NOTES

ARE WOMEN WORTH AS MUCH AS MEN?: EMPLOYMENT INEQUITIES, GENDER ROLES, AND PUBLIC POLICY

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Gender inequities in employment are apparent in many different contexts and have numerous components. The most quantifiable measure is a comparison between the relative earnings of men and women. A related measure is the distribution by gender across occupational lines and the average relative salaries of jobs that tend to be predominantly occupied by workers of one gender. All available statistics show that men earn significantly more than women.[1] This remains true no matter what year the figures are from, or whether they are weighted according to age, labor force status, or educational attainment.[2] If financial compensation for work is any indicator, women are worth significantly less than men in the United States.

Women are not worth as much as men in the labor market because notions of traditional gender roles continue to result in the prescriptive assignment of responsibility for children and home to women. Although it may be true that more women than men would prefer to care for home and family, even in the absence of cultural pressure, not all women desire such a role. It is equally true that not all men would eschew primary caretaking roles. In a fundamentally fair society, the talents and desires of each individual, instead of the biological accident of gender, will decide their appropriate role. Although it is currently possible for an individual to rise above cultural pressures and claim a role different from that encouraged for their gender, the mere fact that a hurdle can be cleared does not justify its existence. The strong influence of prescriptive gender roles is an unnecessary hurdle bar-

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1. *See, e.g.*, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 (113th ed.) 428, Table No. 673; Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, A Model for the Nation*, 1 DUKE J. GENDER L. & P. 66, 66-67 (1994).

2. *See* Morley Gunderson, *Male-Female Wage Differentials and Policy Responses*, 27 J. ECON. LIT. 46, 48-53 (1989) (noting that studies which factor out greater numbers of variables find smaller gender wage gaps, but certain control variables reflect discrimination themselves and should not be factored out).

ring individual choice and a major factor in gender inequities in employment.

This Note argues that the elimination of existing gender inequities in employment will require, first, the establishment of institutional and structural support for families such that concurrent commitments to family and career are possible; second, the abandonment of prescriptive gender roles and expectations; and, third, an appropriate increase in our cultural valuation of nurturing work, particularly the work of childrearing. The result will be that both men and women are equally able to choose whether to commit primarily to career or family, or to pursue concurrent involvement. Section One examines the manifestations and causes of gender inequities in employment in the United States. Section Two examines current public policy with respect to gender inequities in employment and prescriptive gender roles in the family, and offers a brief survey of the cumulative legislative and judicial history with respect to gender inequities in employment. Section Three identifies areas that have not been addressed effectively on a public policy level and suggests that a reformulation of gender ideology is necessary to address gender inequities in employment. The argument is that a causal relationship exists between first, the persistence of gender inequities in employment; second, the persistence of the cultural assumption that it is primarily the woman's responsibility to care for the household and children; third, the cultural devaluation of that work, and fourth; the consequential devaluation of the women themselves who are performing that devalued work or other work. As long as women continue to take primary responsibility for family and home without cultural and institutional support, gender equity in employment cannot be achieved. A woman who has to divide her attention between family and career cannot compete effectively in the marketplace with men who are able to choose—without risk of social stigma—to devote the majority of their attention to their career.

Overt gender discrimination in the workplace has been adequately addressed by federal policy.[3] There still remains, however, the problem that comparable worth proposals attempt to address: namely, that women are "stuck" in lower paying, gender-segregated jobs with few opportunities for upward mobility. An effective, feasible solution, however, must go beyond job evaluations and comparable worth to address the outdated notion that it is a woman's responsibility to rear her children without the benefit of institutional support, and that the work of caring for children is not valuable to our society. Public policy must address childcare and parental leave as social issues—not women's problems. A wide range of options should be made available to all families, whether one or both parents choose to work outside the home. We must create a system in which parental and career commitments are neither mutually exclusive nor gender-driven. The first step in creating such a system must be a shift in public opinion and governmental policy from viewing the responsibility for childrearing as the private folly of

3. I do not contend that gender discrimination in employment is no longer a problem, I merely assert that the proper legislative tools to combat discrimination—as it is currently defined—have been developed. *See infra* Section Two.

individual family units, to a recognition of the stake society as a whole has in raising generations of well cared-for children.

I. WOMEN AND EMPLOYMENT: IDENTIFYING INEQUITIES AND THEIR SOURCES

Throughout history, women in western culture have been considered the inferior sex. Ubiquitous cultural ideals have sharply delineated appropriate gender roles and separate spheres of ambition for men and women—while men have both controlled and enjoyed access to the opportunities of the world at large, the acceptable realm of experience for women has traditionally been confined to the home.[4] While money and power have traditionally defined success, society has seen fit to "protect" women from all means of acquiring them other than attachment to a man, be he father or husband. Although most laws allowing explicit gender discrimination have been repealed, women in the United States still encounter the legacy of these laws in the form of cultural norms and pressures, and in the reality of gender inequities in employment.

Labor force participation rates for women, including wives and mothers, rose dramatically in the mid-twentieth century,[5] as women began to defy traditional ideals. Women's income, however, remained pitifully small in comparison to that earned by their husbands, fathers, and sons.[6] And as women increasingly joined the paid workforce[7] for reasons other than pure financial need, society responsed with less than wholehearted support. Wom-

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4. This is not to say that women in the labor market is a new phenomenon, rather that the culturally acceptable or ideal place for women has been in the home. Women with financial need have always worked outside the home. For men of all classes, however, financial need has been an irrelevant factor in the decision to seek employment. For women, the traditional ideal has been that, in the absence of financial need or particular talent in a given area, it is preferable for her to stay home and care for her family. *See infra* notes 12-24 and accompanying text. Although the reality of labor force participation has varied demographically, the traditional ideal has existed at almost every class level. *See infra* note 32.

5. In 1960, 23,240,000 women over age sixteen were members of the civilian labor force. That number rose in 1970 to 31,543,000, and continued to rise: in 1975 it was 37,475,000; in 1980 it was 45,487,000; in 1985 it was 51,050,000; in 1990 it was 56,554,000; and in 1992 it was 57,798,000. U.S. BUREAU OF THE CENSUS, *supra* note 1, at 394, Table No. 623. In 1992, 9,500,000 of these employed women had children under the age of six, and 13,200,000 had children from ages six to seventeen. Of these 22,700,000 mothers employed outside the home in 1992, 16,800,000 (74 percent) were married with their husband present in the home. *Id.* at 400, Table No. 633.

6. For example, in 1983, men and women working full-time for either wages or salary had median weekly earnings of $378 and $252 respectively; in 1985, men and women respectively earned $406 and $277; in 1990, earnings were $485 and $348; and in 1992, earnings were $505 and $381. U.S. BUREAU OF THE CENSUS, *supra* note 1, at 426, Table No. 671. *See* Hartmann & Aaronson, *supra* note 1, at 66-67. Although the pay gap has narrowed somewhat, it remains significant.

7. It is important to distinguish between the work done outside the home at paid labor and the unpaid work done at home. The popular use of the term "working women" to denote women who work in the paid labor force rather than in the home shows that our cultural conceptions devalue that work traditionally done by women in the home. Women who work *in* the home work just as much as those who work *outside* the home—they are simply not compensated financially for that work. Lack of financial remuneration does not change the character of the labor performed—it is still work and it should be valued as such.

en were "allowed" to go to work, as long as they did not neglect their primary responsibility—care of their home and of their families.

In the mid-1960s, feminist activists sought to raise the consciousness of the average woman to the crisis of women's rights.[8] Political groups were founded to lobby against sexual discrimination and sexual harassment. As a result, legislative provisions intended to allow women equal rights were passed on federal, state, and local levels.[9] In the words of a popular cigarette advertisement: "You've come a long way, baby".[10]

Despite these advances, the struggle is still not over in 1994. Women in the labor force continue to earn average salaries far below those earned by men. The proportional earnings of women have remained relatively constant, and consistently low, over the past thirty years. There is an appallingly low percentage of women in high-level positions.[11] The cultural assumptions are still that, in most double-income families, it is the man's income that is essential, while the woman is earning a paycheck "just to help out."[12] In other words, the cultural belief is that the man has a career, and his wife has a job—he is ultimately responsible for finding the money that is needed.[13] Because men typically earn more than women do—and in our culture money determines relative power and authority—women are caught in a vicious cycle that will continue to perpetuate itself. When someone in a family needs to stay home from work with a sick child, or needs to wait for a repairman, it is most often the woman who does so.[14] This is an economi-

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8. Ironically, feminists have historically been seen by many not as a group for women, but as a group against men. This characterization is consistent with the cultural pressures that confine appropriate women to subordinate, supportive roles. The negative connotations applied to the feminist movement gave credence to hostility directed at its proponents—bias which still exists today. *See* Mary J. Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. LEGAL EDUC. 183, 185 n.7 (1988) (noting the negative connotations attached to the terms 'feminist' and 'feminism'); Mary Dunlap, *The "F" Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L. J. 251, 251-52 (1989) (arguing that the negative connotations associated with the word "feminist" are a result of society's refusal to accept the feminist commitment to empower women). *See also Women in Law: The Glass Ceiling*, A.B.A. J. 49 (June 1, 1988) (chronicling the status of women in the legal profession by examining both statistical and anecdotal sources of gender bias and hostility).

9. *See infra* Section Two.

10. Virginia Slims Cigarettes. Note, however, the irony apparent in the tone of this particular advertising campaign—while praising the progress made towards equal rights for women, the advertisers chose to refer to women using a term of infantilization.

11. Consider, for example, that the 103d Congress, elected in what was widely heralded as the "year of the woman," boasts only 53 women as members—less than ten percent of its total. U.S. BUREAU OF THE CENSUS, *supra* note 1, at 277, Table No. 443.

12. *See* Rose Laub Coser & Gerald Rokoff, *Women in the Occupational World: Social Disruption and Conflict*, WOMEN AND WORK: PROBLEMS AND PERSPECTIVES 39, 44 (Rachel Kahn-Hut, Arlene Kaplan Daniels, & Richard Colvard eds., 1982).

13. *See* Myra H. Strober, *Two-Earner Families*, *in* FEMINISM, CHILDREN, AND THE NEW FAMILIES 161, 177-78 (Sanford M. Dornbusch & Myra H. Strober eds., 1988) (noting that, in dual-career families, it is generally the wife who accommodates her career to family responsibilities).

14. Coser & Rokoff, *supra* note 12, at 42. *See* J. Paul Leigh, *Sex Differences in Absenteeism*, Vol. 22, No. 3 INDUSTRIAL RELATIONS 349, 360 (1983) (noting that "women apparently assume more responsibility for children and report more absences [from work] as the number of

cally rational choice—she is usually the one who earns less money so her presence at work is therefore less valuable.

Cultural norms work strongly to tie women to the home. There is an inherent value placed on the mother-child bond in our society. Women are socialized to be nurturing and caring, while men are socialized to be ambitious and career-oriented. Women are then "better" at childcare and organizing the home because society has prepared them for such a role. Women are more likely to feel responsible for a clean house, while men are more likely to say that it does not matter.[15] If a man chooses to stay at home with his children rather than work outside the home, and therefore chooses to place a greater importance on his wife's career than on his own, that family is looked upon as not quite normal.[16]

Even in homes where both parents work and arrangements have been made for paid help to assist with childcare and housework, it is still the woman who directs and supervises domestic maintenance.[17] When men and women speak of performing household duties, the usual description of

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young children in the household increases"); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1201-02 (1991) (noting that "[e]mployers expect absenteeism and limited job tenure of married women, who may leave their jobs to have children or to follow their husbands to a new job").

15. Housework and childcare are still seen as primarily the woman's responsibility even in homes where both spouses work outside the home in equally demanding careers. *See, e.g.*, ARLIE HOCHSCHILD, THE SECOND SHIFT (1989) (finding that in families where both parents work outside the home, men do not contribute equally to care of the household, thus resulting in women putting in a 'second shift' both before and after they go outside the home to work equivalent to an extra month of work per year as compared to their husbands). *See also* Strober, *supra* note 13, at 168-72 (surveying evidence and noting that women employed outside the home deal with their increased time pressures by decreasing the time spent on household production, volunteer and community work, leisure, and sleep, but that the decrease in time spent is insufficient to explain the gender wage gap because time-use studies demonstrate that women work more intensely than do men).

The institutions of our popular culture play a large role in perpetuating gender role assumptions. The norm that women are responsible for childcare and housework is assumed in advertisements for foods, cleaning aids, and children's toys and clothes—in almost every television advertisement for these products, women are shown as the primary actors. Adherence to appropriate gender roles is also apparent in children's cartoons, television shows, and books. *See Today Show: Working Mother Magazine Survey on Sexism in Cartoons* (NBC Television Broadcast, Dec. 31, 1990); Katha Pollitt, *The Smurfette Principle*, N. Y. TIMES MAG. 8-10 (April 7, 1991). These images are powerful components of children's education—one study indicated that eighty percent of children have television characters as role models. *Today Show, supra.*

16. *See* Coser & Rokoff, *supra* note 12, at 44 (noting that "[t]here is a negative connotation to the term 'career woman.' . . . [n]o such derogatory term exists for men, since their careers are taken for granted"). *See also* BEJAMIN SPOCK, M.D., DR. SPOCK ON PARENTING 28-33, 42-81 (1988) (discussing the importance of proper sex role identification, proper mothering, and a father's appropriate role in childrearing).

17. *See* Joseph H. Pleck, *The Work-Family Role System, in* WOMEN AND WORK, *supra* note 12, at 101, 102-103. In dual-career families where equitable divisions of labor between husband and wife are achieved, the solution is generally dependent on the hiring of another woman to provide childcare and housework for low wages. *See* ROSANNA HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES 159 (1986) (noting that hiring an individual is the most common form of childcare arrangement in dual-career families, but that such a system creates career opportunities for some women by denying those opportunities to other women).

men's participation is that he "helps" with "her" housework; she hires and instructs the cleaning woman and the baby-sitter. In other words, we have progressed to the point where a woman is allowed to delegate her responsibilities in the home, but it is still clearly her responsibility to make sure the children are cared for and the house is clean.

The behavior of women contributes to the perpetuation of traditional gender roles as much as does the behavior of men. Sociologically, women tend to conform to their expected roles, and therefore sacrifice some of their growth potential at work. Women tend to show less attachment to the labor force than do men, particularly when they have children.[18] While men usually cite inability to find work as their reason for staying home, women are more likely to say they have to attend to household duties.[19]

Debates about parental leave and childcare seem to hover more often around the question of whether women should be working, and the effect that a mother who works outside the home has on her children's well-being, rather than on the specifics of an actual policy.[20] A woman is criticized for her lack of dedication to her job if she is unable to maintain a strict separation between work and family.[21] Yet a man who allows his work to encroach upon his family time is rewarded for his ambition.[22] Although many families are able to work out equitable solutions, the structure of the discussion of childcare and women's choices shows the inequity inherent in our cultural division of labor. There is not the same urgency applied to the parallel choices men make—for men, childcare is an option, not an expectation.

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18. *See* Leigh, *supra* note 14, at 349, 360; Crain, *supra* note 14, at 1200-02.

19. In 1975, 79.2 percent of women and 1.5 percent of men reported that keeping house was their reason for being out of the labor force. In 1988 that response came from 62.7 percent of women and 2.3 percent of men. U.S. BUREAU OF LABOR STATISTICS, Jan. 1976, Table 29 and Jan. 1989, Table A-54, *as compiled in* SARA RIX, THE AMERICAN WOMAN 1990-91: A STATUS REPORT 382 Fig. 7 (1991).

20. *See, e.g.*, Strober, *supra* note 13, at 161. *See also* Janet G. Hunt & Larry L. Hunt, *Dilemmas and Contradictions of Status: The Case of the Dual-Career Family*, *in* WOMEN AND WORK, *supra* note 12, at 183-84 (noting that the focus of discussions about management of household in the transition from "two-person careers" to "two-career families" demonstrates that the contribution of the traditional wife has been discounted).

21. *See* Crain, *supra* note 14, at 1178-79. Crain notes:

> At best, women who occupy roles as both workers and mothers are seen as having a 'conflict of allegiance' between home and work. Because complete loyalty to the employer and the job is the male norm in the public sphere, attempts by women to accommodate the two spheres are perceived as evidencing a lack of commitment to the work world. Thus, women workers are caught in a catch-22: they are perceived as aggressive and unfeminine if they do not assume primary responsiblity for child care and family obligations, and as uninterested in market work if they attempt to juggle both roles.

Id. (citations omitted).

22. *See* ROBERT S. WEISS, STAYING THE COURSE: THE EMOTIONAL AND SOCIAL LIVES OF MEN WHO DO WELL AT WORK (1990) (concluding that men can only be successful at work if they have a wife at home whose primary responsibility is the care of the household and the children); Martha H. Peak, *Fathers Earn The Most . . . When Their Wives Stay Home*, Vol. 83, No. 2 MGMT. REV. 6 (1994) (finding that "[t]raditional married men—those who have children and whose wives don't work—earn an average twenty percent more per annum than family men with children and employed wives").

Although women are moving out of the home and into the job market in increasing numbers, there has been no parallel movement of men into the domestic sphere. Consequently women are increasingly called upon to be superwomen—to juggle responsibility for both career and family, while maintaining a strict separation. The problem becomes apparent when one considers that women are still working with the same resources, but trying to accomplish twice as much.[23] Women are often expected to handle both career and family with little or no structural assistance.[24] Simultaneously, however, women are told that the reason they earn less money than men do and have less prestige in the job market is not because of unfair discrimination, but instead because they are not as reliable as men, are unlikely to devote full attention to their job, and do not have the same wealth of experience or the same levels of education.

A. DEVALUATION OF WOMEN AND WOMEN'S WORK: EXPLAINING GENDER INEQUITIES IN EMPLOYMENT

The work that women do, both in the labor force and in the home, tends to be supportive,[25] a quality traditionally associated with femininity.[26]

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23. *See* HOCHSCHILD, *supra* note 15 (finding that, in families where both parents work outside the home, men do not contribute equally to care of the household, thus resulting in women putting in a 'second shift,' both before and after they go outside the home to work, equivalent to an extra month of work per year as compared to their husbands).

24. *See* JUDITH D. AUERBACH, IN THE BUSINESS OF CHILD CARE (1988). In discussing "the ideology of mothering that locates primary responsibility for the care of children with mothers in the privacy of their homes," Auerbach notes:

> This ideology [of mothering] contends that it is natural and necessary for mothers to care for their small children, that they should do so in their own homes, and that it is therefore inappropriate for mothers to work outside the home if it conflicts with this responsibility. It also contends that there is no place for public involvement or expenditure in such a private, family activity. Extrafamilial child care is thus resisted by many in our society because of the belief that nurturance is woman's work, that it is not something that should be compensated, and that government should not intervene in the private lives of families and family members.

Id. at 10.

25. In 1992, for example, while women were 99 percent of all dental assistants, they were only 8.5 percent of all dentists. Women were 98.6 percent of all kindergarten and pre-school teachers and 85.4 percent of all elementary school teachers but only 40.9 percent of all college or university level teachers. Similarly, women were 99 percent of all secretaries, 97.3 percent of all receptionists, 95.9 percent of all childcare workers, cleaners, and servants employed in private homes, 98.7 percent of all out of home childcare workers, 87.6 percent of all librarians, 79.6 percent of all waiter/waitresses, and 87.7 percent of all welfare service aides, but only 8.5 percent of all engineers, 3.3 percent of all repairers or mechanics, and 4.6 percent of all truck drivers. Women were 94.3 percent of all registered nurses, 89.4 percent of all nursing aides, orderlies, and attendants, and 76.7 percent of all legal assistants, but only 20.4 percent of all physicians and 21.4 percent of all lawyers and judges. U.S. BUREAU OF THE CENSUS, *supra* note 1, at 405-7, Table No. 644.

26. *See* Crain, *supra* note 14, at 1201 (noting that "[w]omen's early socialization teaches them to expect to spend their lives as housewives and mothers, encouraging a career only when it is an extension of the serving, subordinate role in the family"); KRISTEN M. SWANSON-KAUFFMAN, WOMEN'S WORK, FAMILIES AND HEALTH: THE BALANCING ACT 14 (1987) (commenting: "[m]other: another word for lover, nurturer, protector, cheerleader, madonna, martyr, carpooler, and cookie-baker. . . . [c]areer: a metaphor for commitment, status, security, chal-

There is an inverse relationship between the percentage of women employed in a field, and the average hourly salary in that field.[27] The cultural perception of "women's work" is that its purpose is primarily to help, rather than to do, and that it requires supervision and direction. The obvious trend of feminine predominance in certain fields has socialized our society into believing that these jobs are appropriate for women, and consequently, inappropriate for men.[28] Sex-segregation of jobs is a significant factor in the lower earning potential of women.

Economic models, particularly neo-classical[29] and segmented labor market theories,[30] provide insight into the lower earnings of women. There are

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lenge, travel, competition, success, and choice").

27. *See, e.g.*, U.S. BUREAU OF THE CENSUS, *supra* note 1, at 428, Table No. 673. Women also earn less than men even in the same fields. *See id.*

28. A myth of gender-appropriate occupations continues to dominate in our culture. One Gallup poll asked the question: "Supposing a young man (woman) came to you for advice on choosing a line of work or career. What kind of work or career would you recommend?" The reported answers indicated that there were fourteen career recommendations mentioned for men, and nineteen suggestions for women. Of the nineteen suggestions for women, there were six choices that were not ever mentioned for men—nursing, secretarial, housewife, social work, merchandising, and civil service. Computers, engineering, skilled crafts, electronics, law, military, accounting, and auto mechanics, however, were all mentioned as choices for men significantly more often than for women. Teaching was also mentioned for both men and women—it came up, however, more than twice as often for women than it did for men. *Survey No. 253-G*, THE GALLUP POLL: PUBLIC OPINION (1985).

29. The neoclassical approach to the labor market is based on several assumptions: first, the value of an employee's services is determined by the individual's productivity; second, labor can be viewed as a commodity, and as such, it necessarily conforms to the inherent systems of supply and demand. Therefore, the most efficient system will be one in which the market is allowed to function without interference, and the wage paid to a worker in a free market is the true and best measure of that individual worker's productivity. The neoclassical economic explanation for the gender pay gap rests on the tenets of supply and demand—simply stated, there is too much labor available. Because the supply of labor so far outweighs the demand for workers, employers find it necessary to rank prospective employees according to potential productivity, and therefore distribute jobs based on the employer's speculation with respect to a worker's potential. Inherent in the evaluation of potential productivity is a tendency to weight decisions according to personal preferences. Because the employers making these decisions are predominantly men who are operating in a system weighted towards the preference of men, employers will tend to choose men over women. In other words, gender inequity in employment is a vicious cycle—as long as women remain disproportionately represented in lower level jobs, they will continue to be denied access to the influence necessary to affect the allocation system, and will continue to be relegated to lower level jobs. *See generally* Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth* 21 RUTGERS L. J. 269, 326-41 (1990).

30. The segmented labor market model differs from the neoclassical model in its basic assumption that neither the economy as a whole, nor individual labor markets, operate under a single set of rules. In other words, the labor market is segmented. *See generally* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1985). Doeringer and Piore address the lack of mobility in low-income labor markets, finding that the labor market is segmented according to whether jobs are filled by competitive or by administrative means. The internal labor market, which governs mobility within fields, is controlled by administrative rules and procedures. The external market is controlled by economic factors, such as the rules of supply and demand, and the evaluation of human capital. Competition only exists at the entry level, or in the external market; after that advancement depends on movement along mobility chains that are determined by the internal market. Upper

two major factors that emerge from a discussion of these economic theories to account for the gender pay gap. First, women are different from men in terms of education, work experience, and labor force attachment. Because women are not as free to make investments in their human capital, they are more likely to settle for low-cost, low-return jobs at the expense of a higher earning potential. Although this difference between the average investment in human capital level of men and women may be lessening, it is a slow process, and the effect on the market is not yet apparent. Second, in the determination of human capital, work history and labor force attachment are considered values that the market neither can nor should be expected to remedy. In the market at large, men are categorically assigned a higher level of work experience and labor force attachment based on a rational gamble that workers adhere to traditional gender roles.[31] If traditional gender roles are adhered to, women who enter the job market have typically prepared for two types of employment—work in the home and work in the market—and have then split their available resources between two separate occupations. All women then earn less because the cultural assumption is that each individual woman will act in accordance with the norm and thus be more likely to choose a job that requires less training, has little risk attached, does not require physical labor, and allows workers to enter and leave the labor force multiple times. As a group, men do not have the drain on their resources that women do, and are therefore at an advantage in the development of their human capital. Women are not able to compete effectively with men in the labor market due to the traditional feminine association with the family and the domestic sphere.

Economic models do provide insight into the lower earnings of women relative to men, but theories based on the workings of a free market are only one part of the larger picture. Although there is a value to explanation, a descriptive economic model is inherently limited to exposition; it has no remedial value. Regardless of explanations, there remains the inescapable fact that the value of women's work, both in the home and in the labor market, has been consistently devalued throughout history.

It is clear that our culture adheres strongly to rigid definitions of gender-appropriate characteristics and behavior; these cultural beliefs translate in the labor market to gender-appropriate divisions of labor and occupational segregation.[32] Men's participation in the labor force is usually discussed in

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level jobs are designed for mobility. Lower level jobs, on the other hand, are more specific, and have fewer opportunities for advancement. *Id.* at 165-69. Women tend to be overrepresented in these lower level jobs. *See supra* note 25. The implication is that, whatever the reason for women's original placement in these lower level jobs, the likelihood that any individual worker will remain in a lower paying job is explained by the rules of the market.

The association of a job with men, and consequently with masculine characteristics, makes it worth more in the market. The association of a job with women, and consequently with lower-valued feminine characteristics, makes it worth less. *See* Awilda R. Marquez, *Comparable Worth and the Maryland Era*, 47 MD. L. REV. 1129, 1150 (1988) (noting that "[j]obs are undervalued because women hold them").

31. But compare this cultural tendency to the Supreme Court's jurisprudence, *infra* note 99, finding unconstitutional laws treating men and women differently based on statistically verified differences in the aggregate.

32. The 'myth of separate worlds' is one explanation for the way the idea of women's

the context of a job-model, while similar discussions about women's participation tend to occur in the context of a gender-model.[33] The masculine job-model emphasizes working conditions, opportunities, and problems encountered therein as the primary source of explanations for what men do at and want from work. The gender-model, on the other hand, tends to ignore job type and working conditions, focussing instead on personal characteristics, family circumstances, and an assumed "family first" commitment in explaining how women feel about their paid jobs and what they do at them.[34] The behavior of women, and the societal constructs which encourage it, are as much an issue in pay equity as is the behavior of men and the behavior of employers.

If, for the sake of argument, we accept the proposition that women desire to make different choices than men do, the next logical question still must be: Why are our social norms such that women's work is devalued? Stereotypical views of the differences between boys and girls affect how each individual develops a personality and assumes a role in society.[35] Part of

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work became delineated from the idea of men's work. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977). Prior to the industrial revolution, according to Kanter, there was no real separation of home and work; consequently, there were no clearly delineated separate domains for men and women. This is not to say that men and women were the same; there has always been a separation between appropriate feminine attributes and behaviors and appropriate masculine attributes and behaviors. The pre-industrial cultural norms did not extend, however, to the point of separate spheres for each gender. There was simply a difference in the type of behavior that was socially acceptable for men and for women within any given sphere. With the growth of industry and urbanization, however, the separate spheres of family and work were created. As these separate spheres developed, men became associated with the role of wage-earner, while women became associated with the role of homemaker; men became associated with the concept of public, women became associated with the concept of private. Family and work came to be seen as separate domains that should not be combined. The association of men and women with the different spheres then came to imply a difference in capabilities and potential. As time went on, men and women conformed to the myth and each sex became proficient within its separate domain, and less competent in the domain of the other. Although the actual separation of public and private domains was not a reality for the majority of America, it was for the upper-class. Lower- and middle-class families often had to have two or more earners in order to survive economically. Because of the upper-class association, however, the concept of separate spheres for men and women evolved into a norm to which members of all classes aspired. The social conditioning which resulted from the rise of this norm led to the widespread belief during the twentieth century in the essential nature of the separation of work from family, and the resulting separation of appropriate gender roles. *Id.*

33. Roslyn L. Feldberg & Evelyn Nakano Glenn, *Male and Female: Job Versus Gender Models in the Sociology of Work*, *in* WOMEN AND WORK, *supra* note 12, at 65.

34. *See supra* notes 12-19 and accompanying text. *See also* David W. Moore & Alec Gallup, *Male Bosses Still Preferred Over Female Bosses*, GALLUP POLL NEWS SERVICE (1993) (noting particularly that women express more sexist views than men in their choice of boss).

35. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

In support of the notion that family is conceived of as a woman's primary responsibility, consider, for example, the teachings of Dr. Benjamin Spock—"The Baby Doctor"—a veritable cultural icon. For years, millions of mothers have listened to Dr. Spock religiously and raised their children according to his prescriptions. Like most other influential childrearing authorities of the last century, Dr. Spock includes in each edition of his book maxims supporting the ubiquitous cultural belief in the inherent value of mothering, as op-

the way in which people view the sexes differently involves ascribing different reasons for success and failure to women and to men. In other words, people tend to believe that there are some things that a woman will do well, and other things that she will not do well—based on her gender, rather than on her individual aptitudes.[36] The same process applies to men. This is, however, a subtle process. Gender-based occupational segregation is related

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posed to parenting or fathering. In his original 1945 edition, Spock includes a final chapter entitled "Special Problems". The table of contents lists the following subsections: Traveling With a Baby; The Premature Baby; Twins; Separated Parents; *The Working Mother*; The Fatherless Child; The Handicapped Child; and The Adopted Child. BENJAMIN SPOCK, M.D., THE COMMON SENSE BOOK OF BABY AND CHILDCARE (1945) (emphasis added). Under the subtitle "The Working Mother," Spock admonishes: "[i]f a mother realized how vital her love and care is to a small child, it may make it easier to decide that the extra money she might receive from an outside job is not so important after all." *Id.* at 484. The same sentence appeared in the 1970 edition, but by that time the 'problem' of working mothers had acquired a more prominent position—it appeared on page three. BENJAMIN SPOCK, M.D., BABY AND CHILDCARE (1970).

Dr. Spock made substantial revisions to his influential book three decades after its original publication. In the 1976 edition, Spock removed the heading of working mothers from the section on special situations and added an introduction advocating egalitarian parenting. BENJAMIN SPOCK, M.D., BABY AND CHILDCARE (1976). He admonishes both parents to recognize the equal right of each to a career, and encourages parents to make an attempt to be equally involved in parenting. He does note that it will most often be the mother who is the primary caretaker, but insists it should be her choice to be so. In his 1985 edition, Dr. Spock betrays his new egalitarian stance, however, in his differential advice to men and women in the section on children with only one parent. Under the heading of The Fatherless Child he advises: "The mother's spirit is most important. . . .The important thing is for her to go on being a normal human being, keeping up her friendships, her recreations, her outside career if she has had one, at least on a part-time basis, and her outside activities as far as she can." BENJAMIN SPOCK, M.D. & MICHAEL B. ROTHENBERG, BABY AND CHILDCARE 672-73 (1985). To the father of a motherless child, however, he offers diametrically opposed advice:

> The father in most cases will have to stick to a full-time job; but he should scrupulously reserve the major part of his after-work hours to be with his child. . . . If his social or romantic interests are pressing he can do a lot of his entertaining at home and try to get his child included in his invitations to dine with others.

Id. at 674. Spock appears here to be reinforcing a stereotype that says women should take primary responsibility for childcare. As a result of that primary responsibility, a mother would be more likely to be over-involved in her child's life, while a father would be more likely to be under-involved. *See* SPOCK, *supra* note 16, at 28-31, 31 (1988 version, discussing whether "a mother of a baby or preschool child should go back to an outside job"). With respect to a parent's decision to work outside the home, Dr. Spock notes:

> For many women the best compromise, when it is possible, is to start with part-time work. . . .
>
> In fairness, a father should be willing to cut down to a part-time job so that the mother won't have to sacrifice so much of her outside work time. *But some fathers are still not ready to think of themselves as care givers, and even in families wher the father is willing to assume such a role, this may not be practical.*

Id. at 31 (emphasis added). *But see* BENJAMIN SPOCK, M.D., & MICHAEL B. ROTHENBERG, M.D., DR. SPOCK'S BABY AND CHILD CARE 27-31, 30 (1992) (noting that child care should be equally shared by mothers and fathers and that "[t]he subordination of women is brought about by countless small acts beginning in early childhood. . . . [of] thoughtless expressions of prejudice or of old tradition").

36. *See* Richard M. Levinson, *Sex Discrimination and Employment Practices: An Experiment with Unconventional Job Inquiries*, *in* WOMEN AND WORK, *supra* note 12, at 54; Crain, *supra* note 11, at 1168.

to the perceived attributes of men versus those of women; because it is the qualities associated with being male rather than the fact of one's gender that gain someone a more favorable position in society and the labor market, the phenomenon of male bias in rewarding work is difficult to regulate. It is not overt gender discrimination that is occurring. Rather, it is a cultural tendency to view certain characteristics as more favorable, while simultaneously tending to assign those qualities to a given gender. If a job is perceived as one requiring typically feminine attributes, it will be paid less because the subjective, cultural evaluation of the attributes required by the job is that they are inherently less valuable to society. If a woman is doing either a neutral job, or one which is viewed as requiring masculine characteristics, she will be seen as bringing to that job her feminine attributes, and the cultural tendency will be to pay her less for the same work.[37] In other words, the cultural devaluation of women leads to the cultural devaluation of women's work, which in turn contributes to the gender pay gap.

B. MOTHERHOOD: A LOFTY PROFESSION UNWORTHY OF COMPENSATION?

Our culture places a higher ideological value on mothering than on fathering or parenting. Women are assumed to be better primary caretakers, and gender roles prescribe mothering as a norm for women.[38] The reality that mothering is a financially uncompensated time commitment almost exclusively assigned to women, in synergy with the cultural connotations of the word mother, substantially contributes to gender inequities in employment. Yet the fact is that parenting talent is not synonymous with gender—prescriptive gender roles assigning the role of caretaker to women and the role of breadwinner to men hurt both men and women.

Because only women can bear children,[39] and children need care, the universal expectation has been that motherhood should be the central role and responsibility in a woman's life.[40] Demographic changes have occurred, however, that should affect this expectation. First, although women are still the only gender capable of bearing children, the fact is that they are having

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37. *See* WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 93 (D. J. Treiman & Heidi I. Hartmann eds., 1981) (finding that "several types of evidence support our judgment that it is true in many instances that jobs which are held mainly by women and minorities pay less at least partly *because* they are held mainly by women and minorities").

38. *See supra* notes 15-22 and accompanying text.

39. Although the medical technology has been developed to produce 'test-tube' babies, the process has not yet become a norm in American culture, and is not likely to become one in the near future.

40. Plato is a notable exception. He made the revolutionary suggestion that women of the 'guardian' or upper class should be educated and allowed the same opportunities as the men of that class, and should not, therefore, be burdened with childcare. Even Plato, however, felt that the care of the children of the community (who were to be held in common) should be administered by nurses, who were to be drawn from the women of the third class. Mothering was still to be women's work, it was just that some women were to be exempt. In a way then, Plato even contributed further to the devaluation of the work childcare by suggesting that women of the upper class would benefit from the exemption. *See* THE REPUBLIC OF PLATO (Francis M. Cornford ed., 1945).

fewer children.[41] Logic would dictate that, because women are having fewer children, childrearing has become a less time-consuming occupation. The increase in average age at marriage[42] and the increase in average life-expectancy,[43] would also tend to indicate that women are devoting a smaller percentage of their lives to raising children. Yet women remain culturally tied by prescriptive gender roles to a career which is no longer enough to occupy an entire lifetime. Yet as women pursue other avenues toward fulfillment, the care of a family is still enough to interfere with a woman's pursuit of a successful career in the labor market. Although the demands of childcare have declined, they have not disappeared, and other, acceptable alternatives to replace the full-time homemaker have not yet emerged.

It has been argued that the cultural belief that women should mother, and that mothering is inherently valuable to both woman and child, is a socially reproduced concept.[44] Men and women, and boys and girls, are different because they are exposed to different attitudes, expectations, and assumptions about their interests and potential accomplishments. Women are taught to nurture and to express their feelings;[45] men are taught to suppress their emotions and to seek objective success, such as the success gained by doing well at work.[46] The cultural assumptions about gender-appropriate behaviors, and the resulting stereotypes and assumptions about gender-specific capabilities and aptitudes, lead women to the work of childcare. Men are not taught the necessary nurturing skills, and are therefore socially unprepared to do well at childcare.

A poignant example of the way law reflects society's prescribed gender roles with respect to parenting is the way child support is assessed against, and collected from, non-custodial parents. Across world regimes, the development of family law since 1960 has embodied change from principles of interdependence and specific gender roles within the family to the domination of a view based on ideals of individualism and gender equality.[47] This change in paradigm, however, has failed to address the fact that women are still the caretakers. Family law continues to actively promote gender allocation of household labor and childrearing responsibilities, but has de-emphasized the interdependence aspect of the original model, thus removing the

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41. *See* U.S. BUREAU OF THE CENSUS *supra* note 1, at 73, Table No. 91.

42. *See id.* at 101, Table No. 142.

43. *See id.* at 85, Table No. 115.

44. *See* NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978) (arguing that the tendency in women to nurture, and therefore to mother, grows ou to fthe psychodynamics of the mother-child relationship itself). *See also* ELIZABETH DEBOLD, MARIE WILSON, & IDELISSE MALAVE, MOTHER DAUGHTER REVOLUTION: FROM BETRAYAL TO POWER (1993) (excerpt reprinted in this volume, Elizabeth Debold, Marie Wilson, & Idelisse Malavé, *From Betrayal To Power*, 1 DUKE J. GENDER L. & P. 50 (1994)).

45. *See* DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND (1990); GILLIGAN, *supra* note 35.

46. *See* Jack W. Sattel, *The Inexpressive Male: Tragedy or Sexual Politics?*, *in* WOMEN AND WORK, *supra* note 12, at 160 (noting additionally that male inexpressiveness forces women to do the additional work of understanding men, helping men to express their emotions, and do the work of expressing men's emotions for them).

47. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE *passim* (1989).

support that used to balance the additional responsibility placed on women.[48]

A good analysis of the stereotypical childcare model under which current policy operates to assign responsibility for children is the volunteer-draftee dichotomy.[49] In the volunteer-draftee paradigm, fathers are defined as volunteer parents; mothers are defined as draftees.[50] Equal valuation is given to non-intrusive financial support and intensive, daily caretaking responsibilities; fathers are then given social support and reinforcement when they act as "volunteer" parents. But while a father's mandated duties toward his children are limited to financial support and do not include caretaking responsibilities, his autonomy with respect to parenting is broadly protected. Fathers retain both the right to avoid a family relationship, and the privilege to gain one with minimal effort.[51] Mothers, on the other hand, are draftee parents—their duties toward their children are extensive and include providing services and intensive caretaking in addition to the responsibility of financial support which they sometimes share with the father. A mother's autonomy in parenting, however, receives little protection—a mother can neither require an unwilling father to provide a family relationship, nor can she avoid the imposition of a family relationship on herself by a father who does wish to have one.[52] Evidence of adherence to the volunteer-draftee model can be found in the Supreme Court's pronouncement that all a biological father must do to become a constitutionally protected father is to volunteer to do a small bit of the job of parent—he may even choose which small bit he wishes to perform.[53] The court views the biological father as having an "opportunity" to establish a relationship with his child; the penalty to the father upon failure to voluntarily assume parental responsibilities is, at most, loss of parental rights, and is more often mere assessment of financial obligation. The mother, in contrast, is viewed as bearing a responsibility to develop a parental relationship: her penalty for failure to do so can go so far as to include criminal neglect charges.[54]

Public policy with respect to the question of who bears ultimate responsibility for our children has been utterly silent on the question of whether

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48. *Id.*

49. *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415 (1991).

50. *Id.* at 1416.

51. *Id.* at 1423.

52. The protection of a father's parental autonomy necessarily reduces that of the mother because he is able to establish his rights in ways that will encroach upon her autonomy. A father may, for example, establish his parental rights with monthly visits with his children, and then object to a custodial mother's plans to move to a new location to pursue an employment or educational opportunity. Should he wish to move, however, the only ramification with respect to his family relationship will be that he bears the burden of arranging to continue his visits. There is no possibility the father's autonomy right to move where he wishes will be denied. *See id.* at 1420-21.

53. *See* Lehr v. Robertson, 463 U.S. 248, 262 n.18 (1983) (noting that the mere mailing of a postcard to the putative father registry would have been sufficient to entitle a putative father to notice of, and opportunity to object to, pending adoption proceedings).

54. *See* Czapanskiy, *supra* note 49, at 1415-22.

the allocation of financial responsibility to fathers and caretaking responsibility to mothers is appropriate.[55] A salient example is the reigning public policy approach to enforcement of child support obligations. Our national family policy does not accept the notion of a true single parent as an acceptable norm. Where such single parents exist, the law imposes a financial obligation on the absent non-custodial parent and attempts to collect that support money with no regard for the law of diminishing returns. The current system imposes a norm of two parents with some degree of responsibility (however unequally allocated) to the point of ignoring the reality of many custodial single mothers, and abdicating any responsibility for providing a support network that will be of real value in aiding her in her fulfillment of her childrearing responsibilities. Ignoring the immense needs of custodial parents for systemic support, while focusing instead on the failure of non-custodial parents to fulfill their nominal duties, indicates a peculiar view of the importance of assuring the quality of childrearing in our society. The low valuation placed on the work of childrearing, combined with the social and legal assignment of that responsibility to women, results in a devaluation of women and the work they do.

C. DUAL RESPONSIBILITIES: THE SOURCE OF GENDER INEQUITIES IN EMPLOYMENT

The movement of women into the labor force is a phenomenon that seems not to threaten men on any significant level.[56] The current system, however, leaves many women with concurrent careers; one of domestic responsibilities and a second of paid labor outside the home.[57] As long as women have to split their attention between career and family, they will not succeed in a market system where dedication is required for success. The segregation of women into lower paying jobs tends to reinforce the system. As long as men are more successful—as success is currently defined—at paid labor than women, men will continue to have careers, while women will continue to have jobs.

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55. *See generally* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367.

56. *See* Laura Vertz, *The New Feminist Politics*, *in* DO ELECTIONS MATTER? 134-47 (Benjamin Ginsberg & Alan Stone eds., 1986) (noting that public opinion polls have consistently indicated that men are as likely as women to support equal rights, childcare provisions, maternity leave policies, and other issues that are generally identified as women's issues). Men's support of women's equal rights in the public sphere seems to be conditional, however, on an understanding that there is not a simultaneous expectation of shared male and female responsibilities in the domestic sphere. *See supra* notes 12-24 and accompanying text.

57. *See* HOCHSCHILD, *supra* note 15. The greatest compliment a woman of the post-sexual revolution era can receive seems to be that of 'superwoman, one who can do everything'. This ideal is epitomized in the popular perfume commercial of the 1970s which showed a woman who went from carrying a briefcase, to standing in the kitchen wearing an apron, to serving her man a drink in a cocktail dress, all the while singing—"I can bring home the bacon, fry it up in a pan, and never, never let you forget you're a man . . . cuz I'm a WOMAN!" Enjoli Perfume. The message is that if a woman feels that she has to work, it is all right, as long as she does not neglect children, husband, or home.

Women's search for equality of opportunity in the job market is hindered by the lack of an emotional support system in the family such as has traditionally been provided by the domestic wife.[58] One function of the traditional family is to provide a "haven in a heartless world".[59] The question has now become: who will maintain the haven when both husband and wife are working? The answer lies in the elimination of gender-specific roles and expectations. The family is important, and it needs to be maintained. Women, however, are neither inherently nor exclusively capable of maintaining a haven. Institutionalized support systems for childcare and parental leave, combined with an elimination of the expectation that women must take primary responsibility for the family by virtue of their gender rather than individual aptitude or interest, will allow for equality of opportunity for both men and women, while simultaneously providing for the continuation of the family. All children need care. The issue is not that women do not want to care for children; many women do find fulfillment in childcare. The biological accident of one's gender, however, should not be the dominant factor in determining one's appropriate occupation. Removal of the stigma of choosing a gender-inappropriate occupation will allow many more men the opportunity to participate equally in childcare, and will allow women greater choice in determining their careers. Appropriately valuing the work of childcare and childrearing will encourage more people who find fulfillment in such work to devote their time to it.

D. THE ROLE OF LAW AND PUBLIC POLICY IN THE PERPETUATION OF PRESCRIPTIVE GENDER ROLES

Longstanding legal tradition in this country presumes that a woman's primary responsibility is for her home and her children, and that a man's primary responsibility is the economic care of his family.[60] These presumptions have formed the basis of many of the laws and policies of our government,[61] which in turn perpetuate a cultural bias toward prescriptive gender

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58. *Compare supra* note 22 (noting that men are more successful at work when they have the domestic support of a traditional wife, one who does not work outside the home).

59. CHRISTOPHER LASCH, HAVEN IN HEARTLESS WORLD (1977).

60. *See generally* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L. J. 1073 (1994).

61. For example, the provisions of the Social Security system are still premised on the one-earner family in which the earner is typically male, and the legal codification of marriage and divorce in this country is still stacked in favor of traditional gender roles. *See* Mary E. Becker, *Commentary: Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989). Becker notes that, because most law students' only exposure to the social security system occurs in their classes on constitutional law, the way the issue is addressed in casebooks leaves them:

> [to] graduate with the impression that the Supreme Court decisions have eliminated sex discrimination in the social security system except, perhaps, to the extent that women receive a benefit denied their spouses under the odd cases allowing some distinctions beneficial to women. . . .
>
> Modern equal protection doctrine gives lip service to equality in marginal cases (e.g. social security cases banning express distinctions between women and men), but leaves intact laws favoring breadwinners relative to homemakers (the basic structure of the social security system).

roles,[62] and support a notion that work in the labor market is valuable, but the work of raising children is the private folly of parents.[63] The effect of assigning a monetary value to work done outside the home, but not according a parallel value to that done inside the home is a devaluation of the women that perform that work.[64]

Institutional devaluation of women is a powerful precedent. It involves more than a simple statute in the law books—it is a concrete manifestation and enforcer of cultural beliefs. The reality is that women are more willing to step into the traditionally male sphere of paid employment than men are to step into the sphere of domestic work. Public policy has supported the devaluation of women's work in the past. The interaction of social and legal

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Id. at 268-69 (footnote omitted). *See* Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1 (1990) (noting that both employer-provided and government retirement systems not only fail to meet the needs of many women, but also blatantly discriminate against them in many ways); Bob Kamman, *How the IRS Sticks It to Spouses*, NAT'L. L. J. 17 (Nov. 15, 1993) (arguing that, because the IRS allows the primary named person on a return to designate a lawyer or accountant to represent the filers but not the second named person, women—who are traditionally listed second on joint tax returns—are discriminated against). Kamman points particularly to cases where joint filers may have been married at the time of filing but are divorced at the time of controversy. If the husband was the first name listed and he designated an attorney, this IRS policy then deprives the wife of the opportunity to be represented by counsel or even by an accountant in the dispute, regardless of the potential effects on the division of property and liability in a perhaps pending divorce action. *Id.*

62. One way in which the social security system, for example, could be restructured is to implement a policy of earnings sharing. *See* Becker, *supra* note 61, at 286-88. Earnings sharing would eliminate all provisions in the law giving social security benefits to dependents, and replace them with a new method of allocating contributions during marriage. Under the new plan, each partner to a marriage would receive credit for one-half of all wages earned by either spouse. The breadwinner and the homemaker would thus end up with identical social security credits based on the total of their joint earnings. Homemaker coverage is not a novel concept, and several countries currently do provide equitable national pension coverage for homemakers: Germany, Japan, Great Britain, Sweden, Canada and France. Note, however, that most of these programs are not true earnings sharing, but are instead funded through voluntary homemaker contributions. *See* Watson, *supra* note 61, at 14. Implementation of an earnings sharing would encourage re-valuation of the work of childrearing because it would make the social security accounts of men and women who do care for children portable and personally owned in the same way that breadwinners' accounts have always been. A homemaker under current law is only entitled to social security benefits as a dependent of the breadwinner. Under the earnings sharing plan, the homemakers work is considered work and compensated as such. The earnings sharing plan is also limited, however, in that it attempts to revalue the work of childrearing without challenging the assumption that children are always reared in a traditional family where there is a full-time homemaker and a full-time breadwinner. The proposal does not address the existence of parents who desire, or necessarily must, make a concurrent commitment to family and work, with or without the presence of a spouse.

63. *See, e.g.*, AUERBACH, *supra* note 24, at 10.

64. *See* Siegel, *supra* note 60, at 1075 n.3 (noting that "[t]he material consequence of [the] theoretical undervaluation of women's values in the material world is that women are economically impoverished. . . . [n]urturant, intimate labor is neither valued by liberal legalism nor compensated by the market economy. . . . [i]t is not compensated in the home and it is not compensated in the workplace . . . ", citing Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58-59 (1988)).

norms is a well-founded principle, and one that must be considered in the context of addressing gender inequities in employment.[65]

Women's lower earning potential in the United States is strongly related to the typical role women fill in the family. Assumption of a caretaker role in turn adversely affects women's ability to commit to work outside the home: because women have the biological responsibility to bear children and the socially constructed responsibility to care for those children, they have an additional burden in the paid labor market. Despite the social imposition of this additional burden, until 1993 there was no national policy allowing a woman to take a leave of absence from her job to address her responsibilities in the family. There is still no guaranteed right to health insurance, nor any requirement that she be paid any portion of her wage lost because she is not working due to pregnancy or childbirth.[66] Leaving a job to bear a

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65. *See, e.g.* Philip Selznick, *Legal Institutions and Social Controls*, 17 VAND. L. REV. 79 (1963); Leo Kanowitz, *Women and The Law: A Reply to Some of the Commentators*, 4 FAM. L. Q. 19 (1970).

66. Indeed, a health care system wherein health insurance is generally a benefit received as a part of one's employment compensation places many women in a Catch-22 situation: typically, a woman must either be employed (or married to a man that is) in order to receive health insurance. Yet the lack of structural support allowing her to simultaneously be employed and attend to her caretaker responsibilities places her at risk of losing both her employment and her health insurance. She is insulated from such risk only if she bears her children while married to an employed man with whom she cohabits. Although the argument is made that such a system is necessary in order to preserve the eroding "Family Values" of our nation, the fact is that women in America must be free to choose when and where they will work—inside or outside the home. The Draconian imposition of such penalties for behavior outside of a single, legislatively supported "Family Values" approved choice—childbearing only in the context of marriage to an employed man with deference given to his career at the expense of hers—synergistically combined with prescribed, restrictive gender roles, serves to deny individual autonomy, further devalue women and their contributions to society, and to insure perpetuation of the pay gap.

The current focus of welfare reform debate is particularly illustrative of our cultural tendency to view childrearing as the private folly of individual parents rather than as a socially useful occupation. *See, e.g., Crossfire: All in the Family* (Cable News Network television broadcast, Aug. 19, 1992) (comments of Mike Kinsley, John Sununu, Reverend Jerry Falwell, and Reverend Joseph Lowrey). Although I do not mean to condone a practice of welfare dependency or to advocate a policy that discourages honest work and contribution to society by offering hand-outs, I do strongly take issue with a notion that raising children—even in low-income situations—is not honest work that contributes to society. Such a notion clearly indicates a devaluation of the nurturant work of childrearing and the women who typically perform it. *See, e.g.*, Clarence Page, *Family Values? Oh, Never Mind*, CHICAGO TRIB. 3 (Sept. 13, 1992) (noting the contradiction of the "Bush-Quayle Family Values" stance—working mothers, like Murphy Brown, should stay home, but welfare mothers should get out of the home to work—"it's only after . . . mothers find work that Bush and Quayle want them to stay home"). *See also* Editorial, *Looking Ahead: Our Hopes for 1994*, ARIZONA REPUBLIC C4 (Jan. 2, 1994) (noting that "[a]ny [welfare] reform must be carefully considered. . . . [b]efore single mothers are required to work, good, inexpensive day care options must be made available. . . . [b]efore laws are passed that are unduly punitive to single parents, a good deal of though must be given to the societal ills that result when women remained with abusive men"); Editorial, *Legal System Places Unfair Burden on Dads*, ST. LOUIS POST-DISPATCH 3B (Nov. 24, 1992) (correctly characterizing "workfare reform" as a program where "welfare mothers serve double-duty as 'mothers' and breadwinner, and children are raised by no parents instead of one" despite author's overall assertion that traditional two-parent families are the only accept-

child is not considered good cause for the purpose of determining eligibility for receipt of unemployment insurance.[67] The historical lack of a legal mandate and the shortcomings of the current directive[68] demonstrate the low priority public policy places on women and their participation in the labor force.[69]

Aside from its economic consequences for women, the historical lack of federal policy on maternity and parental leave poses an interesting paradox. Although the family is touted as an all-American institution deserving of protection at all costs, there is no provision for a comprehensive family policy in our country. As discussed in Sections Two and Three, there is no sys-

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able ones and that society "suffers from deadbeat attorneys. . . . [and] deadbeat feminists who have won the benefits of marriage without needing a husband").

67. *See* Wimberly v. Labor & Industrial Relations Comm'n, 479 U.S. 511 (1987) (holding that application of a Missouri statute which disqualified unemployment claimants who left "work voluntarily without good cause attributable to his work or to his employer" to deny unemployment compensation to a woman who terminated employment because of her pregnancy because the Congressional intent had been merely to prohibit States from singling out pregnancy for unfavorable treatment and not to mandate preferential treatment). For a critique of *Wimberly* and the policy embodied therein, *see* Mary F. Radford, Wimberly *and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. REV. 532 (1988) (arguing that, given the ambiguous legislative history and other Supreme Court precedent in the area of employment compensation, the Court in *Wimberly* could just as easily have held that §3304(a)(12) of the FUTA requires preferential treatment to pregnant and formerly pregnant women). Radford further argues that, given the current realities that women with children are a major component of the workforce and that women generally have no guarantee of job reinstatement when they try to return to work, women should not be disqualified from receiving unemployment benefits, not should they be presumed ineligible for benefits merely because they were or currently are pregnant. Disqualifying pregnant or formerly pregnant women from receiving unemployment benefits, or presuming them ineligible for such benefits, forces them to make a difficult decision between having income and having children. Granting pregnant or formerly pregnant women special treatment in the context of unemployment insurance will further the goal of allowing a concurrent commitment to work and family. *Id.* at 606-08.

68. *See* J.W. Waks & C.R. Brewster, *Family Leave Coverage is Overestimated*, NAT'L L. J. 20, 27-28 (May 3, 1993).

69. The low value placed on women's work in the paid labor market is pointedly demonstrated when a comparison is made between the historical lack of legal mandate to support women who miss work because of pregnancy and the multitude of proposals made in Congress to help the returning veterans of the 1991 Gulf War. *See, e.g.*, Dirk Johnson, *Outpouring of Scholarships and Jobs Await Returning Troops After the Ticker Tape*, N. Y. TIMES 3 (March 9, 1991). Those veterans who missed work were legally guaranteed a job when they return, eligible for government sponsored assistance, subsidized in educational pursuits to allow them the opportunity to advance to a higher position in the labor market, and compensated for their absence from work. *Id.* Women who miss work to bear children are guaranteed none of the above privileges. While the argument can be made that the veterans are entitled to privileges and benefits because they missed work in the course of defending our country, a similar argument can be made on behalf of women who miss work to bear children. If women did not continue to bear children, eventually there would be no country to defend. Women's work of bearing children is even more valuable to the future of our country than any veteran's, yet our government does not value the contribution of women to society enough to recognize it by making provisions for women to bear children without penalty in the job market.

tem of acceptable childcare, and simultaneous parental and career commitments are impossible for the majority of today's citizens. Professional childcare, a job created by the mass movement of women into the workforce and performed most often by women, is one of the lowest paying jobs in this country[70]—truck drivers, who are overwhelmingly male,[71] earn almost three times as much.[72] These cultural priorities would seem to indicate a low valuation of children, family, women, and their work.

II. A SURVEY OF CURRENT PUBLIC POLICY ATTEMPTS TO ADDRESS GENDER INEQUITIES IN EMPLOYMENT

Gender inequities in employment have been addressed on several fronts—among the most notable legislative provisions are the Family and Medical Leave Act of 1993,[73] the Equal Pay Act of 1963,[74] Title VII of the Civil Rights Act of 1964,[75] The Pregnancy Discrimination Act of 1978,[76] and the Civil Rights Act of 1991.[77] The Equal Protection Clause of the Fourteenth Amendment has also been used as a tool to challenge laws and policies that discriminate against women, and to define a constitutional minimum to which the law must adhere with respect to gender equity in employment.[78]

A. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 (the "FMLA") is the most recent Congressional attempt to address gender inequities in employment and maintenance of the family in contemporary society, and the first attempt to articulate a national family leave standard.[79] The FMLA provides that

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70. *See* U.S. BUREAU OF THE CENSUS, *supra* note 1, at 426, Table No. 671. In addition to being poorly compensated, childcare is also often dangerous. *See, e.g.*, Joanne Lipman, *The Nanny Trap: Dark Side of Child Care is How Poorly Workers Are Sometimes Treated*, WALL ST. J. A1, 6 (April 14, 1993).

71. *See* U.S. BUREAU OF THE CENSUS, *supra* note 1, at 405-07, 407, Table No. 644.

72. *See id.* at 426, Table No. 671.

73. *See infra* notes 79-98 and accompanying text.

74. *See infra* notes 103, 107-11 and accompanying text.

75. *See infra* notes 104, 111-34 and accompanying text.

76. *See infra* notes 105, 119-20, 136-40 and accompanying text.

77. *See infra* notes 106, 124-30 and accompanying text.

78. *See infra* notes 99-101 and accompanying text.

79. 29 U.S.C.A. §§2601, 2611-19, 2631-36, 2651-54 (Supp. 1994). *See generally* Maureen Porette & Brian Gunn, *The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values"*, 8 ST. JOHN'S J. L. COMM. 587 (1994); G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361 (1994).

The Act opens with an articulation of its findings and purposes:

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

employers with more than fifty employees in a 75 mile radius are required to offer workers as much as twelve weeks of unpaid leave after childbirth or adoption, to care for a seriously ill child, spouse or parent, or in the case of an employee's own serious illness.[80] Employers must continue health-care coverage during the leave,[81] and guarantee reinstatement to the same or a comparable position.[82] Employers may, however, exempt from coverage their "key" employees, defined as their highest-paid ten percent whose leave would cause economic harm to the employer,[83] as well as any employee who has not worked at least 1,250 hours for the employer in the last year.[84] An employer may also substitute an employee's accrued paid leave for any part of the mandated twelve week period[85]—with the exception that an employee may not be forced to use sick leave as part of the twelve weeks required for childbirth or adoption.[86] Employers may require employees to provide thirty days notice for foreseeable leaves for birth, adoption, or planned medical treatment,[87] and require an employee taking intermittent leave for planned medical treatments to transfer temporarily to an equivalent alternative position[88] and provide medical certification including expected dates of treatment and the planned duration thereof.[89] Provisions designed to discourage abuse include an employer's right to require two doctors' certifications of a serious illness.[90]

The FMLA is the first national family leave legislation; state legislatures have addressed the issue, but provisions have been far from uniform or complete.[91] A 1989 Employee Benefits Survey found that prior to implemen-

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(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) 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; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; . . .

29 U.S.C.A. §2601.

80. *Id.* §2612.
81. *Id.* §2614(c)(1).
82. *Id.* §2614(a)(1).
83. *Id.* §2614(b).
84. *Id.* §2611(2)(A).
85. *Id.* §2612(d)(2)(A).
86. *Id.* §2612(d)(2)(B).
87. *Id.* §2612(e)(1)-(2).
88. *Id.* §2612(b)(2).
89. *Id.* §2613(b).
90. *Id.* §2613(c).
91. Most states provide some form of parental or medical leave independent from that

tation of the national FMLA, only 37 percent of employees were covered by any maternity or paternity leave provisions.[92]

Arguments against the concept of a mandated family leave focus on the desirability of a world view of employer independence wherein regulation would unacceptably compromise competitiveness and flexibility.[93] In this scheme, complete reliance on the free market to determine award of employee benefits will achieve the optimally efficient market. The belief is that government infringements upon management prerogative without reference to supply and demand principles pose undue burdens upon individual employers that hurt our economy as a whole. Major concerns of the anti-leave lobby include claims that small businesses unable to interchange employees during leave periods will be particularly burdened,[94] and that employers may be forced to hold positions open and maintain provision of benefits for employees who have no intention of returning to the workforce.[95] Yet de-

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granted by the FMLA, although the scope of requirements varies greatly. *See* Deirdre A. Whittaker, *In the Conservative Era of the 1980's: Should We Have a National Leave Policy: A Survey of Leave Policies, Problems and Solutions*, 34 HOW. L. J. 411 (1991); HELEN D. IRVIN & RALPH M. SILBERMAN, FAMILY AND MEDICAL LEAVES: THE NEW FEDERAL STATUTE AND STATE LAWS 35-47 (1993). Note that the FMLA does not supersede any provision of state or local law—including both existing laws and those that might be enacted in the future—that provides greater family or medical leave than the Act provides. *Id.* at 35. The following jurisdictions offer pregnancy disability leave: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, Washington, West Virginia, and Wisconsin. *Id.* at 36-47. Length of leaves varies from six weeks to 'a reasonable period'. *Id.* Not all states address the issue of maintaining benefits: some provide that maintenance must be the same as for other disabled workers, some provide that only health insurance is to be maintained, and some provide further that the full cost of maintained benefits are to be paid for by the employee. *Id.* Coverage varies from including employers with 25 or more employees to requiring a minimum of one hundred employees. *Id.* The following jurisdictions go beyond simple pregnancy disability to offer family leave for birth, adoption, or care of a sick child: Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kansas, Maine, Maryland, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

92. 136 CONG. REC. S8006-01, 8007 (1990) (statements of Sen. Burns). *See* U.S. BUREAU OF THE CENSUS, *supra* note 1, at 431, Table No. 679 (indicating that, in 1991, of full-time employees at medium and large private establishments, two percent of employees had paid maternity leave available to them, one percent had paid paternity leave available, 37 percent had unpaid maternity leave available, and 26 percent had unpaid paternity leave available).

93. *See, e.g.*, H. R. REP., No. 103-8, 103d Sess., pt. 2 (1993) (Republican Committee Amendments to H.R. 1, The Family and Medical Leave Act) (noting particularly the paucity of state provisions as an indication that the legislation is undesirable).

94. But note that the FMLA exempts employers with fewer than fifty employees in a 75 mile radius. 29 U.S.C.A. §2611(2)(B)(ii).

95. An employer's obligation to provide benefits under the FMLA ends when it becomes "known that an employee is not returning to employment and therefore ceases to be entitled to leave under this Act." *Id.* §2614(c)(2). This concern was addressed in another manner by the Rhode Island legislature—a Rhode Island employee taking his allotted unpaid leave pays the employer a sum equal to the premium of the maintained benefits prior to commencing the leave. The employer then refunds the payment upon the employee's return to work. R.I. GEN. LAWS §28-48-3(c) (1990).

The concern articulated, however, should properly be viewed in the context of re-defin-

spite the concerns of the business lobby, a recent *Wall Street Journal* survey indicates that most small businesses are ready to comply with the FMLA, and do not anticipate any new burdens or more than a nominal implementation cost.[96] Responding employers indicated that they have already managed to fill vacancies left by workers on leave by simply transferring existing personnel, hiring temporary workers, or allowing job-sharing arrangements.[97] The cost of implementation of a mandated family leave law has been another issue to which conservatives opposed to interference with business have clung. Currently, however, taxpayers are assessed almost $5 billion each year as a direct result of denial of job-protected parental or medical leave.[98] Even putting fairness concerns aside, it is more cost-effective for employers to permit employees to return to their original jobs than for the employers to hire and train new employees; it is similarly more cost-effective for our economy as a whole to accommodate the needs of parents and families in a proactive manner, rather than intervening in a crisis situation by paying unnecessary unemployment insurance and welfare to parents who would be willing to work if given the opportunity.

One argument proffered by the anti-family leave camp holds that the imposition of mandatory family leave will actually hurt women in the workplace insofar as employers, aware of the cultural reality that women tend to care for children and dependents more often than do men, will then consider the cost of providing leave in making employment decisions, and will decline to employ women. There are several flaws in this argument, including the fact that such a decision by an employer would constitute discrimination on the basis of sex that is already clearly illegal under Title VII. The most insidious flaw, however, is that the argument is self-fulfilling. Family leave is a gender-neutral concept; its purpose is to strengthen the valuation of family in our country by allowing all willing parents the opportunity to make family commitments. Passage of the FMLA allows men the option to take time to care for children without penalty that most fathers would not otherwise have. Although cultural taboos against men taking paternity leave still exist, the FMLA is one step towards changing public perception of appropriate gender roles and valuation of the family.

As the foregoing discussion indicates, arguments against a national family leave policy crumble unless one accepts the premise that traditional gender roles are desirable. Proponents of such a view point to the halcyon

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ing the valuation of family in our country. If we view the act of childrearing as one performed by parents for the benefit of society, instead of as a private folly, then the possibility that an employer will have to comply with leave and benefit maintenance for twelve weeks without a guarantee of future labor by that employee, is a small contribution by businesses to the cultural good of creating a generation of cared for children.

96. Timothy L. O'Brien, Udayan Gupta, & Barbara Marsh, *Most Small Businesses Appear Prepared to Cope With New Family-Leave Rules*, WALL ST. J. B1 (Feb. 8, 1993).

97. *Id. But see* Dawn Gunsch, *The Family Leave Act: A Financial Burden?* Vol. 72, No. 9 PERSONNEL J. 48 (1993) (offering anecdotal evidence of the cost of implementation to employers).

98. *See, e.g.*, H. R. REP., No. 103-8, 103d Sess., pt. 2 (1993) (supplemental views of Rep. Morella).

1950s when women stayed home and worked full-time to take care of household, children, and husband. The argument then follows that current problems in the family are the result of women abandoning their domestic commitments in favor of entering the labor market. Within this framework, the idea that these working women should receive the benefit of government-mandated support to enable abandonment of their domestic responsibilities is repugnant. But women are in the workplace to stay. Ignoring the need for family support systems will not change demographic reality—it will merely penalize our children for the perceived sins of their mothers. Parenting should be a gender neutral commitment, and recognition of that fact in our public policies is long overdue.

B. EQUAL PROTECTION, THE SUPREME COURT, AND CONSTITUTIONALLY PROHIBITED GENDER INEQUITIES IN EMPLOYMENT

The FMLA is the most recent national legislation relevant to gender inequities in employment, but it is only one part of the landscape of existing public policy. Before discussing the other elements of federal policy, however, an examination of relevant constitutional issues is helpful. The Equal Protection Clause has been used in several different contexts to overturn laws, policies, and practices based on the assumption that women are financially dependent on men.[99] The possibility that a man might be financially

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99. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (finding invalid a policy which automatically qualified male service personnel for spousal benefits, but required a female personnel member to show proof that her spouse was financially dependent upon her income before she was eligible for the same benefits). The premise of the policy in *Frontiero* was that, because the incidence of husband-dependence was so low and the incidence of wife-dependence was so high, it was administratively simpler to qualify automatically the male personnel for spousal benefits, while simultaneously refraining from giving unnecessary benefits to the probably non-dependent husbands of female personnel. In finding the *Frontiero* policy unconstitutional, the Court disallowed a rationale of administrative convenience to justify gender discrimination—in order to be a permissible policy, a law had to either require that all personnel prove spousal dependence before receiving benefit eligibility, or it had to automatically qualify all personnel regardless of gender-based statistical likelihoods. Other cases include: Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (finding unconstitutional a provision of the Social Security Act which provided payment of death benefits to widows and their children, but in the case of a woman's death, only to her children); Orr v. Orr, 440 U.S. 268 (1979) (finding unconstitutional an Alabama law which stated that husbands were liable to pay alimony, but wives were not); Califano v. Westcott, 443 U.S. 76 (1979) (finding unconstitutional a portion of the Social Security Act which provided for benefits to needy children in the case of the father's unemployment, but not in the case of the mother's); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) (finding unconstitutional a clause in Missouri's workmen's compensation laws which required a husband to prove dependence on his wife's earnings in order to gain eligibility for compensation if his wife was injured on the job, but gave a wife automatic eligibility if her husband was injured); Califano v. Goldfarb, 430 U.S. 199 (1977) (finding unconstitutional a rule that automatically qualified widows for old-age survivor benefits but required widowers to show dependency to be eligible). *But see* Heckler v. Matthews, 465 U.S. 728 (1984) (finding constitutional a transitional rule enacted in response to *Goldfarb* under which widows were automatically qualified for old-age survivor benefits but husbands had to show dependence because the motivation for the rule was to protect reliance on earlier sex-based provisions).

The decisions in these cases are important in the realm of gender discrimination because

dependent on a woman historically has been treated as so improbable that laws were often designed in ways that made it a difficult situation to verify. The legal assumption that a woman is financially supported by a man reinforced the popular belief that what a man earned was therefore inherently more important than what a woman earned, which rationalized the fact that women were paid less than men, often for equal work.

The Equal Protection Clause has been useful in combatting gender discrimination, but it is important to note that its reach is limited. Gender is not seen by the Court as a suspect classification triggering strict scrutiny.[100]

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they challenge the legal viability of the widespread cultural assumption that women are financially dependent on men and that the reverse is almost never true. It is also important to note, however, that although the legal viability of this assumption has been successfully challenged, the cultural underpinnings are still strong. Further, while these case may make strong rhetorical statements about financial discrimination against women, the laws that were actually struck down had very little practical effect. *See* Becker, *supra* note 61, at 274. And although the law can no longer support direct classifications based on gender, it remains legally acceptable to prefer persons performing cultural roles typically assigned to men at the expense of persons performing roles typically assigned to women. For example, *see supra* note 66, discussing the divergent treatment of homemakers versus breadwinners in our Social Security laws. Cultural assumptions are less easily shaken than are legal policies and procedures, and are more damaging to the earning potential and status of women in society.

It is also important to note that there have been several Supreme Court cases that have upheld policies based on the presumption that a man earns the primary income in a family rather than the woman on the theory that such classifications are often motivated by a legislative desire to compensate women for past discrimination. Such an analysis, however, assumes that discrimination against women is no longer a current concern, and weakens efforts to combat the problem at its roots. *See* Kahn v. Shevin, 416 U.S. 351 (1974) (finding constitutional a Florida law granting widows, but not widowers, a $500 property tax exemption as a benign distinction because the death of a husband generally imposes a greater financial loss than does the death of a wife); Califano v. Webster, 430 U.S. 313 (1977) (finding constitutional a provision in the Social Security Act which allowed wives, but not husbands, to exclude three or more of their lower earning years in computing average wage for retirement benefits as a benign, logical response to the problem of gender inequities in employment and the lower earning potential of women); Schlesinger v. Ballard, 419 U.S. 498 (1975) (finding constitutional a Federal law on mandatory Navy discharges that guaranteed women thirteen years of service but provided that men are automatically discharged after failing twice to be promoted as a rational response to the fact that women are likely to be given fewer opportunities to be promoted than are men). Decisions such as these that allow stop-gap measures tend to work against the possibility of achieving true solutions, and instead effectively condone the roots of the problem by myopically addressing only the symptoms.

Statistical justifications for financially disparate treatment of women have also been declared unconstitutional under the Equal Protection Clause. *See* City of Los Angeles Dept. of Water v. Manhart, 435 U.S. 702 (1978) (finding unconstitutional a pension plan that required female employees to pay fifteen percent more into the pension fund than male employees despite statistical evidence demonstrating that, on average, women live longer than men, so the average woman is therefore likely to collect more payments from the fund than is the average man; and noting that "[e]mployment decisions cannot be predicated on mere 'stereotypes' about the characteristics of males or females"). The Court later extended the *Manhart* principle to private employers covered by Title VII. *See* Arizona v. Norris, 464 U.S. 808 (1983) (finding invalid under Title VII a pension plan that made lower payments to women after retirement than to men who had made equal contributions).

100. Gender classifications are currently seen as quasi-suspect, thus warranting heightened scrutiny under the Equal Protection Clause—in order for a classification that treats women differently than men to survive a constitutional challenge, there must be an important govern-

In 1923, immediately following passage of the Nineteenth Amendment—which guaranteed to women the right to vote—an Equal Rights Amendment (the "ERA") was originally proposed in Congress. Passage and ratification of the ERA would have constitutionally guaranteed to women the same rights that have been guaranteed to men throughout the history of our government.[101] The argument has been made that the ERA is not necessary to guarantee the equal rights of women in America because the Equal Protection Clause is sufficient. But although the Equal Protection Clause may have the potential to be a sufficient constitutional base on which to guarantee the equal rights of women, the fact remains that gender discriminatory laws were the norm until the 1970s, and the Supreme Court has still not yet accorded gender sufficient status to make all discriminatory laws unconstitutional. The failure of our Supreme Court to make gender a suspect classification warranting strict scrutiny and the lack of popular support needed to adopt the ERA demonstrate that women still face a biased situation in the United States.

C. FEDERAL EMPLOYMENT DISCRIMINATION POLICY: TITLE VII AND ITS COMPLEMENTS

Employers, labor organizations, and employment agencies are immune to attack on substantive due process or equal protection grounds because those constitutional safeguards are directed at governmental, not private, actors. Prior to 1960, there was no judicial recourse for most discriminatory employment practices. Discrimination in employment has, however, been addressed legislatively on both state and federal levels in the last three de-

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mental objective at stake, and the classification must be substantially related to the achievement of that important objective. The Supreme Court has not granted gender the status of a suspect class, and in fact did not even consider gender a quasi-suspect classification until 1976. Craig v. Boren, 429 U.S. 190 (1976). Suspect classifications—race and legitimacy—are subjected to strict scrutiny under the Equal Protection Clause. In order to survive strict scrutiny, a classification must serve a compelling government objective, and must be necessary to the achievement thereof. *See, e.g.*, Regents of the Univ. of California v. Bakke, 438 U.S. 265, 357 (1978). The most plausible argument justifying the failure to accord gender the status of suspect is based on the historical fact that the Fourteenth Amendment was passed with race in mind, and not gender. *But see* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (extending strict scrutiny analysis under the Equal Protection Clause to include classifications of Asians without explanation for the expansion). For a historical argument in favor of granting suspect status to gender classifications, *see* Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & P. 86 (1994). Note also that direct constitutional challenge under the Equal Protection Clause is limited to discrimination by state action. *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 586-93, 621-87 (11th ed. 1985) (discussing Equal Protection Clause analysis, applicability, and varying levels of scrutiny).

101. *See, e.g.*, John Galotto, *Strict Scrutiny for Gender, via* Croson, 93 COLUM. L. REV. 508 (1993). The proposed amendment read in relevant part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The ERA was not passed by Congress, however, until 1972, despite its re-introduction every year from 1923 through 1972. And although the amendment did receive considerable support from Congress in 1972, it was never ratified by a sufficient number of states to become law. *Id.* at 519.

cades. Unfortunately, though there has been much attention paid to the issue of discrimination in employment and the lower earnings of women, much of this attention has been ineffectively aimed at symptoms, rather than at causes. Consequently, gender inequities in employment are still prevalent. There are two major components that make up the existing federal policy against employment discrimination on the basis of gender:[102] the Equal Pay Act of 1963[103] and Title VII of the Civil Rights Act of 1964,[104] as amended by the Pregnancy Discrimination Act of 1978,[105] and the Civil Rights Act of 1991.[106]

The Equal Pay Act explicitly requires that men and women receive equal pay for equal work. The specific provisions of the Act, however, narrow its remedial effect significantly—in order to qualify as equal work requiring equal pay, a job must require equal skill, effort, responsibility, and working conditions, including physical working space, hazards, and number of consecutive hours.[107] Comparison of jobs to determine equality can only occur within a particular business establishment—there is no legal provision for comparison of jobs by any classification of type, thus sex-segregation by occupation is outside the scope of the statute. In addition, there are four pay structures explicitly recognized that will excuse the failure to give equal pay for equal work: seniority systems, merit systems, systems which measure by quality or quantity of production, and any system which assigns salary based on any differential that is not sex.[108] Furthermore, the plaintiff, rather than the defendant, bears the burden of proof with respect to the existence of a disparity in wages paid, despite the fact that such information is clearly more accessible to the employer than it is to the plaintiff.[109] The statute does, however, allow an award of liquidated damages to a successful plaintiff, and may be privately enforced without the cumbersome administrative prerequisites imposed upon a private Title VII complainant.[110]

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102. Several Executive Orders also embody an anti-discrimination principle, but are extremely specific in their applicability. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §2000e, at 19-24 (1981).

103. Equal Pay Act of 1963, 29 U.S.C. §206 (1978).

104. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e (1981 & Supp. 1992).

105. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978), *incorporated in* 42 U.S.C. §2000e(k) (1981 & Supp. 1992).

106. Civil Rights Act of 1991, Pub. L. No. 102-166, *incorporated in* 42 U.S.C. §2000e (Supp. 1992).

107. 29 U.S.C. §206(d)(1); Corning Glass Works v. Brennan, 417 U.S. 188, 197-204 (1974) (finding that the legislative history of the statutory term "working conditions" includes physical surroundings and hazards).

108. Corning Glass Works, 417 U.S. at 196. Remember, however, as noted earlier, that earning potential is far more dependent on cultural associations with feminine and masculine characteristics than it is on the actual fact of gender. A prohibition against "any system which assigns salary based on any differential that is not sex", then, cannot effectively address the portions of the gender pay gap attributable to prescriptive gender roles and the relative valuations of masculine and feminine attributes. *See supra* notes 35-37 and accompanying text.

109. *Corning Glass Works*, 417 U.S. at 195 (noting that "[a]lthough the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof") (citations omitted).

110. *See* JAMES E. JONES, JR., WILLIAM P. MURPHY, & ROBERT BELTON, DISCRIMINATION IN

Title VII is the broadest anti-discrimination legislation—its key language provides that "[i]t shall be an unlawful . . . practice . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ."[111] The simplicity of the original statutory scheme indicated a Congressional assessment of discrimination in 1964 as an important issue and an unacceptable practice, but also as a simple and obvious occurrence that could be easily remedied.[112]

In 1971, however, the Supreme Court introduced sweeping judicial changes to the statute by establishing the concept of disparate impact as a cognizable cause of action under Title VII.[113] Under the disparate impact theory, a plaintiff could make a prima facie showing of discrimination by merely pointing to statistics that demonstrated a disparity in hiring, promotions, salaries, or the rate at which other benefits of employment were doled out by an employer.[114] The burden then shifted to the employer to articulate a legitimate business reason for its decisions.[115] The plaintiff could rebut with a showing that the proffered reason was pretextual.[116] The Court would then be satisfied that, given the demonstrated statistical disparity, and the absence of sufficient explanation by the employer, that the disparity must be caused by impermissible discrimination.[117] The concept of disparate impact and statistical proof allowed plaintiffs to prove a host of subtle discriminatory practices that would not have been actionable under the original scheme of Title VII due to a lack of direct evidence.

Title VII was amended extensively in 1972,[118] and again in 1978,[119] when, among other things, the statute was changed to include pregnancy, childbirth, and related medical conditions in the terms "because of sex" and 'on the basis of sex.'[120] The essential re-enaction of the statute in 1972 and the passage of the Pregnancy Disability Act (the "PDA") in 1978 indicated a new Congressional willingness to delve more deeply to account for the historical differences between gender and race discrimination.

Some of the remedial impact of Title VII was lessened in 1989, however, when the Court ruled in *Wards Cove Packing Co. v. Atonio*[121] that an employee who alleges that a company's facially neutral practices have a disparate impact on women, blacks, or other minorities, must identify in his complaint the specific practices that result in the discrimination.[122] Previously, a

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EMPLOYMENT 447-464 (5th ed. 1987).

111. 42 U.S.C. §2000e-2(a).

112. *See generally* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983).

113. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

114. *Id.* at 431.

115. *Id.* at 432.

116. *See id.* at 435.

117. *See id.* at 436.

118. Pub. L. No. 92-261 (1972), *incorporated in* 42 U.S.C. §2000e (1981 & Supp. 1992).

119. Pregancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978), *incorporated in* 42 U.S.C. §2000e(k) (1981 & Supp. 1992).

120. *Id.*

121. 490 U.S. 642 (1989).

122. *Id.* at 657.

plaintiff's prima facie case only required a showing of statistical disparity.[123] Although the ultimate burden of persuasion has always rested on the plaintiff with respect to showing that a statistical disparity is not caused by legitimate practices, requiring a plaintiff to also fulfill the burden of production makes statement of a disparate impact claim extremely burdensome. Information with respect to employment decisions and practices is inherently within the control of the employer—to require articulation by the plaintiff of specific practices as a prerequisite to their day in court is to deny many plaintiffs the opportunity to pursue their claims. The *Wards Cove* rule seems also to provide a bizarre incentive to employers to keep sparse records, communicate with employees and applicants as little as possible, and to keep hiring policies and criteria secret.

Congress responded to the Court's weakening of Title VII; despite a veto by President Bush in 1990, a clarifying amendment was successfully enacted in the Civil Rights Act of 1991.[124] The provisions contained therein re-define the allocation of burden in disparate impact cases,[125] prohibit discriminatory adjustment of test scores,[126] limit challenges to judicially affirmed affirmative action plans,[127] allow jury trials,[128] specify at what point time limits begin to run with respect to a challenge to a seniority system,[129] and allow tort-like punitive and compensatory damages for intentional discrimination.[130] The policy embodied in the Civil Rights Act of 1991 encourages employers to adopt uniform personnel policies and to keep careful records of employment decisions and evaluations. Congressional intent is unarguably to put the teeth back into the prohibition against discrimination in employment and to require affirmative attention to the problem of institutionalized discrimination from all employers.

1. Application of Title VII to Instances of Gender Inequity in Employment

Title VII has been used as a tool to challenge several policies and laws which supported the cultural assumption that women have primary responsibility for childrearing. In 1971, for example, the Court declared impermissibly discriminatory a company policy which refused to hire women with pre-school aged children because there was no such rule for men with children of the same age.[131] This decision represents an important challenge to institutional reinforcement of the cultural stereotype that the woman should always have the responsibility of childrearing, and that her option to enter the working world exists only after that primary obligation has been fulfilled.

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123. *See supra* notes 113-117 and accompanying text.

124. Civil Rights Act of 1991, Pub. L. No. 102-166, *incorporated in* 42 U.S.C. §§ 1981a, 2000e (Supp. 1992).

125. *Id.* §2000e-2(k)(1)(A).

126. *Id.* §2000e-2(l).

127. *Id.* §2000e-2(n)(1).

128. *Id.* §1981a(c)(1).

129. *Id.* §2000e-5(e).

130. *Id.* §1981(b)(1).

131. Phillips v. Martin Marietta Corporation, 400 U.S. 542 (1971).

Title VII has been used several times in attempts to address sex segregation in employment by seeking judicial approval of the concept of comparable worth, but such attempts have been largely unsuccessful.[132] But the Supreme Court has held that, unlike claims brought under the Equal Pay Act, Title VII claims are not restricted to claims for equal pay for substantially equal work.[133] The Court noted that its decision was "not based on the controversial concept of comparable worth," but that it would be willing to regard certain explicit inequities between dissimilar jobs as constituting wage discrimination under Title VII.[134]

2. Responsibility of an Employer to a Pregnant Employee Under Title VII[135]

The Pregnancy Disability Act of 1978 (the "PDA") expressly includes pregnancy within the meaning of sex for determining impermissible discrimination.[136] While the PDA was well-intentioned and designed to offer women more protection under Title VII, it belies an apparent Congressional belief that pregnancy accommodation, much like anti-discrimination as originally conceived in the Civil Rights Act of 1964, is simple and easily implemented. The PDA, in mandating equal treatment of pregnant employees,[137] ignores the reality that pregnancy is a gender difference. While pregnancy is not a difference that warrants discrimination against women in the workplace, it is a difference employers must be required to recognize and address.[138]

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132. For a discussion of the concept of comparable worth, *see infra* note 148 and accompanying text.

133. Gunther v. County of Washington, 452 U.S. 161 (1981).

134. *Id.* at 166. In 1983, the American Federation of State, County and Municipal Employees sued the State of Washington, claiming wage discrimination by occupation. AFSCME v. State of Washington, 578 F.Supp. 846 (1983). The first court to hear the case found for the plaintiffs and issued a decision advocating a broad application of the Title VII prohibition on gender discrimination in employment. *Id.* at 856. Had the lower court decision been upheld, it would have essentially mandated a standard of comparable worth. In 1985, however, the Ninth Circuit overruled the decision, stating that the free market cannot be held a suspect enterprise. 770 F.2d 1401 (1985). Although the court recognized that the plaintiffs had indeed demonstrated a differential in wages between occupations that corresponded with gender, the majority held that, as a matter of law, the differential could not be based on discrimination but was the result of the demands of the free market. *Id.* at 1407.

135. As discussed *supra*, at notes 79-98 and accompanying text, the newly enacted FMLA changes the legal responsibility of an employer to a pregnant worker insofar as it requires provision of unpaid family leave to both new mothers and fathers. But the scope of the FMLA goes beyond the issue of actual pregnancy disability—this section specifically addresses the employment rights of pregnant workers under Title VII.

136. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978), *incorporated in* 42 U.S.C. §2000e(k) (1981 & Supp. 1992).

137. *But see* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (arguably allowing a preferential treatment analysis of the PDA).

138. There have been several cases decided with respect to the issue of pregnant workers and an employer's responsibility in recent years, both before and after passage of the PDA in 1978. Although the court has refrained from articulating anything more than broad directives, a fairly coherent scheme has emerged. *See* Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Guerra, 479 U.S. at 272. *Geduldig* addressed California's policy on disability insurance payments to private employees not covered by workmen's compensation. The policy excluded benefits for pregnancy, among other named disabilities, and was upheld by the Court as a

A mere equal treatment mandate fails in any equitable sense when applied to pregnancy, because women are at a biological disadvantage in a culturally created employment situation.[139] A lack of willingness to accom-

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rational, constitutional choice, because the decision not to insure in the case of normal pregnancy was not invidiously discriminatory. 417 U.S. at 494. The Court endorsed an equal treatment theory, noting that:

> [t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

Id. at 496-97. The opinion goes on to say that a state is not required to cover all possible disabilities—it is simply required not to provide any better coverage as a whole to any aggregate group of eligible employees than it does to any other such group. *Id.* at 496. *Gilbert* extended the *Geduldig* holding to private employers. *See* 429 U.S. at 125.

The flaw in the *Geduldig-Gilbert* equal treatment rationale is apparent if one observes that the Court has effectively equated pregnancy with conditions such as prostate or breast cancer—although each condition is gender-specific, *Geduldig* and *Gilbert* would allow exclusion of either as a covered disability as long as the exclusion is not part of a pattern wherein an employer is consistently excluding only those disabilities specific to one gender while covering those specific to the other. Yet categorization of pregnancy with catastrophic illness such as breast or prostate cancer merely because all are gender-specific ignores the essential distinction that pregnancy serves a socially valuable function. Note, however, that the PDA now requires employers covered by Title VII to treat pregnancy as a disability. 42 U.S.C. §2000e(k).

Although the Court has upheld the right of an employer not to pay disability to a pregnant worker, it has also held that pregnancy cannot be, in itself, an excuse for loss of seniority. *See* Satty, 434 U.S. at 136 (holding that the loss of accumulated seniority when returning to work after pregnancy was not allowable under Title VII). This decision separated the responsibility of an employer to treat normal pregnancy as a disability entitling a woman to benefits—which was not required—from the treatment of pregnancy as an authorized leave that did not result in penalization by loss of seniority—which was required. In other words, although the employer has no legal responsibility to aid financially in the case of pregnancy, pregnancy cannot be used as an excuse to keep women in low prestige, low paying jobs. A woman's seniority and present position must remain available to her following a pregnancy leave. Note that the FMLA specifically states that the law in no way compromises the right of employers to implement more protective policies than those mandated, that employees may not collectively bargain below the floor set by the FMLA, and that the Act does not supersede any State or local law that provides greater family or medical leaves. 29 U.S.C.A. §§ 2651-53.

The Court has clearly left it to the legislatures to compose a policy with respect to an employer's responsibility to pregnant employees. In 1987 the Court announced that, although legislatures were not required to go beyond an equal treatment theory to accommodate pregnant workers, neither were they prohibited from doing so. *See* Guerra, 479 U.S. at 272 (upholding a California law requiring employers to grant up to four months of unpaid leave to women disabled by pregnancy and childbirth, even if similar leaves were not granted for other disabilities because the law "merely establishes benefits that employers must, at a minimum, provide to pregnant workers"). *But cf.* Stephen Keyes, *Note: Affirmative Action for Working Mothers: Does Guerra's Preferential Treatment Rationale Extend to Childrearing Leave Benefits?*, 60 FORDHAM L. REV. 309, 322-23 (1991) (arguing that *Guerra* effectively mandates discrimination against men by allowing preferential treatment of pregnant women and implying that all parental leave policies are discriminatory because the reality is that women care for children, so even a gender-neutral policy would discriminate in practice by allowing women leave from work without having to demonstrate medically documented disability).

139. For further discussion of the equal versus special treatment debate, *see generally* Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & P. 1, 3, 4-5 (1994); Marjorie Jacobson,

modate pregnant workers shows a clear lack of an appropriate societal valuation of both the work of childbearing and rearing, and the presence of women in the workforce.[140] An equitable system will be one wherein two things are true: first, the work of childbearing and rearing is valued enough that employers will accommodate this social contribution by women without imposing career penalties; and second, that women themselves are also recognized as possessing useful talents outside the reproductive and caretaking arena such that employers are willing to make accommodations.

III. WHERE NO LEGISLATURE HAS GONE BEFORE: A SURVEY OF INADEQUATELY ADDRESSED GENDER EQUITY ISSUES

Although some legislation currently exists, and courts have made some pronouncements helpful to ending gender inequities in employment, an effective solution will require a comprehensive scheme based on altered cultural assumptions about the value of women, men, children, and family. The foundations for combating overt sex discrimination in the workplace have been adequately established on a national basis. The problem lies in the existing definition of discrimination—it is far too narrow for any further significant change to occur. The next step is to re-define and re-value gender differentiation.

The previous section discussed the federal government's attempts to regulate pay equity, and the legislative and judicial steps that have been taken toward remedying gender inequities in employment. But there still remains a large gap between the earning potential, relative status, and relative power of men and women in the labor market. Although the FMLA is an important element of a comprehensive policy to address both the needs of the family and gender inequities in employment, it cannot stand alone. The

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Note: Pregnancy and Employment: Three Approaches to Equal Opportunity, 68 B. U. L. REV. 1019 (1988); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699 (1986).

140. The Supreme Court, when called upon to evaluate various legislation with ramifications as to the meaning of pregnancy in our society, has consistently held an inconsistent view. Much of this inconsistency can be traced to the historical view that an immoral woman posed a danger to the well-being of society as a whole. This was the basis of much so-called protective legislation, and still finds expression in phenomena such as the criminalization of prostitution, social and legal prejudice against rape victims, and controversies over sex education of children and availability and legitimacy of birth control and abortion. The sexuality of women has long been used to legally suppress women, and pregnancy is inextricably linked to the existence of that sexuality. The Court has mirrored the struggle apparent in society between support of women who use their sexuality appropriately—for procreation in marriage—and sanctioning those who use it in other, less wholesome ways.

With respect to the inconsistency of the Court's view, consider the contrast between Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding California's statutory rape law that punishes the man involved but not the woman and noting that the possibility of pregnancy was enough of a potential punishment for women, and that an additional deterrent to young women by threat of legal punishment was unnecessary and redundant) and the fact that, in deciding whether or not there should be mandated maternity leaves, prior to passage of the PDA, the Court did not view pregnancy as a 'disability'. *See supra* note 138 and accompanying text.

Act sufficiently covers the need for short-term leave to deal with intense family needs, but does not address implementation of a system wherein it is possible to make a concurrent, ongoing commitment to both family and work. No legislation has yet addressed the incompatibility of simultaneous parental and career commitments, the lack of institutional support for families, the issue of sex-segregation by occupation, or the relative valuation of the work traditionally associated with women to work traditionally associated with men.

A. RE-DEFINING COMMITMENTS TO CAREER AND FAMILY

The options for childcare, maternity leave, and parental leave that currently exist in this country, are first, inadequate; second, stigmatized to the point that many people do not take advantage of available opportunities; and third, still "appropriate" only for women without significant career ambitions.[141] Parental leave should be equally available to men and women, with no gender-determined stigma attached. The work of childrearing must be appropriately valued in our culture so that men and women who wish to do so are free to without significant penalty. Our system must be restructured in a manner wherein both men and women are free, if they choose, to make a concurrent commitment to both family and work.

One of the main reasons there is no comprehensive program providing for childcare and parental leave in the United States is that the issue challenges traditional assumptions about the family and appropriate gender roles.[142] An argument often articulated is that, due to the potential costs, it

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141. *See* WHO CARES FOR AMERICA'S CHILDREN? (Cheryl D. Hayes, John L. Palmer, & Martha J. Zaslow eds., 1990) (examining childcare in the United States and offering recommendation for improvement of government-directed childcare programs). The conclusions reached by Hayes, Palmer, and Zaslow were: first, existing childcare is inadequate; second, poor quality childcare is dangerous; third, childcare is a necessity for the majority of American families; fourth, arranging childcare is most difficult for low-income families; fifth, childcare policy at a government level needs to be cohesive and directed; sixth, there should be a comprehensive array of options so that the needs of different people can be adequately met; and finally, responsibility for childcare should be shared by families, employers, and government. *Id.* at xii-xiii. Based on these conclusions, several recommendations were made. The state and federal government should make investments to strengthen the infrastructure of the childcare system. This would entail expanding the resource and referral services for finding out about childcare options, improving care-giver training levels and wages, expanding vendor-voucher programs, encouraging organization of family day care systems and improving the planning and coordination of childcare programs. Additionally, the federal government should develop national standards for childcare, in areas such as staff-to-child ratios, group sizes, training and experience of care-givers and the physical space and facilities of childcare centers. The final recommendation was that the federal government should mandate unpaid, job-protected leave for employed parents of infants up to one year of age. *Id.* at xiii-xvii.

A recent survey of professional women found that 85, 91, 90, and 55 percent respectively thought that reducing work hours, refusing to work evenings or weekends, refusing to travel, or missing work due to a child's illness would adversely affect a woman's career. DEBORAH SWISS & JUDITH WALKER, WOMEN AND THE WORK/FAMILY DILEMMA 240-41 (1993).

142. *See* SWISS & WALKER, *supra* note 141, at 221; AUERBACH, *supra* note 24, at 10. A recent poll found that fully 62 percent of 1,502 randomly selected adults across the county believe that passing tax incentives to help mothers of young children stay in the home and not work

is not fair to expect employers to provide programs for childcare and parental leave. But there have been attempts made by individual employers to provide programs for their employees.[143] Studies indicate that family-friendly policies are actually cost-beneficial to employers because any costs incurred are more than offset by the savings realized from lower turnover, higher productivity, and reduced the costs for training new employees.[144]

The United States is the last industrialized nation without a national parental leave policy. Most countries provide for compensation of a parent on leave and provide a guarantee of reinstatement upon return; many provide for the use of a social welfare insurance scheme, either as a substitute for, or in addition to the employer's contribution, to alleviate the cost to individual employers.[145] The key difference between the United States and

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would be an effective government action to strengthen the family. Gerald F. Seib, *Americans Feel Families and Values Are Eroding But They Disagree Over the Causes and Solutions*, WALL ST. J. A12 (June 11, 1993). The current demographic reality is that both mothers and fathers are working outside the home. *See* U.S. BUREAU OF THE CENSUS, *supra* note 1, at 400, Table Nos. 633, 634. Female-headed households are significantly more likely to be living below the poverty level. *See id.* at 473, Table No. 745. *But see* Alecia Swasy, *Status Symbols: Stay-at-Home Moms Are Fashionable Again in Many Communities*, WALL ST. J. A1 (July 23, 1993).

Private provision of childcare and parental leave is usually presented as addressing a 'women's issue'. *See, e.g.*, Carol Lawson, *Like Growing Number of Companies, I.B.M. is Building Childcare Centers*, N. Y. TIMES A20 (Dec. 12, 1990) (quoting an I.B.M. spokesman at the press conference to announce the company's intention to build new childcare centers as saying that "childcare had become a vital program to keep women in the work force).

A further problem is that private industry's commitment to childcare and parental leave programs is necessarily questionable. A noted child psychologist at Yale University was quoted in the same article as commenting that, while I.B.M. is to be commended for its efforts, "such corporate initiatives are not the solution to the lack of adequate childcare in the United States." *Id.* (statements of Dr. Edward F. Zigler). Dr. Zigler went on to pose the vital question, "What will happen when a company falls on hard times? It will close a childcare center, not an assembly plant." *Id.* The implications are clear—while large corporations can afford to create their own childcare programs, most companies cannot. Without a clear federal policy, employers will lack the incentive to spend the money to provide childcare and parental leave options for their employees. Without federal funds to support the establishment of a childcare and parental leave system, many parents will find that available options are prohibitively expensive.

143. *See, e.g.*, Jaclyn Fierman, *Are Companies Less Family-Friendly?*, FORTUNE 64 (Mar. 21, 1994) (commenting that, although a majority of companies offer some form of childcare support, referral service, or flexible scheduling to their employees, "good luck finding companies where use of these programs is either widespread or wholeheartedly embraced by management. . . . [t]here are penalties for using these policies"). *See also* Lisa Jenner, *Family-Friendly Backlash*, Vol. 83, No. 5 MGMT. REV. 7 (1994) (discussing new lobbying groups that work on behalf of non-parent workers who feel discriminated against and assert that "[i]t's not business' place to put a value on parenting").

144. *See, e.g.*, Liza Donaldson, *Nurturing the Bottom Line—It Makes Good Business Sense to be a Family-Friendly Employer*, FIN. TIMES 11 (April 11, 1994); Fierman, *supra* note 144.

145. *See* Patricia Shiu, *Work and Family: Policies for the Working Poor*, 26 HARV. J. ON LEGIS. 349, 350 n.5, 355-56 (1989). West Germany provides fourteen weeks of job-guaranteed leave, with an additional four weeks in case of premature or multiple birth. A woman is entitled to one hundred percent of her wages while on leave, and a monthly allowance of approximately $207 during the extended leave period. France offers sixteen weeks of paid, job-guaranteed leave, with a possible additional two weeks in the case of multiple birth, and the option of two years of unpaid leave with priority for reinstatement for one year following the leave.

other industrialized nations is the relative valuations of work and family—our children are seen as a parent's private folly, and parents are expected to rear their children in spite of their other obligations.

B. VALUING WOMEN AND THEIR WORK: RE-THINKING GENDER IDEOLOGY IN PUBLIC POLICY

Comparable worth has been proposed to remedy the problems experienced in trying to implement equal pay for equal work. The theory is that a job that is different is not necessarily inferior or superior, and there should be a system whereby jobs are rated according to different characteristics and assigned point values; the point value of a given job can then be translated into a salary, the range of which would be regulated by legislation.[146] One of the notable limitations of the comparable worth proposal is that it does not directly address the issue of occupational sex-segregation in our economy—it is instead an attempt to gain higher wages for female sex-segregated occupations.

The comparable worth concept has been criticized on several grounds. Critics claim that the free market will be disrupted; that the costs of implementation will be exorbitant; that employers will find women too expensive to hire—thus women will ultimately be hurt not helped by the implementation of the comparable worth; that equalizing pay for women's jobs will discourage women from seeking true equality with men in jobs traditionally considered male occupations; that the assignment of points to a job is necessarily arbitrary because there is no inherent value to jobs that can be measured—jobs are worth what they can command in the free market and comparable worth interferes with the workings of that market; and that, because part of the wage gap can be attributed to legitimate economic causes, implementation of comparable worth would be to erroneously assign the entire wage gap to discrimination. Note that many of these arguments mirror those

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The employee receives ninety percent salary from the employer's contribution to maternity insurance. Italy provides five months job protected pregnancy leave, followed by six months protected leave for either the mother or the father. Japan provides for a twelve week leave period, with sixty percent salary paid through social security or insurance with job protection continuing thirty days past the twelve weeks. Canada provides seventeen weeks of protected maternity leave and 24 weeks of protected parental leave with sixty percent salary paid through unemployment insurance. Denmark provides 24 weeks of leave for all new parents with ninety percent salary. The first three weeks are paid by the employer, the rest by social security. Sweden has the most extensive policy: a full year of paid parental leave with the first 180 days at one hundred percent salary. The second 180 days can be taken at any time until the child is eight years old, and are compensated at ninety percent. Additionally, sixty days per year until the child reaches age twelve are compensated at ninety percent. *Id.* at ??. Note, however, that not all of these countries have gender-neutral policies. While comprehensive maternity leave provisions are indicative of a healthy valuation of the work of childrearing, the additional aspect of gender neutrality is a necessary component of a policy that has as its goal eradication of the lower earning potential of women.

146. *See generally* Hartmann & Aaronson, *supra* note 1; Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Its Implementation*, 20 U. MICH. J.L. REF. 7 (1986).

made about the FMLA, and in opposition to anti-discrimination legislation generally.[147]

Comparable worth as a policy or a solution is neither complete nor sufficient. It may be, however, a valid starting point from which to develop a comprehensive policy that is sufficient, complete, and feasible. The question of what the goal in eliminating gender inequities in employment should be is difficult. We have determined that the cultural assumptions about the qualities and aptitudes of men and women affect the earning potential of each gender. Although the characteristics of an aggregate group can be determined, each and every man and woman is an individual. And as an individual, each man and each woman possesses some of the qualities that can be called feminine, and some of the qualities that can be called masculine. Therefore, to assume that any individual has exactly the same qualities as the stereotype or average of the group to which he or she belongs is unfair.

Does the aggregate difference between men and women mean that separate spheres are inherently wrong? One part of the answer lies in the relative valuations of the different spheres. In our society, the attributes associated with women, and consequently women themselves and the work they do, have been devalued. Although perhaps women should not seek to work in a sphere that is exactly the same as the one in which men work, fundamental fairness demands that women do have a right to seek a sphere that is worth as much as that which men have. Every individual should have the option to seek an experience in a field in which she or he is interested, regardless of his or her gender.

Men and women as groups are different. They think differently, they act differently, they dress differently, they communicate differently, and they relate to others differently. Women should not abandon the feminine qualities that make them women, just as men should not abandon the masculine qualities that make them men. Women and men should, however, seek to eliminate the devaluation of feminine qualities in our culture generally, and our labor market specifically. A woman who wishes to be successful in the labor market should not have to work towards her goal by emulating men; a woman should be able to bring her feminine qualities to a job, do the job well, and be recognized and compensated appropriately for her achievement and her work, just as a man is. Additionally, because all men and women are individuals, the restriction of culturally enforced prescriptive gender roles must be eliminated if we are to allow all men and women to work and earn according to each person's individual potential and aptitude, rather than according to an arbitrary valuation based on the biological fact of gender. The components of a solution to eliminate the lower earning potential of women must begin with the elimination of restrictive gender roles and the establishment of an equal valuation of the qualities normally called feminine and the qualities normally called masculine.

The goals of this proposal are: first, the establishment of institutional and structural support for families such that concurrent commitments to

147. *See supra* notes 93-98 and accompanying text.

family and career are both possible and acceptable; second, the abandonment of prescriptive gender roles and expectations; and third, an appropriate increase in our cultural valuation of nurturing work, particularly the work of childrearing. We must recognize the necessity of preserving the family in some form, and the need for a social support system which allows children to grow up in a nurturing, stable environment. It is equally important that the status of the United States as a world economic power be preserved. Because not all Americans are the same, the solution to the problem of gender inequities in employment will necessarily involve choices. There must be several different options, all of which fit the above requirements, so that men and women can choose whichever childcare solution fits their personal goals.

The primary component of an effective solution will involve a shift in the norms and ideals of American society. The assumptions behind our public policies play a large part in the perpetuation of stereotypes, and can be instrumental in providing support for changes in norms. Law and public policy can facilitate a shift in cultural assumptions: first, by examining and changing the assumptions upon which existing legislation in all areas is based; and second, by proactively legislating on issues specifically addressed to gender inequities.

Proactive legislation would include government-mandated provisions for non-gender-based childcare for all employed people, and non-gender-specific parental leaves. There should be a variety of choices—including, but not limited to, flexible schedules (both in days worked per week and hours worked per day), days off for childcare, and complete parental leaves for a specified period of time with job protection for parents of newborn or newly adopted children. There should be a complete removal of the stigmatization of gender in the division of labor, and there should be no possibility that either a woman or a man will be penalized, overtly or subtly, for taking an "inappropriate" parental leave. The success of such programs will depend on the cultural acceptance of a change in gender roles. It will be insufficient to establish programs if the norms and ideals of the culture remain such that programs will not be utilized fully or effectively, or if those who participate in them will be penalized. The perpetuation of cultural norms cannot be ignored if gender inequities in employment are to be eliminated. It is crucial to the facilitation of a shift in cultural norms for legislators to examine existing legislation, such as the Social Security system, and to eliminate elements that have as their basis assumptions about appropriate gender roles, or a devaluation of the work of childrearing.

Acceptance of non-gender-specific support systems could be encouraged by providing equal incentives in the form of a family allowance payment (similar to that offered in many European countries) from a government-administered insurance fund to men and women who take time off work for childcare. The act of raising children is necessary to the stability and continuation of our country, and childcare must be valued accordingly. Rather than viewing time off for childrearing as a privilege parents must work for, our culture must recognize it as a necessary and valuable service that each parent provides. Because parents are effectively supporting our country by

rearing children in stable families, the notion of an allowance payment is less like a handout, and more like compensation for work performed.

The government should support the option of re-allocation of work and family time over the life cycle by offering low-interest loans to parents of young children. This would mean that both parents would sacrifice a portion of their earning potential while their children are young by working part-time. Once the children are old enough, both parents would return to work full-time. To compensate for the elected sacrifice in earning, parents would continue to work part-time after they reach the normal retirement age. Thus the overall earnings per family would remain at current levels—there would simply be a re-distribution of earning levels both over the life cycle and between husband and wife. The government could support this option by providing low-interest, federally guaranteed loans to the parents of young children, similar to the way student loans are currently offered. Other elements of a comprehensive plan could involve the use of tax credits for both childcare expenditures and time spent out of the labor market for childrearing purposes, and payment of unemployment insurance to men and women who are out of the labor market for childbearing or rearing purposes.

Other possible programs to aid with childcare include expansion of the school day so it coincides with the work day, provision of government subsidized and regulated day care centers for young children, and the offer of incentives to employers who establish programs for their employees. A shift in cultural norms and ideals will give unions more power to negotiate on behalf of their members for employer-sponsored programs providing flexible hours, day care, and parental leave. Developer-tax programs could be utilized to provide incentives to employers to provide adequate childcare spaces for parents who wish to work rather than to stay home.

Funding for government-sponsored programs to encourage parents to devote more time to childrearing can be provided through a re-allocation of available resources. The majority of parents with young children in this country currently pay for childcare. The establishment of a program similar to the Social Security system would allow workers to contribute to the fund slowly over the course of their working lives. The government would then become the manager of the money, and would distribute it to parents in a manner that will further the good of both our individual citizens and our population as a whole. This method of funding would not require a decrease in either our overall production level, American capability to compete in the world market, the earning potential of any given family, or the current median standard of living. In line with the new view of childrearing as a patriotic service rather than an individual folly, those who do not parent children and thus never collect from the fund will be able to view their contribution as a substitute for performing the duty of childrearing, rather than as money lost.

The removal of gender bias in determining whether one is going to put priority on family or on career is crucial in the quest to eliminate gender inequities in employment. Different people have different talents and different interests. There is no inherent reason that a man should pursue a career

as his first priority; none that a woman should have to place her priority on her family; and none that a man should be the leader and a woman the supportive assistant based solely on gender. Cultural assumptions are at the root of government policies. As long as the norm dictates that women should take responsibility for housekeeping and childcare, the government will not have sufficient motivation to institute support systems to allow women to compete fairly with men in the job market. Recognition of the work of childrearing as valuable will pave the way for the establishment of support systems to allow concurrent commitments to work and family. The institutionalization of support systems which foster flexibility in working schedules will allow families to develop a system for childcare that is appropriate for their individual tastes, without sacrificing any part of a given family's earning potential. The elimination of restrictive expectations based on gender will then complete the foundation to eradicate gender inequities in employment.