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# THE HIDDEN HARMS OF THE FAMILY AND MEDICAL LEAVE ACT: GENDER-NEUTRAL VERSUS GENDER- EQUAL

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## I. INTRODUCTION

Since colonial times, American women have been clamoring for equality and justice in a society whose foundations are purportedly based on precisely those principles. With the reality of women's lives so divergent from these fundamentally revered ideals, many activists devoted their lives to attempting to gain legal rights equal to those that men enjoyed. Early philosophers, such as John Stuart Mill, pioneered new arguments for suffrage and rights for women, and many of these ideas were incorporated into efforts by American women toward rights attainment. A key claim in these arguments was often that because gender is a social construct there is no inherent reason to relegate either gender to an inferior status.<sup>1</sup> Other arguments for equality included fairness and justice, regardless of whether gender differences were inherent or constructed.<sup>2</sup>

These historical approaches have typically been liberal in their attempts to rectify the ubiquitous gender problem. Women's rights activists have focused on ideals of personal autonomy, individuality, and identity, and have lobbied the governing structure to codify these and other rights to guarantee their extension to all intended beneficiaries. To the extent that these measures fell short of their highest goals, more laws and better enforcement are the proffered answers. Thus, ever since women attained the right to vote in 1920 and then realized that true equality still eluded them, they have worked to change other laws and policies that served to oppress their gender. Women have succeeded in obtaining the passage of many measures aimed at equalizing their status and minimizing or eliminating the difference in legal treatment between women and men.

The Family and Medical Leave Act<sup>3</sup> (FMLA) is one such example of a liberal effort to gain legal rights that improve the status of a particular group. In this case, the law is gender-neutral, focusing on facial equality, and was enacted to provide job protection for people who must take leave from work for medical reasons including maternity leave and family or personal illness. This article analyzes the impetus for the law's passage and investigates related gender issues, including whether a purpose of the Act was to address gender inequality in the workforce, and the extent to

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1. See JOHN STUART MILL, *The Subjection of Women*, in ON LIBERTY AND THE SUBJECTION OF WOMEN 133, 133 (Alan Ryan ed., Penguin Books 2006) (1869) (arguing that the legal subordination of one sex to the other is wrong and society should replace this view with one of equality).

2. See, e.g., *United States v. Virginia*, 518 U.S. 515, 516, 532, 541-45 (1996) (observing that a law is incompatible with equal protection when it "denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society . . .").

3. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified in part at 29 U.S.C. §§ 2601-2654 (2000)).

which it has been successful in that aim.

Some groups, especially employers, were opposed to passing the FMLA, and an analysis of the opposition arguments is relevant.<sup>4</sup> The law has serious limitations, and those limitations may disproportionately affect women, especially middle- and low-income women.<sup>5</sup> This paper addresses some of the harms that women in particular suffer as a result of the FMLA, why there is such gendered harm from a gender-neutral law, and how the potential remedies to the problem might play out according to liberal theory. A feminist theoretical approach is utilized to that end, and several prominent scholars are referenced to support the analysis. Each theorist presents a different take on how gender equality should be conceived and approached, and how close our current legal framework can take us to the desired goal. Each analysis will be applied to the FMLA and the problems surrounding it to determine what solutions would be viable in the effort to incorporate women fully into working society so that they may have truly meaningful lives as mothers and caregivers without being forced to sacrifice their status and position in public life.

## II. HISTORY OF FAMILY LEAVE POLICY FOR WOMEN

The questions of family leave, and how law and social policy should treat women in the workforce, have sustained a history of intense conflict in the United States. There has existed extensive debate concerning who should be responsible for issues relating to family and caregiving. With the private realm considered beyond the reach of state intervention, the liberal tradition has evinced a sharp distinction between what is considered “public” (work, politics, and law) and that which is “private” (home and family). Thus, all family matters, including parenting, caregiving, and how to balance those matters with work obligations, have typically been left off the public radar and are up to individual families to work out amongst themselves. Any inequality extant in the private sphere is likewise of no concern to the state, nor is the term “justice” applicable there.<sup>6</sup> This is why

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4. See S. REP. NO. 103-3, pt. 9, at 49 (1993) (minority views) (fearing that passage of the FMLA would force employers to reduce voluntary benefits because of the excessive costs of mandated benefits under the legislation, and would excessively burden small and mid-sized businesses).

5. See Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 39 (2007) (noting that, at least under the Pregnancy Discrimination Act, courts could still cover lower-income workers through the use of disparate impact theory, whereas courts do not have the same flexibility to “extend coverage” to lower-income workers disproportionately excluded by the FMLA exemptions).

6. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 26 (1989) (arguing that the division of labor in a hierarchical, gender-structured family is unfair and unequal in the context of general standards of justice).

we have taken measures to eliminate gender discrimination in public situations but have taken no similar steps to address gender injustice in the family. The former is fair game for intervention; the latter is not. Catharine MacKinnon claims that the “doctrine of privacy has become the triumph of the state’s abdication of women in the name of freedom and self-determination.”<sup>7</sup> However, there is no clear, inherent reason why this distinction is necessary; it is simply how the liberal political tradition has developed, and therefore now constitutes the central values that Americans hold dear. The events preceding the enactment of the FMLA shed important light on how the need for a family leave policy developed and was perceived with respect to “private” notions of family and care.

### *A. Gender Discrimination in Employment*

While historically there existed rampant discrimination against women in private employment, such discrimination was often also a function of state-sponsored gender discrimination in the legal realm. A variety of laws regulated women’s employment, and they were typically upheld when challenged in court. State laws enforced a variety of regulations, including limiting the types of positions women could hold, restricting the number of hours women could work,<sup>8</sup> prohibiting overtime and evening work,<sup>9</sup> limiting the amount of weight that women could lift,<sup>10</sup> and requiring rest periods.<sup>11</sup> Women were also prevented outright from professions including law and bartending; such restrictions were upheld by the Supreme Court.<sup>12</sup>

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7. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

8. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) (upholding an Oregon law restricting the number of hours women could work in laundry facilities to ten hours per day, and rationalizing that the law is a valid exercise of the state’s police power to protect the health and well-being of working women).

9. *See, e.g.*, *People v. Charles Schweinler Press*, 108 N.E. 639, 641 (N.Y. 1915) (affirming a New York law prohibiting women from working before six o’clock in the morning and after ten o’clock in the evening, and stating that this law was a valid exercise of the state’s police power to protect the health of women, their offspring, and society in general).

10. *See, e.g.*, *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (concluding that a company may restrict women from lifting a certain amount of weight under a bona fide qualification exception to the Civil Rights Act, which prohibits discrimination in employment practices unless the company can show that all or substantially all women would not be able to perform the task safely).

11. *See, e.g.*, *Burns v. Rohr Corp.*, 346 F. Supp. 994, 998-99 (S.D. Cal. 1972) (striking a California state law that required rest periods only for female employees because it violated the Civil Rights Act).

12. *See* *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding as a valid exercise of the state’s legislative power a Michigan statute prohibiting females from bartending if neither their husband nor father owned the bar); *Bradwell v. Illinois*, 83 U.S. 130, 142 (1872) (Bradley, J., concurring) (validating the denial of a license to practice law to a female plaintiff because the granting of license to practice law in a state’s courts is properly controlled by that state, and given the “peculiar characteristics, destiny, and

In this way, substantial limits were placed on female workers while few were placed on men, causing women to be less desirable employees who were more likely to stay at home and fulfill their domestic duties as wives and mothers.<sup>13</sup>

When they did venture into the workforce, they could not venture too far because they were required to remain in the more acceptable “feminine” positions.<sup>14</sup> In 1908, the Supreme Court noted that nineteen states had laws limiting the hours women could work.<sup>15</sup> The Court declared that “a proper discharge of [a woman’s] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man.”<sup>16</sup> Until 1969, every state had some kind of labor legislation that restricted only women,<sup>17</sup> and until 1971, the Supreme Court upheld such legal sanctions on women.<sup>18</sup> Therefore, as women entered the workforce in increasing numbers throughout the twentieth century, they were met with resistance and resentment.

Moreover, before the Family and Medical Leave Act of 1993, ways to make employment more accessible to women were very low on the public radar. Leave policies were rare and limited, despite becoming more common in the 1960s and 70s. The problem of individual supervisors using their discretion to grant leave in a way that resulted in unequal treatment helped prompt Congress to pass the federal Family and Medical Leave Act in 1993.<sup>19</sup>

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mission of woman,” Illinois was within its power to exclude women from being lawyers).

13. See *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) (opining that women are not fit for civil life and that their natural role is in the domestic sphere).

14. See Joan Kennedy Taylor, *Protective Labor Legislation*, in *FREEDOM, FEMINISM, AND THE STATE* 267, 268-70 (Wendy McElroy ed., 1982) (theorizing that protective labor legislation served to prevent women from entering higher-paying male jobs); *Bradwell*, 83 U.S. at 141 (asserting that although women had by this time ventured into the workforce, they did not have rights or privileges guaranteed by the Constitution to engage in jobs that had special qualifications or responsibilities).

15. See *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908).

16. *Id.* at 423.

17. See JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN’S LABOR LEGISLATION* 4 (1978) (noting that in 1969 the Equal Employment Opportunity Commission ruled that the Civil Rights Act superseded conflicting protective labor laws for women).

18. See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding, by unanimous vote, that the Equal Protection Clause of the Fourteenth Amendment extends to distinctions based on sex).

19. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 732 (2003) (citing H.R. REP. NO. 103-8, pt. 2, at 10-11 (1993)) (noting that the discretionary nature of granting family leave, despite facially neutral state laws and policies, gave rise to sex discrimination).

*B. The Civil Rights Act of 1964*

Early claims of women vying for employment equality and opportunity dealt with the issue of pregnancy discrimination. Because women were frequently denied employment, fired, or refused promotions due to pregnancy, the Civil Rights Act of 1964 included women as a class protected from discrimination.<sup>20</sup> In the early cases brought under the Civil Rights Act, plaintiffs claimed that discrimination based on pregnancy amounted to illegal discrimination against women.<sup>21</sup> They argued that because only women become pregnant and because the type of harm that affected pregnant women could never befall a man, laws and policies were discriminatory if they did not provide exemptions or protection for pregnant women. Women began suing their employers under Title VII, claiming that they were being subjected to unlawful gender discrimination. These cases set the stage for the pursuit of liberal equality for women under our current legal and political framework.

However, in *General Electric Co. v. Gilbert*, the Supreme Court effectively forestalled any further attempts to claim that pregnancy discrimination constituted gender discrimination under Title VII.<sup>22</sup> Although the employer had a disability plan that explicitly excluded pregnancy from its coverage, the Court held that such a practice was *not* sex discrimination under Title VII because the disparate treatment was not actually gender-based.<sup>23</sup> The Court held that the distinction was not between women and men, but rather pregnant and non-pregnant *persons*, which included both women and men.<sup>24</sup> Since men cannot become pregnant, and not *all* women will become pregnant, the Court upheld the policy, concluding that any policy singling out pregnancy is not discriminatory because women and men are not similarly situated.<sup>25</sup> This type of reasoning represents an intentional self-delusion as to both biological and social reality, manifested in a requirement that

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20. See generally Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964) (prohibiting discrimination based on race, color, religion, sex, or national origin). *But see* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (amending Title VII to cover gender-based employment discrimination and defining employment discrimination based on sex as unequal or negative treatment directed toward women because of pregnancy, childbirth, or other gender-related medical conditions).

21. See, e.g., *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900, 903 (S.D. Tex. 1979) (finding that the school district required only pregnant female employees to take sick leave without pay, which constituted unlawful discrimination based on sex).

22. 429 U.S. 125, 136 (1976) (holding that the defendant's benefit plan did not violate Title VII because there was no indication that the employer's lack of an inclusive benefit plan was a pretext for discriminating against women).

23. *Id.*

24. *Id.* at 134-35.

25. *Id.* at 125, 134-36.

discrimination cannot take place unless *similarly situated* groups are treated differently.<sup>26</sup>

Clearly the anti-discrimination provisions provided to women in Title VII were not enough to achieve meaningful employment equality. With respect to family leave issues, the law only mandated equality between genders and that was interpreted to mean that a lack of family leave was perfectly acceptable. Because these policies—or a lack thereof—ostensibly treated both genders equally, there is no Title VII violation, irrespective of whether one gender was harmed more than the other by the policy. Indeed, Congress found that “[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women,”<sup>27</sup> which means that far more working women than men would be excluded by the absence of a family leave policy.<sup>28</sup> Yet there was no legal violation involved here. Thus, it became obvious that something more than Title VII would be necessary to respond to the history of gender discrimination in employment.

### C. *The Pregnancy Discrimination Act*

In 1978, Congress quickly picked up on this issue and reacted to the *Gilbert* decision’s implications for gender equality in employment by passing the Pregnancy Discrimination Act (PDA) as an amendment to the Civil Rights Act of 1964.<sup>29</sup> The new law stated:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise . . . .<sup>30</sup>

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26. See MacKinnon, *supra* note 7, at 1286-87 (chastising the way the courts and the public have construed the “similarly situated” requirement under Title VII to mean that women can only be treated as equal to men to the extent that they are not women); see also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.”).

27. S. REP. NO. 103-3, at Part II (1993); see also H.R. REP. NO. 103-8, pt. 1, at 24 (1993).

28. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (holding that the Family and Medical Leave Act was an appropriate means of correcting the problems caused by the stereotypical stigmas attached to women taking leave because of pregnancy and childbirth, and that the new across-the-board policy will prevent businesses from seeing women as an inordinate drain).

29. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

30. *Id.*

As a result, pregnancy discrimination now falls squarely within the purview of sex discrimination law, and women who are denied employment opportunities as a result of pregnancy may sue their employer for such actions.

However, the result of this new law has also provided leverage for men to claim discrimination when pregnancy has been at issue. In effect, men have claimed that providing more benefits for pregnancy-related issues than for other disabilities has constituted gender discrimination against men. For example, in *California Federal Savings & Loan Ass'n v. Guerra*, a pregnant worker's employer claimed that California's law requiring that pregnant employees be provided with leave and reinstatement was discriminatory because men did not enjoy similar benefits for other types of disabilities (although neither did women).<sup>31</sup> Such "special treatment" for women, the argument went, amounted to discrimination against men on the basis of pregnancy, which is prohibited by the PDA. By a vote of six to three, the Supreme Court rejected this claim and opted to uphold California's pregnancy law, reasoning that the PDA constituted a floor of protection for pregnant employees beneath which employers could not fall, rather than a ceiling limiting how far they could reach.<sup>32</sup> The Court cited the comments of Senator Williams, the sponsor of the PDA who stated "[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."<sup>33</sup> In the absence of the PDA, one wonders if the *Guerra* Court would have adopted the same "similarly situated" requirement that it relied upon in *Gilbert*, claiming that the California law did not discriminate against men per se, but merely non-pregnant persons.<sup>34</sup>

Despite enactment of the PDA, the law left much to be desired in the realm of employment equality for women. Although it prohibited employers from treating pregnancy any worse than a disability, the law did not require employers to provide any benefits to pregnant women that they did not already provide to other disabled employees. In other words, if benefits and leave are not provided as a matter of course, then pregnant

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31. See 479 U.S. 272, 290 (1987) (holding that a California statute that required pregnancy leave and reinstatement for women did not violate Title VII because it was narrowly drawn only to cover the period of actual physical disability resulting from pregnancy and did not reflect archaic or stereotypical notions about pregnancy and pregnant workers).

32. See *id.* at 285-86 (asserting that in passing the PDA, while Congress had before it an abundance of evidence showing discrimination against pregnancy, the legislative history lacks discussion concerning preferential treatment for pregnancy; therefore, Congress merely intended the PDA to end discrimination against pregnant workers).

33. *Id.* at 289 (citing 123 Cong. Rec. 29658 (1977)).

34. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976).

women are as bad off as everyone else. In 1987, for example, a Missouri law stated that anyone who leaves work for reasons not connected to work shall be disqualified from receiving unemployment benefits.<sup>35</sup> In *Wimberly v. Labor & Industrial Relations Commission*, a woman was not reinstated when she tried to return to work after taking a pregnancy leave from J.C. Penney.<sup>36</sup> She applied for unemployment compensation, but her application was denied because the Division of Employment Security determined that she took leave for reasons not connected to work.<sup>37</sup> Suing under the Federal Unemployment Tax Act (FUTA), a federal law mirroring the PDA's anti-discrimination provisions regarding pregnancy,<sup>38</sup> the plaintiff argued that the denial of benefits was based on her pregnancy.<sup>39</sup> The Supreme Court ruled against her, reasoning that Missouri's law did not discriminate on the basis of pregnancy because it applied to all medical conditions.<sup>40</sup> The only intent of the FUTA, the Court said, was to ensure equality of treatment—even if that “equality” means that women who become pregnant may be harmed, while men will not.<sup>41</sup> The Court held that neutral criteria are acceptable, even if they result in a denial of benefits to pregnant women.<sup>42</sup> Thus, what the Court and Missouri considered to be “preferential treatment” was not required by the FUTA.<sup>43</sup>

The application of the PDA and analogous statutes to situations involving pregnant women made it clear that the results of the Act still fell far short of gender equality in employment. Since benefits for pregnant workers were only guaranteed if similar benefits were already available to other workers, large coverage gaps existed for women experiencing pregnancy and maternity. That this was considered equality demonstrates a

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35. See Mo. Rev. Stat. § 288.050.1(1) (Supp. 1984) (disqualifying any employee who left work voluntarily without good cause attributable to that work).

36. 479 U.S. 511, 513 (1987).

37. *Id.* (“A deputy for the Division determined that petitioner had ‘quit because of pregnancy,’ and therefore had left work ‘voluntarily and without good cause attributable to [her] work or to [her] employer.’”).

38. 26 U.S.C. § 3304(a)(12) (2006) (providing that no State participating in the federal-state unemployment compensation program shall deny compensation solely on the basis of pregnancy).

39. *Wimberly*, 479 U.S. at 511.

40. *Id.* at 517 (construing the FUTA as prohibiting disadvantageous treatment of pregnant workers rather than mandating preferential treatment, and therefore, finding that the Missouri law was not inconsistent with the federal statute).

41. *Id.* at 511, 517-18.

42. See *id.* at 521 (pointing to the FUTA's legislative history as evidence of Congress's approval of facially neutral laws like Missouri's as well as its intent to merely prohibit states from passing laws that single out pregnant women for disadvantageous treatment).

43. See *id.* at 518 (noting that even the petitioner conceded that the FUTA does not prohibit states from denying benefits to pregnant women who do not satisfy neutral eligibility requirements, such as ability and availability for work).

particular and narrow conception of equality that merely requires facial neutrality and avoids explicit distinctions of women versus men. Such a concept of equality also ignores both the reality of social conditions—such as biological procreative differences between women and men, which have a significant impact on true “equality”—and the socially imposed gender division of labor that makes certain “neutral” laws more harmful to women than to men. Although the PDA ensures gender-neutrality, it clearly harms women in some areas much more than men: most women will become pregnant and give birth at some point in their lives,<sup>44</sup> while no man ever will. These pregnancy cases set the groundwork for recognition of the necessity of the FMLA, which was meant to be a solution to these types of inequalities resulting from existing law. In fact, in 2003, the Supreme Court declared that the historical context of state-imposed and sanctioned barriers to women in employment justified the enactment of the FMLA.<sup>45</sup> The Court also held that this historical discrimination implicated the Fourteenth Amendment’s Equal Protection Clause<sup>46</sup>—an approach that had long been utilized in cases of race discrimination, but one that courts previously rejected in early cases of sex discrimination.<sup>47</sup> Given this context and the limitations of the PDA, Congress attempted to even the playing field through the passage of a comprehensive policy requiring that employment leave be available for workers who, for medical reasons, needed to take time off to care for themselves or a family member. This policy eventually became the FMLA.

### III. PASSAGE AND IMPLEMENTATION OF THE FAMILY AND MEDICAL LEAVE ACT

Family benefits are important to workers. Many indices demonstrate that women value these benefits on average about twice as much as men do. One poll indicated that 40% of mothers stated that family benefits were

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44. See UNITED STATES CENSUS BUREAU, CURRENT POPULATION SURVEY (2006), available at <http://www.census.gov/population/socdemo/fertility/cps2006/table1-06-allraces.xls> (asserting that approximately 20% of women in their early forties have never had children); KUNZ CTR. FOR RESEARCH ON WORK, FAMILY, & GENDER, WORK AND FAMILY IN AMERICA: CURRENT STATISTICS, available at <http://asweb.artsci.uc.edu/sociology/kunzctr/stats.htm> (last visited Sept. 29, 2008) (finding that women are increasingly delaying childbirth, such that the number of women in their forties without a child has risen from 10% in the 1970s to 18% in 1994).

45. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734-35 (2003) (holding that the states’ participation in and fostering of gender-based discrimination in leave benefits justified the enactment of the FMLA).

46. U.S. CONST. amend. XIV, § 1.

47. See, e.g., *Spencer v. Bd. of Registration*, 8 D.C. (1 MacArth.) 169 at \*7 (1873) (holding that the Fourteenth Amendment does not provide women with the right to vote; it merely gives them the capacity to become voters).

more important than any other job benefit, whereas only 21% of fathers held the same opinion.<sup>48</sup> In the same poll, 50% of mothers, compared to 26% of fathers, indicated that family responsive policies were even more important than pay, and 47% of those who lacked leave time for family illness indicated that they would sacrifice pay or benefits to gain such leave.<sup>49</sup> Clearly, there is a need that is not being met, and women seem to feel the pressure of that need more strongly than men.

Workplace initiatives and legal policies that address family needs generally fall into three categories: (1) leave time to care for family medical needs; (2) flexible work schedules that do not decrease total work hours but allow workers to schedule work hours around family needs; and (3) workplace social support for parents.<sup>50</sup> While (2) and (3) are largely considered voluntary on the part of employers and are encouraged but not required, the FMLA and other legal initiatives have focused on mandatory leave time as a critical step in insuring the well-being of workers and their families. The latter two, however, are important elements of social policy that cannot be overlooked, and will be briefly addressed later in this paper.

#### A. *History, Debates, and Passage of the FMLA*

Like many Congressional successes, the FMLA had a history of failure within Congress prior to its enactment with various versions of the law proposed and fiercely debated before the current Act passed in 1993. The first proposal was the Family Employment Security Act (FESA) in 1984, which was never formally introduced in Congress but did begin discussion of the underlying principles of “family care” and “job security” that remained key components of proposed legislation throughout the decade.<sup>51</sup> A year later, the Parental Disability Leave Act was proposed in the house, but died in committee. Again in 1986, the Parental and Medical Leave Act was proposed, with more bipartisan support in both houses of Congress, but also died before a vote in either House.<sup>52</sup>

Key debates in these bills concerned the length of leave that should be provided, the amount of time the worker must be employed to qualify for

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48. Jennifer L. Glass & Sarah Beth Estes, *The Family Responsive Workplace*, 23 ANN. REV. SOC. 289, 293 (1997).

49. *Id.*

50. *Id.* at 294.

51. See STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 136-37 (2001) (describing the objective of the FESA as not aimed solely at maternity leave, but a broad array of employee rights, including pregnancy, a child’s illness, and a spouse’s disability, that would benefit all workers regardless of gender).

52. See *id.* at 141-44 (stating that although the FMLA emerged from the Education and Labor Committee with a favorable, partisan vote, the House Democratic leadership decided the bill was not ready for a vote and should be reintroduced in 1987).

leave, the minimum size of the company to be held to the new legal requirements, and how much these benefits would cost businesses.<sup>53</sup> Strong opposition was voiced within the business community, and President George H.W. Bush promised to veto the law if it passed Congress.<sup>54</sup> There were various debates played out with these bills, and controversy revolved around issues such as whether to provide “special treatment” for women as opposed to a gender-neutral law that allowed men the same leave as women. Another point of contention was to what extent the policies should be modeled after European ones, many of which had already been around for some time. Whether leave should be paid was also debated, but given the conservative political climate under a Republican president, it was agreed that the proposal for paid leave was too controversial and was dropped.<sup>55</sup> The cost of the law to businesses was one of the larger issues, with enormous variation in the estimates of the financial burden businesses would have to endure if the law became effective. When the U.S. Chamber of Commerce estimated the cost at between two and sixteen billion dollars, the General Accounting Office conducted a fiscal impact study that determined the Chamber of Commerce had inflated its numbers, and came in with a much lower estimate at \$188 to 236 million.<sup>56</sup>

In an interesting dynamic, proponents of the law emphasized its benefit to men and children as a major selling point, indicating that its importance to women was not valuable enough to warrant its passage, but instead required demonstration of how useful the law would be for everyone else.<sup>57</sup> In fact, a major selling point amongst Congressional Republicans was the idea that the FMLA would reduce abortions because, if women didn't have to lose their jobs to have babies, they would be less likely to abort a pregnancy.<sup>58</sup> Along similar lines, another important argument centered on

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53. *See id.* at 142-44 (describing Republican opposition to the FMLA and their demands to reduce company size, time for family leave, time for medical leave, and to exempt certain high-paid employees from coverage).

54. *See id.* at 146 (noting that 1988 was a low point for the FMLA, as it had been stalled in both houses for three years and the incoming president, George H. W. Bush, campaigned against it and promised to veto the bill if Congress passed it).

55. *See id.* at 138 (explaining that the choice to drop paid leave was motivated by a desire to avoid a battle over the cost of a new entitlement program and a desire to defuse strong opposition early on).

56. *See id.* at 145.

57. *See Roundtable Discussion: The Family and Medical Leave Act: A Dozen Years of Experience: Examining the Family Medical Leave Act: Hearing Before S. Comm. on Health, Educ., Labor, and Pensions, 109th Cong. 8, 9 (2005)* [hereinafter *Roundtable Discussion: The Family and Medical Leave Act*] (emphasizing the positive effects the FMLA has had on all workers particularly because the parental leave permitted under the FMLA has improved early child development).

58. *See WISENSALE, supra* note 51, at 146 (explaining that Republicans' lower abortion rates argument in support of the bill provided the political cover they needed

the claim that men were being discriminated against in family leave policies, given that when they did exist, they were more likely to apply to women. The Supreme Court even utilized this argument, claiming that, “[m]en, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave.”<sup>59</sup> It is an important dynamic that where women suffer from gender inequality, measures aimed to reduce its effects cannot pass without reference to the benefits expected by men. At times, equal treatment for women is interpreted as discrimination against men.

Those opposing the FMLA primarily consisted of businesses and employers who were concerned with shielding the private sector from “unnecessary costs and excessive government regulations.”<sup>60</sup> Opponents argued that employers should voluntarily provide leave policies, and President Bush agreed, proposing a voluntary incentive plan to encourage, but not require, businesses to do so.<sup>61</sup> In addition, opponents argued that the FMLA would actually increase gender inequality in the workplace by leading to more gender discrimination since employers would be disinclined to hire women due to the presumption that women are more likely to take such leave.<sup>62</sup> If this were true, it would represent a larger problem of gender inequality in society, and should not be a reason to abandon the cause; rather, it underscores the need to enforce antidiscrimination policies and change social attitudes about gender. The arguments against the FMLA presumed some workers must suffer in order to protect business interests. The majority of those workers would be women. Businesses resented being required to provide women with employment opportunities because the “ideal worker” was still based upon the male standard of someone who has a spouse available to take care of the domestic and caregiving needs of the family.

The 1987 FMLA garnered much stronger support than any of its predecessors, and although Republicans introduced controversial amendments as well as a procedural filibuster intended to kill the law, several high-ranking Republicans broke ranks and supported the FMLA.<sup>63</sup>

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to avoid jeopardizing their position with a vote in support of family leave).

59. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

60. *See WISENSALE, supra* note 51, at 95 (explaining that many in the business community viewed the FMLA as a “Trojan Horse that would allow big government to intervene in corporate personnel matters”).

61. *See id.* at 149 (justifying President Bush’s thirty-second veto of the FMLA as an indication that he wanted to emphasize the importance of employer-provided leave benefits without mandating that employers provide such leave).

62. *See id.* at 162.

63. *Id.* at 146 (noting that one House Republican, Representative Henry Hyde, was persuaded to vote in favor of the FMLA when he was convinced that allowing women family leave after the birth of a child would reduce the number of abortions in the

By 1990, proponents of the law had enough votes to pass it through the House and Senate, but not enough to override Bush's veto.<sup>64</sup> Congress was not done yet; it passed the bill a second time in 1992, which was vetoed again by Bush, who claimed to support family leave policies but argued they should be voluntary for employers rather than mandatory. This time Bush's veto was overridden by the Senate, but the House could not garner the necessary votes for an override, and the bill failed again. Democrats waited for the next election in hopes of introducing the bill a third time if Bush lost the race for the presidency.<sup>65</sup> In November 1992, Bill Clinton was elected President—the first Democrat to hold that position in twelve years—and the Family and Medical Leave Act swept through Congress easily before Clinton was inaugurated. Clinton signed the FMLA into law as his first major piece of legislation in February 1993.

Despite the fact that the FMLA is on its face gender-neutral, there were many gendered dynamics behind its passage. The law was a continuation of feminist efforts toward equal employment for women, and was lauded by many feminist groups. A number of these groups strongly lobbied for its passage, including the Women's Legal Defense Fund, National Organization for Women, Women's Equity League, National Council of Jewish Women, and the Junior League; a total of 239 groups and organizations supported the Act.<sup>66</sup> With respect to the debate over "special treatment" versus "equal treatment," any provision that applied only to women was considered "special treatment" and therefore unacceptable—whether women actually had a greater need was irrelevant for purposes of this debate. The approach used created a standard of "gender equality" in leave policies that resulted in coverage not just for women, and for more than just childbirth. While this standard overlooks the social reality that a greater share of the burden of caregiving is placed on women, there is a compelling argument for the gender-neutrality of leave policies: granting parental leave only to women implicitly assumes—and reinforces—that childcare is women's work only. In so doing, it exacerbates the inequality in the division of labor at home. The Supreme Court took up this position in *Hibbs*, stating, "[s]tereotypes about women's domestic roles are

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country).

64. *See id.* at 146-47.

65. *See id.* at 149 (observing that Democrats relied on the change in political makeup of the House and Senate to provide new opportunities to garner support for the bill).

66. *Legislative Hearing on H.R. 1, the Family and Medical Leave Act Before the H. Subcomm. on Labor-Mgmt. Relations of the Comm. on Educ. and Labor*, 103d Cong. 55-60 (1993) [hereinafter *Legislative Hearing on H.R. 1*]; *see* WISENSALE, *supra* note 51, at 150 (elaborating that instead of weakening like the child care coalition of the 1970s, the FMLA grew stronger by making the bill more appealing to undecided parties as well as converting prior adversaries).

reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.”<sup>67</sup> The Court noted that those stereotypes were firmly rooted at the time of the FMLA’s passage,<sup>68</sup> and created a “self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”<sup>69</sup> While this is no doubt true, it overlooks the fact that changing the law merely masks those social stereotypes, assumptions, and expectations of women’s caregiving roles and does not repair the problem. A law that refuses to take gender into account is effective only if the private social structure does not *itself* perpetuate women’s inequality, regardless of what the law says. The United States is nowhere near that point.

Indeed, gender was largely on the mind of Congress when it passed the FMLA; the stated purpose of the law was to “minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.”<sup>70</sup> Thus, the congressional intent behind the FMLA was clearly to alleviate a pattern of historic and unconstitutional gender discrimination. The law sought to “promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause.”<sup>71</sup> While they had in mind employer policies that provided medical leave but not maternity leave, congressional findings also revealed that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>72</sup> Congress’s view of those who suffered most from the lack of leave policies—and therefore those who stood to benefit most from the FMLA—were working women. This demonstrates an understanding that when there is no leave policy, women suffer more from that deficiency as a result of their socially imposed roles; Congress was striving to remedy the gender-discriminatory impact of not having employer family leave policies. Yet an important point is overlooked: if the *lack* of parental leave for *either* gender is seen as a sex discrimination issue for women due to socially

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67. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

68. See *id.* at 730 (referring to employers’ reliance on such stereotypical allocation of family duties in establishing leave policies).

69. *Id.* at 736.

70. See 29 U.S.C. § 2601(b)(1)-(5).

71. See *id.* § 2601(b)(4).

72. *Id.* § 2601(a)(5).

imposed roles, then why is Congress convinced that *providing* gender-neutral parental leave on limited terms produces gender equality when those socially imposed roles are still present? To be sure, any leave policy is better than none. But the gender-neutral *presence* of a policy does not automatically produce equality any more than the gender-neutral *lack* of a policy does. There are many limits to the FMLA, and they are likely to harm women disproportionately.

### *B. Legal Requirements and Provisions of the FMLA*

The FMLA allows a covered employee to take leave to care for her- or himself, children, spouse, or parents for a serious medical illness, or the birth or adoption of a baby. The terms that were finally signed into law provide various requirements for an employee to be covered under the Act. To be able to take FMLA leave, an employee must have worked for the employer for at least one year and for a total of at least 1,250 hours within the last year. The leave-taker must be working for a company that employs at least fifty people within a seventy-five-mile radius, and the length of leave is limited to twelve weeks within a year. The leave is unpaid, and when taken due to illness, is only available for serious illness, which is defined as requiring more than three consecutive days' treatment, and must involve more than one medical treatment via doctor or hospital.<sup>73</sup> Thus, illnesses such as cold, flu, upset stomach, headaches, earaches, and dental problems are not covered.<sup>74</sup> In addition, thirty days' advance notice is required, or else the employer can delay the leave for thirty days from the date the notice is provided.<sup>75</sup> If all of these qualifying conditions are met, the employee has the right to twelve weeks of unpaid leave, and to return to his or her job in the same position (or its equivalent) from which he or she left.<sup>76</sup>

### *C. Implementation of the FMLA: Harm Based on Gender, Race, and Class*

The problems resulting from the FMLA's limitations are numerous and provide significant barriers to access for some groups, especially women, minorities, and the poor. First, the law's scope of coverage is quite limiting, especially for women. Only 6% of all work establishments, and

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73. ALLAN WEITZMAN, JOSEPH SANTORO & DEANNA GELAK, TIME OFF TO REFLECT ON THE FAMILY AND MEDICAL LEAVE ACT 7 (2001) (summarizing regulatory criteria for coverage of an absence due to a serious health condition).

74. *See id.* (listing common illnesses left out of FMLA coverage as they do not meet aforementioned regulatory criteria).

75. *See id.* at 10-11 (elaborating that if thirty days' notice is not practicable or leave is unforeseeable, the employee is required to notify the employer as soon as is practicable under the circumstances of the case).

76. 29 U.S.C. § 2614(a)(1) (2006).

60% of all American workers, are covered,<sup>77</sup> which leaves 33.6 million workers unprotected.<sup>78</sup> When including the 1250 hour work requirement, the percentage of covered workers is reduced to 46%.<sup>79</sup> Studies indicate that unprotected workers tend to be less affluent; the financially secure workers are more likely to work in the larger organizations that are covered by the law.<sup>80</sup> Women are more likely than men to be employed in part-time positions with lower pay and fewer benefits, which means they are also less likely to be covered by the leave provisions of the FMLA.<sup>81</sup> On top of that, women are more likely to change jobs and transition in and out of the labor force due to childbearing and other family needs, so the FMLA's length of employment requirement of 12 months limits women more than men. This often results in a "decrease in mothers' financial and occupational attainment."<sup>82</sup>

Tightly tied into this analysis is the fact that FMLA leave is unpaid. Only 34% of all those taking leave received any pay.<sup>83</sup> Of those who were entitled to take leave but did not, the top reason stated was the unpaid nature of the leave;<sup>84</sup> about 60% of those not taking leave stated that they could not afford to be unpaid for that length of time.<sup>85</sup> Naomi Gerstel and Katherine McGonagle place the number of respondents citing financial reasons at 64%, while the National Partnership of Women and Families states that it is 78%.<sup>86</sup> The National Partnership for Women and Families estimates that about 50% of all full time private sector workers, and 25% of low wage workers, are afforded any type of paid sick leave at all.<sup>87</sup> Less

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77. See WISENSALE, *supra* note 51, at 151.

78. U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE 7-1 (2001), available at <http://webharvest.gov/peth04/20041118135126/www.dol.gov/asp/fmla/chapter2.htm> [hereinafter U.S. DEP'T OF LABOR].

79. See Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 DEMOGRAPHY 191, 191 (2003).

80. Naomi Gerstel & Katherine McGonagle, *Job Leaves and the Limits of the Family and Medical Leave Act: The Effects of Gender, Race, and Family*, 26 WORK & OCCUPATIONS 510, 525 (1999) (interpreting a table of logistic regression regarding adding coverage to predict leave taking among those needing leave).

81. Glass & Estes, *supra* note 48, at 300 (concluding that as family responsibilities expand, mothers are more likely than fathers to change jobs, work part-time, or exit the labor force due to the financial inability to lose the father's wages).

82. *Id.*

83. See U.S. DEP'T OF LABOR, *supra* note 78, at 4-5.

84. Gerstel & McGonagle, *supra* note 80, at 523-24.

85. See WISENSALE, *supra* note 51, at 158.

86. Gerstel & McGonagle, *supra* note 80, at 523-24; see also DONNA LENHOFF, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, FAMILY LEAVE BENEFITS: A MENU OF POLICY MODELS FOR STATE AND LOCAL POLICY LEADERS 2 (2001) (pointing out that the problem is most severe for lower-income families).

87. See *Roundtable Discussion: The Family and Medical Leave Act*, *supra* note 57,

than 33% of workers have any paid sick days that allow them leave to care for sick children.<sup>88</sup> Gerstel and McGonagle found that half of those taking leave returned to work early because they could not afford any additional time off.<sup>89</sup> They argue that the FMLA targets for protection people with access to resources, especially white, middle class, and married workers. Their study found that low-income workers were more likely to be denied leave when they requested it, and felt more pressure to return to work when taking leave. Even in establishments covered under the law, leave was found to be more accessible to those with higher incomes. Yet if one considers who needs the leave the most, these results are incongruous: low- and middle-income working adults spend much more time caring for elderly parents than higher earners. Forty percent of these lower-income workers spend one to four hours per month providing such care, compared with only 27% of higher-income individuals.<sup>90</sup> But the lower-income workers who provide more care are also less likely to have access to family leave, or the potential for job flexibility.<sup>91</sup> Jennifer Glass and Sarah Beth Estes cite a study reporting that the same dynamic is witnessed when considering only women: “women in professional and managerial positions are much more likely to receive family friendly benefits such as funded maternity leave, schedule flexibility, and child-care assistance than are women in less skilled jobs,” and they note that the mothers most in need of family accommodations, such as low-income single mothers, are the least likely to receive them.<sup>92</sup>

Findings of other studies vary, but all indicate that the lack of paid leave is an enormous obstacle to taking leave when perceived to be necessary. Those who do not have sick or vacation time available or a partner earning enough to support the family single-handedly are placed in a very difficult position, having to choose between time off to care for a newborn and keeping a job that is necessary for the family’s livelihood. In fact, the

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at 12; *see also* LENHOFF, *supra* note 86, at 18 (stating that two-thirds of the working poor lack paid sick leave or paid vacation days).

88. *See Roundtable Discussion: The Family and Medical Leave Act*, *supra* note 57, at 12; *see also* LENHOFF, *supra* note 86, at 18 (concluding that working families must frequently choose between their paychecks and ill children or family members).

89. *See* Gerstel & McGonagle, *supra* note 80, at 524 (adding that about 25% of those whose leave was unpaid, or only partially paid, had to borrow money during their leave).

90. *Caregivers Caught in a Time-Off Crunch*, COMPENSATION & BENEFITS REPORT, Jan. 21, 2005, at 5 (explaining that low-income workers spend more time caring for their elderly parents even though they have less leave and flexibility to meet these needs).

91. Katherin Ross Phillips, *Access to Leave Among Working Parents*, No. B-57 in Series, *New Federalism: National Survey of America’s Families*, available at <http://www.urban.org/publications/310977.html> (last viewed Sept. 29, 2008).

92. Glass & Estes, *supra* note 48, at 300.

Department of Labor stated that 100% of eligible women who did need maternity-disability leave but did not take it made that choice because they could not afford to take leave.<sup>93</sup> With women generally having less income than men, constituting a larger percentage of the poor, and the fact that women are employed in positions where they are less likely to be covered under the FMLA, it becomes clear that the limitations in the law play out differently based upon gender.<sup>94</sup>

A very obvious and wide-reaching problem with the implementation of the FMLA is that, whatever the limitations of the law, the limitations will impact women more than men due to the fact that women more often take on caregiving responsibility in our society than men. A portion of that is biological: women, and only women, will give birth to children. But the rest of women's burden is socially imposed, and is significant. On average, adult women up to age sixty-five spend about twenty-two hours per week doing housework, even when they are employed outside the home, while men average ten hours of housework per week.<sup>95</sup> Interestingly, the amount of housework done by men does not change significantly when their wives work outside of the home or when young children are in the home.<sup>96</sup> Others have found that women do 65-80% more caregiving than men, and that working women carry a disproportionately large load of caregiving, while having less sick leave time or work flexibility than men.<sup>97</sup> Indeed, most work schedules still operate on the male breadwinner model, which assumes that employees do not have family demands that must be addressed. Since women are *more* likely to be responsible for caregiving responsibilities at home, yet *less* likely to be in a position with paid leave, and *less* likely to have high incomes to be able to afford it, the end result is the feminization of poverty. In 2003, the percentage of the poor who lived in female-headed households was 50%,<sup>98</sup> almost three times the rate in

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93. See U.S. COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 272-73 (1996) (explaining that 1% of women who need leave name maternity-disability as a reason for needing leave, yet none of those women take the needed leave because they cannot afford it).

94. See Daniel N. Hawkins & Shawn D. Whiteman, *Balancing Work and Family: Problems and Solutions for Low-Income Families*, in WORK-FAMILY CHALLENGES FOR LOW-INCOME PARENTS AND THEIR CHILDREN 273, 275 (Anne C. Coulter & Alan Booth eds., 2004) (explaining that even though the gender gap in pay is diminishing in low-wage markets, it is occurring as a result of a gradual decrease in men's blue collar market jobs, not an increase in women's wages).

95. See KUNZ CTR. FOR RESEARCH ON WORK, FAMILY, & GENDER, WORK AND FAMILY IN AMERICA: CURRENT STATISTICS, *supra* note 44.

96. See *id.* (noting that household tasks also differ by gender, as men mostly perform yard and home maintenance work, while women are mostly responsible for grocery shopping, cooking, laundry, and dishwashing).

97. *Caregivers Caught in a Time-Off Crunch*, *supra* note 90, at 5.

98. HARRELL R. RODGERS, AMERICAN POVERTY IN A NEW ERA OF REFORM 30 (2d

1959,<sup>99</sup> and over one in four single-mother families were poor.<sup>100</sup> It should be noted that the greater the percentage of an employer's workforce consists of women, the larger the chance that family-friendly policies will be found in those workplaces.<sup>101</sup> While having such family-friendly policies is not a bad thing, it effectively locks women into "feminine" positions and solidifies male dominance and overrepresentation in traditionally male positions.

Some studies have shown that the gender gap in pay has been reduced to the penalties of motherhood. The Waldfogel study suggests that the penalty for mothers became a larger component of the gender gap in the eleven years from 1980 to 1991.<sup>102</sup> As discussed earlier, this unequal treatment continues to support a traditional division of domestic labor and supports women's homemaking and motherhood roles by precluding other viable options. The inequality of caregiving responsibilities and the gendered division of labor in the home exacerbates for women the limitations of the FMLA and reinforces the continuing inequality they experience in the labor market as well. Gerstel and McGonagle argue that "whereas the act may have been passed as an attempt at gender-neutral policy, the opportunities it ensures are not only highly gendered, but also restricted by race and family characteristics."<sup>103</sup>

Employers' claims that they resist meaningful family leave policies because of financial concerns are dubious. Employers incorporate other expensive benefits aimed at assisting the masculine head of household worker: while only 40% of workers in a 1989 Bureau of Labor Statistics study received maternity leave, 53% received leave for military service, 81% received some type of employer provided pension, and 94% received life insurance.<sup>104</sup> Maternity leave is not a benefit necessary to the male

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ed. 2006).

99. See KUNZ CTR. FOR RESEARCH ON WORK, FAMILY, & GENDER, *WORK AND FAMILY IN AMERICA: CURRENT STATISTICS*, *supra* note 44 (stating that in 1959, 18% of the poverty population lived in female-headed households).

100. RODGERS, *supra* note 98, at 30 (noting that in 2003, 28% of all female headed families were poor).

101. See Glass & Estes, *supra* note 48, at 302 (adding that firm size, in addition to female concentration in the workplace, is also an important determinant of the number of family policies that are offered).

102. Jane Waldfogel, *Working Mothers Then and Now: A Cross-Cohort Analysis of the Effects of Maternity Leave on Women's Pay*, in *GENDER AND FAMILY ISSUES IN THE WORKPLACE* 92, 119 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) (arguing that even though the gender pay gap narrowed between 1980 and 1991, the returns that women and men received in the labor market for their family status was different for both sexes, and concluding that the penalties women received for being married or a parent increased 17% from 1980 to 1991).

103. Gerstel & McGonagle, *supra* note 80, at 512.

104. Glass & Estes, *supra* note 48, at 299 (indicating that the lack of widespread institutionalization of family leave benefits, as compared to other government benefit

breadwinner, yet pension, life insurance, and military leave are, so employers institute the benefits necessary for men, even at substantial cost, and reject “women’s” benefits based on cost.

If these facts about the gendered nature of leave-taking need and behavior are true, we should expect to see those results borne out in statistics regarding FMLA leave. Indeed, a Department of Labor study on the FMLA in 2000 reveals some telling facts, showing that approximately 49% of FMLA leave was to care for someone other than the employee, and caring for children accounts for more work leave than any other group other than caring for oneself.<sup>105</sup> An estimated 58% of those taking FMLA leave are women.<sup>106</sup> Gerstel and McGonagle found that 22% of all FMLA leave was to care for children,<sup>107</sup> interestingly, however, they also determined that while having children in the home significantly increases the length of leave for women, it actually decreases the length of leave for men.<sup>108</sup> Women’s increased responsibilities at home are confirmed in the finding that women are much more likely to feel pressure to take leave: nearly 25% of women felt such pressure compared with 16.3% of men.<sup>109</sup> Those with less money reported needing leave more than those with higher income, as did those with children at home, but those groups did not actually *take* leave any more often than other groups, despite their increased need.<sup>110</sup> In fact, those with higher income are slightly more likely to take leave than others, and that is probably due to the fact that they are more likely to have access to it, to have paid leave, or to have the ability to afford taking unpaid leave.<sup>111</sup>

In fact, when men take FMLA leave, it is significantly more likely to be for themselves, even if maternity leave is considered leave for oneself.<sup>112</sup> While men account for 42% of FMLA leave-takers, 58% of those men use

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programs, continues to protect the male-centric workplace).

105. See U.S. DEP’T OF LABOR, *supra* note 78, at 2-5 (describing in more detail that caring for one’s parent as a more frequent reason for obtaining leave than caring for one’s spouse).

106. See *Roundtable Discussion: The Family and Medical Leave Act*, *supra* note 57, at 8.

107. See Gerstel & McGonagle, *supra* note 80, at 522. The U.S. Department of Labor, however, placed this number at 30%. See U.S. DEP’T OF LABOR, *supra* note 78, at table 2.3 (stating that 18.5% of leave was to care for a newborn or newly adopted child or newly placed foster child, and 11.5% of leave was to care for an ill child).

108. See Gerstel & McGonagle, *supra* note 80, at 522.

109. See *id.* at 519.

110. See *id.* at 520.

111. See *id.* at 521 (showing that those with an income greater than \$30,000 are three percent more likely to take leave).

112. *Id.* at 522 (adding that less than five percent of women who take leave do so for maternity disability).

the leave for their own illness.<sup>113</sup> Women are twice as likely as men to take leave to care for their children or parents, and four times as likely to take leave to care for another relative's health.<sup>114</sup>

Adding to the drawbacks of the FMLA, the definition of "family" for whom one may take leave is also limited: only a child, spouse, parent, or parent-in-law qualifies as one for whom leave may be taken.<sup>115</sup> This represents a narrow conception of caregiving and in effect defines what types of caregiving relationships are legitimate. This limitation serves to reinforce the white, heterosexual, nuclear family norm of relationships in that it only allows for the inclusion of heterosexual relationships and excludes extended family members, the latter of which is likely to have a harsher impact on minorities and cultures exhibiting a greater emphasis on extended family ties.

Furthermore, the fact that the law only allows leave for serious illness, defined as more than three days and more than one medical treatment, means that a parent who needs to stay home to care for a child with the flu, a cold, or ear infection will not have access to leave, unless it is voluntarily provided by the employer. Even leave for medical check-ups and child immunizations would not exist. Since women are more likely to be the parent who stays home, the lack of this type of leave hurts them disproportionately. Lower-income families are also harmed by the requirement that more than one medical treatment must be sought—not only is pay lost from missing work, but extra money must be spent on doctor visits that may not be necessary except to meet the requirements of "serious illness" under the law.

A final problem with the FMLA is not inherent in the law itself or determined by its provisions; rather, it is caused by societal norms that paint the ideal worker in masculine, individual, and autonomous terms. Occupational standards often fail to take account of familial ties and caregiving responsibilities, which are necessary and critical in any society. Even when a given company has family-friendly work policies in compliance with the FMLA, or goes above and beyond the Act's requirements, a stigma persists in taking or asking for such leave, as some organizational cultures frown upon taking leave. Pressure from bosses and coworkers has a significant impact on whether leave is taken. This again was found to have a disproportionate impact on women, with 26% of

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113. *Roundtable Discussion: The Family and Medical Leave Act*, *supra* note 57, at 8.

114. See Gerstel & McGonagle, *supra* note 80, at 522 (noting that people with more income are more likely to take leave to care for others, in part resulting from the fact that the less affluent can only afford to miss work when they are too sick to work, whereas the affluent can care for others as well as themselves).

115. See 29 U.S.C. § 2612(a)(1).

women stating they “felt pressure to return to work by bosses and coworkers,” compared to 19% of men, and individuals with less income felt similar increased pressure, as compared to individuals with more income.<sup>116</sup> Some studies find that leave is often discouraged by managers and/or organizational culture, especially for lower level employees.<sup>117</sup> Glass and Estes argue that “[q]ualitative evidence has repeatedly revealed that employees will not take advantage of family responsive policies . . . if they feel that doing so will jeopardize their job security, work assignments, or promotional possibilities,” and point out that managers often have room to subvert formal policy when employees have to receive supervisor permission before taking leave, as is often the case.<sup>118</sup>

In considering the best way to approach gender issues in work policies, there is a difference between including *both* women and men in the policy, and being *gender-neutral*. An inclusive policy would represent the needs of both genders, and take realistic account of their divergent situations in society. One need not hold that the “differences” between women and men are innate or biological to take this approach; whatever their original source, our social norms make those differences real, and legal policy must take account of them to be truly effective. The FMLA is a gender-neutral policy, but it fails to consider the individual needs of women created by a social construct that places heavy burdens on them in the “private” sphere of family life. As such, it tends to reinforce the disparity of those burdens while claiming to equalize them.

#### *D. Expanding the FMLA*

Several expansions of the law have been proposed based on a partial recognition of some of the problems with the FMLA noted herein. In 1996, President Clinton proposed the Family-Friendly Workplace Act, which purported to fill in some important gaps of the FMLA. It allowed overtime workers to choose between receiving extra money and taking compensatory time.<sup>119</sup> This is important since many workers would prefer to receive more time to spend with family than extra money, as discussed above. The

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116. See Gerstel & McGonagle, *supra* note 80, at 527 (citing studies which showed that 28% of lower-income workers felt pressured to return to work whereas only 21% of higher-income workers felt the same pressure).

117. See *id.* (asserting that even where company culture is sympathetic to family matters, managers may discourage employees from taking advantage of policies that are in place).

118. Glass & Estes, *supra* note 48, at 301 (finding that employees did not take advantage of leave, work reduction, and work schedule policies where they had to receive permission from their superiors to change their work schedule or take time off).

119. See J. Marshall Wolman, *Equity Between the Public and Private Sectors: The Need for Compensatory Time Legislation for the Private Sector*, 12 GEO. J. ON POVERTY L. & POL'Y 243, 251-52 (2005).

Family-Friendly Workplace Act also allowed twenty-four hours of unpaid leave each year to fulfill certain family obligations, including routine medical visits and school activities relating to academic achievement, such as parent/teacher conferences, or routine medical appointments for children or elderly relatives. It has been found that low-income children are particularly academically vulnerable because their parents are less likely to be able to take time off from work to be involved in educational activities. One study found that of children whose reading and math scores were in the bottom 25%, their parents were more likely to lack paid vacation leave, sick leave, and work flexibility. Of these children, more than half had parents without any paid leave at all, and nearly three-quarters of the parents could not consistently rely on flexibility at work to take time to meet with teachers and learning specialists.<sup>120</sup> Clearly Clinton's proposal was an important step, as both children and parents suffer from a lack of employment leave for short-term minor medical problems as well as educational involvement, both areas where the FMLA provides no protection. Yet the proposal did not pass.

Indeed, in the six years following the passage of the FMLA in 1993, there were almost twenty proposed expansions of the policy, yet not a single one has been made into law.<sup>121</sup> In 1996 a Congressional Commission on Leave also proposed a "uniform system of wage replacement for periods of family and medical leave."<sup>122</sup> Two years later the National Partnership for Women and Families called for an expanded leave policy that would include wage replacement and extend the provisions of the FMLA to smaller companies currently not covered.<sup>123</sup> In 2002, Senator Christopher Dodd introduced a formal bill that would extend FMLA coverage to companies with twenty-five or more employees (instead of the FMLA's fifty), provide federal grants to states to provide

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120. *Caregivers Caught in a Time-Off Crunch*, *supra* note 90, at 5.

121. See WISENSALE, *supra* note 51, at 185 (describing that Congress failed to pass any initiatives to expand the FMLA, including applying it to smaller companies, providing additional hours for other family needs, expanding coverage to domestic partners, or preventing employers from requiring that disputes go to arbitration). Some of these failed acts included provisions that would allow for leave to attend school related activities for an employee's child. See Family and Medical Leave Improvements Act of 1997, H.R. 109, 105th Cong. (1997); Time for Schools Act of 1997, S. 280, 105th Cong. (1997); see also Battered Women's Protection Act, S. 367, 105th Cong. (1997) (addressing adverse job consequences for women suffering from domestic violence and providing unemployment compensation for such women); H.R. 191, 105th Cong. (1997) (expanding FMLA coverage to a greater percentage of the U.S. workforce and allowing parental involvement leave for children's educational activities).

122. Gerstel & McGonagle, *supra* note 80, at 530.

123. *Id.* (noting that wage-replacement is used in some states, and evidence exists to show that in such states women are more likely to take maternity leave than in states without the replacement).

paid leave, allow leave to address a domestic violence situation, and provide twenty-four hours of school involvement leave per year.<sup>124</sup> The measure did not pass.<sup>125</sup>

Today, only five out of 173 studied countries do not provide paid maternity leave for employees: Lesotho, Liberia, Swaziland, Papua New Guinea, and the United States; the United States is the only wealthy country worldwide without such a benefit.<sup>126</sup> Even as early as 1989, most European and Western countries provided paid leave, including Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. The number of weeks paid range from eight (Switzerland) to twenty six (France), and the percentage of the woman's regular pay that she receives on leave ranges from 50% (Greece) to 100% (Austria, Germany, the Netherlands, and Portugal).<sup>127</sup> Qualifying conditions in other countries vary, but leave periods are almost universally longer than the leave provided for under the FMLA.<sup>128</sup> While some countries provide paid maternity leave through state social security systems, others require employers, rather than states, to pay leave for workers.<sup>129</sup> The United States does neither, but could certainly learn some valuable lessons about which policies work by looking to the practices of other countries.

Within the United States, standard paid medical leave is not unheard of. Rhode Island, Hawaii, New Jersey, California, New York, and Puerto Rico each provide some sort of paid medical leave for workers within their jurisdiction, and certainly national efforts could mirror some of the successes of those policies.<sup>130</sup> The U.S. Department of Labor took steps to increase these numbers by adopting an unemployment compensation rule in August 2000 that allowed state unemployment agencies to provide

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124. Family and Medical Leave Expansion Act, S. 3141, 107th Cong. (2002).

125. *See id.* (the bill was referred to the Senate Committee on Health, Education, Labor and Pensions, but never made it out of committee).

126. *See* JODY HEYMANN ET. AL., THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 1-2 (2007).

127. *See* Press Release, Int'l Labour Org. [ILO], More than 120 Nations Provide Paid Maternity Leave (Feb. 16, 1998) [hereinafter Press Release, ILO].

128. *See* Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 THE FUTURE OF CHILDREN 99, 102 (2001).

129. *See* ILO, *Maternity Protection at Work*, WORLD OF WORK, Apr. 1998, available at <http://www.ilo.org/public/english/bureau/inf/magazine/24/matern.htm#note2> (noting that while over one hundred ILO member countries provide paid leave through the state, others mandate that employers must provide partial or full benefits to the worker while on maternity leave).

130. *See* Press Release, ILO, *supra* note 127 (revealing that despite a lack of any national program, a number of U.S. states have implemented successful paid maternity leave programs similar to many ILO member nations).

unemployment benefits for parents on approved leave for newborns or newly adopted children.<sup>131</sup> There included no job protection provision, leave itself was not guaranteed but merely paid for by states when provided, and the program was voluntarily administered by the states. The amount of leave paid for under the program was also variable by state.<sup>132</sup> Although thirteen states considered the program, not a single state implemented it, and in October 2003 the policy was discontinued and the rule repealed.<sup>133</sup> In addition to the lack of utilization of the program, the Department of Labor cited as the reason for its repeal that “it encourages parents to refuse available work.”<sup>134</sup>

Although various proposals have been discussed, the United States has seen no expansions or amendments to the FMLA that would serve to alleviate some of its most harmful elements. Many of those proposals have aimed to find a way to provide paid leave when workers are forced to take time off for medical reasons. Such a move would serve to alleviate some of the most detrimental elements of the current law. Yet our country’s strong liberal foundations and ties to individualism, autonomy, and limited government, along with continued notions of the separation of the public and the private spheres, politically prevent such a measure from taking hold. Indeed, public attitudes have become increasingly hostile towards entitlement and social welfare programs in recent decades, and great efforts have been expended to reduce or eliminate the scope of those programs already in place.<sup>135</sup> Given this growing conservative climate, it may be exceedingly difficult to institute such programs, despite the fact that most of the Western world, and even much of the non-Western world, has been doing so successfully for some time.

We would do well to take a serious look at the harm that is caused by a failure to act on this need. A great many negative consequences result from a devaluing of family and caregiving work that is still primarily done by women. Significant gender, race, and class inequality persist in the current system. In addition to these harms discussed, however, other

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131. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 114 (June 13, 2000) (repealed 2003) (expressing that no exact time was set because Congress preferred not to disrupt existing state regulations).

132. *Id.*

133. *DOL Repeals Birth and Adoption Regs.*, BUS. & LEGAL REP., Oct. 13, 2003, available at <http://comp.blr.com/display/cfm/id/151170> (stating that the birth and adoption regulations discouraged parents from accepting available work and therefore was counter to the Unemployment Compensation program’s aims).

134. *Id.*

135. JOEL F. HANDLER & YEHEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 166 (2007) (describing measures taken in the 1960s and 70s to limit welfare; “man in the house” rules, which were relatively common in the early 1960s, required termination of welfare benefits to female beneficiaries engaged in a casual affair).

consequences can be expected. Numerous studies have proven that conflict between family and work responsibilities often lead to lower productivity, higher absenteeism, and greater turnover, which in turn lead to lowered career achievement for the worker affected.<sup>136</sup> Personal issues result from the work/family tension as well. Glass and Estes note that research has consistently shown the links between work/family conflict and physical and mental health ailments, parenting behaviors, depression, physical distress, sleep disorders, decreased concentration, decreased alertness, and marital satisfaction, tension, and companionship.<sup>137</sup> They reference research revealing that “women’s disproportionate responsibility in the home results in significantly more turnover because of family illness, household duties, and changes in residence,”<sup>138</sup> and noting that the result is that “[w]hen family responsibilities expand, mothers are more likely than fathers to change jobs, to work part time, or exit the labor force for a spell . . . . The result is often a decrease in mothers’ financial and occupational attainment.”<sup>139</sup> Jennifer Glass and Lisa Riley found that certain family-friendly employer policies significantly decreased job attrition, even after controlling for the effects of wages, partner income, and number of existing children.<sup>140</sup> The most significant of these policies to benefit workers was the length of leave available for childbirth, and the ability to avoid mandatory overtime upon return.<sup>141</sup>

Paid leave for childbearing and childrearing allows parents more time to address children’s needs. Such parental attention improves children’s health, emotional development, and educational success. Such leave also bolsters a family’s economic outlook, as their long-term employment,

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136. See, e.g., Glass & Estes, *supra* note 48, at 294-97 (detailing that conflicts between work and family can result in wasted time, mistakes, high job turnover, and generally less productive employees).

137. *Id.* at 294-96 (listing the negative effects on an employee’s family that can result from extended work hours, inflexibility in those hours, and a workplace environment that is unsupportive of parental needs).

138. *Id.* at 297 (citing S. Spilerman & H. Schrank, *Responses to the Intrusion of Family Responsibilities in the Workplace*, in 10 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 27 (R. Althausser & M. Wallace eds., 1991)).

139. *Id.* (citing D.H. Felmlee, *Causes and Consequences of Women’s Employment Discontinuity, 1967-1973*, 22 WORK OCCUP. 167 (1995), and M. Corcoran et al., *Work Experience, Job Segregation, and Wages*, in SEX SEGREGATION IN THE WORKPLACE 171 (B. Reskin ed., 1984)).

140. Jennifer L. Glass & Lisa Riley, *Family Responsive Policies and Employee Retention Following Childbirth*, 47 SOC. FORCES 1401, 1417-29 (1998) (analyzing the effects that hours reduction, schedule flexibility, and social support have on women returning to the labor force postpartum).

141. See *id.* at 1401 (asserting that regardless of the worker’s wages, her partner’s income, or her total number of children, the length of leave available following childbirth and the ability to avoid having to work overtime on return from that leave had the greatest impact on the worker’s decision to return to work after she gave birth).

earning prospects, and job security are improved.<sup>142</sup> In addition to more tangible employment benefits from having family-friendly work policies, research has demonstrated that reduced work hours increases mental health; longer time off work after giving birth decreases depression and anger and leads to lower levels of anxiety, while reducing job turnover; schedule flexibility is linked to less depression, physical complaints, and lower blood cholesterol; and social support systems at work reduce the work/family conflict.<sup>143</sup>

Thus, if women are harmed more by the FMLA's failings, the harms are not just short-term; women can expect lower lifetime career achievements as a result of their extra burdens at home. This then affects their pay, seniority, pensions, insurance benefits, and social standing, resulting in a cyclical process whereby women's work inequalities push them further away from decent work and more into the home and part-time work, which then further limits their employment prospects and opportunities.

Family-friendly policies are not merely good for employees, however. Other research has shown that policies addressing employees' needs for leave lead to increased organizational productivity and decreased turnover, along with less tardiness and absenteeism, and more job satisfaction.<sup>144</sup> Given the benefits of such programs, the costs of instituting them may not be as significant as it might first appear. There is an enormous range in the estimates of the cost of a program of paid medical leave, ranging from \$6.2 billion to \$28.4 billion, but the issue is really more a matter of prioritizing certain expenses over others.<sup>145</sup> The United States provides billions in tax credits for parents, and billions more in tax incentives and breaks for businesses. Annual defense spending in 2008 alone is expected to total over \$481 billion,<sup>146</sup> and the war in Iraq has cost to date over \$300 billion, with the Congressional Budget Office estimating that the total cost of the war may reach one trillion dollars by 2010.<sup>147</sup> Providing expanded, paid

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142. See HEYMAN *supra* note 126, at 6.

143. See generally Glass & Estes, *supra* note 48, at 305-06 (reporting how work policies that were responsive to family needs resulted in benefits to employees' mental, emotional, and physical health).

144. See *id.* at 304 (linking reduced work hours to increased productivity; decreased turnover and flexible work schedules to decreases in tardiness and absenteeism; and workplace support of family needs to recruitment and retention of employees).

145. See WISENSALE, *supra* note 51, at 207 (stating that the Employment Policy Foundation estimated the cost of expanding the FMLA to include paid leave based on take-up rates, length of paid leave time, and "other factors").

146. See OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER), NATIONAL DEFENSE BUDGET ESTIMATES FOR FY 2008, at 13 (2007), available at <http://www.defenselink.mil/comptroller/defbudget/fy2008/>; see also National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong. (2007).

147. See Michael Moran, *Cost of Iraq War, Like Fog, Is Illusive*, STAR-LEDGER OF NEWARK, Jan. 7, 2007, available at [http://www.cfr.org/publication/12377/cost\\_of\\_](http://www.cfr.org/publication/12377/cost_of_)

medical leave is a small percentage of some of these expenditures; the issue is more one of prioritizing the value of families and the harmony of work and family obligations.

#### IV. FEMINIST ANALYSIS

It was not until 1971 that the United States Supreme Court held that women are entitled to the Fourteenth Amendment's guarantee of equal protection.<sup>148</sup> Yet despite that guarantee, our public sphere of work life still presumes an ideal worker who is a male head-of-household with a spouse at home to take care of family considerations. The FMLA provides a certain minimum level of employee protections, but it does not come close to meeting the real needs of workers, especially the more vulnerable ones.

A good deal of feminist theorizing since the women's movement gained steam in the 1960s has focused on the difference versus sameness question: are women really just the same as men (and therefore to be treated the same), or are there inherent differences in women that need to be acknowledged and addressed? In its simplest terms, the debate emulates the age-old nature versus nurture issue, and it has created some conflicts in feminism regarding family leave issues and what are the best policies to equalize women in the workforce.<sup>149</sup> Should we support women who choose to be homemakers and strive to increase the value society places on such work, or should we encourage women to pursue careers and aim to provide opportunities for them to do so, including affordable quality child care and antidiscrimination laws? The question is far from settled, but this paper has shown that, for purposes of family leave policy, the difference versus sameness question is largely irrelevant. Women are in the workforce in greater numbers than ever before,<sup>150</sup> and they still bear the majority of the responsibility in the home.<sup>151</sup> Gender difference cannot be

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[iraq\\_war\\_like\\_fog\\_is\\_illusive.html](#) (last visited Sept. 29, 2008) (basing a trillion dollar Iraq war cost on the assumption that a sizeable U.S. force will remain in Iraq until 2010).

148. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (invalidating an Idaho law granting automatic preference in the administration of an estate to surviving male relatives on the grounds that the law denied women equal protection).

149. LISE VOGEL, *MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKFORCE 1* (1993) (articulating that a central dilemma that policymakers face when confronting women's rights is whether women are better served by trying to achieve equality with men or by embracing the inherent differences and concerns that women encounter).

150. See Howard V. Hayghe, *Developments in Women's Labor Force Participation*, 120 MONTHLY LAB. REV. 41, 42 (1997) (noting that the labor force participation rate of women increased from 45.9% in 1975 to nearly 60% in 1996).

151. See Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. OF MARRIAGE & THE FAM. 322, 322 (2000) (discussing that despite major shifts in women's labor force participation and economic roles, married women still do the majority of housework,

rejected without considering the historical context—if there is no *inherent* gender difference, society creates the distinction anyway, and we therefore cannot pretend that such differences are irrelevant or do not exist, and simply treat women as men. In the words of Catharine MacKinnon, “[m]ost disadvantages can be construed as, and therefore become, differences,”<sup>152</sup> mirroring Mill’s claim that women are stripped of opportunity, then defined as inferior and different when they fail to achieve.<sup>153</sup>

The fact is that the law’s dealings with pregnancy, childbearing, and caregiving are not created from the perspective of those actually doing that work, but rather from an outside, male viewpoint. This has been evident in the resulting policies. Creating gender-neutral laws does not erase socially imposed roles; such laws actually tend to reinforce norms as they obscure the social forces that naturalize gender difference and pressure women in the home. If the “neutral” quality of the laws convinces us that we have equality, then we will either blind ourselves to the inequality that continues to exist, or attribute that inequality to “inherent” differences in men and women for which the law can provide no remedy.

#### A. *Implications of the Liberal Approach to Gender Equality*

Critical to the issue of gender equality, and also fiercely debated within feminism, is the question whether liberalism as a political approach even allows for the possibility of gender equality, and whether it can adjust to and embrace feminist ends. The United States was founded upon the liberal principles espoused by Enlightenment philosophers such as Thomas Hobbes and John Locke, and those principles are still largely fundamental to and ingrained in our political and legal framework. Liberalism is classically defined as affirming the basic principles of human reason, self-government, and individual rights, leading to an avowal of achievement and individualism, and importantly, an entrenchment of a divide between the realms of public/political/social life and private/domestic/family life.<sup>154</sup> The feminist critique of classical liberalism concerns the fact that its primary tenets typically entail that women occupy the private dimension,

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even when husbands earn less or are unemployed).

152. MacKinnon, *supra* note 7, at 1322 (describing Congress’s amendment to Title VII to explicitly state that discrimination on the basis of pregnancy is discrimination based on sex, after the Supreme Court ruled that pregnancy discrimination was not covered under sex).

153. See MILL, *supra* note 1, at 186 (contending that men attempt to subordinate women in order to maintain a monopoly on professional life and because men are not ready to handle living with an equal partner).

154. ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 7 (Oxford Univ. Press 2001).

separate and apart from public and political life, thus disguising and naturalizing their inequality and exempting the family from the requirements and rights inherent in *public* liberal life.<sup>155</sup> Some, such as Wendy Brown, have argued that liberalism is *inherently* flawed in this way, and that its very terms require inequality, hierarchy, and oppression for the maintenance of the theory and the advantage of the white men who operate within it.<sup>156</sup> Alternatively, some scholars, such as Susan Moller Okin, believe that liberalism as a sociological theory is merely incomplete, rather than inherently flawed.<sup>157</sup> Liberalism's confluence with other factors, such as gender dependency and racial hierarchy, causes the problems that we witness in our society and the social orderings that supplement liberalism, rather than liberalism itself, to be defective.<sup>158</sup> While it is possible that certain aspects of liberal theory make those inequalities more likely and yet less visible, they are not inherently present.

A critique of liberalism serves to highlight the ways in which the separate spheres argument is relevant to the FMLA debate. Wendy Brown argues that liberalism itself systemically produces inequality and hierarchy; inequality lies at the very foundations of liberalism, and liberalism as a system cannot function without that inequality—the two concepts are inextricably enmeshed.<sup>159</sup> Claiming, therefore, that liberalism is itself intrinsically flawed, Brown notes that liberal notions of autonomy, individuality, and the public/private divide inherently presume a masculine subject.<sup>160</sup> One cannot achieve the ideals of liberalism, Brown claims, without having the support, and thus creating the oppression, of an ancillary individual in the private, unregulated, and unrecognized sphere.<sup>161</sup> Liberalism therefore depends upon an autonomous male individual's oppression of women at home. As such, liberal "rights" aimed at things like equality and antidiscrimination mask this reality and present a false perception of equality. Furthermore, Brown claims that the common

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155. See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 156-57 (1995).

156. See *id.* at 152-64 (discussing how key terms of liberal political discourse reveal male dominance).

157. See OKIN, *supra* note 6, at 89 (criticizing John Rawls's theory of justice and fairness for neglecting to independently address the issue of gender).

158. See *id.* at 7-14 (asserting that many liberal theorists continue to assume a gender-structured family with a male serving as the head of a traditional household).

159. See BROWN, *supra* note 155, at 156-57 (claiming that liberalism allows men to feel independent in contrast to the perception of women as dependent and reliant on the family for self-worth).

160. See *id.* (contending that the autonomous liberal is free, mobile, and self-interested—qualities that are at odds with historical views of women).

161. See *id.* at 161-62 (arguing that the selfish liberal requires the invisible labor of a selfless household subject, who is typically a gendered female).

political focus on identity politics as a method of achieving rights within a diverse society only serves to legitimize the social power structure which makes those differences relevant in the first place.<sup>162</sup>

The facially gender-neutral character of the FMLA serves to mask the fact that this social imposition on women still exists, while its terms—such as lack of pay—ensure that the work is devalued and that women will thus continue to perform such work. Liberalism's principles entail that men acquire citizenship and individuality—characteristics at the core of liberal theory—through the subordination of women, which is relevant in consideration of the defects of the FMLA.<sup>163</sup> In essence, men could not attain their public individuality were it not for the work of women in the private sphere. By definition under liberalism, women will never reach the same individuality and autonomy as men, and the harms demonstrated by the FMLA illustrate this point. Because such a result is innate and irreversible within liberal theory, no matter how the theory is adjusted or fine-tuned, any approach that utilizes liberalism in an effort to gain gender equality is necessarily doomed to failure. This means that as long as we are operating within a liberal system that emphasizes public individuality and autonomy to the detriment of private connections, amending the FMLA will be useless. Minor improvements may be seen, but the core of liberalism and its oppression of women will remain the same. Gender equality cannot be attained through a liberal scheme.

Employment policies are generally geared more towards the needs of men than of women, even when they are worded in a gender-neutral way, and the FMLA does not escape this deficiency. In the public/private dichotomy, the structure of the public sphere, including public identity and worth, is naturally oriented towards men rather than women.<sup>164</sup> Women, necessarily defined by others in the public realm, may never have autonomy or attain their own individual, self-governing, and self-defining status. Men, on the other hand, depend on women for services within the private sphere, but that dependence *sustains* their autonomy as it is manifested publicly in politics, employment, and society. Women's homemaking role allows men to fulfill their employment responsibilities without many impositions or competing priorities, and to measure up to and reinforce the masculine nature of work structures. Laws such as the

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162. *See id.* at 98 (describing how claims of property and privacy rights paradoxically can extend social stratification by empowering one group while disempowering another).

163. *See id.* at 160-61 (stating that liberal individualism requires a woman to surrender selfhood at home for the sake of the selfish male).

164. *See id.* at 144 (articulating a sexual division of labor in which men's work is increasingly socialized and removed from the home while women perform invisible service functions).

FMLA do little to change this dynamic.

As gender hierarchies are embedded in liberalism and serve to sustain it, any notion of reforming the public sphere into a gender-neutral, egalitarian institution is misguided: we cannot eliminate the hierarchy without eliminating liberalism, for gender subordination exists in the very terms of liberal discourse. Furthermore, any attempt to disavow the idea of gendered subjects within liberal terms only serves to obscure the issue, while covertly continuing to produce gendered subjects. As such, Brown would claim that many gender-neutral liberal approaches are more than simply wrong, but that they actually produce further harm for the status of women.<sup>165</sup> The FMLA reinforces notions of the masculine ideal worker while wearing the pretense of justice and equality. In that context, any inequality that remains is deemed to be the fault of women themselves. Gender-neutral measures may be passed, but they do not eliminate the gender hierarchy, as the above discussion of the FMLA's disproportionate harm to women demonstrates.

Feminist legal scholar Catharine MacKinnon is critical of liberalism and proposed equality laws whereby women are supposed to achieve equal rights.<sup>166</sup> She argues that the foundations of the current legal system are still based upon assumptions that were created when women had no rights at all.<sup>167</sup> The existing framework and legal doctrine were never questioned, but were merely extended to women. This means that the masculine subject embedded within liberalism is still present, and the extension of the theory to women will naturally be incongruous as a result. "The point was to apply existing law to women as if women were citizens—as if the doctrine was not gendered to women's disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies."<sup>168</sup> As a result, women have been brought into a system designed by and for men, but with no more distinctions based on sex. This assimilationist approach has been harangued by many scholars, but nevertheless reigns in the liberal "inclusion" of women into its terms

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165. *See id.* at 164-65 (noting that child care and household help allow some women to advance but only through the subordination of other women providing those services).

166. MacKinnon, *supra* note 7, at 1284 (arguing that the U.S. has not done enough to protect against discrimination based on sex, after failing to ratify the Equal Rights Amendment in 1971).

167. *See id.* at 1285-86 (summarizing that legal traditions and practices were created when the education of women was prohibited, and that legal foundations grew out of a society in which women were silent property).

168. *Id.* at 1286 (describing an early approach to advancing women's rights, which attempted to provide women equality by refraining from granting women any special concessions).

and values.<sup>169</sup> The FMLA is a prime example of existing law merely being extended to women as if they were already citizens in the same right as men. The social, political, and legal system, including employment systems, were designed by and for men. Now women are included within those systems, but the systems' foundational *designs* have not changed, and women continue to suffer as a result.

MacKinnon argues, in a point important to the FMLA discussion above, that reproductive and caregiving issues have developed legally as issues of privacy, which necessarily leads to a lack of accountability.<sup>170</sup> Everyone is presumed equal in the private realm, which is of course a legal fiction; but to the extent it is not true, there is no recourse in the law to rectify it. The very ideology of privacy as an area unintended for state intervention, MacKinnon argues, means that the conditions necessary to make autonomy and individuality real under liberalism cannot be ensured.<sup>171</sup> This is why it is so difficult to enact FMLA-type protections—caregiving issues are seen as the “private,” “female” arena, unrelated to justice and autonomy, and therefore of little concern to the law. Any inequalities borne out of the FMLA that result from the gendered division of labor at home are not considered the problem of liberalism, the law, or social policy. Yet, as the feminist mantra claims, “the personal is political,” especially now that a great deal of the caregivers in society are also working in the public sphere, creating a wide overlap between the public and private. If the distinction between the two ever made sense, it certainly does not seem to any longer.

MacKinnon believes that many of women's social disadvantages can be traced to their childbearing capacity. “Although reproduction has a major impact on both sexes, men are not generally fired from their jobs [or] excluded from public life . . . for making babies,”<sup>172</sup> nor are they required to devote their lives to caregiving in a position that “is not even considered an occupation but an expression of the X chromosome.”<sup>173</sup> Socially speaking, pregnancy is critical to women's subordination to men. This directly relates to the FMLA and its disproportionate harm to women, in that women are more likely to need medical leave due to their childbearing capacity, yet are less likely to be in a position where they are able to

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169. *See id.* at 1287-88 (noting that this male-focused idea of equality failed to address female-focused equality issues such as pregnancy).

170. *See id.* at 1311 (arguing that the sphere of privacy is controlled by the individuals in power, leading to isolation and unaccountability rather than equality).

171. *See id.* (stating that “the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination”).

172. *Id.* at 1308-09 (expressing the viewpoint that biological differences between men and women have a disadvantageous societal impact on women).

173. *Id.* at 1312-13 (asserting that childbearing denies women professional and societal advancement while men are not negatively impacted by their reproductive facilities).

qualify for or afford it.

MacKinnon places a great deal of emphasis on what will here be called the “similarly situated problem,” which is the legal doctrine of equal treatment stating that those who are similar must be treated equal, while those who are different may be treated differently.<sup>174</sup> In other words, treating one group differently from another is not allowed as long as the groups are similar in all important respects. But problems sometimes arise when women are compared with men. If policies are created that disadvantage pregnant women, there are no similarly situated pregnant men that we can point to in order to show that the women are being treated unfairly; therefore, there is no “inequality.” This was the very problem that arose in the Supreme Court’s 1976 *Gilbert* decision, which held that pregnancy discrimination was not sex discrimination, simply because there are no pregnant men who are treated better than the pregnant women.<sup>175</sup> MacKinnon argues that this “similarly situated” problem is relevant in a wide range of sex inequality issues, because a legal remedy is available only when gender comparisons can be shown, but that is impossible when dealing with issues of procreation.<sup>176</sup> She is also critical of the fact that the point of reference for determining sameness is men: “Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?”<sup>177</sup> In fact, the worse the gender disparity, the harder it is to show discrimination because the groups will not be considered similarly situated. In this way, women are defined as different from men, but then entitled to equality only to the extent that they are like men. As a result, the similarly situated requirement functions as a white male standard in disguise. As applied to the FMLA, this means that women will suffer more from their procreative ability than will men—for instance, by needing more leave than men for childbirth and caregiving, or for having less money to be able to afford unpaid leave—but the law will not recognize a disparity that it must address. If women’s issues are unique, then there is no discrimination, and therefore no legal remedy.

The law of inequality is also grossly insufficient, according to

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174. *See id.* at 1286-87 (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (“[a]ll persons similarly circumstanced shall be treated alike”).

175. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

176. MacKinnon, *supra* note 7, at 1297 (arguing that there is no possible constitutional equal protection attack against laws regarding procreation, abortion, and sexual assault because gender comparisons are unavailable or tenuous).

177. *See id.* at 1287 (stressing the illogical quality of the “similarly situated” requirement with regard to sex discrimination against women, and arguing that women should not have to strive to be like the white men they are compared against).

MacKinnon, in that it relies on the presence of facial classifications.<sup>178</sup> The singling out of a particular group is for the most part the only recognized manifestation of legal inequality. Yet for issues like the FMLA, facial classifications are now quite rare and are no longer relevant to women's concerns, but sex inequality remains rampant. The FMLA is considered under liberalism to be promoting sex equality because it is gender-neutral. But the "conditions of inequality" that made the reform necessary in the first place have not been changed at all.<sup>179</sup> In other words, the FMLA's gender-neutral character doesn't mean it promotes sex equality, because the reason why we needed the law in the first place—a male-worker standard in public life that ignores any family obligations and relegates those to women—is still present. To the extent that women do have problems specific to women, the law is impotent to address them because it must remain gender-neutral. As such, women with children will suffer in a society that "does not allocate resources to assist combining family needs with work outside the home."<sup>180</sup>

With women bearing responsibility for a majority of caregiving—which leads to increased turnover, lower productivity, and more shifts in and out of the workforce—the FMLA's ignorance of the gender disparity may actually serve to reinforce that disparity and the inequality that results. MacKinnon's observation that social norms limit women's options because of their "enforced role in childbearing and childrearing" applies directly to the FMLA.<sup>181</sup> Even after childbirth, she argues, women are primarily responsible for the care of children by social custom, as well as pressure and exclusion from well paying jobs, the structure of the market, and the lack of adequate childcare.<sup>182</sup>

Yet while MacKinnon is harshly critical of the liberal institution that creates these inequalities, she paradoxically turns to the legal system to remedy them. She proposes that existing laws be interpreted according to constitutional sex equality requirements, but without the "similarly

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178. *See id.* at 1299-1300 (arguing that a reliance on facial classifications fails to address inequality in regards to sexual assault and reproduction because many of these laws regard inequalities as crimes or privacy violations rather than discrimination on the basis of sex).

179. *Id.* at 1292 (arguing that remedying discrimination by requiring gender-neutral laws is not effective because this strategy does not address the reasons for inequality).

180. *Id.* at 1312 (expressing that because society often views childbirth and childrearing as women's main pursuit, society does not allocate enough resources to allow women to achieve other goals).

181. *Id.* (conveying that women do not always control the circumstances under which they become pregnant and thus are, in some circumstances, constrained from pursuing other endeavors).

182. *See id.* at 1312-13 (stating that society does not adequately provide for women looking to combine family responsibilities with work outside of the home).

situated” requirement that leaves issues of procreation unaddressed.<sup>183</sup> She seems to favor legal protections and rights as generally appropriate, but calls for a change in the way they are applied. It is important, she argues, for the law to develop a new doctrine with better notions of discrimination, which should include a much wider notion of disparate impact as amounting to discrimination.<sup>184</sup> As such, the disproportionate harm to women witnessed in the FMLA would likely constitute sex discrimination. The facial neutrality is irrelevant; what matters is the gendered effect of the law. “If sex equality existed . . . the workplace would be organized with women as much in mind as men; the care of children would be a priority for adults without respect to gender; women would be able to support themselves and their families (in whatever form) in dignity through the work they do.”<sup>185</sup>

Gender-neutral policies such as the FMLA may represent equality in law, but not equality in fact. The current state of family life is unjust and therefore unacceptable, making women unnecessarily vulnerable and enhancing the existing gendered power dynamic. Susan Moller Okin writes, in explanation of John Rawls’s *A Theory of Justice*, that although the “modern liberal society . . . is deeply and pervasively gender-structured,” it is not necessarily doomed by this and nevertheless has much to offer.<sup>186</sup> Okin describes a revised version of liberalism, offering up solutions to lingering problems. She explains that society can never truly be just if the family, its most basic institution where each individual is socialized, is unjust.<sup>187</sup> She thus attacks the division of labor that makes marriage and family life so unjust for women.<sup>188</sup> A move toward equality in the family would lighten the disparate burden that many women face from the FMLA. In her own critique of classical liberalism, Okin takes aim at liberal theories that fail to take account of women, other than to presume that they will take care of all the productive, reproductive, and daily service needs of the private sphere without being vested with any rights of their own within the public sphere.<sup>189</sup> Okin echoes Brown’s claim that the “good life” is implicitly reserved for men, but is only possible for men as a

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183. See *id.* at 1324 (arguing that the “similarly situated” test is ineffective because “no man is ever in the same position a woman is, because he is not in it as a woman”).

184. See *id.* at 1325 (arguing that state law needs to more adequately address not only obvious discriminatory acts but invidious discrimination as well).

185. *Id.* at 1326-27.

186. See OKIN, *supra* note 6, at 89 (claiming that John Rawls’s liberal principles challenge the role of gender in society but that his theory is underdeveloped).

187. See *id.* at 99 (stating that if families are not just, then Rawls’s whole structure of moral development is built on shaky ground).

188. See *id.* at 100 (providing examples of how family roles are divided by gender).

189. See *id.* at 108 (arguing that Rawls neglects gender and does not consider whether the family is a just institution).

result of this presumed female subordination.<sup>190</sup> For Okin, this public/private dichotomy and the division of labor that it engenders is the source of the problem. She spends some time demonstrating how the “personal is political,” and that relegating women to the private sphere actually oppresses them in *all* spheres, as dominance and subordination are continuously circular.<sup>191</sup> This is directly relevant to the causes for the FMLA’s disproportionate harm to women, and speaks to potential ways to alleviate the problem.

Yet Okin is unwilling to give up the basic tenets of liberalism in her quest towards equality, believing that liberalism is not *inherently* flawed, but is problematic only in the way it has conventionally been applied. This represents the essential difference between her position and that of Brown.<sup>192</sup> Okin argues strongly that the family should be held to standards of justice equal to that of the public sphere.<sup>193</sup> Justice for women is defined by complete egalitarianism both at home and in public, and she applies the principle by reference to equal basic liberty and fair equality of opportunity *both in law and in fact*.<sup>194</sup>

Okin claims, however, that the basic precepts of liberalism are the same as those of feminism: namely, a belief in fundamental equality of human beings, with individual freedoms being central.<sup>195</sup> As such, feminism and liberalism can be reconciled. The only way to accomplish this, according to Okin, is to completely abolish gender in society and reform the family. Since the family is not inseparably tied to its current gender structure, a real and complete sharing of all obligations, domestic and public, can eradicate the dualism existing in liberalism and eliminate gender inequality.<sup>196</sup> She concludes that the family must be reformed to adhere to standards of justice toward the end of complete egalitarianism.<sup>197</sup> Presumably, if such an event

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190. See BROWN, *supra* note 155, at 144 (arguing that in the traditional familial “division of labor,” where the male works outside the home and the female works inside the home, the female’s work is undervalued due to its private nature, while the male’s work is overvalued due to its social and public nature).

191. See OKIN, *supra* note 6, at 125 (discussing the “interconnections between women’s domestic roles and their inequality and segregation in the workplace”).

192. See BROWN, *supra* note 155, at 139 (claiming that Okin criticizes liberalist theory because of its failure to apply the interest of eliminating the subordination of women in the economic sphere to the goal of “democratizing” the household sphere).

193. See OKIN, *supra* note 6, at 126 (claiming that “domestic life needs to be just and have its justice reinforced by the state and its legal system”).

194. See *id.* at 171 (arguing that any solution to injustice must encourage equal sharing by men and women of family responsibilities).

195. See *id.* at 61 (stating that many of the basic tenets of liberalism are the same as those of feminism and giving examples).

196. See *id.* at 172 (claiming that moving away from gender is essential to remaining true to democratic ideals).

197. See *id.* at 183 (arguing that families in which roles are equally shared regardless of sex are the most just).

were to occur, then gender-neutral public policies would be more appropriate, provided the FMLA is expanded to provide more thorough provisions for family responsibilities. It is clear that Okin has high hopes and expectations for liberalism's potential in a gender-free society that upholds the highest standards of justice and equality. As such, she advocates for a change in liberal thinking, but does so within a liberal framework and using liberal arguments, the end result being something she would conceive of as a *genuinely* liberal society, more true to its own revered principles.

Therefore, while the FMLA exhibits several serious problems that may increase gender inequality, simply revising the FMLA to address those problems, while necessary, is not enough. There are two distinct issues here: the first problem is that the provisions of the FMLA are too limiting in terms of coverage requirements, length of leave, and pay. It assumes and reinforces both a certain amount of employment status and masculine notions of the ideal worker. This ideal worker either has no family obligations, or prioritizes work over family, where children's needs, as well as personal fulfillment, are sacrificed for economic advantage. Traditional male breadwinners have been able to do this without much harm, but others attempting to succeed in employment have a much more difficult time.<sup>198</sup> This construction of the "ideal worker" is socially determined, and is not necessary for successful economic development.<sup>199</sup> It results in the economic marginalization of those with the majority of family obligations, who are also more likely to be women. There is no inherent reason why a choice should have to be made between work and family; that is often presumed to be the case simply because it is how our culture has developed over time. A conception of the "ideal worker" could be reconstructed to include workers with ongoing family responsibilities, and productivity need not suffer as a result. In fact, as statistics reveal, productivity may actually be increased.<sup>200</sup>

The second problem is unrelated to the FMLA itself, and is only peripherally related to the workplace. Rather, it relates to the division of labor in the "private" sphere that causes the extant laws to hurt women and the poor more than men and the wealthy. This creates a circular problem whereby women's greater burdens at home make them less able to succeed in the workforce, and women's lack of success in the workforce make it

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198. See KESSLER-HARRIS, *supra* note 154, at 11-12 (arguing that the use of traditional gender roles has been used to justify workplace discrimination and decreased workforce positions for women).

199. See *id.* at 5.

200. Patricia A. Roos, Book Review, 16 GENDER & SOC'Y 570, 570-71 (2002) (reviewing JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000)).

more likely that women will bear the burdens at home. This is why writing the FMLA to apply to women and men equally still hurts women—their extra burdens at home have not changed, but their legal rights and protections are the same as for those who have never had significant family responsibilities to limit them.

### B. Solutions

An important question remains whether, in the attempt to achieve true gender equality, which to date remains elusive, liberalism should be rejected or embraced, or perhaps accepted but modified. Certainly, changes to the FMLA are needed in order to take account of the realities of caregiving responsibilities in our society and their gendered nature. The law needs to be expanded to provide further protections, including paid leaves, wider scope of coverage for businesses and employees, coverage for minor illness, coverage for extended family, and lengthier leave. This approach is a liberal one, relying on legal protections to uphold individual rights; yet it starts to move away from liberalism when one considers that the “rights” being protected are less about individualism, self-government, and autonomy, than they are about family responsibilities, social connections, and the overlap between the public and private. These legal changes must be incorporated in ways that take account of socially constructed gender and power difference, rather than simply pretending that facial equality equals real equality. The FMLA cannot equalize the gender imbalance simply by applying to both genders. This, in effect, purports to solve societal harms that are *gender-specific* by enacting protections and rights that are *gender-neutral*, and therefore unable to address the harms fully. This argument again moves away from a liberalism which presumes that facial equality is all that is needed for justice. The approach advocated here rejects the value of facial equality as the sole determinant of justice, and instead requires a more nuanced discussion of societal norms and impositions as they play out across groups. These inequalities are not *legally* imposed, but *socially*; yet that fact does not make them any less real or harmful. If inequality itself is a problem, why should only legal inequality matter?

Therefore, in addition to expanding upon the FMLA, a revamping of gendered family life and the division of labor at home is necessary to afford women the full autonomy in the public sphere that men have enjoyed. There is nothing inherent in a liberal political system that *requires* an unequal and gendered division of labor (whereby it will almost always be women doing the work that is private, unrecognized, and devalued); true equality at home is possible within a liberal framework. Yet this approach also necessarily entails the elimination of the (ostensible) public/private

divide that relegates the private realm to obscurity and non-importance, and considers it beyond the concerns of justice. Feminists have pointed out that this divide is a myth in any case, masking the reality of our socio-political system whereby certain “private” issues are in fact regulated by the state—most notably marriage, divorce, and child custody laws.<sup>201</sup> In effect, the state does not simply stay out of the private realm, but actually decides which private issues it will regulate. Thus, while the elimination of the public/private divide appears to be a revision of liberal public policy, it is not such a drastic change as it might first appear to be. While the private realm already overlaps with the public realm in many respects, what this approach will entail is a *recognition and admission* of that fact. Bringing the private into the public will lead to greater valuing of familial and caregiving responsibilities and the recognition of a general societal interest in these values. It will not mean that the state steps in to regulate every aspect of peoples’ private lives that have traditionally been up to individuals to decide for themselves. Rather, it will mean that notions of justice and fairness apply in the home as much as they do in public, and that injustice in one realm leads to and reinforces injustice in the other. Until family and home life are truly equal, gender-neutrality in public—as represented in laws such as the FMLA—is insufficient and misguided.

The desired result can be obtained while maintaining liberalism’s core principles, such as autonomy, justice, and self-government. Yet the liberal notion of “individuality” is more dubious. In effect, individuality is less about freedom of self-government than it is about the “freedom” to sink or swim, *regardless of what social forces are already working against you*. It is unclear why this type of severe individuality is necessary within a liberal framework. It seems reasonable to suggest that a liberal theory involves autonomy, justice, and self-government, and rather than individuality, a social connectedness recognizing a societal stake in individual as well as family success. Liberalism need not necessarily exclude such community or group attachments, although they have not typically been found there. Although liberalism has tended to ignore the family (except to dictate what rights women have within marriage), it depends upon it in order to function properly. Given this dependence, then, family responsibilities should receive much greater emphasis and support. Perhaps this has not yet happened because women still bear the majority of responsibilities. If men contributed equally to family life, it is more likely that society would place higher value on such responsibility and would thus institute policies accounting for public subjects (like employees) who have familial

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201. See OKIN, *supra* note 6, at 129 (declaring that there is no clear distinction between areas of life that are public and subject to state regulation, and areas of life that are private).

responsibilities and interests. Recognition of the value of this behavior is necessary before public policy is likely to shift in that direction. Liberalism no longer needs to depend upon the subjection of half of its citizens so that the other half can achieve the ideal.

One might wonder how far we can push liberal principles while still calling the end result “liberalism.” Yet the real issue is not so much whether we call it “liberalism” or something else, but rather what it looks like in terms of policy, and whether it will be accepted by a society that was founded upon certain liberal principles. Our entire political, legal, and constitutional structure is so embedded within liberalism that it may be exceedingly difficult for us to truly escape it without a complete revolution of our socio-political structure. Strategically speaking, then, some liberal values would thus need to be maintained in order for change to be allowed to happen. Yet what is truly necessary need not be sacrificed for political practicality; most of liberalism’s core values can be maintained toward the end of gender equality, as discussed above. A de-emphasis on the divide between public and private, as well as on the value of “individualism,” is necessary to achieve it.

#### V. CONCLUSION

In a society where 78% of families have both parents working outside the home for pay, and where single-parent families are more common than ever, it is critical that social and legal policy recognize the need for family-friendly policies and workplaces that allow parents and other caregivers to meet their familial responsibilities without sacrificing their public lives and livelihoods.<sup>202</sup> Our current laws and policies, which notably include the FMLA as a law designed to address that very problem, fall far short of meeting the need that exists; they still largely presume a male breadwinner employee that has little to no private responsibilities, which while generally untrue for women, may be less and less true for men as well. Socially-imposed norms and responsibilities differ based on gender, which means that the limits of the FMLA affect women more harshly. As such, the law may actually “exacerbate inequalities it could diminish.”<sup>203</sup> Classical liberal ideas play into this problem by enforcing a mythical divide between public and private life that devalues the “private” realm of family, and

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202. See JODI GRANT, TAYLOR HATCHER & NIRALI PATEL, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS 2* (2005) (utilizing this data to argue that the workplace is out of touch with reality in the United States because many employers do not provide, nor does the federal government require, paid leave for new parents).

203. See GERSTEL & MCGONAGLE, *supra* note 80, at 528 (noting, however, that the data used could not show how the FMLA independently affected parental leave, given that other factors would also affect the rate).

emphasizes individualist ideals of self-help that ignore society's interest in family stability. In the words of Gerstel & McGonagle: "gender-neutral state policy can reinforce gender inequality of the wider social context, consisting of gender inequality in family caregiving as well as in material opportunities and rewards . . . ."<sup>204</sup> Liberal theory must take account of this fact and reject the prevailing presumption that facial neutrality alone constitutes justice. Instead, liberal theory must incorporate ideals and policy that more fully and effectively result in equal opportunity.

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204. *See id.* at 529 (pointing out that returning to work can often be more comforting and stress reducing than staying at home to care for a new child).