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MATERNITY LEAVE POLICIES OF THE UNITED STATES AND GERMANY: A COMPARATIVE STUDY

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"Liberation will mean little for men or women if women enter men's world on men's terms."[1]

I. INTRODUCTION

In the United States and many other countries, the issue of women's unequal treatment in the work force has been hotly debated for two decades. With respect to women's unique ability to bear children, the question arises as to whether women and men should be treated identically despite this difference, or whether this special capacity should be considered in fashioning equality in the workplace. Because women have always suffered disadvantages from their roles as childbearers and as mothers, a mere equality approach as currently defined appears insufficient.[2] In order to eliminate women's subordination, policies are needed that will enable women to compete with men on an equal basis despite socially created disadvantages that have been justified as logical consequences of the particular biological differences between the sexes.[3]

Traditionally, men and women have occupied different positions in society. Whereas the man was deemed the primary breadwinner who left

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1. WARREN FARRELL, THE LIBERATED MAN 26, *quoted in* SYLVIA HEWLETT, A LESSER LIFE 402 (1986).

2. Current scholarship equates "equal to" with the "same as" men. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 33 (1987). Only if equality were defined as the end of disadvantage would this approach be adequate.

3. Since the "difference" model implicitly assumes that women are different, it is men who are the yardstick in defining biological functions. *Id.* at 34. This substantiates the claim that neither actual difference nor sameness are decisive, but rather that women are subordinated in society by being defined as different. In addition, although women are biologically different from men, many of the distinctions drawn are not of a biological but of a social nature.

the family for work, the woman's place was in the home where she was responsible for housework and the rearing of children. This picture has been changing as a growing number of women have entered the work force. Nevertheless, women are frequently made to choose between motherhood and a career. Often this choice is forced onto them by discrimination in the workplace and by societal pressures,[4] which tacitly compel them to elect homemaking. In addition, the absence of policies that would allow a woman to combine both spheres of her life successfully contributes to this development.

A woman's perceived special responsibility toward child rearing must be viewed within the larger context of male-female relations. Homemaking and child rearing often deprive a woman of any bargaining power in a household since she does not contribute to the family income. Although she advances the well-being of all family members, her contribution is not taken as seriously as that of the male breadwinner. The disadvantages women suffer as "mere" mothers and homemakers make it even more imperative to allow them to retain their positions in the labor market when they prefer to do so and to combine family life with a career. This article compares the maternity leave and compensation policies of the United States with those of Germany (FRG)[5] in an effort to understand the different approaches the two countries have taken.[6] This assessment will be conducted within the framework of the prevailing models of equality analysis, the difference and sameness approaches, that have dominated much of the thinking about equality issues. In addition, the article will consider briefly the issues raised in an alternative model, advanced by Catharine MacKinnon, which she terms the dominance approach. This article will also investigate the impact the two different national practices have had upon women's positions in the labor market. Lastly, it will outline a policy that would allow men and women to spend time with their children without being deprived of professional advancement.

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4. Society deems women who do not choose to primarily care for their children to be bad mothers. This stigma might be particularly hard to bear for a woman because it implies that she fulfilled her desire for a career before she attended to her child. Because women have been brought up to put themselves last, such accusations might create a strong feeling of guilt.

5. The policies described are those of West Germany before unification. After unification these policies were automatically carried over to all of Germany.

6. This paper focuses exclusively on normal pregnancies and excludes adoptions. With the exception of the Family and Medical Leave Act of 1993, in the United States policies regulating adoptions are generally more inadequate than the legislation governing normal pregnancies. In Germany, the *Erziehungsurlaub* can be used for adopted children.

II. TWO APPROACHES TO EQUALITY

A. The Equal Treatment Model

Generally, the women's rights movements in the United States and Western Europe have pursued different goals. For many American women the equal treatment model, which focuses on the achievement of equal rights, has been the paramount approach.[7] The equality principle rejects all gender-based restrictions, based on the notion that women should be accorded the same legal privileges as men, such as voting rights.[8] After having been provided with these rights, women are assumed to be able to compete with men on an equal footing. Basically, the advocates of this approach claim that women are the same as men and should be treated accordingly. The American struggle for the Equal Rights Amendment ("ERA") and reproductive freedom are examples of this ongoing attempt to achieve equal rights in terms of "sameness."

The idea of equal rights[9] is especially appealing to American women because gender-based protective statutes have often been used to women's detriment rather than for their protection. Although the evidence is mixed, protective legislation in the workplace appears to have resulted in the exclusion of women from more strenuous, but higher paying positions. Moreover, it has led to the confinement of women to motherhood and a domestic existence by restricting their access to the labor market. Therefore, so-called "protective" legislation is incongruent with legal equality. Based on this ideological outlook, American feminists have often opposed special policies, such as maternity leave, that protect women with children.[10]

The equal treatment approach fails to consider that a male norm has defined the social patterns into which women have had to assimilate.[11] Therefore, the equality approach does not protect women who are either

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7. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 81 (1989); Lisa A. Rodensky, Comment, California Federal Savings & Loan Association v. Guerra: *Preferential Treatment and the Pregnancy Discrimination Act*, 10 HARV. WOMEN'S L.J. 225, 231 (1987).

8. Rodensky, *supra* note 7, at 231.

9. In this context the term "equal rights" implies that women are treated the same as men. *See* MACKINNON, *supra* note 2.

10. This debate was at the center of *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

11. Catherine Colvin, *New Perspectives in Parental Leave: The Family & Medical Leave Act of 1987*, 12 EMPLOYEE REL. L.J. 546, 557 (1987).

unable or unwilling to conform to this predetermined norm.[12] However, this means that "those who most need equal treatment will be the *least* similar, socially, to those whose situation sets the standard against which their entitlement of equal treatment is measured."[13] This is particularly true biologically because only women are able to bear children. In advocating essentially the same treatment for men and women, the equal treatment approach will not be able, or be allowed, to take this unique feature into account. On a practical level, this means, for example, that women should not receive maternity leave because men are not entitled to it.[14] Of course this approach fails to consider that men do not need such leave because they cannot bear children. Consequently, equal treatment disadvantages women who choose to have children. Moreover, abstract equality will reinforce the inequality of the status quo by perpetuating behavior that is theoretically the same but, in actuality, further disadvantages women.[15]

B. The Difference Approach

The counterpart to the equal treatment model is the special treatment, or difference approach, which takes notice of biological differences.[16] Advocates of the difference approach, which is the other path to sex equality within the equality analysis, claim that special treatment focuses on actual rather than legal equality. To achieve this aim, the difference approach examines whether a proposed policy advances or impedes equal employment opportunity. In addition, it questions the means chosen to achieve actual equality so as to avoid the incorporation or reinforcement of culturally based stereotypes.[17]

However, the difference approach contains the potential to destroy women's rights because difference "may justify different treatment—better

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12. *Id.*

13. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 233-34 (1989).

14. This dilemma could only be resolved by declaring pregnancy a disability. Disability leave in contrast to maternity leave can be made available to men and women. *See infra* text accompanying note 36.

15. In the past, the sameness standard has mainly benefitted men. Almost every sex discrimination case litigated to the Supreme Court and won has been brought by a man. MACKINNON, *supra* note 2, at 35.

16. *Id.* at 33; Rodensky, *supra* note 7, at 232.

17. Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REVIEW 699, 764 (1986).

or worse."[18] Equally destructive is different treatment that appears to benefit women but leaves them with fewer opportunities in the long run.[19] This approach is therefore particularly invidious because it does not provide women with "the dignity of the single standard."[20]

The difference approach more clearly reflects the European model than does the equal treatment model.[21] In most European nations, women not only are guaranteed legal equality but they also experience special protection in areas in which they could be disadvantaged because of their physical characteristics. European policies seem to acknowledge that it is these distinctions that contribute to the dual burden of women, in the labor market and at home, and that eventually lead to women's second-class status.[22] In order to remedy this societal problem, European legislatures have established a number of special compensatory policies that are aimed particularly at protecting working women with infants.

The approaches Germany and the United States have taken to maternity- and parental-leave policies reflect those distinct theoretical models. Whereas the United States tended to follow an almost strict equal treatment approach,[23] Germany's legislation mirrors the difference model. A comparison of the economic situation in which women find themselves as a consequence of these policies will illustrate the unique advantages and disadvantages of these models.

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18. MACKINNON, *supra* note 13, at 226.

19. So-called protective labor laws have often caused women to fail in their search for employment because employers did not want to accommodate them when they could hire men instead. MACKINNON, *supra* note 2, at 242 n.18 (citing *amicus curiae* brief of the American Civil Liberties Union).

20. *Id.* at 38.

21. In an alternative model, feminist legal scholar Catharine MacKinnon, who severely criticizes the mainstream approach, has defined gender inequality in terms of a distribution of power, with men at the top and women as the subordinate class. It is the social hierarchy that produces inequalities and shapes the meaning of sex difference. MACKINNON, *supra* note 13, at 232. Because the existing models fail to take this social reality into account, the currently employed legal methods are entirely inadequate in capturing women's reality. Although, Professor MacKinnon's model provides an interesting approach, the prevalent theories in the United States and Western Europe are mainly oriented on the sameness and difference models.

22. HEWLETT, *supra* note 1, at 142.

23. The Supreme Court's decision in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), was the first major case in which the Court adopted a more subtle approach.

III. THE AMERICAN APPROACH TO EQUALITY

In 1986, 66.4% of all women between the ages of twenty and sixty-four worked in the United States.[24] Among the most staggering changes in the American work force has been the increased participation of women with infants.[25] In 1986, fifty-one percent of all mothers with children under six years of age worked.[26] Almost all of these women have suffered severe repercussions from their decisions to have children. Many do not have the necessary insurance to cover childbirth expenses, others cannot obtain their old positions after childbirth, and others do not receive compensation while absent from work.

A. Legislative Policies and Judicial Responses

Although the United States does not explicitly guarantee the equal treatment of men and women in its Constitution,[27] the Fourteenth Amendment prohibits states from denying "to any person . . . the equal protection of the laws."[28] In the private-employment sector, the United States has outlawed sex discrimination in Title VII of the Civil Rights Act of 1964.[29] In contrast to most other developed nations, however, the United States does not have a federal statutory provision that (1) guarantees every working woman the right to maternity leave; (2) protects her job during this time; (3) provides a cash benefit throughout the leave; or (4) guarantees health insurance to cover medical expenses at the time of childbirth. Nevertheless, the Family and Medical Leave Act of 1993 guarantees a substantial number of working women an unpaid leave of twelve weeks upon childbirth or adoption. The Act also ensures that the employee must be restored to the same or an equivalent position upon return to work. In addition, it mandates that an employer maintain health insurance coverage for an employee on family leave.[30] Some states have

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24. ESCHEL M. RHOODIE, DISCRIMINATION AGAINST WOMEN 249 (1989).

25. Eighty-five percent of all working women can be expected to get pregnant at least once during their working lives. *Id.*

26. MARY F. RADFORD, PARENTAL LEAVE: JUDICIAL AND LEGISLATIVE TRENDS: CURRENT PRACTICES IN THE WORKPLACE 1 (1987).

27. This lack of explicit protection eventually was the reason for the introduction of the Equal Rights Amendment ("ERA"). The ERA was passed by the legislatures of only 35 states. Ratification would have required the approval of 38 states.

28. U.S. CONST. amend. XIV, § 1.

29. Opponents of Title VII added the sex discrimination clause in an effort to defeat the entire bill which was designed to outlaw race discrimination.

30. Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (1993) (to be

enacted legislation insuring certain benefits to pregnant women, such as unpaid leave.[31] Also, under the Pregnancy Discrimination Act of 1978 ("PDA"), medical plans denying coverage for pregnancy and pregnancy related treatment have been found to violate Title VII of the Civil Rights Act of 1964.

This Act repudiated two earlier Supreme Court decisions that had declared pregnancy related discrimination not to be gender based discrimination. In *Geduldig v. Aiello*,[32] the Supreme Court upheld part of California's disability insurance system that excluded from coverage disabilities resulting from a normal pregnancy. It ruled that the regulation was in conformity with the Equal Protection Clause of the Fourteenth Amendment. Two years later, in *General Electric Company v. Gilbert*,[33] the Court upheld a private employer's decision not to cover pregnancy under its non-occupational sickness and accident plan. At that time, the Supreme Court based its decision on Title VII of the Civil Rights Act of 1964, arguing that the differences between men and women were not the same as those between non-pregnant and pregnant persons. Since pregnant persons and women are not identical according to the Court's reasoning, the plan did not discriminate against women.

The Court also developed a parallel theory that prevented employers from imposing unduly restrictive maternity policies. In *Cleveland Board of Education v. LaFleur*,[34] the Court decided that a mandatory pre-birth leave of four to five months was an "overly restrictive maternity leave regulation" which imposed an undue burden on the employee. The Court rejected the school board's irrebuttable presumptions that teachers are physically incapable of working once they are four to five months pregnant and that they are unfit to resume work until a certain period of time after they give birth. Since the school board did not determine physical unfitness of pregnant teachers individually, the regulations were declared

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codified at 29 U.S.C. ch.28) [hereinafter Family and Medical Leave].

31. An example is New Jersey's leave plan which went into effect on May 4, 1990. The New Jersey Family Leave Act provides most workers with unpaid leave for up to 12 weeks within any 24-month period while protecting any benefits accumulated. State legislation, however, cannot serve as a substitute for federal legislation in this area because it does not guarantee all women in the United States the same benefits. Elizabeth Ryan Sullivan, *N.J. Leave Act Confounds Attorneys*, NAT'L L.J., Apr. 2, 1990, at 3.

32. 417 U.S. 484 (1974).

33. 429 U.S. 125 (1976).

34. 414 U.S. 632, 640 (1974). For an analysis of these cases, *see* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment-Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

to violate the Fourteenth Amendment's Due Process Clause. The Court also employed the "undue burden" approach in *Nashville Gas Company v. Satty*,[35] in which it struck down an employer's policy that forced a woman on maternity leave to forfeit accrued seniority.

In order to create a uniform policy on pregnancy related issues and to countermand the Supreme Court's decision in *Gilbert*, Congress passed the Pregnancy Discrimination Act in 1978. It defined sex discrimination so as to include discriminatory actions based on pregnancy or childbirth. The Equal Employment Opportunity Commission's ("EEOC") guidelines on the PDA prohibit employers from terminating employment or refusing to hire or promote female employees based on actual or potential pregnancy. The guidelines also outlaw any mandatory pre-birth maternity leave. Any woman who chooses to avail herself of pre- or post-birth maternity leave is guaranteed reinstatement. In addition, the guidelines declare pregnancy a disability and mandate that it be treated accordingly. Therefore, pregnant women are eligible for the same disability/sick leave that is available for other medical conditions. The same applies to health insurance. Moreover, the guidelines clearly state that any benefits available to female employees with respect to pregnancy should also be accessible to the spouses of male employees.[36] By declaring pregnancy a disability, Congress found an avenue to guarantee pregnant women better treatment without violating the Equal Protection Clause.

In *California Federal Savings and Loan Association v. Guerra*,[37] the Supreme Court interpreted the PDA as "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[38] In that case, the Supreme Court upheld a California law mandating four months of unpaid maternity leave with a job guarantee for pregnant workers but not requiring such leaves of absence for other temporarily disabled workers. The Savings and Loan Association claimed that the California Fair Employment Practices Act was preempted by the federal PDA, which requires that pregnancy be treated the same as other disabilities. Justice Marshall justified the Court's decision on two levels. First, he stated that the California law did not provide preferential treatment, but rather served to promote equal employment opportunities for

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35. 434 U.S. 136 (1977).

36. RADFORD, *supra* note 26, at 5. The Supreme Court upheld this regulation in *Newport News Shipbuilding v. EEOC*, 462 U.S. 669 (1983).

37. *See supra* note 10 and accompanying text.

38. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987), *quoting* California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 391, 396 (1985).

working women. Consequently, this decision gave states the latitude to enact statutes that extended the benefits already guaranteed to women under the PDA.[39] Second, Justice Marshall wrote that the state legislation did not compel better treatment of women since the provision could be extended to all workers afflicted with temporary disabilities.

While Justice Marshall's opinion marked the end of the Court's almost exclusive dependence on the sameness model, it did not entirely embrace the difference approach.[40] The flaw in the decision is that it makes the man the yardstick by defining pregnancy as a disability and therefore it assimilates women into a pre-defined male world. Consequently, this decision perpetuates the stereotype that women are inferior, disabled in some way. However, an argument can be made that pregnancy is a unique ability rather than a disability. In addition, the decision could pose a threat to the employment of women by providing employers with economic reasons not to hire women. Consequently, this case does not satisfactorily answer the question of how a real difference between the sexes, namely pregnancy, should be treated.[41]

In 1987, Congress was asked to consider the Family and Medical Leave Act, which had been introduced by Representative Patricia Schroeder. That bill, which died in committee, would have allowed women comparatively extensive maternity leaves and certain protections connected with them. In addition, it would have given mothers and fathers the opportunity to take an unpaid parental leave. Allowing for and encouraging parental leave, rather than maternal leave, demonstrates that this law was explicitly designed to guarantee women the same treatment as men without perpetuating paternalistic attitudes and cultural stereotypes. The bill constituted an aberration from the equal treatment model, which had dominated until then. By providing women with a benefit men do not require, namely, maternity leave, the bill promoted equality rather than preferential treatment for women. However, this first drive for true equality might have been a major factor to the early demise of the bill.

In addition to federal efforts, twenty-five states and the District of Columbia have enacted parental or family leave bills. However, seven of

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39. Under a Title VII analysis, it could be claimed that the lack of disability leave has a disparate impact on women and therefore discriminates against them. The remedy would be to mandate disability leaves including a reinstatement guarantee after childbirth.

40. In many respects it can be argued that the *Guerra* decision reflects the Court's desperation with gender neutrality in an area in which the sexes are different.

41. A week later the Supreme Court clarified its opinion by noting that a state cannot be forced to enact statutes mandating preferential treatment for women based on pregnancy. Wimberly v. Labor & Indus. Relations Comm'n of Mo., 479 U.S. 511, 521 (1987).

them cover only state or public employees.[42] Five states[43] and Puerto Rico require mandatory temporary disability insurance for non-job-related disabilities. Because of the mandate of the PDA, in these states, the insurance covers pregnancy related expenses and provides for maternity leaves. As mentioned above, California also statutorily guarantees a rather long but unpaid maternity leave of four months. Most other states with statutes mandating maternity leave with reinstatement permit time periods of two to four months for these leaves.[44] Dade County, Florida, was the first municipality to pass a family leave ordinance. The measure closely resembles the new federal legislation, which will go into effect in August 1993.[45]

On February 6, 1993, President Clinton signed into law the Family and Medical Leave Act of 1993. In the preamble, Congress expressly indicated that family caretaking duties most often fall on women. To allow employees to accommodate their family and work responsibilities while avoiding discrimination against women in the work force, Congress decided to ensure leave on a gender-neutral basis for eligible medical reasons "including maternity-related disability" and for compelling family reasons.[46]

The Act, which was twice vetoed by then President Bush, allows a worker to take up to twelve weeks of unpaid leave in any twelve-month period for the birth of a child or an adoption, to care for a child, spouse or parent with a serious health condition, or for the worker's own serious health condition that makes it impossible to perform a job. It mandates that an employee must be reinstated to his or her previous job or an equivalent position upon returning to work. It also requires an employer to provide the same health care benefits during the leave as though the worker were fully employed.

One of the limitations of the Act is that it covers only employees who were employed for at least one year by the employer from which they request leave and that they worked at least twenty-five hours per week. Although the Act covers federal, state and local government employees, it

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42. Felicity Barringer, *In Family-Leave Debate, A Profound Ambivalence*, N.Y. TIMES, Oct. 7, 1992, at A1, A22.

43. California, Hawaii, New Jersey, New York, and Rhode Island.

44. SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 96 (1983).

45. Larry Rohter, *In Florida, Family Bill Wins Converts*, N.Y. TIMES, Feb. 5, 1993, at A14.

46. Family and Medical Leave, *supra* note 30, § 2(b)(4).

targets only private companies with fifty or more workers. This means that the Act will cover approximately half of the work-force.[47]

In addition to state and federal mandates, employers also have the right to voluntarily institute more generous programs. Recent studies indicate that fifty to ninety percent of all companies offer some form of paid short-term disability leave. However, only one third of them allow for a six-week long leave with full salary replacement for a normal pregnancy.[48] In many enterprises, a general fund for wage replacements does not exist; and often wage substitutes are paid out of a combination of sickness benefits, vacation pay, short- or long-term disability benefits, and salary continuation plans.[49] It appears that larger companies, that is, those with 500 or more employees, are more likely to grant leaves, provide for longer unpaid leaves, and offer short, but paid leaves.[50]

B. Reasons for the Nature of Existing Programs

Although these federal, state, and private initiatives are highly desirable, in the international context these efforts seem rather minuscule. Three reasons might account for this blatant discrepancy in the availability of maternity leaves and protective policies in the United States and other developed countries. First, as outlined above, many Americans do not want to address the issue of institutionalized sex inequality, which has often been incorrectly ascribed to biological differences rather than to socially created disadvantages. It has frequently been argued that considering these biological differences could actually work to women's economic disadvantage in that fewer employers might hire women of child-bearing age because they fear increased overhead costs in case of pregnancies.[51] This argument has often been used by business that tends to believe that larger employers do enough to accommodate women, whereas smaller businesses lack the funds and the organizational flexibility for parental leave policies.[52]

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47. Adam Clymer, *Family-Leave Bill Passes the Senate and Nears Signing*, N.Y. TIMES, Feb. 5, 1993, at A1, A14.

48. RADFORD, *supra* note 26, at 21.

49. KAMERMAN ET AL., *supra* note 44, at 111.

50. *Id.* at 22.

51. This argument fails to consider that the status quo perpetuates inequality. MACKINNON, *supra* note 2, at 40-45.

52. *See, e.g.*, Barringer, *supra* note 42, at A22.

Moreover, the argument has been advanced that the preferential treatment of pregnant women and their husbands presents an equity problem. By its nature, parental leave can only be granted to new parents rather than to all employees. In order to avoid a charge of unequal treatment, many employers have forced their employees to take maternity or parental leave out of sick days, vacation time, and other accrued days, which are available to all employees.

Second, American society has been built on an extreme free-market model, which categorically rejects state interference in the economy, even though it is commonplace. This attitude—although softened by New Deal-type programs—accounts for the lack of a comprehensive health insurance plan, which leaves the pregnancy related costs of many women uncovered.[53] With respect to parental leave policies, many policymakers and economists fear that extensive plans might substantially increase the employers' costs. The free-market model prefers to allow the market to regulate itself. It is assumed that only the best and most efficient system would survive in a highly competitive market. If a company did not follow the lead of more progressive competitors in extending desired employee benefits, it would lose valuable workers to these other companies.

Third, America's long history of federalism has contributed to the federal government's reluctance to interfere with state policies. Historically, protective legislation for women has been more successful on the state than on the national level. With respect to maternity leave policies, some states have been able to enact more extensive statutes than those implemented by the federal government.

In 1981, the lack of uniform guidelines had left at least half of the female labor force without income or job protection at the time of childbirth.[54] In addition, many women do not have the kind of health insurance that would cover birth-related costs. Consequently, the lack of financial protection is a form of indirect sex discrimination with all its concomitant negative consequences. The threatened loss of benefits and the lack of job protection forces many women to return to their workplaces early. In addition, the absence of sufficient remuneration during this time period decreases women's bargaining power in marriage and leaves them at the financial mercy of their husbands.[55]

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53. Deborah Rhode advanced the argument that in the absence of protective policies for all workers, such as comprehensive health, unemployment, and disability protection, the sameness-difference debate will continue. RHODE, *supra* note 7, at 124.

54. KAMERMAN ET AL., *supra* note 44, at 141.

55. Protection would not constitute preferential treatment but merely establish equality.

Moreover, lack of child-care facilities aggravates these problems. Women are frequently unable to return to their workplaces as early as they desire because many child-care centers do not accept infants until they are three months old. Under these circumstances, the mother is either forced to stay at home or is compelled to ask willing relatives or hire (often expensive) sitters to care for the infant. The situation is further complicated by employers who tend to believe that women who take extended leaves lack full commitment to the job.[56] This perception is often borne out in the initial hiring process. For example, women either are only hired for jobs in which they are easily replaceable when on maternity leave or are not hired because the employer fears the inconvenience and costs associated with pregnancy. These facts illuminate the dilemma in which equal treatment advocates find themselves. Equal treatment for men and women leaves women poorer and disadvantaged in the competitive market. While this has been widely recognized, no adequate alternative has been found that would provide women with equal employment opportunities while also adequately considering their biological functions.

Although the *Guerra* approach[57] seems to provide an alternative, it is flawed in many respects. For example, the *Guerra* Court continues to use men as the standard, thereby viewing pregnant women as disabled. The decision also does not alter the unequal distribution of power between men and women since the Court implies that the reinstatement guarantee treats women better than men unless employers provide disability leave to men as well. This fails to demonstrate a convincing understanding that pregnancy leaves for women do not constitute preferential treatment but merely change the unequal status quo. In order to find a better policy, the United States should study the experiences of countries that have taken a different approach to these issues. One of these countries is Germany.

IV. THE GERMAN APPROACH TO EQUALITY

Although the United States and Germany differ in many respects, they are both federalist, democratic, and highly developed nations. The increasing number of American women in the work force who have small children has been replicated by German female workers. In 1984, 38.2% of the work force were women, many of them mothers with infants.[58] As

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MACKINNON, *supra* note 2, at 40-45.

56. KAMERMAN ET AL., *supra* note 44, at 141.

57. *See supra* notes 37-40 and accompanying text.

58. RHOODIE, *supra* note 24, at 221.

in the United States, the economic position of women is inferior to that of men. In both countries, huge wage gaps exist and most jobs are highly segregated by sex. In Germany, women tend to be over-represented in the service industry, clerical positions, and social work.[59] In fact, ninety percent of all women work in only twelve professions.[60] Three quarters of all female workers are employed in areas that are filled predominantly by employees of their gender. These positions are generally less prestigious and lower paying than traditional male employment. In 1988, the average woman in the United States earned only sixty-four cents for every dollar earned by a man.[61] In Germany, women's earnings were only seventy-three percent of those of men.[62]

A. Historical Development

Despite these similarities in the economic positions of American and German women, the German government has approached issues related to maternity quite differently. This might be attributable in part to the distinct historical development of social issues in the two countries. The German Empire enacted its first social policies in the 1880s, among which were national health, unemployment, and old age insurance plans. At approximately that time, the German legislature also passed its first law protecting pregnant women. After 1877, women had to take a mandatory three-week long post-birth leave. This time span was gradually extended in subsequent years and women were compensated during this time by their health insurance. These early laws reflect the general tendency of most of the current enactments regarding pregnant women in the work force: German laws protect mothers without giving them a choice to decline such protection. First, this reflects a very paternalistic attitude towards women who are obviously viewed as insufficiently equipped to make choices benefitting them. An alternative explanation for these policies is that the state is so deeply interested in the development of future generations that it believes it possesses the inherent right to protect offspring even against the wishes of the woman who is carrying the fetus.[63] Second, these statutes demonstrate the German legislature's willingness to act in areas directly affecting social welfare, in the workplace as well as at home. This presents a striking contrast to congressional actions.

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59. Christina Jonung, *Patterns of Occupational Segregation by Sex in the Labor Market*, *in* SEX DISCRIMINATION AND EQUAL OPPORTUNITY 55 (Gunther Schmid & Renate Weitzel eds., 1984).

60. RHOODIE, *supra* note 24, at 221.

61. BARBARA R. BERGMAN, THE ECONOMIC EMERGENCE OF WOMEN 63 (1986).

62. RHOODIE, *supra* note 24, at 168.

63. This explanation seems to be confirmed by West Germany's restrictive abortion laws. *See infra* note 69.

Article 3 of the Basic Laws (Grundgesetz GG) of the FRG, which were ratified in 1949, guarantees equal rights and equality in all spheres of social life to men and women.[64] Despite this promise of equal rights, in reality women are treated very differently from men. In 1980, the German parliament passed the Equal Treatment Act, which was necessary to bring Germany into compliance with the European Community's Equal Treatment Directive.[65] However, the Act fails to mention affirmative action plans and does not sufficiently compensate victims of discrimination. It also does not outlaw indirect sex discrimination, including discrimination based on one's marital and family status.[66]

In article 6, section 1, the Basic Laws explicitly protect "marriage and family." In addition, they guarantee every mother the protection, care, and assistance of the community.[67] German maternity leave policies, which are based on this constitutional provision, are very extensive. They consist of three distinct but interrelated parts: *Mutterschutz* (protection of the mother), *bezahlter Mutterschaftsurlaub* (paid maternity leave), and *Erziehungsurlaub* (Parental Leave Allowances Law).[68]

B. Mutterschutz

Mutterschutz establishes policies that protect the pregnant woman and her fetus,[69] as well as the breastfeeding mother.[70] Among the regula-

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64. GRUNDGESETZ [Constitution] [GG] art. 3, §§ 1, 2 (F.R.G.).

65. Christopher Docksey, *The European Community and the Promotion of Equality, in* WOMEN, EMPLOYMENT AND EUROPEAN EQUALITY LAW 3 (Christopher McCrudden ed., 1987).

66. Heide M. Pfarr & Ludwig Eitel, *Equal Opportunity Policies for Women in the Federal Republic of Germany, in* SEX DISCRIMINATION AND EQUAL OPPORTUNITY 164-66 (Gunther Schmid & Renate Weitzel eds., 1984).

67. GRUNDGESETZ [Constitution] [GG] art. 6, § 4 (F.R.G.).

68. These laws are applied to all working women in private industry. A number of exceptions exist for home workers and employees in private households. The largest group of female employees not covered by the *Mutterschutzgesetz* (MuSchG) are civil servants. However, their protection is generally more extensive because of their special relation to the state.

69. The explicit protection of the fetus seems to conform with Germany's abortion policies. Since a 1976 *Bundes-verfassungsgericht* decision, abortions are generally outlawed. They are legal, however, if the woman is a rape victim, if her life and health are endangered, or if economic or social factors exist that would effect a pregnancy negatively (*soziale Indikation*). Consequently, the right to abortion is restricted. This approach might change when East and West Germany negotiate a common policy on abortion. Nomi Morris, *Tough Challenge for Germany–A Unified Abortion Law*, S. F. CHRONICLE, Feb. 11, 1992, at A10.

70. All costs relating to pregnancy and birth are covered by the national health insurance.

tions are very detailed prohibitions on the kind of work in which a pregnant woman is allowed to partake.[71] Most physical work is disallowed, as is work at night and on Sundays.[72] In addition, pregnant workers are strongly discouraged from working during the six weeks predating birth.[73] Although female employees are allowed to work during this time, they must give explicit assent and they have the right to stop working at any point. Because of the threat that a woman might quit from one day to the next during this time span, many employers, in order to facilitate their planning processes, encourage women to take the entire time off. After the birth of her child, a woman must take a mandatory eight-week maternity leave, which is not waivable under any circumstances.[74] This leave is designed to give women the opportunity to recuperate fully and to bond with their children. As an additional safeguard, during the period of her pregnancy and the first four months following birth, a female employee cannot be fired.[75]

The pre- and post-birth leaves of fourteen weeks are paid at full salary. During this time period, women are guaranteed a minimum income of 400 DM per month.[76] The state pays this set amount and the employer is required to supplement the income up to the level of the woman's actual salary. Full compensation and the job guarantee are designed to enable a woman to be free of all additional emotional and financial strain during her pregnancy and immediately after birth.

C. Erziehungsurlaub

After the paid maternity leave, the mother (or the father) can take the *Erziehungsurlaub*. It is based upon the idea that during infancy, bonding

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71. *Mutterschutzgesetz* [MuSchG] §§ 4, 6 (F.R.G.).

72. The pregnant woman will be compensated if she is not allowed to work. The employer has the option of offering her another job, which has to fulfill certain vague criteria. MuSchG § 11.

73. MuSchG § 3(2).

74. MuSchG § 6(1).

75. MuSchG § 9(1).

76. MuSchG § 13.

between the child and one parent is extremely important. Therefore, it allows either parent to stay at home with the child during the infant's first three years.[77] The German legislature has followed the Swedish model by providing the option of leave to either parent.[78] During this *Erziehungsurlaub*, the state pays 600 DM for the first seven months to the parent who stays at home and works less than nineteen hours a week. For another eighteen months, the monthly allowance is dependent on a family's total income.[79] During the entire time period, the parent's workplace is protected.[80] Although both parents cannot take advantage of this leave at the same time, they can split the current three-year period up to three times. For example, the mother can stay at home during the first six months after the child's birth (including the eight weeks of maternity leave) and the father can stay with the child during the remaining two and one-half years. However, the mother is unequivocally considered to be the primary caregiver. She is automatically assumed to take advantage of this leave, whereas the father must deliver a written statement declaring that both parents desire him to be the non-working child rearer.[81]

The times during which either parent does not work under the *Erziehungsurlaub* are credited toward his or her old age insurance. Whenever either parent elects to leave the work force permanently to raise a child, up to ten years (per child) can be added toward this insurance system (*Kinderberücksichtigungszeit*). This system was created to secure old age pensions for women as protection against divorce or their husbands' early deaths.[82]

These generous policies are highly protective of women and tend to emphasize the woman's role as mother and homemaker. In addition, they

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77. This time period has been increased continually over the last three years. Whereas parents whose child was born between 1986 and 1988 had a right to a 10 month-long leave, on July 1, 1990, this leave was extended to 18 months, *Bundeserziehungsgesetz* [BErzGG] § 4(1) (F.R.G.), and on January 1, 1992, the current time span of three years was instituted. *Rentenreform '92*, at 6 (1990).

78. Sweden instituted a paternity leave policy years ago. Kathleen Teltsch, *Swedish Feminists See a New Sense of Apathy*, N.Y. TIMES, July 9, 1982, at B6.

79. BErzGG § 5. Currently, legislation is pending before the *Bundestag*, the German parliament, that would make all payments dependent on a family's total income. Alexander Jungkunz, *Bewährtes über Bord*, NÜRNBERGER NACHRICHTEN, Jan. 19, 1993, at 2.

80. BErzGG § 18(1). The employee/parent can only be fired in clearly delineated exceptional cases that require the permission of a state commission.

81. BErzGG § 3(2).

82. *Rentenreform '92*, at 6 (1990).

are not always beneficial to the working woman. First, they place a heavy financial burden on companies, particularly on small businesses, that must pay a major portion of a woman's salary while she is on maternity leave. However, the state compensates companies with fewer than thirty employees for up to eighty percent of this expenditure. The fund from which this money is taken is financed by all small businesses, regardless of the percentage of women employed by the individual company.[83] Nevertheless, small businesses might still be deterred from employing women since they have to make the workplace sufficiently responsive to pregnant or breastfeeding women.[84] Lastly, in order to insure the running of the enterprise, they must hire substitute workers or try to allocate the work differently. This economic and organizational burden might lead many employers to refuse hiring women during their childbearing years. In fact, in June 1989, the unemployment rate for women was one and one half times as high as that for men.[85] Such an attitude on the part of employers is highly detrimental to women's careers because the years between the ages of twenty-five and thirty-five are the most fruitful years for a career, during which men lay the foundation for a productive work life.

The law has dealt with this preferential treatment for women by creating a special *Treuepflicht* (duty of trust) between the woman and her employer.[86] This is first illustrated in the job interview, in which the employer has the right to ask a woman whether she is pregnant; and the employer can expect a truthful answer.[87] An already existing pregnancy is a legally permissible reason for not hiring a woman since no employer can be expected to voluntarily take such a financial burden upon itself.[88] The newly created *Erziehungsurlaub* might actually revolutionize this

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83. *Frauen in der Bundesrepublik Deutschland*, at 47.

84. MuSchG § 2.

85. The quotas were 6.4% for men and 9.1% for women. This is based on data from the social security scheme. Therefore, it does not include unemployed women who have either given up looking for jobs or who were not covered by social security benefits during their last employment. For women between 25 and 34 years of age the unemployment rate is twice the average rate. Gunther Schmid, *The Political Economy of Labor Market Discrimination: A Theoretical and Comparative Analysis of Sex Discrimination, in* SEX DISCRIMINATION AND EQUAL OPPORTUNITY 287 (Gunther Schmid & Renate Weitzel eds., 1984).

86. PETER MEISEL & HANS-HARALD SOWKA, MUTTERSCHUTZ/MUTTERSCHAFTSHILFE/ ERZIEHUNGSGELD KOMMENTAR 113 (1988).

87. This might be limited to jobs for which only women apply. *Id.* at 109.

88. ALEXANDER DIX, GLEICHBERECHTIGUNG DURCH GESETZ 310 (1984).

treatment of women. Because the law now allows fathers to take off time to bring up their children, employers have reason to ask whether the male applicants' spouses are pregnant. If so, the employer might expect at least organizational difficulties when the father elects to go on paternity leave for a few months. This scenario might lead employers to inquire into the status of a male employee's spouse and thus further pry into the privacy of an interviewee or might cause them to discard this policy altogether.

Another drawback of the existing policies is the mandatory two-month post-birth maternity leave,[89] which most pregnant female employees supplement with the almost mandatory six-week long pre-birth leave. There is no obvious medical reason for proscribing a mandatory maternity leave after birth. In fact, women recuperate differently after a birth and also adjust differently to pre-birth changes. A physician's statement concerning a woman's ability to return to her workplace should be sufficient to allow her to do so. In effect, these overly protective laws, which mandate specific behavior, tend to reinforce the image of women as the "weaker sex," needing extra-special protection. These enactments place women in the role of minors who are not able to decide what is best for them. This is not surprising since the precursors of these laws date back to a period in which women did not even have the right to vote.

Since *Erziehungsurlaub* did not come into effect until January 1, 1986, at this point, it might still be too early to evaluate the level of acceptance of paternity leave by men. Nevertheless, during the first three years after its enactment, only 1.5% of all working men have taken advantage of this provision.[90] In 1992, the number fell even farther, to 1.3%.[91] Of those parents who have availed themselves of this opportunity, for every man, ninety women have taken the leave.[92] Consequently, it is predominantly women who went on the *Erziehungsurlaub.* Lack of information concerning the existing opportunity might be partially responsible for the reluctance of men to exercise this right. However, it is at least equally likely that the new *Erziehungsurlaub* reinforces prior stereotypes about a woman's primary role in the upbringing of children. By allowing women to stay at home longer, this plan places women in a weaker bargaining position in the home because in most families they do not financially contribute as much as their husbands. In addition, the law might also

89. German law does not consider pregnancy a sickness or a disability.

90. RHOODIE, *supra* note 24, at 189.

91. Peter Abspacher, *Gegen die "Wildwuchs"-Parole*, NÜRNBERGER NACHRICHTEN, Jan. 19, 1993.

92. *Frauen in der Bundesrepublik Deutschland*, at 47.

loosen women's ties to the labor market and might foster labor market segregation by locking women into lower-paid, part-time positions.[93]

The potential impact of the *Erziehungsurlaub* upon the work force is very important. The leave does not require that the parent who elects to bring up the child stay at home full-time but it gives her or him the option of working part-time (less than nineteen hours a week) at her or his old workplace. This seems to be a positive development especially since it will permit single parents to devote most of their time to their children while working only a few hours a week. The small remuneration during the *Erziehungsurlaub* will turn this option into a mandatory provision for many women. Therefore, the law creates the danger of placing even more women into poorly paid part-time jobs in which there is no possibility of advancement. This seems to have already partially come true as 92.3% of all part-time jobs are held by women.[94]

Another problem derives from the connotation of the word *Erziehungsurlaub*. In contrast to the rather neutral term "leave," the second part of the word, *Urlaub*, connotes leisure and free time. The term conjures up the image that staying at home with an infant is a vacation rather than hard work. Due to this connotation, it might be difficult to convince German men to stay at home and take care of their children since it appears to be menial, less prestigious, and less demanding work.

The problems connected with Germany's maternity protection and parental leave laws demonstrate the particular difficulties inherent in the special treatment approach. The existing policies were often designed with the intention of improving the position of women in the marketplace.[95] Nevertheless, the policies' long-term consequences have often had the opposite effect and have led to the impairment of women's economic opportunities. In addition, such legislation has fostered cultural stereotypes and has enhanced the notion of women as mothers and homemakers.

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93. Isabella Bakker, *Women's Employment in Comparative Perspective, in* FEMINIZATION OF THE LABOR FORCE: PARADOXES AND PROMISES 22 (Jane Jenson et al. eds., 1988).

94. RHOODIE, *supra* note 24, at 188.

95. "Ziel des Bundeserziehungsgeldgesetzes ist es, die ständige Betreuung eines Kindes in der ersten Lebensphase durch ein Elternteil zu fördern und mehr Wahlfreiheit für die Entscheidung zwischen Tätigkeit in der Familie und ausserhäuslicher Tätigkeit zu schaffen." MEISEL & SOWKA, *supra* note 86, at 524. However, this might not have been the only motive. The *Erziehungsurlaub* also grew out of the conservative party's desire to attract more voters and to encourage young couples to have more children to counter Germany's low birth rate. All in all, a variety of motives propelled this legislation, which accounts for its lack of focus on the bettering of women's economic situations.

V. A FRAMEWORK FOR ACHIEVING EQUALITY IN BOTH COUNTRIES

In both the United States and Germany, the main problem with the existing maternity leave provisions is the inability of the legislature to combine equal opportunities for women in the work place with women's unique ability to bear children. The combined experience of both countries, however, can provide a framework for offering equal opportunities in the marketplace together with better legal protection for women during pregnancy and its immediate aftermath. Whereas in the United States, Congress fails to take women's physical differences adequately into account, in Germany, parliament does not sufficiently emphasize equal opportunity. Both countries must learn to understand that the status quo perpetuates inequality as well as a social hierarchy that has made men the measure of all things.

First, women must be given the opportunity to choose freely whether to remain in the work force immediately before and after birth. When there are no medical grounds for a contrary decision women should not be forced to stay at home for a mandatory period of time. Any mandatory leave deprives women of their right to free choice and enhances the stereotypical picture of the weak woman needing protection. German policy makers must recognize that women have the right and the ability to decide on their own if and when to take pre- and post-birth maternity leaves. This decision should be left to the woman (and her physician) rather than to the legislature. The state would continue to be permitted to determine when the employer must give time off, but it could not force a woman to follow these recommended guidelines. Women should be allowed to make a free choice to return to work at any point during a given time frame, without the pressure that often exists in American companies to return as soon as medically possible. This proposal strikes a healthy balance between a woman's independent decision in a pressure-free environment and the state's right to pass legislation that establishes a maximum leave period that cannot be reduced unilaterally by employers.

The mandatory eight-week maternity leave in Germany also entails a variety of practical problems, especially in technical and professional positions. Women, who choose to do so, should be permitted to ease back into their jobs by coming to work for a couple of hours every day before they resume working full-time. This would allow them to stay in touch with developments at their workplace and to care for their newborn children while recuperating from birth. This option, which is offered by a number of American companies, seems to be working successfully because it promises advantages to both employer and employee. However,

in the United States such an opportunity should be combined with an extension of post-birth leave. Current medical opinion seems to consider two to six weeks as too short a leave. This is especially true when maternity leave cannot be extended after this period, which is company policy in many American enterprises.[96]

Second, the treatment of pregnancy as a disease or as a natural occurrence with an emphasis on the mother-child relationship has both advantages and disadvantages. In the United States, viewing pregnancy as a disability has helped to guarantee women certain minimum benefits that are a part of general disability benefits. On the other hand, it has attached the stigma of sickness to pregnant women although no disability exists.[97] In addition, this approach, combined with the lack of comprehensive health and disability insurance, will always disadvantage women since only they can bear children, whereas most other disabilities can occur to both men and women. Therefore, in order to allow women paid maternity leaves and guaranteed benefits during this time, it is necessary either to change the current attitude towards pregnant women or to institute national policies that will protect men and women in cases of sickness and disability. Again, it is important to realize that pregnancy does not have to be treated as a disability.[98] However, if such a perspective is adopted, a drive to implement the broadest possible medical coverage for all workers would be most beneficial. The long-term benefits of such coverage will most likely outweigh its short-term costs.

The German view of pregnancy as a unique experience for women has resulted in legislation that fosters cultural stereotypes. However, the problems with Germany's model could be remedied by deemphasizing the woman's role as mother and primary care giver.

Third, pregnancy and the period immediately following birth are often rather difficult times for a woman; additional insecurity should not be created. Consequently, it is necessary to allow the further accrual of benefits such as seniority rights and health insurance during these weeks of absence from work. Women should also be guaranteed their job, which will allow them to return to their old position. Although this might cause some complications for the employer, the current American assurance of the same or a comparable job is insufficient. In many cases, comparable

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96. RADFORD, *supra* note 26, at 18.

97. Many women who were never sick might find themselves after a birth stigmatized as workers who are frequently sick because they exhausted their sick days as part of their maternity leaves.

98. In fact pregnancy should not be viewed as a *disability*; it could be viewed as a special and unique *ability*. *See generally* MACKINNON, *supra* note 2, at 43-45.

jobs are located in different plants or offices, thereby substantially increasing the time that a woman spends commuting to work. The substitution of this job for her old position creates a hardship rather than an alleviation of the burden already resting on a woman. This additional difficulty might force her to accept another job closer to her home. It would be best to promise a woman her old position for a specific period of time. In the alternative, the guarantee of a comparable job should be more strictly construed. The Family and Medical Leave Act of 1993, if construed literally, incorporates such guarantees.

Fourth, in order to reduce the financial hardship on the female employee, maternity leave should be remunerated fully. The wage replacement could be partially paid by the state (out of general taxes or a fund financed by all employers independent of their percentage of female employees), thereby displaying its concern for new mothers, and by the employer, thus evincing consideration for its employees. This would alleviate the financial burden on the individual employer, who might otherwise tend to reject female employees.[99] Theoretically, under the PDA, female employees in the United States are covered by temporary disability insurance. However, since this insurance is mandatory only in five states, many companies do not offer this type of benefit. Furthermore, if it exists, it might often be insufficient because it does not offer a full wage replacement or does not cover the necessary period of recuperation. A mandatory temporary disability insurance with extensive coverage could contribute to the financial security of men and women since both are victims of temporary disabilities.[100] With the new elective benefit plans, the American employee has the option of buying certain types of insurance while excluding certain others. Women might want to obtain paid maternity leave insurance. The drawback of this approach is that choosing this insurance will necessarily exclude the woman from another benefit, which a man can include in his benefit plan because he will not require the maternity leave insurance.

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99. The issue of employers rejecting women because of their childbearing capacity will not be remedied under either the sameness or the difference approach. In both cases, employers might fear the financial and organizational problems caused by a potential pregnancy of the female employee. Although legally outlawing sex discrimination based on pregnancy will be helpful, it is not a panacea. *See generally* MACKINNON, *supra* note 2, at 1-5.

100. In fact, the United States should consider requiring mandatory health insurance. Although the current administration appears to be moving in this direction, all past efforts in this respect have failed miserably. *See, e. g.*, Oswald Johnston, *Democrat Plan on Health Said Close to GOP's*, L.A. TIMES, June 12, 1991, at A19.

Germany guarantees a full salary replacement during maternity leave. National health insurance pays a certain percentage of the salary and the employer is financially responsible for the difference between that percentage and the actual salary a woman has made on average during the three months immediately preceding her pregnancy.[101] This plan seems to have worked rather successfully, although many employers had initially voiced the fear that their budgets would not allow them to pay out such a substantial amount of money. Such a plan gives women the financial security to stay at home during the weeks directly before and after birth if they elect to do so.

Fifth, the policies outlined above benefit the woman only because she is the one who bears the child. However, such a distinction is not required for the time period in which either parent can choose to raise his or her children. Therefore, the option of parental leave should exist for either parent. Germany has tried to make this equal treatment a reality in the form of the *Erziehungsurlaub*. This option might decrease discrimination against women since employers must assume that their male employees take some time off to help raise their children. In addition, it could end the stereotypical role models that have existed in western societies for so long. Now fathers and mothers are given the opportunity to pursue a career and to raise their children together rather than relegating the woman to an inferior position in the home. *Erziehungsurlaub*, however, might not be the best approach to accomplishing these goals because it is singularly focused on the well-being of the child. Concern for the child's required bonding experience rather than for women's equal employment opportunities seems to have propelled this leave through the legislature. The *Bundestag* did not consider that any interruption of a career for one year (or longer) can set it back for a number of years or forever stall its upward movement. Moreover, the assumed caretaking by one parent presumably will hinder the development of more child-care centers for children under one year of age.

Lastly, the option fails to consider that children also require parental support and caretaking after the first few years of their lives. Most infant and school-aged children will become ill or require parental help at one point or another. Consequently, the more effective option would be to allow both parents a certain amount of sick and family days during one year until the child reaches a certain age. It would be essential to give both parents the same amount of days and not to allow them to carry the leave time from year to year or to use it for other purposes. In this way,

101. MuSchG §§ 13, 14.

men would be more likely to take time off to care for their children and share equally in the performance of household chores. In addition, any presumed stigma for men would be eliminated because all fathers would have to take time off for their children or forfeit their leave. This proposal follows the Swedish model.[102] Finally, employers could offer flexible work hours and work reduction for both parents to make it easier to combine family responsibilities with a career.

VI. CONCLUSION

In sum, the proposed plan will allow women to choose freely to bear and raise children without being disadvantaged in the marketplace. In order to accomplish this goal, it is necessary to combine the best features of the difference and the sameness approaches. In addition, Prof. MacKinnon's dominance approach adds the understanding that gender must cease to be utilized as a basis for inequality and that it is necessary to abolish the existing male dominance that relegates women to an inferior societal position before women will achieve true equality. In this respect pregnancy is of particular importance because this difference has been used to socially subordinate women. As Catharine MacKinnon stated, "the differences attributed to sex become lines that inequality draws, not any kind of basis for it."[103] In view of this statement, women should not be forced to take a mandatory maternity leave. It should be within their discretion to resume work within a prescribed, sufficiently lengthy period of time. Women should receive fully paid maternity leaves with a job guarantee and continuing job benefits. These features will account for their unique ability to bear children and will take into consideration the fact that women's positions at work depend on their situations at home. However, the raising of children is not physically unique to one parent but should be shared by both partners. In order to include men more actively in the upbringing of children, both parents should be provided with a number of family days spread out over their children's youth, which would allow both of them to spend time with their offspring.

The importance of well conceived maternity- and parental-leave programs are borne out by the impact of the role the mother has upon a woman's work history, which in turn strongly affects her (inferior) opportunities for advancement and her (lower) wage level. The most

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102. MARY RUGGIE, THE STATE AND WORKING WOMEN: A COMPARATIVE STUDY OF BRITAIN AND SWEDEN 272 (1984).

103. MACKINNON, *supra* note 13, at 218.

influential theories that account for the wage differential and explain the "pink ghettos" refer to the women's special biological function and the traditional roles women have fulfilled as housekeepers and mothers as reasons for women's subordinate positions in the labor market.[104]

The traditional female roles also seem to account for the discrepant work histories of men and women. On average, women tend to work fewer years, work fewer hours when employed, and exit the work force more frequently than do men. This is most often caused by child birth and by women's family responsibilities. In addition to shouldering the main burden of household chores, women generally are responsible for rearing children. Most importantly, they actually bear the children. It is this biological function and their traditional role as mothers (and housekeepers) that account for their erratic work histories. Consequently, policies that take these factors into consideration will in fact enhance women's equal employment opportunities.

There is indirect proof that the wage gap and sex segregation in the work force are at least partially due to family responsibilities because wage levels for women vary according to their family status. A greater proportion of single and childless women can be found in professional, technical, and administrative jobs that traditionally have been filled by men. In addition, the number and spacing of children determine the amount of money earned. Earnings over a woman's life cycle demonstrate the depressing effect of childrearing. The longer she leaves the work force and the more she tries to accommodate her work pattern to her family responsibilities, the greater the difference to the average male wage earner in the same age group.[105]

These facts demonstrate the importance of a maternity leave policy that enables women to combine pregnancy/maternity and a career most effectively without reinforcing current stereotypes of women's roles. As we have seen, neither the German nor the American policies achieve these goals. Whereas the German policy fails to treat women equally in areas where this would be easily possible, the American approach does not consider a woman's biological function sufficiently to protect her from the vagaries of the marketplace. The suggestions outlined above constitute a strategy that combines features of both systems so as to protect children and preserve equal opportunities for women. It is now time for all of us

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104. For an explanation of the human capital investment theory, the discrimination and labor market barriers theory, and the split market theory, see June O'Neill, *Earnings Differentials: Empirical Evidence and Causes*, *in* SEX DISCRIMINATION AND EQUAL OPPORTUNITY 71-76 (Gunther Schmid & Renate Weitzel eds., 1984).

105. *See generally*, HEWLETT, *supra* note 1, at 82-83.

to realize that both sexes must have equal opportunities in the workplace and that the biological uniqueness of one cannot be used as a pretext to disadvantage it. Most importantly, this approach will allow mothers and fathers to pursue careers while sharing equally their responsibilities as parents.