because of care issues, they are unemployed but they might not be considered part of the unemployment rate—unless they are actively seeking work. “Among those not in the labor force in December, 4.6 million persons were prevented from looking for work due to the pandemic. This measure is up from 3.9 million in November. (To be counted as unemployed, by definition, individuals must be either actively looking for work or on temporary layoff.)”<sup>21</sup>

We are now seeing the official unemployment rate for women stabilize. However, once adjusted it is still higher for women than it is for men—reflecting how many more women have exited the labor force entirely.<sup>22</sup> In January 2021, the United States economy gained 49,000 net jobs. Women netted all gains with women gaining 87,000 jobs and men losing 38,000. Even with these gains, 44.2% of the over 22.3 million jobs lost in March and April 2020 have not returned. Additionally, 275,000 more women left the labor force in January. Because these women are no longer working or looking for work, they completely disappear from the calculation of an employment rate.<sup>23</sup>

The real devastation in women’s jobs is this mass exodus from the workforce. Once women leave, they are no longer counted. By January 2021, the total number of women who have left the labor force reached over 2.3 million. Women’s labor force participation rate—the percent of adult women who are either working or looking for work—is 57.0%.<sup>24</sup> This is the lowest women’s labor force participation rate since 1988. In contrast, approximately 1.8 million men have left the labor force since February 2020.<sup>25</sup>

Many women who have left the workforce are describing themselves as “retired” according to a Gallup analysis looking at COVID-19 job losses.<sup>26</sup> Women are not perceiving their exits as temporary. One of the primary

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<sup>21</sup> *The Employment Situation – December 2020*, U.S. BUREAU OF LAB. STAT., (Jan. 8, 2021), [https://www.bls.gov/news.release/archives/empsit\\_01082021.pdf](https://www.bls.gov/news.release/archives/empsit_01082021.pdf).

<sup>22</sup> Ewing-Nelson, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Jonathan Rothwell & Lydia Saad, *How Have U.S. Working Women Fared During the Pandemic?*, GALLUP (Mar. 8, 2021), <https://news.gallup.com/poll/330533/working-women-fared-during-pandemic.aspx>.

reasons women are leaving the workforce is because of care responsibilities.<sup>27</sup> The Gallup analysis determined that women were hit harder by the pandemic than men, starting with the pandemic in early 2020 and continuing one year later through February 2021.<sup>28</sup> The analysis is based on United States Bureau of Labor Statistics employment trends from February 2020 through February 2021, as well as Gallup and United States Census Bureau data on the factors influencing women's workforce participation.

## II. THE CARE CRISIS

With all the losses, 2020 left us with a looming care crisis. The crisis is not new or particularly novel. Caregivers—typically women—have confronted these issues for decades. However, the pandemic exposed the inequities and the inequalities, and now we are in a truly urgent situation.<sup>29</sup>

The United States stands alone as the only developed nation without a paid parental leave policy.<sup>30</sup> In these industrialized countries, subsidized childcare and education have had the single biggest positive effect on women's employment.<sup>31</sup> Given this reality, the only real way that so many mothers have been able to pursue their careers is by coming across an understanding and supportive male ally.

In the United States, childcare remains inaccessible. Cost and scarcity due to location, staffing, and hours affect women across all income

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<sup>27</sup> Victoria Masterson, *Why COVID-19 Could Force Millions of Women to Quit Work—and How to Support Them*, WORLD ECON. F. (Oct. 20, 2020), <https://www.weforum.org/agenda/2020/10/women-work-gender-equality-covid19/>; Sarah Coury et al., *Women in the Workplace 2020*, MCKINSEY & CO. (Sept. 30, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>.

<sup>28</sup> Rothwell & Saad, *supra* note 26.

<sup>29</sup> Cynthia Koons, *The U.S. Child-Care Crisis is Torturing Parents and the Economy*, BLOOMBERG (Dec. 10, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-12-10/u-s-economy-could-get-a-boost-from-expanded-child-care>.

<sup>30</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RES. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

<sup>31</sup> Claudia Olivetti & Barbara Petrongolo, *The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High-Income Countries*, 31 J. ECON. PERSPECT. 205, 224–25 (2017).

brackets.<sup>32</sup> However, women of color and lower-income families continue to be affected disproportionately.<sup>33</sup>

While cost is not the primary barrier for higher income brackets, professional women also have significant issues accessing childcare.<sup>34</sup> Professional women—like academics, lawyers, accountants, and others—have reduced working hours or stopped working altogether because of the increased demands of childcare during the pandemic.<sup>35</sup>

An early study of the COVID-19 pandemic—looking at the period prior to the first widespread U.S. outbreak through the first peak—showed that mothers with young children had reduced their work hours four to five times more than fathers, exacerbating the gender gap in work hours by 20–50 percent.<sup>36</sup> This study published in the academic journal *Gender, Work & Organization* looked at heterosexual couples, where both the mother and father were continuously employed and had children under thirteen.<sup>37</sup>

This is a specific type of family—dual earning, heterosexual, married couples who tended to be middle or upper class—and many had jobs that could be done from home. Even so, the study’s findings are consistent with other research about who is handling the majority of childcare during the pandemic.<sup>38</sup>

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<sup>32</sup> Leila Schochet, *The Childcare Crisis is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 28, 2019, 8:00 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce/>.

<sup>33</sup> *Id.* The top reason cited by Hispanic mothers (at two times the rate of white and Black mothers) was location. Black mothers cited cost as their top reason for difficulty accessing childcare. Hispanic, American Indian, and Alaska Native mothers were more than twice as likely as white mothers to respond that they did not find their desired child care program. Unsurprisingly, families earning less than \$100,000 a year singled out cost as the most significant barrier to establishing care. *Id.*

<sup>34</sup> Quality concerns and limited slot availability were the primary reasons for hardship according to those in the highest income brackets. *Id.*

<sup>35</sup> Stephanie M.H. Moore, *Women Risk Losing Decades of Workplace Progress Due to COVID-19—Here’s How Companies Can Prevent That*, THE CONVERSATION (Oct. 4, 2020, 8:10 AM), <https://theconversation.com/women-risk-losing-decades-of-workplace-progress-due-to-covid-19-heres-how-companies-can-prevent-that-145073>.

<sup>36</sup> Caitlyn Collins et al., *COVID-19 and the Gender Gap in Work Hours*, 28 GENDER, WORK & ORGANIZATION 101, 101–12 (2020), <https://onlinelibrary.wiley.com/doi/10.1111/gwao.12506>.

<sup>37</sup> *Id.*

<sup>38</sup> Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It’s Been Difficult to Handle Child Care During the Pandemic*, PEW RSCH. CTR. (Jan. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/>.

A Syracuse University research brief also looked at the pandemic's disparate impact on women in the workforce.<sup>39</sup> It examined data from the Census Household Pulse survey,<sup>40</sup> conducted in late April and early May. They found that over 80 percent of U.S. adults who were not working because they had to care for their children who were not in school or day care were women.

Many schools are still online or in a hybrid format, and many childcare centers are closed or operating at a reduced capacity. Women continue to cite childcare at a much higher rate than men do as a reason that they are not able to work.<sup>41</sup>

Surveys have found that men and women are both doing more housework and childcare than usual during the pandemic, but results suggest they are not dividing the work any differently or more equitably than they were before. Seventy percent of women say they are fully or mostly responsible for housework, and sixty-six percent say so for childcare—roughly the same shares as before.<sup>42</sup>

A Pew Research Center study released in January 2021 found that among parents “who have childcare responsibilities while working from home, mothers are more likely than fathers to say they have needed to reduce their work hours (50% vs. 30%), have been treated as if they weren't committed to their work (22% vs. 13%), have been passed over for a promotion (13% vs. 3%) or have turned down a promotion (13% vs. 5%).”<sup>43</sup>

The 2020 Women in the Workforce Report recently released by McKinsey Institute and LeanIn.Org determined that “decades of research shows that women do significantly more housework and childcare than men—so much so that women who are employed full-time are often said to be working a ‘double shift.’”<sup>44</sup> The Report found that, during the pandemic, mothers are more than three times as likely as fathers to be responsible for most of the housework and caregiving. It also found that mothers are 1.5

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<sup>39</sup> Danielle Rhubarb, *Gender Disparities in Caretaking During the COVID-19 Pandemic*, SYRACUSE U.: LERNER CTR. FOR PUB. HEALTH PROMOTION (June 4, 2020), <https://lernercenter.syr.edu/2020/06/04/ds-18/>.

<sup>40</sup> U.S. CENSUS BUREAU, *Measuring Household Experiences During the Coronavirus Pandemic* (May 5, 2021), <https://www.census.gov/data/experimental-data-products/household-pulse-survey.html>.

<sup>41</sup> Coury, *supra* note 27.

<sup>42</sup> Clair Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling*.

<sup>3</sup> *Percent of Women Agree.*, N.Y. TIMES (last updated May 8, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>.

<sup>43</sup> Igielnik, *supra* note 38.

<sup>44</sup> McKinsey & Co., *Women in the Workplace 2020*, GREATER HOUS. WOMEN'S CHAMBER OF COM. (Nov. 6, 2020), <https://ghwcc.org/2020/11/women-in-the-workplace-2020/>.

times more likely to be spending an additional three or more hours per day on housework and childcare.<sup>45</sup>

The 2020 Women in the Workforce Report found that more than one in four women—and one in three mothers—are considering leaving the workforce or downshifting their careers.<sup>46</sup> Prior to 2020, Women in the Workplace research had found that women and men left their jobs at similar rates. 2020 was markedly different. Because of the COVID-19 crisis, an unprecedented two million women are considering leaving the workforce.<sup>47</sup>

This is a situation where employers are not necessarily laying off employees, but it cannot really be characterized as voluntary separation or reduction either as women are forced to make the choice under these crisis conditions. These studies demonstrate that school and day care closures increase caregiving responsibilities for working parents generally and that many parents must change their work hours to meet household demands. They also create a disparate impact<sup>48</sup> on women.

Part of this is because of workplace norms and larger gender biases. However, some of it is also because of practicalities in families. If someone needs to reduce hours, families ask—“Who is paid less? And who has the flexibility?”—and more often, that is the woman.<sup>49</sup>

We know more women than men work part time,<sup>50</sup> and in the U.S. in heterosexual families, the traditional structure of the man earning more than the woman persists.<sup>51</sup> So, the woman’s job is often a lower priority<sup>52</sup> when disruptions come along.

The intersection then between societal norms, biases, and practicalities is very difficult to unwrap and so a crisis like a pandemic does exacerbate existing societal inequities—sometimes quite drastically.

<sup>45</sup> *Id.*

<sup>46</sup> Coury, *supra* note 27.

<sup>47</sup> *Id.*

<sup>48</sup> McKinsey & Co., *supra* note 44; Igielnik, *supra* note 38; Miller, *supra* note 42.

<sup>49</sup> Laura D’Andrea Tyson & Ceri Parker, *An Economist Explains Why Women Are Paid Less*, WORLD ECON. F. (Mar. 8, 2019), <https://www.weforum.org/agenda/2019/03/an-economist-explains-why-women-get-paid-less/>.

<sup>50</sup> *Employment Characteristics of Families—2019*, U.S. BUREAU OF LAB. STAT. (Apr. 21, 2020, 10:00 AM), [https://www.bls.gov/news.release/archives/famee\\_04212020.pdf](https://www.bls.gov/news.release/archives/famee_04212020.pdf).

<sup>51</sup> Sonam Sheth et al., *These 8 Charts Show the Glaring Gap Between Men’s and Women’s Salaries In the US*, INSIDER (Mar. 24, 2021, 10:51 AM), <https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3>.

<sup>52</sup> Robert VerBruggen & Wendy Wang, *The Real Housewives of America: Dad’s Income and Mom’s Work*, INST. FOR FAM. STUD. (Jan. 23, 2019), <https://ifstudies.org/blog/the-real-housewives-of-america-dads-income-and-moms-work>.

The care crisis in academia hits a little differently. Many academics are able to work from home. Though, many of us also teach some or all of our courses in person as well. Even those academics working primarily online and from home are struggling with care needs. Flexible work is a tremendous benefit. However, a house full of children needing care strains many research, teaching, and service requirements. The academy is not a business, but administering a college or university looks a lot like other businesses.<sup>53</sup>

Here in Monroe County, Indiana, schools are either online or in-person. Families keeping their children online have significant—and consistent—care and educational support expectations. Families sending their children to in-person school experience serious care disruptions as well. As the COVID-19 numbers fluctuate, the school system moves between in-person, online, and hybrid modes to account for virus concerns.<sup>54</sup> These shifts cause significant care disruptions for families—especially working mothers. Because of these fluctuations, both the online and in-person models are untenable for many working families.

Men also participate in caregiving and support. However, Boston Consulting Group found women are spending fifteen more hours a week on domestic labor during the pandemic than men,<sup>55</sup> and women are twice as likely as men to be responsible for homeschooling.<sup>56</sup> Women without children are also more likely to be in caregiving roles, even more so during the pandemic. Two-thirds of caregivers in the United States are women, meaning they provide daily or regular support to children, adults, or people with chronic illnesses or disabilities.<sup>57</sup>

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<sup>53</sup> Sioux McKenna, *Here Are Five Signs that Universities Are Turning into Corporations*, THE CONVERSATION (Mar. 13, 2018, 12:39 PM), <https://theconversation.com/here-are-five-signs-that-universities-are-turning-into-corporations-93100>; Richard M. Freeland, *Yes, Higher Ed Is a Business—But It's Also a Calling*, CHRON. HIGHER EDUC. (Mar. 18, 2018), <https://www.chronicle.com/article/yes-higher-ed-is-a-business-but-its-also-a-calling/>.

<sup>54</sup> Emily Cox, *Schools in Monroe County Report New Covid-19 Cases, Change Learning Plans*, THE HERALD-TIMES (Nov. 23, 2020, 5:00 PM), <https://www.heraldtimesonline.com/story/news/local/2020/11/23/schools-in-monroe-county-report-new-covid-19-cases-change-learning-plans/43808829/>.

<sup>55</sup> Matt Krentz et al., *Easing the COVID-19 Burden on Working Parents*, BOSTON CONSULTING GRP. (May 21, 2020), <https://www.bcg.com/publications/2020/helping-working-parents-ease-the-burden-of-covid-19>.

<sup>56</sup> *The Impact of Covid-19 on Workplace Inclusion: Survey (Quick Take)*, CATALYST (July 15, 2020), <https://www.catalyst.org/research/workplace-inclusion-covid-19/>.

<sup>57</sup> *Women, Caregiving, and COVID-19*, CTRS. DISEASE CONTROL & PREVENTION (June 21, 2021), <https://www.cdc.gov/women/caregivers-covid-19/index.html>.

### III. WOMEN ARE GOOD FOR BUSINESS—AND THE ACADEMY

High level, we have comprehensive data like the 2015 McKinsey Global Institute Report that found that \$12 trillion could be added to global GDP by 2025 by advancing women's equality.<sup>58</sup> The Delivering through Diversity Report in 2018 reinforced the link between diversity and company financial performance—and suggested how organizations can craft better inclusion strategies for a competitive edge. That expanded on the 2017 data set where they found that gender diversity on executive teams is strongly correlated with profitability and value creation.<sup>59</sup>

The most recent 2020 Women in the Workplace Report further detailed why companies cannot afford to lose women leaders.<sup>60</sup> Research shows that company profits and share performance can be close to fifty percent higher when women are well represented at the top.<sup>61</sup> Beyond that, senior-level women have a vast and meaningful impact on a company's culture. They are more likely than senior-level men to embrace employee-friendly policies. These acts of allyship benefit everyone.<sup>62</sup>

### IV. MEANINGFUL CHANGE CANNOT BE PERSONAL

I am now the mother of four—ages eleven to twenty. The care issues that shaped my career in the beginning hit me differently now. I have a child in elementary, middle, and high school—and one in college here in town. I do not have an infant or a toddler—but the mental and physical care toll at least meets those early years. The pull is just different. Included in my narrative are stories that are still too raw to tell.

I have always thought of my story as personal when it is the story of so many others.<sup>63</sup> The individual thinking is what kept me from really believing that it could be different. The few times I ventured out and shared my story, I was pushed back into that singular thinking.

Some of my academic and career achievements are quite impressive. I graduated first in my class. I clerked for a federal appellate judge. I served in

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<sup>58</sup> Jonathan Woetzel et al., *How Advancing Women's Equality Can Add \$12 Trillion To Global Growth*, MCKINSEY & CO. (Sept. 1, 2015), <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>.

<sup>59</sup> Vivian Hunt et al., *Delivering Through Diversity*, MCKINSEY & CO. (Jan. 18, 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>.

<sup>60</sup> *Id.*; McKinsey & Co., *supra* note 44.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

a supervisory capacity for other term clerks. I served on boards and produced quality work product. I also have gaps in my paid full-time employment—because of caregiving. And that is ultimately what ended up dictating my opportunities.

I do not fit neatly into a box. Many women do not. When we apply and interview for positions, we are evaluated by the same societal constructs that later prevent us from advancing in these same positions. These archaic standards are barriers to entry and they keep us from progressing and making important contributions. They prevent us from becoming leaders and policy-makers. When we are unable to look at women holistically—both as applicants and as employees with caregiving needs—we lose the benefit of diverse and creative voices.

These same barriers are hurting companies—and the academy. We are holding ourselves back. We ask why we do not have more “qualified” women in our candidate pools. We further ask why the women we do have are not advancing. These are the wrong questions. We are continually asking the wrong questions.<sup>64</sup>

Companies who are effectively advancing gender equity in their firms are taking a more inquisitive, feedback-oriented approach. These companies are rejecting old scripts and biases and seeking an evidence-based understanding of how women experience the workplace. By doing so, they create the conditions that increase women’s prospects for success.<sup>65</sup>

Research shows that women demand temporal flexibility.<sup>66</sup> Jobs that do not allow for this flexibility send a message to women that they are not valued. When women are valued, they reward organizations with creativity, compassion, and value creation. Organizations that shut women out of certain positions lose these benefits.

We know that women in academia are feeling the brunt of the COVID-19 pandemic in myriad ways. Women are publishing comparatively less than men,<sup>67</sup> with the distortion especially high in health and medicine.

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<sup>64</sup> Catherine H. Tinsley & Robin J. Ely, *What Most People Get Wrong About Men and Women*, HARV. BUS. REV., May–June 2018, at 114.

<sup>65</sup> *Id.*

<sup>66</sup> Claudia Goldin, *How To Achieve Gender Equality*, MILKEN INST. REV., Third Quarter 2015, at 24, 26, [https://scholar.harvard.edu/files/goldin/files/gender\\_equality.pdf?utm\\_source=npr\\_newsletter&utm\\_medium=email&utm\\_content=20200817&utm\\_term=4756833&utm\\_campaign=money&utm\\_id=984457&orgid=353](https://scholar.harvard.edu/files/goldin/files/gender_equality.pdf?utm_source=npr_newsletter&utm_medium=email&utm_content=20200817&utm_term=4756833&utm_campaign=money&utm_id=984457&orgid=353); Julia B. Bear, *Forget the “Mommy Track”*: Temporal Flexibility Increases Promotion Aspirations for Women and Reduces Gender Gaps, 45 PSYCH. WOMEN Q. 294 (2021), <https://journals.sagepub.com/doi/abs/10.1177/03616843211003070>.

<sup>67</sup> Colleen Flaherty, *Women Are Falling Behind*, INSIDE HIGHER EDUC. (Oct. 20, 2020), <https://www.insidehighered.com/news/2020/10/20/large-scale-study-backs-other-research-showing-relative-declines-womens-research> (“While other studies using different metrics show that women are

Women take on caregiving at home and in their professional roles. They take on more academic service—often because they are asked to do this work and because they are more likely to agree. They are also more likely to mentor students. All of this work is necessary and important for a university.<sup>68</sup>

Adding in tenure clock pauses and reorganizing responsibilities during the pandemic are all important steps. But they are temporary. They are part of a plan—but they are not the solution. We need a system overhaul, not interim stopgap measures. COVID-19 is not the cause of the care crisis and the care crisis will not end with a vaccine.

Without the primary steps of redefining how we recruit and assess applicants, we will not increase representation of women—especially women of color. Without recognizing the value of women’s contributions in teaching and service, we will not retain these talented and diverse leaders. Without breaking down arbitrary categories and boxes, we will lose creativity, progress, and excellence. Without changing what we value and how we value it, we risk complacency.

Teaching business law and ethics to undergraduates, I often encounter a primary question. What is the role of these social and societal issues in a business course? Sometimes students struggle with this initial hurdle of understanding why we study diversity, equity, inclusion, and justice in the workplace. But societal issues *are* business issues. They form the lens by which we view everything else. The care crisis is a foundational barrier to any meaningful systemic breakthrough. We must build a community that will support women at every step.

Women are good for business. They are good for a university. They are good for society. We can take this opportunity to realign our internal systems to truly value and support women and the contributions they bring. Or we can continue to ask women to fit into a system that says it values them—without building meaningful internal support.

Organizations—and their leaders—decide the parameters of job searches, promotions, and bonuses. They decide who leads committees. They choose what is important and who to value. With each decision, leadership must confront their own biases in those decision-making processes.

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publishing much less now than they were before the pandemic, this new paper finds something different: at least in terms of submissions to academic journals from the mega-publisher Elsevier, both men and women’s productivity actually increased during the first few months of the pandemic, relative to the same period of time in 2018 and 2019. But women’s productivity didn’t increase as much as men’s, meaning that women are still trailing behind male peers as a result of pandemic-era increased caregiving responsibilities.”).

<sup>68</sup> Jillian Kramer, *The Virus Moved Female Faculty to the Brink. Will Universities Help?*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/science/covid-universities-women.html>.

In 2001, I began my clerkship with a new law degree and an infant. As a point of privilege, a kind and powerful man kept me from ruining my career before it started—by letting me bring my baby to work. I am forever grateful. Twenty years later, we are no closer to solving the care crisis that is a systemic, countrywide problem. Amid a pandemic, we have an opportunity—and a responsibility—to make meaningful change.