

THE PAST, PRESENT AND FUTURE OF THE WORKING WOMAN: SOLUTIONS FOR SUBSTANTIVE INEQUALITY IN THE WORKPLACE

I. INTRODUCTION

In 1872, Supreme Court Justice Joseph P. Bradley wrote that women were not constitutionally entitled to practice law, stating that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother.”¹ Recent data indicates that women make up 47% of law school students, 41% of associates in private law firms, and 52% of assistant professors in legal academia.² While these numbers prove that women have been deemed fit to participate meaningfully in the legal profession, other statistics are less heartening: only 14% of partnerships in law firms and a mere 6% of tenured positions in law schools are held by women.³

These trends are pervasive throughout fields traditionally dominated by men,⁴ and raise the question of gender equality. While it is clear that

1. SUPREME COURT DECISIONS AND WOMEN’S RIGHTS 6 (Clare Cushman ed., 2001) (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1872)). In *Bradwell*, the Supreme Court held that the Privileges and Immunities Clause did not protect the right of a person to choose a certain type of employment or occupation. *Id.* at 139. Justice Bradley’s paternalistic view of women is found throughout his concurring opinion. Justice Bradley also stated that under common law, a husband was regarded as his wife’s “head and representative in the social state,” and that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” *Id.*

2. American Bar Association, *A Snapshot of Women in the Law in the Year 2000*, at <http://www.abanet.org/women/snapshots.pdf> (last visited Jan. 20, 2003). Additionally, of 964,000 attorneys in the United States in 2000, 278,596 were women. *Id.* While from 1951 to 1999, law school enrollment of women increased from 0% to 47%, in private practice, women made up 44% of summer associate classes, but only 14% of partnerships. *Id.* Only forty-four women held general counsel positions at Fortune 500 companies, and law faculty staffs were comprised of only 31% women. *Id.* In the judiciary, two women sat (and continue to sit) on the United States Supreme Court, 16% of United States circuit court judges were women, 15% of United States district court judges were women, and 26% of state court of last resort judges were women. *Id.* Finally, the American Bar Association’s membership is 29% female but has had only two female presidents and, in 2000, 7 of 37 members of the Board of Governors were female. *Id.*

3. *Id.*

4. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 35-44* (2001). In one large accounting firm, roughly half of all new hires are women, while only 10% of partners are female. *Id.* at 36. While nearly half of an

formal equality is at least an accepted goal of modern American society,⁵ women still lack the substantive equality that would ensure their success at the highest levels of traditionally male-dominated careers.⁶ This lack of substantive equality can be attributed to the treatment of pregnancy in the workplace.⁷ While the law has recognized a woman's right to seek out any career she desires,⁸ the typical employer stunts her success by forcing her to choose between parenting and working. Now, that choice must be made earlier because of biological data.⁹ New research indicates that women are less likely to conceive if they delay pregnancy until their career is established.¹⁰ Therefore, women face reproductive consequences by deciding to delay motherhood and career consequences by choosing to pursue motherhood.¹¹ To compound the problem, society stigmatizes either choice, which colors women's reproductive decisions.¹² These biological, career-oriented, and societal realities create a pressure on women to decide whether to have children, to pursue a career, or to combine motherhood with a career. Men in positions of equivalent achievement simply do not have to face the same pressure, resulting in substantive inequality in the American workplace.¹³ Fortunately, women

incoming class of graduate students in science in 1995 were women, less than 10% of full professorships in science and engineering belonged to women in the same year. *Id.* at 39. Only about one in ten of the top executive positions in the federal government were held by women in 1992. *Id.* at 41. While more than 40% of students enrolled in medical school are women and one out of every five doctors is female, female physicians are likely to be found in less lucrative positions, such as pediatrics, than men. *Id.* at 42-43.

5. See Parts II.A, B, and C. The fact that the judiciary and legislature have been responsive to women's demands for formal equality is evidenced by the development of employment law as it pertains to pregnancy. *But see* Part II.E (explaining that the number of women in the United States who are trying to balance professional and personal responsibilities is continuing to increase, but Congress has failed to provide further legislative remedies for the problems these women face).

6. See *supra* note 4.

7. See Part II.B and C. The Pregnancy Discrimination ("PDA") and the Family Medical Leave Act ("FMLA") provide incomplete job protection for parents of either sex who wish to create time for a family. These important pieces of legislation are missing elements such as job protection and paid parenting leave, offered in countries including Sweden and Denmark, that would provide parents of either sex the opportunity to strike a balance between their professional and personal lives. See Parts II.E and IV.

8. 42 U.S.C. § 2000e-2(a) (2000). See also DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989). "Title VII of the 1964 Civil Rights Act . . . prohibits sex-based discrimination in hiring, advancement, termination, training and related terms of employment. *Id.* at 162.

9. See *infra* notes 110 and 111.

10. See *infra* note 110.

11. See Part II.E. See also *infra* note 111.

12. See Part III.

13. *Id.*

have achieved substantive equality in other parts of the world,¹⁴ and Congress could stimulate societal change in the United States by providing women with this same flexibility.¹⁵

This Note addresses this lack of substantive equality in three parts. Part II reviews the historical treatment of pregnant women in the workplace, surveying jurisprudence of the Supreme Court, the Pregnancy Discrimination Act of 1978, and the Family and Medical Leave Act. The focus then switches to the statistical data that relates to the current treatment of working women and motherhood's effect on the careers of these women. This statistical data is used in Part III to analyze the situation facing women entering the workplace today, especially the ways in which the choices concerning parenthood and career are colored by the realities of the working woman. Finally, Part IV offers societal initiatives and legislative actions that could serve to eradicate the inequality between men and women that pervades the modern workplace.

II. THE PAST AND THE PRESENT: HISTORICAL AND SOCIOLOGICAL PERSPECTIVES ON WORKING MOTHERS

The body of law addressing the treatment of mothers in the workplace has developed congruously with the flux of women employed outside of the home throughout American history.¹⁶ While the issue was addressed as early as 1908, the law has remained stagnant at least since the passage of the Family Medical Leave Act in 1993 and, more accurately, since the passage of the Pregnancy Discrimination Act of 1978.¹⁷ Recent research shows that women continue to enter the professional world in increasing numbers,¹⁸ but legislative change has slowed, creating substantive inequality between men and women in today's workplace.

14. See Part II.D. See generally DAVID BRADLEY, *FAMILY LAW AND POLITICAL CULTURE* (1996).

15. See Part IV.B. See generally BRADLEY, *supra* note 14.

16. CLAUDIA GOLDIN, *CAREER AND FAMILY: COLLEGE WOMEN LOOK TO THE PAST* (1995), available at <http://papers.nber.org/papers/w5188.pdf>. The law began reacting to the needs of women in the 1970s, a decade that produced the first generation of college-educated women seeking to pursue both family and professional careers.

17. See generally MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (1997).

18. See SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* 133 (2002) (citing U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Employment and Earnings*, January 2000). In 1999, 77% of women aged 25-54 were part of the workforce, up from 57% in 1976. *Id.* Current data shows that women make up 47% of the workforce in the United States. *Id.*

A. *Judicial Treatment of Pregnancy in the Workplace Prior to the Pregnancy Discrimination Act of 1978*

The current debate concerning the legal treatment of women in the workplace can be traced back to a 1908 decision by the United States Supreme Court.¹⁹ In *Muller v. Oregon*, the Supreme Court upheld an Oregon statute limiting a woman's work day to ten hours.²⁰ The decision turned, in part, on facts suggesting that extended work hours were hazardous to current and future mothers alike.²¹ The Court's opinion put each woman "in a class by herself" because "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."²² Until the 1970s, when liberal feminism began to achieve an increase in female participation in traditionally male-dominated career fields, pregnant employees were often fired or required to take long, unpaid maternity leaves.²³ Additionally, employers at the time viewed pregnancy as a precursor to a woman's departure from the labor force to care for her child at home, which provided a reason to deny medical benefits to pregnant employees.²⁴ Even as women began their ascent into the work force, the issue of pregnancy loomed large.

19. *Muller v. Oregon*, 208 U.S. 412 (1908). See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 17-19.

20. *Muller*, 208 U.S. at 423.

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 422-23. See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 17.

21. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 17. For example, experts found that sewing machines exerted pressure against a woman's abdomen and that an overtired mother's milk could induce "spasmodic diarrhea" in infants. *Id.*

22. *Muller*, 208 U.S. at 421-22.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421. See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 17-18.

23. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 164.

24. *Id.*

The 1970s ushered in a feminist movement concerned with formal equality.²⁵ As women made strides on several fronts, resulting in an increase of women receiving higher education and obtaining employment in traditionally male-dominated fields, the Supreme Court began to respond to this sociological change.²⁶ In *Cleveland Board of Education v. LaFleur*,²⁷ the Supreme Court held unconstitutional the Cleveland Board of Education's maternity leave policy, which mandated an unpaid leave lasting from four months before expected delivery until the beginning of the first school semester at least three months after childbirth.²⁸ Additionally, women forced into this maternity leave were not allowed to return to their previous posts, but were merely given priority for vacancies they were qualified to fill.²⁹ The Court found that this policy and similar ones violated a woman's due process rights because mandating arbitrary

25. See generally CHAMALLAS, *supra* note 17, at 31-46. "Usually, scholars date [feminist legal theory's] inception to the early 1970s, when women's rights advocates first mounted an organized legal campaign against sex discrimination in the courts." *Id.* at 31.

26. See generally CHAMALLAS, *supra* note 17, at 31-46.

27. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 165-68.

28. The Cleveland Board of Education rule at issue stated:

MATERNITY PROVISIONS

a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

(1) Maternity leave must be requested in writing at the time of termination of employment.

(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

LaFleur, 414 U.S. at 637-38 n.5.

29. *Id.*

points at which all pregnant women are no longer fit to work “unduly penalize[d] a female teacher for deciding to bear a child.”³⁰

Later in the same decade, women were not successful in proving discrimination against pregnant employees under the Equal Protection Clause.³¹ The Supreme Court backed away from its prior protection of pregnant women, holding in *Geduldig v. Aiello* that discrimination did not occur under the Equal Protection Clause when costs of normal pregnancy and childbirth were excluded from California’s state disability insurance program.³² The California Unemployment Insurance Code, at the time, defined a person as disabled “on any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work,” but pregnant women who did not experience complications were specifically excluded from receiving benefits under this definition.³³ The Supreme Court held that the state statute was based on a physical condition and did not involve “discrimination based upon gender as such,” so “[t]he fiscal and actuarial benefits of the program thus accrue[d] to members of both sexes.”³⁴ The court found no Equal Protection violation requiring heightened scrutiny because “[t]here [was] no risk from which men [were] protected and woman [were] not.”³⁵ Proceeding under the

30. *Id.* at 648. “While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.” *Id.* See also SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 167.

31. *Geduldig v. Aiello*, 417 U.S. 484 (1974). See also SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 168-170.

32. *Geduldig*, 417 U.S. at 494.

33. *Id.* at 491 n.15. The provision at issue stated:

§ 2626 “Disability” or “disabled” includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.”

§ 2626.2 Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor’s certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor’s certification that a condition possibly arising out of pregnancy would disable that claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebotrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

Id.

34. *Id.* at 496-97 n.20. See also SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 169.

35. *Geduldig*, 417 U.S. at 496-97.

rational basis standard of scrutiny, the state's claim that compensation for pregnant persons would create an unmanageable financial burden was held a "legitimate" interest of the state.³⁶

B. The Pregnancy Discrimination Act of 1978

Despite the fact that employers continued to refuse to provide medical benefits to pregnant employees³⁷ and despite the Supreme Court's failure to see this refusal as a violation of either the Due Process Clause or Title VII of the Civil Rights Act of 1964,³⁸ other governmental bodies did respond to the discrimination increasingly occurring in the workplace.³⁹ Based on the Equal Employment Opportunity Commission's (the "EEOC") 1972 guidelines for Title VII,⁴⁰ Congress promulgated the Pregnancy Discrimination Act (the "PDA") in 1978.⁴¹ The PDA expands Title VII's definition of sex discrimination by including pregnancy as a classification based on gender.⁴² Therefore, under the PDA, a pregnant employee must receive the same benefits as other employees when pregnancy affects her ability to work.⁴³

36. *Id.*

37. "As the number of working women increased during the 1970s the ambivalent attitude of employers toward pregnancy and childbirth became more pronounced." SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 173.

38. See Part II.A and accompanying notes.

39. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 173-74; see *infra* note 40.

40. The EEOC, in its 1972 guidelines on Title VII, suggested that pregnant women should be allowed to work for as long as medically appropriate and to return to paid employment as soon as their doctors cleared them for employment after giving birth. Moreover, women should be compensated during the period of disability caused in pregnancy and childbirth on the same basis that employees were compensated for other disabilities. Congress adopted these two lines of reasoning in the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII to include pregnancy as a classification based on gender.

SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 173-74.

41. 42 U.S.C. § 2000e(k) (2000).

42. *Id.*

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

Id.

43. "The 'equal treatment' approach of the PDA requires that pregnant employees receive the same benefits and privileges that other employees (male or female) receive when disability affects their capacity to work." CHAMALLAS, *supra* note 17, at 49.

However, the PDA guarantees only equal treatment,⁴⁴ so the high numbers of women in the 1970s employed in industries that tended to offer few benefits overall were relatively unaffected by the PDA.⁴⁵ In response, some states enacted so-called “special treatment” legislation, which mandated disability benefits for pregnant women as a class, regardless of the employer’s treatment of other employees.⁴⁶ For instance, in California, a statute required that employers provide four months of unpaid “pregnancy disability leave,” which included a reinstatement upon conclusion of that leave.⁴⁷ Statutes such as this provided the beginning for a still-popular debate: equal versus special treatment for pregnancy.⁴⁸ One strain of feminism argues that a literal interpretation of the PDA is necessary to promote equality between males and females.⁴⁹ Therefore, proponents of this “equal treatment” approach advocate extending pregnancy disability leave to all disabled workers to avoid the stigma of stereotyping all women as “potential mothers,” a stereotype that feminists had worked so hard to overcome in the preceding decades.⁵⁰ On the other hand, “special treatment” advocates support dissimilar treatment of men and women because reproductive reality places women at a disadvantage in the workplace.⁵¹ These feminists argue that the equality of pregnant women, especially working class women and single mothers whose

44. *Id.*

45. *Id.*

Many employers, particularly those in highly competitive industries such as retail sales, employed a high percentage of women and tended to offer few benefits to any of their employees when it came to sick and disability leaves, guaranteed rights of reinstatement, and other fringe benefits. For the huge class of predominantly female temporary and part-time workers, moreover, there were often no fringe benefit programs of any kind [T]he PDA left large numbers of women employees unprotected.

Id.

46. *Id.* at 50. “This ‘special treatment’ legislation differed from the PDA in that it did not matter how the employer treated other employees with temporary disabilities. The protection went exclusively to pregnant employees and thus exclusively to women.” *Id.*

47. 1978 Cal. Stat. 1321 § 1. *See also* California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 275-76 (1987); SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 176-78.

48. *See* SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 176-78. *See also* CHAMALLAS, *supra* note 17, at 49 (“The ‘equal treatment’ approach of the PDA requires that pregnant employees receive the same benefits and privileges that other employees (male or female) receive when disability affects their capacity to work”).

49. *See* SUPREME COURT DECISIONS AND WOMEN’S RIGHTS, *supra* note 1, at 176-78.

50. *Id.* *See also* CHAMALLAS, *supra* note 17, at 48-49.

51. *Id.* *See also* CHAMALLAS, *supra* note 17, at 50. (“This ‘special treatment’ legislation differed from the PDA in that it did not matter how the employer treated other employees with temporary disabilities. The protection went exclusively to pregnant employees and thus exclusively to women”).

employer typically would not provide disability benefits to any employee, is protected by statutes proscribing special treatment.⁵²

The Supreme Court entered the equal versus special treatment debate by ruling that California's special treatment statute did not contradict Title VII but actually furthered the PDA's goals.⁵³ In response to arguments that special treatment laws subject employers to charges of reverse discrimination under Title VII because the statutes require special treatment for only one class of employees, the Supreme Court held that the PDA established a floor rather than a ceiling for pregnancy benefits offered by employers.⁵⁴ Providing support to special treatment proponents, the Court noted that California's statute did not reinforce stereotypical notions about pregnant employees but rather worked in conjunction with the PDA to support equality among employees.⁵⁵ While the Supreme Court clearly came down on the side of women in this case, discord still exists between feminists advocating equal treatment of the sexes and those advocating special treatment.⁵⁶

C. The Family and Medical Leave Act

Until the 1990s, the focus on the legal treatment of pregnancy leave left the father's role unaddressed.⁵⁷ Because the law of pregnancy leave focused on the physical disability caused by pregnancy rather than the needs of the child, paternity leave was never required by Title VII.⁵⁸ Theoretically, Title VII does require an employer allowing women to take infant care leave to extend this privilege to men as well, but challenges to this provision are rare.⁵⁹ Special treatment laws established by some states extending the scope of the PDA clearly did not apply to men, as they were

52. See SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 176-78, 181.

53. *Guerra*, 479 U.S. 272 (1982). See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 176-78.

54. *Guerra*, 479 U.S. at 285. "Accordingly, subject to certain limitations, we agree with the Court of Appeal's conclusion that Congress intended the PDA to be "'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'" *Id.* (quoting *California Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (1985)). See also *Guerra* 479 U.S. at 286-88; SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 177.

55. *Guerra*, 479 U.S. at 285-88. See also SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 177.

56. See generally CHAMALLAS, *supra* note 17.

57. "While some employers had traditionally allowed men to take a few days off when their wives gave birth as 'paternity leave,' they had never been legally required to do so." SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 181.

58. See Part II.B and accompanying notes.

59. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 1, at 181.

aimed at putting women experiencing pregnancy on equal footing with men.⁶⁰

In 1993, Congress heard the cries of equal treatment advocates and passed the Family and Medical Leave Act (the “FMLA”) in response.⁶¹ The FMLA attends to the needs of disabled employees and working parents, on a gender-neutral basis, by allowing both men and women to take up to twelve weeks of unpaid absence when they are seriously ill, providing care for a newly-born or adopted child, or providing care for a seriously ill parent, child, or spouse.⁶² Furthermore, the FMLA guarantees an employee’s right to continuing health benefits during this leave and the right to return to the same or a similar job.⁶³

A switch from the traditional notion of “maternity leave,” the FMLA’s gender-neutral scheme recognizes the parental obligations and

60. See Part II.B and accompanying notes.

61. 5 U.S.C. § 6382 (2000).

62. The act provides:

§ 6382. Leave requirement

(a)(1) Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

63. The Act provides:

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

29 U.S.C. § 2614 (2000).

responsibilities of both men and women.⁶⁴ But, similar to the PDA, the statute is plagued by flaws.⁶⁵ While theoretically a victory because the FMLA reflects a view that both men and women are responsible for child care and emphasizes the importance our society places on parenting, many women are left unprotected because small- and mid-sized employers are exempt from the statute.⁶⁶ Also, women who cannot afford to take unpaid leave are offered no protection.⁶⁷ Statistics show that men are not using the benefits provided to them by the FMLA, in part because our society has not abandoned gender roles as Congress has, and partly because it is simply economically unfeasible for a family, especially one with a new and expensive infant, to go without any income for three months.⁶⁸ While the FMLA represents a welcomed change in legislative thought about the family, women's reality has not been altered by its passage.⁶⁹

D. Legislative Solutions from Abroad

Concurrently with the United States' implementation of the FMLA, other countries were indirectly addressing the problem of substantive inequality in the workplace.⁷⁰ In Denmark, labor shortages prompted the government to adopt measures that provide women with a meaningful choice concerning career and parenthood.⁷¹ In 1989, Denmark's Equal Treatment Law was amended to include provisions for maternity and paternity leave while placing the burden of proof for termination of employment occurring during the leave upon the employer.⁷² As of 1993, mothers are now statutorily guaranteed fourteen weeks of leave after childbirth, and fathers are entitled to ten weeks.⁷³ Additionally, fathers have the right to two more weeks of leave during the first fourteen weeks

64. CHAMALLAS, *supra* note 17, at 52. "In some respects, FMLA seems the ideal solution to the equal-versus-special treatment dilemma because, by giving both mothers and fathers time to care for their infants, it accommodates the workplace to women's pregnancies without sending the message that child care is an exclusively female activity." *Id.*

65. See Parts II.B and C and accompanying notes.

66. CHAMALLAS, *supra* note 17, at 52. "[T]he current legislation still leaves many women workers unprotected by exempting small and midsized employers and providing no benefits for lower-income women who cannot afford to take unpaid leave".

67. *Id.*

68. See generally CRITTENDEN, *supra* note 4, at 165-66.

69. See Part II.E and accompanying notes.

70. See generally SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002).

71. BRADLEY *supra* note 14, at 137-44.

72. *Id.* at 143.

73. *Id.* at 144.

following childbirth, and parents may share an additional thirteen to twenty-six weeks of leave during which compensation is paid based on a percentage of unemployment benefits.⁷⁴ If the employer is agreeable, an additional 26 weeks leave, totaling a full year of leave for child care, may be granted to either parent.⁷⁵ Another Danish law, the Law of Social Assistance, requires municipal councils to provide and allocate day care facilities.⁷⁶ Two-thirds of day care costs are covered by public funds.⁷⁷

Denmark's policies are "based on the reality of women's lives, the rejection of a male characterisation [sic] of equality and, in some cases, the assertion that women and men are different."⁷⁸ The changes have led to a society where "the full-time housewife is almost unknown."⁷⁹ In contrast to other Scandinavian models, "Danish policy appears to have been directed at creating flexible opportunities to choose roles at home and in employment."⁸⁰

Sweden is also attempting to "reconcil[e] women's equality with raising children."⁸¹ The Swedish government provides the following benefits for women: "a year's paid leave after childbirth, the right to work a six-hour day with full benefits until [her] child is in primary school, and a stipend from the government to help pay child-care expenses."⁸² In Sweden, since the 1970s, "ten days of paid leave have been set aside for new fathers after childbirth, in addition to twelve months of paid leave that can be shared by both parents" with 75% pay.⁸³ In 1994, new legislation passed reserving one of the twelve months specifically for men, at 80% pay.⁸⁴ All parents with children under the age of eight have the statutory right to work an 80% schedule.⁸⁵

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* It is also notable that the fact that the laws in Denmark were passed is often attributed to the large numbers of women in government in 1993, evidence of women's potential to influence social policy. *Id.* at 150.

78. *Id.* at 149.

79. *Id.* at 137.

80. *Id.* at 147.

81. CRITTENDEN, *supra* note 4, at 249. It is important to note that, generally speaking, Swedish employees simply work less than their American counterparts. *Id.* at 247-48.

82. *Id.* at 108.

83. *Id.* at 239-42.

84. *Id.* at 245. This new legislation has been hotly debated. To the surprise of the members of the commission, the most vociferous protest came from women. *Id.* Feminists argued that "now men were trying to have everything, the best-paying work and the mother's job as well." *Id.* But,

[w]hether a man shares in parenting is not dependent on the man's income or position. It's the woman's income and position that counts . . . We've seen that underprivileged, unskilled women want to have their time with their children and are not so eager to share the parental

One Swedish government official, commenting on women's fight for equality in the workplace stated, "In the first stage women were set apart in an apartheid system. In the second stage, in the 1960s and 1970s, women emerged by adopting male role models. In the third stage, we will have integration and individuals will be free to assume any role they want."⁸⁶ The goal of the Swedish policy is to "[e]stablish[] a status in the labour market for women identical to that of men and chang[e] men's role in the home."⁸⁷ While complete success has not been achieved in Sweden, one study shows that in 1990 Sweden had the smallest difference in male and female employment levels and the largest proportion of women employed of the Western European countries.⁸⁸

E. The Modern Working Woman

Recent studies show that the fight for formal equality in the U.S. has done little to change the day-to-day reality that most women experience.⁸⁹ One such study, *High-Achieving Women, 2001*, explores the professional and private lives of highly educated, highly paid women and compares this reality to that of similarly situated men.⁹⁰ The statistics show that biology⁹¹ and sociology⁹² weigh heavily against professional women trying to cash in on the promise to "have it all" provided by the move for formal equality. The result is that high-achieving women,⁹³ defined as women

leave with their husbands. In families with higher education and qualifications, there is a definite tendency to share the leave. In the final analysis, it's the woman who decides.

Id. at 244 (quoting Goran Swedin, Head of Maternal and Child Health Care at Ostersond County Hospital, Sweden).

85. *Id.* at 240.

86. *Id.* at 249.

87. BRADLEY, *supra* note 14, at 80.

88. *Id.* at 92.

89. *See* Part III.

90. HEWLETT, *supra* note 70, at 310-11 n.1. "The survey included a nationally representative sample of 1168 high-achieving career women aged 28-55 years, a nationally representative sample of 479 high-achieving non-career women aged 28-55, and a nationally representative sample of 472 high-achieving men aged 28-55. The survey was self-administered on-line through the Internet." *Id.* *See also* <http://www.parentsunite.org>.

91. *See infra* notes 111, 117, 144.

92. *See* HEWLETT, *supra* note 70, at 106-09.

93. *Id.* at 311 n.1.

High-achieving career women are defined as women who are employed full-time or self-employed and earn an income that places them in the top 10 percent of their age group . . . or women who have a doctorate or who have a professional degree in medicine, law or dentistry. The sample includes an oversample of "ultra" high-achieving career women earning at least \$100,000 . . . *High-achieving noncareer* women are defined as women who are highly educated but not currently in full-time employment. They have completed a bachelor's degree

who earn an income in the top ten percent of their age group or who have a doctorate or professional degree,⁹⁴ feel they are less likely to have it all when compared to their male colleagues.⁹⁵

Approximately one-third of these high-achieving women report working more than fifty hours per week, and their work week appears to be increasing steadily.⁹⁶ Coined the “second shift”,⁹⁷ these same women are also primarily responsible for home maintenance and child rearing in addition to the large amount of time committed to in-office work.⁹⁸ Among married, high-achieving women, only 9% of their husbands are responsible for meal preparation, 10% are responsible for doing laundry, and 5% are responsible for house cleaning.⁹⁹ In contrast, in marriages where women are described as “ultra-achievers,” defined as women whose income places them in the top 1% of earners in their age group,¹⁰⁰ only 8% of husbands are primarily responsible for child care, 5% perform the house cleaning duties, 9% are responsible for meal preparation, and 10% are responsible for doing laundry.¹⁰¹ So, despite the fact that these husbands generally earn lower wages than their high-or ultra-achieving wives, they are not contributing to the workload within the home.¹⁰²

with high honors, or completed a graduate school/professional school, or obtained a CPA qualification. Either they are out of the labor market completely, or they are at work only a small number of hours a week.

Id.

94. HEWLETT, *supra* note 70, at 311. *See also supra* note 93.

95. *Id.* at 311 n.1.

High-achieving career men are defined as men who are employed full-time or self-employed and earn an income that places them in the top 10 percent of their age group . . . or who have completed graduate school/professional school.”

Id.

96. *Id.* at 89.

The more successful the woman, the longer her work week. Twenty-nine percent of high-achievers and 34 percent of ultra-achievers work more than 50 hours a week (medicine, law and academia are particularly time-intensive). Among ultra-achievers, a significant minority (14 percent) work more than 60 hours a week. A third of these women work longer hours than they did five years ago.

Id. “[T]he percentage of women working fifty hours per week or more is now higher in America than in any other country in the world.” Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 458-59 (1998).

97. “[T]he . . . term signifies that even women who are employed outside the home still perform a vastly disproportionate share of housework.” CHAMALLAS, *supra* note 17, at 190-91.

98. HEWLETT, *supra* note 70, at 88. “High-earning women continue to take prime responsibility for home and children.” *Id.*

99. *Id.* at 106-07.

100. *Id.* at 311.

101. *Id.*

102. *Id.* at 107

Although some shift in the distribution of “second shift” labor has occurred, the shift is disturbingly small. For example, while 8% of older husbands, aged forty-one to fifty-five years,¹⁰³ do laundry, only 13% of younger husbands, aged twenty-eight to forty years,¹⁰⁴ are primarily responsible for this chore.¹⁰⁵ Additionally, between 37% and 43% of high-achieving women feel that their husbands generate more chores at home than they complete.¹⁰⁶

According to another study, members of the breakthrough generation¹⁰⁷ were not successful in having it all.¹⁰⁸ As few as 13% were able to achieve a career and a family by age forty, while fully 50% chose to pursue only a career.¹⁰⁹ Looking again at high-achieving women, 62% of older women, members of the breakthrough generation, had a child by age thirty-five, while only 45% of the following generation had a child by the same age.¹¹⁰ This decline may be attributed to the fact that older women were likely to have had their first child at age twenty-two, while younger women are choosing to delay parenthood until around age twenty-nine.¹¹¹

103. *Id.* at 311.

104. *Id.*

105. *Id.* “Younger wives do slightly less than older wives, and younger husbands do slightly more than older husbands, indicating that the division of labor has become slightly more equal over the years. However, these shifts have been quite small.” *Id.*

106. *Id.*

107. GOLDIN, *supra* note 16. In her study, Goldin defines the breakthrough generation to include women graduating from college between 1966 and 1970. *See also* HEWLETT, *supra* note 70, at 92-98.

108. GOLDIN, *supra* note 16.

109. *Id.* at 2, 4.

110. HEWLETT, *supra* note 70, at 90.

[T]ough trade-offs faced by the breakthrough generation women dog the footsteps of younger women. Indeed, if you compare women in the younger age group with women in the older age group by calculating what proportion had a child by age 35, younger women seem to be in worse shape. Only 45 percent of younger women have had a child by age 35, while 62 percent of older women had had a child by this point in time. In other words, young women are having a harder time balancing work and family than their older sisters.

Id. The author fails to take into account the fact that some professional women may choose not to pursue motherhood. In her book, Hewlett says, “Figure out what you want your life to look like at age 45 If you don’t want children, the pressure is off.” *Id.* at 301. This generalization marginalizes the effect society’s view of all women as potential mothers has on each individual woman, including those who do not want to have children. Many would agree that often, women who choose to pursue professional goals over motherhood are either pitied as victims of circumstance or disliked because they possess seemingly masculine characteristics.

Additionally, Hewlett suggests that young women who want children plan their lives around that goal by giving “urgent priority to finding partner[s] . . . in [their] twenties” and “choos[ing] career[s] that will give [them] the ‘gift of time.’” *Id.* at 301-02. This advice, while perhaps practical, ignores the fact that sociological change in our society is necessary so that all women can realize a fulfilling career and parenthood in the same way men currently do.

111. *Id.* at 114. “The data from the survey show that among older women, the most popular age to have a first child was 22, while among younger women the most popular age—so far—is 29.” *Id.*

Delaying pregnancy has consequences, though, as only 1% of women aged forty-one to fifty-five who tried to conceive had a first child after age thirty-nine.¹¹² Additionally, data shows that a woman's most fertile years occur between the ages of twenty and thirty, with a decline of 20% at age thirty and a decline of 50% at age thirty-five.¹¹³ Advances in reproductive technological certainly hedge against these statistics,¹¹⁴ but the cost of such methods of conception are extremely high,¹¹⁵ health risks are associated with the procedures,¹¹⁶ and success appears to be minimal.¹¹⁷ Among the highest achieving women, 49% are childless, while only 19% of similarly situated men are childless.¹¹⁸

Once women have children, their lives do not get easier, especially in the workplace. The majority of women who left the workplace after having a child "feel this decision was forced upon them by long work-

112. *Id.* at 115.

113. *Id.* at 216-17.

114. The Fertility Institutes, at http://www.fertility-docs.com/art_types.phtml (last viewed Oct. 27, 2003).

IVF (in vitro fertilization) involves extracting a woman's eggs, fertilizing the eggs in the laboratory, and then transferring the resulting embryo(s) into the woman's uterus through the cervix.

GIFT (gamete intrafallopian transfer) involves using a fiber-optic instrument called a laparoscope to guide the transfer of unfertilized eggs and sperm (gametes) into the woman's fallopian tubes through small incisions in her abdomen.

ZIFT (zygote intrafallopian transfer) involves fertilizing a woman's eggs in the laboratory and then using a laparoscope to guide the transfer of the fertilized eggs (zygotes) into her fallopian tubes.

Id.

115. HEWLETT, *supra* note 70, at 205-06. "Donors eggs can significantly boost an older woman's chance at conception, but obtaining the precious eggs has its own set of challenges. Prices are high and rising rapidly (eggs start at \$3,000 and can go all the way up to \$50,000 for so-called designer eggs)." *Id.* "Take, for example, the price tag for IVF: over 90 percent of late-in-life pregnancies involve IVF, and prices range from \$10,000 to \$100,000, depending on how many attempts are required and whether or not you need donor eggs." *Id.* at 215.

116. Alice S. Whittemore, Robin Harris and Jacqueline Itnyre, and the Collaborative Ovarian Cancer Group, *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 U.S. Case-Control Studies*, 136 AMERICAN JOURNAL OF EPIDEMIOLOGY 1184, 1184-1203 (1992). This study found that women who have been treated for infertility with fertility medications are *three times more* likely to develop ovarian cancer than women who have not been. *Id.* at 1199. Additionally, scientists have been aware for many years that exposure to hormones man increases the risk of many cancers, especial cancer of the breast, ovary, and uterus. *See* HEWLETT, *supra* note 70, at 226-29.

117. HEWLETT, *supra* note 70, at 206. "[C]linics often inflate their success rates by suggesting that pregnancy rather than a live birth is the end goal." *Id.* "In 1998 . . . 25,582 babies were born as a result of IVF . . . [T]his figure accounts for only six-tenths of 1 percent of 3.9 million babies born that year." *Id.* at 211.

118. *Id.* at 97. Also, in corporate America, only 57% of high achieving women are married, while 76% of high achieving men are married. This may reflect on the difference in the rates of childlessness between men and women. *Id.* at 102.

weeks, unsympathetic employers and inflexible workplaces.”¹¹⁹ While 66% would prefer to be back at work, they prefer to work for employers providing options such as flextime, paid leave, and reduced job hours.¹²⁰ About 12% of employers offer job-protected leave, 31% offer job sharing, 69% offer staggered hours, and 48% offer work-at-home options.¹²¹ Additionally, a survey of 1,000 employers found that 87% offered childcare assistance while 77% provided flextime.¹²² But, these programs engender bitter feelings among working women who choose not to have children, evidenced by the fact that that 54% of high-achieving women without children report that they are expected to pick up the slack generated by these types of programs.¹²³ So, while some protection is afforded women by the PDA and the FMLA,¹²⁴ statistical evidence proves that pregnancy still keeps women from achieving the level of professional and personal satisfaction similarly situated men enjoy.¹²⁵

III. SUBSTANTIVE INEQUALITY: THE WORKING WOMAN’S DILEMMA

“So what are you going to do about your big-time, private sector career? . . . ”

“If I want kids, I’ll have to bag it.”¹²⁶

This exchange sums up the reality facing today’s working women. Thanks to the establishment of formal equality, women are reaching a critical mass in the formerly male-dominated spheres of medicine, law,

119. *Id.* at 90.

The survey found that many high-potential women currently not in careers left organizations with inadequate work/life policies. In contrast, high-achieving women currently on-track in their careers tend to work for organizations that offer substantial help to working mothers. Flextime, telecommuting, reduced-hour schedules, paid parenting leave, compressed workweeks, and help with childcare are all much more likely to be a part of the benefits package [sic] at these organizations . . . [A]most 90 percent of the [working] women surveyed said they have made personal use of one of these policies. In sharp contrast, only 7 percent of high-potential women—those who left their careers mostly for family reasons—feel that managers in their previous place of work had encouraged the use of work/life policies.

Id. at 112.

120. *Id.* at 90.

121. *Id.* at 264.

122. *Id.* at 275.

123. *Id.* at 91. “Fifty-four percent of high-achieving women without children say that in their workplaces people without children are unfairly expected to pick up the slack for those who have children.” *Id.*

124. See Parts II.B and II.C and accompanying notes.

125. See generally HEWLETT, *supra* note 70. See also Part II.E and accompanying notes.

126. Interview by Sylvia Ann Howlett with Karen Maguire (Sept. 23, 2000), in HEWLETT, *supra* note 70, at 132.

business, and research.¹²⁷ But unlike their male colleagues, women face complex choices when attempting to achieve success both professionally and privately.¹²⁸ The data previously discussed shows that, due to biological realities, women are forced to consider and plan for their private lives earlier than men are.¹²⁹ Additionally, the environment of the modern workplace and society's definition of women's roles at home make it nearly impossible for women to succeed as parents and as professionals.¹³⁰ Men, on the other hand, appear to be more successful is pursuing these divergent interests.¹³¹ Whether or not women choose to be parents, they are dramatically affected by the intolerance for mothers in the modern workplace.¹³²

Substantive inequality in the modern workplace exists because men and women are presented with different opportunities for success.¹³³ At the very beginning of her career, a woman is faced with a different reality than her male colleagues.¹³⁴ Data shows that women are hired at rates consistent with men, but are derailed when they have children.¹³⁵ This phenomenon dramatically impacts the course a woman must take in both her professional and private lives. Because she knows that she will be primarily responsible for home and children,¹³⁶ and that this responsibility will thwart her efforts to succeed professionally,¹³⁷ a woman's decision

127. See American Bar Association, *A Snapshot of Women in the Law in the Year 2000*, at <http://www.abanet.org/women/snapshots.pdf> (last visited Jan. 20, 2003). See also *supra* note 4.

128. See Part II.E and accompanying notes.

129. *Id.*

130. *Id.* "The survey tells us that only a small proportion of high-achieving women—16 percent, to be precise—feel that it's very likely that women can 'have it all' in terms of career and family." HEWLETT, *supra* note 70, at 118.

131. See generally National Fatherhood Initiative at <http://www.fatherhood.org> (last visited Jan. 26, 2003). Regardless of the statistics, "[o]nly seven percent of male respondents feel that men can have it all." HEWLETT, *supra* note 70, at 119.

132. See *supra* note 84.

133. See *supra* Part I and note 4.

134. See *supra* Part III and accompanying notes.

135. See *supra* Part I and note 4.

136. See *supra* Part II.E and accompanying notes.

137. HEWLETT, *supra* note 70, at 277.

The official rules are those laid out in company handbooks and manuals that technically define the conditions of employment. They tend to highlight recently established work/life policies. The unofficial rules are unwritten, but are embedded in the corporate culture and need to be taken extremely seriously by any employee wanting to be tapped for promotion. These rules emphasize the need to put in all kinds of face time—12-14 hour days in the office very visibly "on the job."

Id.

The face time ritual deducts points for the woman who comes in at 7:00 A.M. so she can pick up her child at the daycare center by 6:00 P.M. It adds points for the man who comes in at 9:00 A.M. and stays at his desk until 8:00 P.M. This is because "after hours" face time yields

concerning parenthood may be motivated by factors other than pure desire. Having children at a young age means delaying the career she has invested time and money to pursue.¹³⁸ Women who go this route generally feel either forced off the fast track,¹³⁹ not taken seriously at work, or simply tired from juggling two demanding jobs.¹⁴⁰ The other option, delaying motherhood to establish herself professionally first, often leads women to realize that the right to time to exit from the professional highway will never present itself¹⁴¹ or that biology is working against them.¹⁴² These unsavory results place intense pressure on women as they consider the real effects of parenthood that simply are not felt by men, who do not face the

the highest points of all.

Id. at 277-78. See also Keith H. Hammonds, *Family Values*, FAST COMPANY, Dec. 2000, at 169, available at <http://www.fastcompany.com/magazine/41/familyvalues.html>; Stewart D. Friedman, Perry Christensen & Jessica DeGroot, *Work and Life: The End of the Zero-Sum Game*, HARV. BUS. REV., Nov.-Dec., 1998, at 119.

138. "U.S. Department of Education statistics show the average tuition, room and board paid in 2000-2001 by in-state undergraduates attending public schools in the United States was \$8,655. Tuition, room and board at private colleges and universities ran to \$21,997." Associated Press, *College Costs Push Americans to Canada*, at <http://www.cnn.com/2002/EDUCATION/10/04/canada.college.ap/> (last viewed Oct. 27, 2003).

139. See HEWLETT, *supra* note 70, at 110-11. Many women believe that "pregnancy trigger[s] shabby treatment in the workplace." *Id.* at 111. For instance, when one woman "became pregnant . . . [her boss] required that [she] work a fifty-hour week, plus, [her boss] slapped on some extra travel. It was a mess. [She] went into labor . . . then took several months off work, which is when they replaced [her]." *Id.* at 110-11.

140. See *id.* at 266. Hewlett explains, "Think of what a 55-hour week means in terms of work/life balance. Assuming an hour lunch and a 45-minute round-trip commute (the national average), the workday stretches almost 13 hours: 7:30 A.M. to 8:15 P.M. . . . A mother of a five or eight-year-old who works a 55-hour week would not make it home in time to eat dinner with her child, and would only have a fighting chance of getting home in time to read a bedtime story and kiss her child good night." *Id.*

141. See *id.* at 128-29. One 28-year-old associate at Paine Webber, a large financial firm, who works seventy-two hour weeks notes:

If I want to have two or three children . . . and if I am not prepared to use fancy reproductive engineering . . . I need to think about having my last child in my early forties. I then start backing up, leaving two or three years in between each child, and this pushes me to my mid-thirties. So then I think, okay, if I need to be married and ready to have a child by the age of 35, I need to find a husband soon . . . I go through this exercise and then I think of my job and I start laughing. I mean, it's a joke. When am I going to do all this?

Id. at 128-29.

142. See *id.* at 46-50. Stella Parsons, who began trying to have children at age thirty-seven, comments:

[T]he baby-making bit wasn't easy for us. I didn't get pregnant the first six months, or the next, or the next . . . [A]fter four months on Clomid I got pregnant. Then I miscarried . . . A few months later we tried again . . . I miscarried in week thirteen . . . We took out a second mortgage on our house and signed up for IVF. Twelve months and three cycles later I got pregnant again, only to miscarry in week five . . . So after the third miscarriage we had to walk away—to heal our wounds are recoup our various losses.

Id. at 46-49.

same consequences as a result of parenthood.¹⁴³ Because society places less emphasis on the role of a father in his child's life¹⁴⁴ and measures a man's worth by professional achievement,¹⁴⁵ men simply expect to raise children and achieve professional success.¹⁴⁶

Substantive inequality in the modern workplace, then, can be attributed to both biological and sociological pressures that are exerted on young women.¹⁴⁷ When a woman is planning her life, she must consider whether she wants to have children at a very young age.¹⁴⁸ When making that decision, rather than following her true desire, she must take a good look at reality—women who have children often suffer severe professional repercussions.¹⁴⁹ They are less likely to reach the highest ranks in any field,¹⁵⁰ they must balance a demanding career while performing the majority of household chores and child-rearing tasks,¹⁵¹ and they are often left feeling unsuccessful either professionally or personally.¹⁵² If a woman wants to have children early in life, she may never achieve professional

143. *See id.* at 99. “High-achieving men do not experience a significant gap between what they want and what they have on the children front . . . 79 percent wanted children, 75 percent have children . . . Sixteen percent have one child, 46 percent have two children, and the rest (38 percent) have more than two.” *Id.* at 99.

It may appear that substantive inequality exists only for women who want to have children. But, substantive inequality occurs during the process of choosing rather than as a result of the decision. In light of new biological data, women are forced to decide whether they want to have children when they are very young. The idea that all “normal” women want to have children exerts added pressure during the decision-making process that is not felt by men. Additionally, women who choose not to have children often feel they are expected to work harder to absorb the hours lost on mothers who have chosen to taken advantage of workplace policies that do benefit mothers. *See generally* Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

144. Anna Gavanas, *The Fatherhood Responsibility Movement: The Centrality of Marriage, Work and Male Sexuality in Reconstructions of Masculinity and Fatherhood*, in *MAKING MEN INTO FATHERS: MEN, MASCULINITIES, AND THE SOCIAL POLITICS OF FATHERHOOD* 213 (Barbara Hobson ed., 2002).

145. *Id.*

146. *Id.*

147. *See* Part II.E and accompanying notes.

148. *Id.*

149. *Id.*

150. *See* Part I and accompanying notes.

151. *See* Part II.E and accompanying notes.

152. HEWLETT, *supra* note 70, at 109-10.

At the time it seemed as though I had no choice. IBM decided to relocate my husband to Austin just before my second child was born, so I resigned my job and all four of us moved to Texas Now with the girls “launched” I would give my eyeteeth to have something substantial to sink my teeth into. And it’s not for want of trying. Over the last five years I must have applied for forty or fifty jobs, but all I’ve been able to come up with is this little job . . . which uses perhaps a tenth of my skills and energy.”

Id.

success,¹⁵³ and if she waits to have children, she may never achieve motherhood.¹⁵⁴ On the other hand, if a woman decides not to have children, she is either pitied as an unfortunate receiver of infertile genes¹⁵⁵ or she is a “bitch,”¹⁵⁶ exuding the qualities of determination and drive that are masculine at best or selfish at worst. Because society does not expect a man to provide emotionally for his children, he is a good dad as long as he provides monetarily for his family.¹⁵⁷ His professional success is in no way linked to his personal or familial status.¹⁵⁸

In spite of the formal equality victories won for women, the modern workplace is far from providing an environment that meets the needs of women in the same way that it caters to men.¹⁵⁹ Because society defines woman as mother, combined with the fact that mothers face difficulties in trying to achieve both professional and personal success, all women are unfairly pressured when determining whether they actually want to pursue motherhood.¹⁶⁰ Additionally, men are not expected to contribute to the home or family in the same way that women are, which allows men to achieve society’s definition of both personal and professional success in ways that working women cannot.¹⁶¹ The problem that working women face is an example of substantive inequality, but the solution can be found in legislative action that has provided the impetus for societal change in other countries.¹⁶²

153. See generally *id.* at 121-60. “At least in America, government and employers do such a poor job supporting working mothers—providing little in the way of paid parenting leave, job-back guarantees, flextime, or quality childcare—that women routinely become downwardly mobile in the labor market once they have children.” *Id.* at 127.

154. See *id.* at 203-52.

According to figures put out by the Mayo Clinic, peak fertility occurs between ages 20 and 30. Fertility drops 20 percent after age 30, 50 percent after age 35, and 95 percent after age 40. While 72 percent of 28-year-old women get pregnant after trying for a year, only 24 percent of 38-year-olds do.

Id. at 216-17.

155. See generally Case, *supra* note 143.

156. See KATHLEEN HALL JAMIESON, BEYOND THE DOUBLE BIND 4-5 (1995).

157. See Ann Shola Orloff and Renee Monson, *Citizens, Workers or Fathers? Men in the History of U.S. Social Policy*, in MAKING MEN INTO FATHERS: MEN, MASCULINITIES AND THE SOCIAL POLITICS OF FATHERHOOD 61 (Barbara Hobson ed., 2002).

158. *Id.*

159. See HEWLETT, *supra* note 70.

160. See Part I.E and accompanying notes.

161. *Id.*

162. CRITTENDEN, *supra* note 4, at 239-50.

IV. THE FUTURE: SOLVING THE DILEMMA FACING WORKING WOMEN

Remedying the substantive inequality in the modern workplace is not a simple task. To effect real change, long lasting ideas about the role of women in American society must be changed.¹⁶³ Additionally, society must accept new definitions of father and change the workplace culture.¹⁶⁴ Placing more responsibility on fathers will help remedy current substantive inequality between working men and women because men will face the same decision-making process concerning career and family.¹⁶⁵ In other countries, legislative action has worked to lessen the substantive inequality facing young women entering the workforce and has even brought about the necessary sociological change.¹⁶⁶

A. Sociological Solutions

Authors have suggested that women should simply stop doing everything and force their husbands to participate in day-to-day child rearing and responsibility for the home.¹⁶⁷ But this tactic has come under attack.¹⁶⁸ Such drastic measures may not be necessary, as it appears that one side effect of the feminist movement has been that men are beginning to realize that they are missing out on much of their children's lives.¹⁶⁹ If men are looking for more meaningful involvement in their children's lives and women are looking for the chance to succeed in their chosen careers after having children, then perhaps communication lies at the root of the problem. The bottom line is that society measures women in terms of nurturing capacity and men in terms of earning capacity, without taking into account the actual desires of either sex.¹⁷⁰

163. See Part III and accompanying notes.

164. See GAVANAS, *supra* note 144.

165. See Part IV.A and B and accompanying notes.

166. See generally BRADLEY, *supra* note 71.

167. See Case, *supra* note 143.

168. Many women feel Case's approach is too harsh and that children will suffer while men will be unresponsive.

169. See HEWLETT, *supra* note 70, at 119. One man comments:

There were twenty years in there—from the time I finished medical school to when I resigned my hospital appointment—when I was so tethered to my work that I hardly saw my family. The girls were asleep when I got home at night and on the weekends I was so bone tired I had very little good energy for them. Thinking back on it, I know I didn't have children the way my wife had children.

Id.

170. For some time, economists have been proposing that individual well-being serves as a basis for the measure of success. For instance, as early as 1859, John Stuart Mill found "imperative that human beings should be free to form opinions and express their opinions without reserve." JOHN

The societal focus must shift from an evaluation of men and women as separate parents to the function of the family as a whole, the success of which should be measured by the personal satisfaction of each member.¹⁷¹ This shift would serve to lessen the substantive inequality between men and women because the success of a family would be related directly to whether the woman, for instance, felt she was successful in her career, or whether the man felt he was involved in his children's lives.¹⁷² This new perception of success for both men and women would focus on individual needs, barring any dependence on societal norms, and giving new valuation to a woman's choice of career rather than family.¹⁷³ What should be important in society's valuation—whether an individual person is doing what is right for herself—is simply missing from the American culture as it now stands.¹⁷⁴ Of course, the modern workplace does not allow for the flexibility that is needed to allow either men or women to combine career and family.¹⁷⁵ The result is that women choose to have children and get off the career highway, possibly forever, or choose not to have children to stay on the career highway.¹⁷⁶

B. Legislative Solutions

The flexibility needed for societal change has been forced onto the workplace by the governments of some countries.¹⁷⁷ In Denmark and

STUART MILL, *ON LIBERTY* 80 (Henry Regnery Co. 1955).

171. The data presented by the various researchers surveyed here shows that neither women nor men are ultimately happy. Although this Note focuses on the struggle women face in balancing a career and parenthood, men are also challenged. By focusing on personal satisfaction, rather than socially accepted standards of female and male success, both women and men would be free to choose the appropriate path for achieving fulfillment professionally and personally. See HEWLETT, *supra* note 70; see also CRITTENDEN, *supra* note 4; Gavannas, *supra* note 144.

172. See HEWLETT, *supra* note 70.

173. *Id.*

174. *Id.*

175. See HEWLETT, *supra* note 70, at 256-89. Hewlett suggests several methods for gaining flexibility in the workplace, which would alleviate the "time crunch" many women balancing career and family face. *Id.*

Within the private sector, Hewlett suggests creating a time bank of six months paid leave that parents can take throughout their children's lives and creating high-level positions that continually require reduced hours and reduced workloads. *Id.* at 281-83. Additionally, "on ramps and off ramps" from the career highway are suggested. *Id.* at 283. These include career breaks; unpaid, but job protected, leave; alumni status to preserve ties; and separate listings for reduced-hour jobs. *Id.*

Hewlett also suggests that the federal government extend FMLA requirements to small companies; provide paid leave to employees, provide tax incentives to companies offering reduced hour jobs, job sharing, paid parenting leave, telecommuting, and compressed work weeks; and eliminate incentives for long-hour work weeks. *Id.* at 284-85.

176. See Part I.E and accompanying notes.

177. See CRITTENDEN, *supra* note 4, at 239-50. Compare this account of a Swedish family with

Sweden, traditional male and female roles within the family and within the workplace have become “almost a parenthesis in history” due in part to the sweeping legislative reforms that have occurred over the past several decades.¹⁷⁸ These reforms have had a dramatic impact by providing the workplace flexibility needed for both men and women to achieve personal fulfillment.¹⁷⁹

It is clear from the study of family law in Denmark and Sweden that parenting incentives approved by the federal government can help American women overcome substantive inequality.¹⁸⁰ First, data shows that American men are willing to become more involved in their children’s lives.¹⁸¹ By allowing men the opportunity to participate meaningfully in child-rearing without the fear of losing pay or a job, women will be afforded true parenting partners as well as the time to dedicate to the development of a career.¹⁸² Additionally, guaranteeing pay for both men and women who choose to dedicate at least some time to parenting provides the needed incentive and protection in the same package.¹⁸³

the account of an American mother in note 136:

Karin told me she had just finished a full year at home with Andreas [her thirteen month old son], on a paid leave from her job as a marketing executive for the Stockholm airport. For that year of mothering, she received a check from the government each month amounting to 75 percent of her salary.

Id. at 239.

When Andreas was settled, Karin planned to return to her job on an 80 percent schedule, a statutory right of every parent of a child under the age of eight. “My boss says that I can only work a shorter schedule until Christmas, but that’s not how it’s going to be. It’s going to be longer,” she said, with the confidence of someone who knows the law is on her side.

Id. at 240. Explaining father’s rights in Sweden, Karin’s husband Staffin said:

I got ten days off in the beginning—that is the leave reserved just for fathers. I also took another [paid] month at home. And from now on I’ll be working an 80 percent schedule like Karin. She’ll stay home on Mondays, and I’ll be home on Fridays, so Andreas will only have to be in day care three days a week.

Id.

178. See generally BRADLEY, *supra* note 14.

179. See *supra* note 170.

180. See Part II.D and accompanying notes.

181. See generally Gavannas, *supra* note 144.

182. See HEWLETT, *supra* note 70, at 256-89. According to Hewlett’s research, the biggest problem women face in attempting to balance professional and personal lives is time. *Id.* For instance, one young professional notes:

This career of mine is eating me alive. I mean, it’s stimulating and challenging and I love working . . . but the time demands are awesome. When I’m working in Cambridge it’s not too bad. I get in about 8:30 A.M. and leave at 7:30 P.M. Now I do check my e-mail twice during the course of an evening, but we’re still talking about a pretty decent workweek—fifty-eight hours or so.

Id. at 256.

183. In Denmark and Sweden, men are afforded paid leave after the birth of a child. See Bradley, *supra* note 14, at 91 and 143-44. In these countries, men are more apt to take leave than in the United

Finally, if both men and women have the federally protected opportunity to care for their children at home, women's decisions whether or not to have children will be on par with the decisions men make.¹⁸⁴

V. CONCLUSION

The fact that women still comprise the part of the population that must adjust their lives to accommodate a family creates substantive inequality in American society. This inequality appears at an early stage—when women are deciding whether or not they wish to have children.¹⁸⁵ Men do not face the pressure women face in deciding whether or not to balance a career with family.¹⁸⁶ They are expected to be successful on both fronts, but their success as parents is not defined as being actively involved.¹⁸⁷ Women, due to the inflexible work environment in America and the societal norms mandating that women are solely responsible for the care of children, must decide whether they want to have children and abandon their careers, try to balance both families and careers, knowing the highest levels of professional achievement will be closed to them, or forgo a families for professional accolades.¹⁸⁸

The inequality is clear—men can have it all and women cannot. But, a remedy to this inequality is available.¹⁸⁹ It is important that societal emphasis be shifted from evaluating a person's success based upon whether she fits the conceptual mold society has chosen for her to evaluating success an individual, functional basis.¹⁹⁰ This shift cannot be effected, though, unless women are given the tools to actually achieve both personal and professional happiness.¹⁹¹ These tools include shortened work weeks for all employees and paid parenting leave that is supported by the federal government.¹⁹² These solutions have worked in other countries, most notably Denmark and Sweden.¹⁹³ By allowing women the

States, where the FMLA only provides for unpaid leave. See CRITTENDEN, *supra* note 4, at 239-50.

184. The cumulative affect of alleviation of the time-crunch and paid parenting leave would be that both men and women would have equal bases upon which to formulate their professional and personal decisions. This has occurred in Sweden and Denmark, due in part to their progressive legislation. *Id.*

185. See *supra* notes 111 and 117.

186. See Parts II.E and III and accompanying notes.

187. *Id.* See also Gavannas *supra* note 144.

188. See Part III.

189. See Parts IV.A and B and accompanying notes.

190. See Part IV.A and accompanying notes.

191. See *supra* note 175.

192. See Part IV.B and accompanying notes.

193. See Part II.D and accompanying notes.

opportunity to succeed both professionally and privately, substantive inequality will be lessened because men and women will both have the opportunity to have it all.

*Kelly M. Zigaitis**

* B.S. (2001) Southeast Missouri State University; J.D. Candidate (2004), Washington University School of Law. Special thanks to Professor Laura Ann Rosenbury, Washington University School of Law, for assisting me with understanding the basic chronology of the women's movement and the fundamental principles of feminist legal theory. Also, special thanks to Lauren Lofton, Executive Notes Editor Washington University Law Quarterly, for her assistance throughout the topic development and writing process.