INCLUSIONS AND EXCLUSIONS IN WORK-FAMILY POLICY: THE PUBLIC VALUES AND MORAL CODE EMBEDDED IN THE FAMILY AND MEDICAL LEAVE ACT

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> [A]s we debate appropriate ways for government to protect the well-being of its citizens under current circumstances, we must move beyond the New Deal theme of help for the common working man, and strike a new theme of help for the working family.[1]

The United States has done little to help working families. We lack any comprehensive national family policy. We were among the last industrialized nations to pass parental leave legislation.[2] Historically, governmental action on work and family issues, constrained by values of privacy, autonomy, self-sufficiency, and minimal government interference,[3] has been limited to piecemeal responses to headline grabbing outrages. Recently, however, with the demographic changes in American families, the increasing participation of women in the workforce, the aging of the population, and the evolution of the employer-employee relationship, the government has been forced to confront the reality of the work-family

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[1] Patricia Schroeder, Is there a Role for the Federal Government in Work and the Family?, 26 Harv. J. on Legis. 299, 300 (1989).

[2] Paolo Wright-Carozza, Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective, 81 Calif. L. Rev. 531, 533 (1993). *See also* Schroeder, *supra* note 1, at 302. For statistics on maternal and family leave policies internationally, *see* More Than 120 Nations Provide Paid Maternity Leave, International Labor Organization Press Release, Feb. 15, 1998 (visited Feb. 20, 2000) <http://us.ilo.org/news/prsrls/maternity.html>.

[3] Schroeder, *supra* note 1, at 299; Nancy Ehrenreich, A Trend?: The Progressive Potential in Privatization, 73 Denv. U. L. Rev. 1235, 1251 (1996).

dilemmas faced by many Americans. Yet this government involvement has been profoundly shaped by the "reality that [c]ultural assumptions are at the root of government policies."[4]

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. ("FMLA" or "the Act"), signed into law on February 5, 1993, is the first federal initiative to create a policy to protect working families. The Act, which emerged from an eight-year Congressional battle to pass parental leave legislation, including two presidential vetoes by George Bush, was the first piece of legislation signed by President Clinton after he took office. The Act mandates twelve weeks of unpaid leave each year to care for a newborn or newly adopted child, to take care of a child, parent or spouse with a serious health condition, or to recover from one's own serious health condition. The law also entitles employees to return to their previous jobs or "equivalent" jobs, with the same pay, benefits and other conditions.

Prior to its passage, the Act faced a great deal of opposition from business interests which argued that by "mandating" benefits, the Act interfered with the need for flexibility in the workplace[5] and threatened to stifle the United States' competitive status.[6] Although employer concerns focused on the potentially devastating costs to business, such fears have proven unwarranted.[7] Business apprehensions were further raised as threats—veiled in language of concern—that women will be subject to discrimination, or at least reluctance, in hiring because they will be viewed as more likely to need to take leave.[8]

While some business lobbyists continued to complain even after the Act was passed,[9] the Act's implementation has not wreaked the corporate

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[4] Kathryn Branch, Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy, 1 Duke J. Gender L. & Pol'y 119, 157 (1994).

[5] H.R. Rep. 103-08 at 1 (1993); Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law (1995).

[6] Deirdre A. Whittaker, Should We Have a National Leave Policy: A Survey of Leave Policies, Problems and Solutions, 34 How. L.J. 411, 414-15 (1991).

[7] *See* A Workable Balance: Report to Congress on Family and Medical Leave Policies 99 (1996) [hereinafter A Workable Balance].

[8] Whittaker, *supra* note 6, at 415; Martin H. Malin, Fathers and Parental Leave, 72 Tex. L. Rev. 1047 (1994); Maria L. Ontiveros, The Myth of Market Forces, Mothers, and Private Employment: The Parental Leave Veto, 1 Cornell J.L. Pub. Pol'y 25 (1992).

[9] *See* Anne Kellog, Family Leave Found Benign to Business: Panel Says 3 Year Old Law Hasn't Proved Costly to Employers, The Hartford Courant, May 2, 1996, at B9;

havoc that many business lobbyists portended.[10] Although corporate America has "regularly fiercely opposed the initiation of public social policies,"[11] most businesses have proved able to "accommodate, to reshape, and even to benefit from strengthened state interventions after the fact."[12] Since the implementation of family and medical leave, businesses have reported lower absenteeism and higher employee morale, have found the law easy and costless to administer, and have eliminated the costs associated with permanently replacing workers who needed leave.[13]

While business opposition to the Act has quieted, a continuing critique has come from supporters of the law who urge that only paid leave will make the legislation useful. Early activists for federal parental leave legislation reluctantly abandoned their efforts to secure paid leave only when they realized it was a politically unfeasible demand,[14] and the Commission on Family and Medical Leave's 1993 report cited lost pay as the most significant barrier to parents taking advantage of leave after the birth or adoption of a child.[15] Some low-income women have had to rely on welfare to fund their needed leave.[16]

In response to these criticisms, President Clinton announced that the Department of Labor (DOL) was proposing a regulation to allow states to

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Rachel L. Jones, New Family Leave Law Has a Price/Some Can't Afford Unpaid Time Off, Houston Chronicle, May 2, 1996, at A1.

10 *See* A Workable Balance, *supra* note 7; Unsigned Editorial, Paid Family Leave, Washington Post, Dec. 6, 1999, at A26.

11 The Politics of Social Policy in the United States 14 (Margaret Weir et al. eds., 1988). *See also* A Workable Balance, *supra* note 7, at 110-11.

12 Weir et al., *supra* note 11.

13 Cristina Duarte, The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution, 32 U. Louisville J. Fam. L. 833, 836-39 (1994); *see also* A Workable Balance, *supra* note 7.

14 Judith Lichtman, Remarks, Women's Bar Association Luncheon, A New Lost Generation? 87% of Law Firm Partners are Still Men (Nov. 16, 1999); *see* A Workable Balance, *supra* note 7, at 99.

15 A Workable Balance, *supra* note 7, at 99.

16 *See* A Workable Balance, *supra* note 7; *see also*, Unsigned Editorial, Paid Family Leave, Washington Post, Dec. 6, 1999, at A26.

draw upon their unemployment insurance trust funds to pay for parental leave.[17] In announcing this initiative, Clinton explained:

> We have no higher value than family, but too many of our families are having trouble balancing the demands of home and work. Today I'm using my executive order authority to give these parents new tools to succeed at home and on the job.[18]

Clinton's initiative created another round of debate. This program does address a major criticism lodged by many workplace advocates and women's groups by making the Act's promise of parental leave a reality for the many employees who need, but cannot afford, to take leave.[19] Business associations, however, are treating this initiative as a perilous threat to our national economic health.[20] They claim that this "raiding" of the unemployment trust fund will create skyrocketing costs for employers and will threaten the security that unemployed and laid-off workers now enjoy.[21] These opponents have threatened suit against the administration and have launched a national campaign on the Internet to stop the proposal.[22] In response, supporters of the regulation contend that many states have ample

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17 *See* Remarks by the President on Parental Leave, Nov. 30, 1999, White House Office of Press Secretary (visited Feb. 2, 2000) <http://www.pub.whitehouse.gov/uri-res> [hereinafter Clinton Statement].

18 *See id.*

19 *See* A Workable Balance, *supra* note 7 (reporting that almost sixty-four percent of surveyed employees cited loss of wages as their reason for not taking leave).

20 *See, e.g.*, Diane E. Lewis, Clinton Starts Program for Parental Paid Leave, Boston Globe, Dec. 1, 1999, at A1; Unsigned Editorial, Paid Family Leave, Washington Post, Dec. 6, 1999, at A26; Staff Editorial, Extend Parent Benefits: States Can Help Families by Offering Paid Leave After Childbirth, The Atlanta Constitution, Dec. 2, 1999, at A22.

21 *See* Advertisement by the Unemployment Insurance Working Group, Roll Call, Nov. 1, 1999 (on file with author); Extend Parent Benefits, *supra* note 20.

22 *See* Kent Hoover, Business Groups Rally Against New Family-Leave Plan, Boston Business Journal, Dec. 10-16, 1999, at 15; Advertisement by the Unemployment Insurance Working Group, *supra* note 21.

unemployment reserves,[23] and that because each state's participation is voluntary, this is a reasonable solution to a real problem.[24]

But both sides miss the point. Clinton's statement that "[w]e have no higher value than family," exposes the irony in this enterprise. By explaining that "we're using the strength of our economy to help strengthen working families,"[25] Clinton's rhetoric belies the fact that our nation's economic strength has been gained at the cost of internalized and privatized struggles borne by working families. In attempting to fashion a national employment policy to balance work and family by providing benefits through the employment relationship, the Act's drafters have created a clash between market-driven policy and family values, resulting in an incoherent, inconsistent, and limited strategy which fails to alleviate work-family burdens. The regulation, as the Act itself, remains mired in a set of public values and norms that function to conceal and perpetuate the problems that the Act intended to address.

The Family and Medical Leave Act can be viewed as a proxy for national public values regarding the working family. The provisions of the Act embody and sustain the values that the government is willing to advance on behalf of the working family. At the same time, exclusions from the Act reflect a moral code,[26] pronouncing which individuals and families are entitled to the coverage and security of a national policy, and which are not. While certain individuals and families are rewarded, protected, and benefited by the coverage of the Act, others are disadvantaged, punished, disregarded, and ignored. By concealing values, assumptions, and moral judgments within its provisions, and by attempting to locate social welfare provisions for the family within the employment context, the Act operates to maintain the inequities and work-family dilemmas that U.S. working families face. In addition, by providing only emergency or short-term coverage, and by relying on gender-neutral language in the context of a highly gender-stratified reality, the benefits provided by the Act are more symbolic than they are real.

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[23] Extend Parent Benefits, *supra* note 20.

[24] *See* Unsigned Editorial, Paid Leave for Parents, N. Y. Times, Dec. 1, 1999, at A5.

[25] Clinton Statement, *supra* note 17.

[26] *See* Adrienne L. Hiegel, Sexual Exclusions: The Americans with Disabilities Act As a Moral Code, 94 Colum. L. Rev. 1451 (1994) (arguing that the ADA's denial of legal protections to individuals with sex-based disabilities indicates a sex-related moral qualification for employment).

This Article argues that the Family and Medical Leave Act, set in the context of current societal and workplace norms, structures, and practices, is embedded in a set of public values and a moral code which function to perpetuate many of the problems that the Act intended to rectify.[27] Part I will provide a brief background and discussion of the Act's history, provisions, and purposes. Part II will address the current social context and norms of both the workplace and the family. It will examine the problems with locating social welfare benefits in the private sector. Part III will consider the assumptions, inclusions, and requirements of the Act in an effort to identify the public values embedded in the Act. It will then explore the exclusions inherent in the Act to argue that these exclusions operate as a moral code. Finally, Part IV will briefly review some theoretical and practical approaches to creating a more useful and equitable leave policy for working families.

I. BACKGROUND

A. A Brief History

Throughout the 19th century, the cultural and legal milieu functioned to relegate women to the home.[28] As women began to enter the workforce, protective legislation often followed. In an effort to contain women in their proper sphere, labor laws through the late 1900s restricted the ability of pregnant women to work, and, by providing no guaranteed wage replacement or job security, these laws "'protected' pregnant women right out of their jobs."[29] Thus, a woman's pregnancy signaled her separation from the workplace. "Pregnancy and maternity . . . were little more than the boundary between women as workers (i.e., women imitating men) and women as mothers (i.e., women as such)."[30]

The 1978 Pregnancy Discrimination Act[31] ("PDA"), a Congressional response to Supreme Court decisions allowing employers to discriminate

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[27] Although the Act applies to both public and private employers, the focus of this Article will be on the application of the Act to private employers, where distinguishable.

[28] For a description of the history of society's discomfort with women's employment, *see generally* Ontiveros, *supra* note 8.

[29] Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325, 334 (1984-85).

[30] Wright-Carozza, *supra* note 2, at 555.

[31] 42 U.S.C. § 2000e (k) (1994).

against pregnant women,[32] offered a step toward incorporating pregnant women into the workplace, by explicitly equating pregnancy with other temporary disabilities.[33] In 1987, the Supreme Court ruled that this legislation was intended to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[34] However, while the PDA provided job-protected leave for women after childbirth, it stopped short of addressing family or medical needs more broadly, and failed to provide a mechanism to extend parental leave to men. In addition, as later cases clarified,[35] this Act was merely intended to cover the pregnant woman's period of physical disability after childbirth, and it did not extend to caretaking leave.

To handle the need for childcare arising from women's participation in the workforce, parental leave statutes were then created at the state level.[36] While some states merely extended benefits based on general disability leave, others offered parenting leave only for female employees. Still other states adopted a gender-neutral approach, extending benefits to both male and female employees and, thus, separating physical incapacity from childcare responsibility.[37] The FMLA, providing a federal response to the issue of parental leave, followed this third approach. With the Act, Congress sought

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[32] *See* Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[33] *See* Deborah L. Rhode, Justice and Gender, 119-20 (1989). This Act gave rise to a fierce equal treatment/special treatment debate among feminists. *See, e.g.*, Wendy Williams, *supra* note 29 (arguing that equal treatment is more likely to reduce structural barriers to women's full workplace participation); Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women's L. J. 1 (1985) (arguing that law should recognize women's biological, episodic differences).

[34] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 (1987).

[35] *See* Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990); Maganuco v. Leyden Community High Sch., 939 F.2d 440 (7th Cir. 1991).

[36] For information on state leave policies, *see* Whittaker, *supra* note 6, at 417-22; Jane Waldfogel, Family Leave Coverage in the 1990s, Monthly Labor Review, Oct. 1999.

[37] For a list of states and an interesting analysis of the effects of the FMLA on state parental leave laws, *see* Waldfogel, *supra* note 36.

to ensure job security by providing job-protected leave benefits on a gender-neutral basis to qualified employees in order to "promote family stability."[38]

B. Facts and Figures: The Act in Action

The FMLA provides up to twelve weeks of unpaid leave per year for employees to care for newborn or newly adopted infants, seriously ill children, parents or spouses, or to recover personally from a serious health condition if the employee is unable to perform the functions of her/his position,[39] as long as the employee has worked for the employer at least one year and 1,250 hours during the previous year, and, for private employers,[40] there are at least fifty employees within a seventy-five-mile area.[41] For childcare purposes only, the leave expires one year after the birth or placement of the child, and intermittent leave or reduced schedule employment for childcare is available only if the employer agrees.[42] During the leave, the employer must continue to provide any health care benefits the employee received on the job. No income replacement is mandated,[43] but the employee's job, or an "equivalent" job, is guaranteed upon her return.

As part of the FMLA legislation, Congress established a commission charged with evaluating the effectiveness of the Act for both employers and employees.[44] The Commission surveyed 1,200 businesses and 2,200 employees nationwide[45] and its research covered an eighteen-month period,

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[38] 29 U.S.C. § 2601 (1993).

[39] *See* 29 U.S.C. § 2601 (1993).

[40] All public sector employers are covered, without regard to the number of employees at a given worksite. *See* A Workable Balance, *supra* note 7, at xvi.

[41] The Act also applies to state, local, and federal government employees, but this Article will be limited to the Act's effect on private employers and employees.

[42] *See* 29 U.S.C. § 2601 (1993).

[43] *But see* text accompanying notes 15-22.

[44] *See* 29 U.S.C. 2631-2636 (1993)

[45] *See* A Workable Balance, *supra* note 7; Rachel L. Jones, Study: Family Leave Law Aids Some, But Not All Workers, Austin American-Statesman, May 2, 1996, at A12.

from January 1994 to June 1995. In May of 1996, the Commission reported its findings to Congress.[46] Although the report establishes that the Act is being used, the Commission noted serious problems with its usefulness for many workers.

Two-thirds of the U.S. labor force works for employers covered by the FMLA.[47] While only ten percent of private-sector worksites are covered by the Act, this accounts for almost sixty percent of the nation's private sector employees.[48] Among private sector worksites, then, eighty-nine percent, accounting for 40.5 percent of the nation's employees, are not covered.[49]

Despite extensive initial opposition to its passage from the business community,[50] statistics from employers indicate that the FMLA is a success. The Commission found that the law has done little to increase business costs or to disrupt the workplace.[51] Two-thirds of employers covered by the law changed their policies to come into compliance with the Act, most of whom experienced little or no cost.[52] Almost eighty-seven percent of employers found no noticeable effect on productivity, profitability or growth,[53] and employers reported increased morale and loyalty as a result of the law.[54] Over ninety percent of covered employers found it "somewhat" or "very" easy to administer, while larger employers had more difficulties than smaller ones.[55] Businesses cited employees taking intermittent leave, with days off punctuating their schedules, as one of the more difficult problems. Although

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[46] *See* A Workable Balance, *supra* note 7.

[47] *See id.* at 130.

[48] *See id.* at 119.

[49] *See id.* at 65.

[50] *See* Elving, *supra* note 5, at 13.

[51] *See* Jon Frandsen, Gannet News Service, May 2, 1996, 1996 WL 4383112.

[52] *See* Laura Meckler, Report: Family-Leave Law is Not Harming Business, The Fresno Bee, May 2, 1996 at D3.

[53] *See* A Workable Balance, *supra* note 7.

[54] *See id.* at 94.

[55] *See id.* at 95.

only 11.5 percent of people taking leave did so intermittently, 39.2 percent of employers cited this as posing an administrative difficulty.[56] According to the Congressional report, the FMLA "has not been a serious burden on the tenth of the nation's businesses that are affected."[57]

During the period covered by the Commission's report, approximately one-fifth of U.S. workers reported needing leave under the FMLA, almost seventeen percent of employees took leave, and 3.4 percent of employees needed but did not take leave.[58] While the Commission estimates that between one and a half to three million employees took leave during the eighteen month period covered by the Commission's survey, estimates of leave among employees throughout the entire period since the FMLA was passed hover closer to twenty-four million.[59]

About eighty percent of the employees who took leave did so for reasons related to health and medical concerns.[60] Sixty percent of employees took leave for their own health problems, thirteen percent took time off to care for a newborn, adopted or foster child, and seven and a half percent took time off to care for a sick child.[61] Fifteen percent took leave to care for a sick parent, spouse or other relative.[62] Forty-one percent of those who took leave did so for seven or fewer days.[63] Eligible workers who have taken family leave usually returned to work within two weeks, with the median length of leave averaging ten days.[64] Women made up fifty-eight percent of leave-

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[56] *See id.* at 94.

[57] *See id.* at 96.

[58] *See id.* at xvi.

[59] "President's New Family Leave Initiative is a Major Step Forward for America's Working Families," Statement by Judith Lichtman, President, National Partnership for Women and Families, Sat. Feb. 12, 2000 (on file with author).

[60] A Workable Balance, *supra* note 7, at 95.

[61] *Id.*

[62] *See* Meckler, *supra* note 52, at D3.

[63] *See* Jones, *supra* note 45, at A12.

[64] Employers Find the Family and Medical Leave Act is Good Business, Office of Information and Public Affairs, U.S. Dept of Labor, News Release, May 1, 1996.

takers as of October 1995, while men were forty-two percent of leave-takers.[65] Men were more likely to use the act for personal illness, while women more often took leave to care for seriously ill family members.[66]

While the Act has proven useful for some employees and caused little difficulty for employers, problems with the law persist. Because eligibility and coverage requirements are strict, and because the leave is unpaid, many people who need the Act cannot use it.[67] The Commission found that many workers—over forty percent—are unaware of the law, and others are unable to take advantage of the leave because of financial constraints.[68] Employees in households with low family income levels, low levels of education, and those from Latino backgrounds are the least likely employees to work for covered employers.[69] Further, young, part-time, low-income, and never married workers are least likely to meet the service and hours of eligibility requirements.[70]

Complaints and lawsuits about the Act exist as well. Between August 1993 and October 1995, over 3,800 complaints alleging employer failure to comply with the FMLA were lodged with the Department of Labor (DOL), with almost sixty percent of these complaints found to be valid violations of the Act by covered employers.[71] Over 2,100 violations were found; more than sixty percent of these were the result of employers refusing to reinstate leave-takers to the same or an equivalent position, and almost twenty percent involved employer refusal to grant leave.[72] More recent data from the DOL indicate that, for the period from August 1993 to October 1998, forty-four

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[65] *See* Family and Medical Leave Commission Survey of Workers and Employers Shatters Myths About Knowledge, Use of Act, Office of Information and Public Affairs, U.S.D.O.L., News Release, Oct. 19, 1995, at 1.

[66] *See* A Workable Balance, *supra* note 7.

[67] *See* Kellog, *supra* note 9.

[68] *See* Study Says Family Leave Act Aids Some Workers, Has Little Effect on Business, West's Legal News, May 6, 1996, 1996 WL 260700.

[69] *See* A Workable Balance, *supra* note 7, at 87.

[70] *See id.*

[71] *See id.* at 85.

[72] *See id.* at 85.

percent of the over 13,500 complaints processed by the DOL were complaints related to failure to reinstate and over twenty percent involved employer refusal to grant leave.[73] On August 5, 1994, the first lawsuits were filed by the DOL against two companies for violations of the FMLA.[74] As of September 30, 1998, the DOL's Office of the Solicitor had filed twenty-nine suits and six amicus briefs, and monetary damages awarded for violations had exceeded $13.2 million.[75] The vast majority of suits, however, are private.[76]

C. The Purposes of the Act

The Family and Medical Leave Act was intended to encourage "stability in the family as well as productivity in the workplace."[77] Its stated purposes include:

> 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; to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition; to accomplish the[se] purposes . . . in a manner that accommodates the legitimate interests of employers; . . . to ensur[e] . . . that leave is available . . . on a gender-neutral basis; and to promote the goal of equal employment opportunity for women and men . . . .[78]

The Act was necessitated by increased work-family conflicts created by the failure of the business community to respond to the changing realities in the American family structure, including an ever increasing number of

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[73] U.S. Department of Labor Figures (on file with author).

[74] *See* First Lawsuits Filed for Alleged FMLA Violations, Employment Standards Administration, Office of Information, U.S.D.O.L., Aug. 5, 1994, at 1.

[75] U.S. Department of Labor Figures, *supra* note 73.

[76] *Id.*

[77] Marcus D. Ward, Note, The Family and Medical Leave Act of 1993: A Sound Investment or An Expensive Lesson in Employee Benefits?, 20 T. Marshall L. Rev. 413, 422 (1995).

[78] 29 U.S.C. § 2601 (1993).

single parents and dual-career couples, an aging population increasingly relying on family care, and an increase in the number of women entering the workforce.[79] Congress determined that employers were not providing reasonable leave or job security to employees who were parents,[80] and studies indicated that employers were acting irresponsibly in providing measures to respond to economic and social changes that have "intensified tensions between work and family."[81] Thus, Congress's declared goal in passing the Act was to provide an "adequate solution to the social and economic conflict between work and family."[82]

While Congress embraced gender-neutral language in order to comply with the Fourteenth Amendment, and because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate,"[83] the Act was meant to relieve the pressures on working women. Congress noted in its findings that "the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than . . . men."[84] Further, the legislative history of the Act indicates that policymakers were concerned that demographic changes were undermining the "crucial unpaid caretaking services traditionally performed by wives," resulting in "weakened," "failed" families, "emotionally and physically deprived children," and "permanent scarring" of those deprived of care.[85] This charged language belies the internalized stereotypes at work among legislators. Thus, while giving a nod to gender-neutral terminology, policymakers failed to challenge the existing gendered stereotypes or social arrangements, but rather created legislation intended to be used solely by women.

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[79] Jane Rigler, Analysis and Understanding of the Family and Medical Leave Act of 1993, 45 Case W. Res. L. Rev. 457, 460 (1995).

[80] *See* Schroeder, *supra* note 1, at 306.

[81] *See* Amy Olsen, Comment, Family Leave Legislation: Ensuring Both Job Security and Family Values, 35 Santa Clara L. Rev. 983, 1009 (1995).

[82] Ward, *supra* note 77, at 415.

[83] 29 U.S.C. § 2601(a)(6) (1993)

[84] 29 U.S.C. § 2601(a)(5) (1993); *see also* Malin, *supra* note 8.

[85] Rigler, *supra* note 79.

At the same time, Congress was mindful of the need to protect business interests. The Act included the "necessary safeguards to meet the legitimate concerns of business to prevent abuse, and give employers sufficient flexibility."[86] Employer protections included a mandate of only unpaid leave to alleviate fears of soaring costs, and a limit on both which employers would be required to provide the leave and which employees could take the leave.[87] Further, although Congress passed the legislation in response to a lack of adequate solutions by the private sector to economic and social changes,[88] the policy was to be administered by and through the employer, allowing the private sector to exercise control and decision-making authority over the granting of leave. Thus, although initially designed to protect working women, and praised by working women's advocates, the legislation allowed the interests of "large businesses and of the patriarchy to flourish unchecked,"[89] and was created within a climate of sex-role stereotypes which resulted in reifying gendered divisions of labor.

While legislation is always the result of a balancing of competing interests,[90] the Act's twin goals—to "simultaneously preserve the integrity of the American family and promote business interests"[91]—are inconsistent and incompatible, setting up a clash between market driven policy and family values which results in a limited, incoherent policy. By choosing to achieve these aims through an expansion of employee benefits, Congress has situated the provision and administration of benefits with the employer. When the corporation is established as grantor of benefits and overseer of family stability, the employer becomes the arbiter of public values and enforcer of norms. This newfound power enables the employer to privilege certain values and exclude others. This private social welfare system produces a

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86 H.R. Rep 103-08, Feb. 2, 1993 (additional views of Representatives Roukema and Molinari).

87 For instance, employees must obtain medical certification for illness and must meet hour and length requirements so that seasonal or other short-term workers are not eligible for leave. *Id.*

88 Rigler, *supra* note 79.

89 H.R. Rep 103-08 (1993); Duarte, *supra* note 13, at 866.

90 Duarte, *supra* note 13, at 844.

91 Jeremy I. Bohrer, You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the Glass Ceiling, 50 Wash. U. J. Urb. & Contemp. L. 401, 411 (1996).

policymaker (i.e., the corporation) that is focused on the profit motive and unquestioning in its acceptance of current societal norms and arrangements. Thus, rather than overcoming problems rooted in prevailing gendered norms of work and family, the Act merely reflects and solidifies these norms.

II. GENDERED STRUCTURES, GENDERED STANDARDS

American social policy is shaped and influenced by national values, dominant ideologies, cultural conditions and cultural actors.[92] In attempting to analyze the Family and Medical Leave Act, we can employ a public values approach in which norms that both "reflect and help constitute social experience" are seen as "embedded" in the legal rules we create.[93] In the context of work-family issues, gendered ideologies persist because they operate within a social context which adopts and reinforces these norms and ideologies. The norm of patriarchy, for example, "transmitted through . . . the operations of formal institutions and structures of power" and through daily events, remains an unquestioned norm in American culture.[94] However, by referencing the fact that "most women now work," society can deny the existence of this norm.[95]

A. The Employer as Purveyor of Social Welfare Benefits

Most Americans today depend on a connection to the workplace, rather than relying on the government, for basic forms of protection against financial insecurity.[96] While "[t]he half century since the New Deal has

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[92] This approach is known as the national values approach. For a description of this approach *see* Weir et al., *supra* note 11, at 10-11. For advocates of this approach, *see id.* at 11, n. 19; Gaston Rimlinger, Welfare Policy and Industrialization in Europe, America, and Russia (1971); *see also* Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 16 (1995).

[93] Wright-Carozza, *supra* note 2, at 533; *see* William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1008 (1989).

[94] Martha Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J. 274, 290 (1991) [hereinafter Images]; *see also* Carol Pateman, The Disorders of Women (1989).

[95] Joan Williams, Market Work and Family Work in the 21st Century, 44 Vill. L. Rev. 305, 315-16 (1996).

[96] Ontiveros, *supra* note 8, at 49.

witnessed a deepening commitment by the federal government to the maintenance of individual economic security,"[97] the United States has made the "unique decision to use the employment relationship to deliver social welfare benefits."[98] The U.S. has chosen a system in which social benefits are provided through the employment relationship and regulated by the government.[99]

This private welfare state of corporate social welfare benefits offered to workers and their dependents developed in response to labor movement pressure for private benefits after the public sector failed to expand its own programs.[100] The development of employer sponsored benefits emerged from an initially inadvertent and later intentional strategy by the federal government beginning in the late 1920s to standardize tax and wage policies, and then to rationalize and institutionalize the significant existing private benefit programs, after realizing that these benefits maintained labor peace by retaining union bargaining power and reduced union pressure for public programs.[101]

We now have an employer welfare state in which a range of employee benefits including pensions, bonuses, retirement benefits, life, health and disability insurance, vacation time, sick leave, maternity leave, childcare, and adoption assistance are provided by employers and have become a "major source of social welfare for most Americans."[102] Private enterprise currently provides almost one-quarter of all social welfare benefits,[103] and employers spend between forty and sixty-five percent of their total payroll on employee benefits, eight percent of which is mandated.[104] Of the most common

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[97] Beth Stevens, Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector, *in* Weir et al., *supra* note 11, at 123.

[98] Ontiveros, *supra* note 8, at 55.

[99] *Id.* at 49.

[100] Stevens, *supra* note 97, at 135.

[101] *Id.* at 125-26.

[102] *Id.* at 123; Hiegel, *supra* note 26, at 1492. *See also* Rothstein and Liebman, Employment Law: Cases and Materials, 544 (3d. ed. 1994).

[103] *See* Ontiveros, *supra* note 8, at 50.

[104] Duarte, *supra* note 13, at 864.

benefits, employers spend least on childcare, stock benefits, and maternal leave.[105]

By offering these benefits, employers "take responsibility for certain social obligations unrelated to work or production."[106] Health insurance is provided to both dependents and retirees, although they are outside the workplace.[107] The provision of unemployment compensation and benefits to those workers represents "both the obligation of employers to former employees who left work through no fault of their own and the reality that the workplace is the major port of access to benefits."[108]

This private social welfare scheme operates to increase loyalty to the corporate community and decrease loyalty to the state, for "[w]hen the business community assumes the mantle of benefactor, it gains legitimacy as an arbiter of social life."[109] The result is that the private sector wins increased prestige and power, enabling it to claim a larger role in social welfare policymaking,[110] while employers subtly gain greater power and control over their employees through the provision of these benefits.[111]

Through this system of privately supplied social benefits, "[p]rivate benefits become *de facto* social policy."[112] Important national issues are now placed on an agenda within labor market, rather than political institutions, resulting in a reduced power of individual citizens and organized interest groups to influence social welfare decisions. Policy decisions become recast as economic rather than political, focus shifts from social needs to business

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[105] U.S. Chamber of Commerce 1999 Employee Benefits Study, cited in U.S. Companies Spend More Money on Employee Benefits, New Survey Says, Daily Labor Report No. 242, Dec. 17, 1999, at A5.

[106] Ontiveros, *supra* note 8, at 53.

[107] *Id.*

[108] *Id.* at 54.

[109] Stevens, *supra* note 97, at 146.

[110] *Id.*

[111] *Id.* at 135-42. Over the past thirty years, workers have added, on average, an extra 164 hours to their work year, and workers are taking fewer paid leaves and shorter vacations; *see* Mike Long, Friend of the Family?, 58 MAY Or. St. B. Bull. 35 (1998).

[112] Ontiveros, *supra* note 8, at 54.

costs, and activists are forced to move from an emphasis on "structural change of the economic order to a search for pragmatic economic rewards."[113]

This market-based system appears efficient because it provides rational constraints on the demand for social benefits based on economic capacity.[114] However, this myth of private benefits hides the extent of government regulation and the mutual influence exerted on the public and private sectors,[115] which are "inextricably intertwined" in the provision of social welfare benefits.[116] Privatization thus becomes another form of regulation,[117] where employers are the seat of social welfare benefits. This constitutes "covert governmental preservation of existing social inequalities."[118]

B. Workplace Hostility to Women and Families

Corporations now have control over employee benefits, but assigning the protection of "family integrity" to the workplace is problematic. Although the institutional culture of the workplace professes egalitarianism, "[c]ompeting normative expectations within the organizational culture . . . reinforce the traditional beliefs about women in the workplace."[119] Because management employees are disproportionately male heads of single-earner families, supervisors tend to bring attitudes stemming from socialization, experience, and background to their position, infusing a "gendered perspective" which results in stereotyping and occupational segregation, as well as inflexible parenting options for both men and women.[120] Gender

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[113] Stevens, *supra* note 97, at 146.

[114] *See* Ontiveros, *supra* note 8, at 56.

[115] Stevens, *supra* note 97, at 126.

[116] Ontiveros, *supra* note 8, at 58.

[117] Ehrenreich, *supra* note 3, at 1240.

[118] *Id.* at 1243.

[119] Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 Harv. C.R.-C.L. L. Rev. 79, 96 (1989).

[120] *Id.* at 98.

stereotypes are responsible for a "pervasive work culture that limits choice even when benefits formally afford such choices."[121] Employers take "rational gamble[s]" that workers adhere to traditional gender roles in offering career advancements and salary increases to men and assigning the responsibility for children and home to women.[122] Employment arrangements expect work and family issues to be kept separate and, within this separation, "presumes the accommodation of family to work."[123]

The wage gap and occupational segregation, the result of these gendered assumptions about work and family conflicts, create a vicious cycle which perpetuates the limited choices for both women and men. Providing formal choices for male and female employees ignores the embedded structural problems in the workplace and does nothing to advance equality in the family.[124] The availability of paternity leave, for instance, means little in terms of workplace equality if male employees do not take the leave for fear of employer repercussions, cannot take leave for economic reasons, or are not allowed to take the leave when they request it.[125]

Within this gendered social context, idealized images of workers, parents, and families inform and influence the creation and interpretation of public policy.

C. Prevailing Norms of Work and Family

1. The Ideal Worker Norm

Though many American workers are parents, the culture of the American workplace denies this fact, forcing workers to prioritize their role as worker.[126] The American workplace is organized around the concept of an

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[121] *Id.*

[122] Branch, *supra* note 4, at 127.

[123] Dowd, *supra* note 119, at 100-02.

[124] *Id.* at 115.

[125] *See* Knussman v. Maryland, 65 F. Supp. 2d 353 (S.D. Md. 1999); Father Awarded $375,000 In a Parental Leave Case, N.Y. Times, Feb. 3, 1999, at A11 (Male police officer denied leave by employer sued under state and federal leave statutes).

[126] Wright-Carozza, *supra* note 2, at 585.

autonomous, unencumbered worker.[127] This approach presumes formal equality between individuals who have no relationships, attachments, obligations or family responsibilities outside the workplace.[128] In this view, workers are "shorn of their external attachments and relationships."[129]

Current workplace norms envision a worker who is fully committed to his employer either because he has no family or because he has a family with a wife at home.[130] This ideal-worker norm "is not ungendered: instead, it is framed around the life patterns typical of men."[131] As Joan Williams points out, workplaces are designed around this ideal employee—everything from equipment which is designed around men's bodies to career patterns and advancement based upon an employee whose worklife is not interrupted by childbirth or caregiving activities.[132]

As women have entered the labor force, this male standard adopted as the basis for the workplace has given rise to conflict:

> The workplace has always been set up to accommodate traditional workers: men who have wives at home to care for the house and children. The workplace structure assumes that workers have no other obligations and can devote all their energies to work. When women enter the workplace with multiple roles and responsibilities, however, the workplace has traditionally not responded with any greater flexibility.[133]

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[127] *Id.*

[128] Jana B. Singer, Still Hostile After All These Years? Gender, Work and Family Revisited, 44 Vill. L. Rev. 297, 298 (1999); Wright-Carozza, *supra* note 2, at 581.

[129] Wright-Carozza, *supra* note 2, at 581.

[130] Note, Why Law Firms Cannot Afford to Maintain the Mommy Track, 109 Harv. L. Rev. 1375, 1377 (1996) [hereinafter Mommy Track].

[131] Joan C. Williams, Restructuring Work and Family Entitlements Around Family Values, 19 Harv. J.L. & Pub. Pol'y 753, 756 (1996); Ontiveros, *supra* note 8, at 43. *See generally* Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000) [hereinafter Unbending Gender].

[132] *See* Williams, Unbending Gender, *supra* note 131.

[133] Kyle B. Arndt & Christina A. Bull, The Impact of the Family and Medical Leave Act of 1993 on the Legal Profession, 3 UCLA Women's L.J. 77, 80 (1993).

Structural barriers exist which impede the ability of women in the labor force to achieve equality.[134] The mommy track[135] is foisted upon many female workers. Time and schedule conflicts arise because work schedules and benefits do not always conform to the needs of workers who have family responsibilities.[136] The school day and school year conflict with the work day and work year, and the "occupational cycle of the workplace and the life cycle of the family and individual family members" clash.[137] Demands of both family and work are strongest at the early stages of one's life, creating "a predictable collision course" during the early stages of career and family.[138] This clash produces gendered labor patterns in which men's professional development is linear and uninterrupted, while women "often interrupt their careers, begin them later, or otherwise find that child-care responsibilities limit their career involvements."[139]

Job benefits are often better for those who have a long, uninterrupted job tenure.[140] Social Security, which uses a formula that looks at length of employment and earnings to determine the amount that a worker receives upon retirement, "reflects the worklife of a man, not a woman."[141] Therefore, a female worker—who typically works for a shorter time period with lower earnings and periods of interruption—"will earn significantly less upon retirement than her male counterpart because the male profile was used to

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[134] Singer, *supra* note 128.

[135] *See* Felice Schwartz, Management Women and the New Facts of Life, Harvard Business Review, Jan-Feb 1989. Although Schwartz did not use this term herself, the term Mommy Track was coined as a result of this article, which suggested that employers should create two career tracks for women, one for those who choose flexible hours and benefits, in order to accommodate family commitments and involvements, and another for those who choose to stay on the fast track, and thus forgo family responsibilities.

[136] Ontiveros, *supra* note 8, at 43; Dowd, *supra* note 119, at 88.

[137] Dowd, *supra* note 119, at 87.

[138] *Id.* at 88.

[139] Malin, *supra* note 8, at 1048.

[140] Ontiveros, *supra* note 8, at 43.

[141] *Id.* at 44.

develop the system."[142] Additionally, the most desirable work, and the work with the most benefits and advancement opportunities, is often full-time. Because women continue to bear greater responsibility than men for family care, they are more likely to work part-time. Women are also more likely than men to leave the labor force more often and for longer periods of time, and are often more limited in their availability for weekend, shift and overtime work.[143] Since many high paying jobs in both blue and white collar fields require overtime or extensive travel, women are often unable to accept, or may not be offered, these assignments, and face detrimental job consequences and limits on their ability to advance as a result.[144]

Such a system, in which the ideal worker norm is created around male bodies and life patterns, renders the female worker imperfect, unable to compete fully, and in some way disabled:

> Under the current male-oriented structure of the workplace, the only way to fit pregnant women and new mothers into its definitions of worker and benefits is to treat them as imperfect or disabled men. Since only women are eligible for this type of leave, their action in taking leave makes them vulnerable to adverse employment decisions justified by their choice. The true inequality in this situation comes . . . from the attempt to fit women into a workplace that was built without regard for the needs of those with responsibility for children.[145]

Thus, 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."[146] As long as women are faced with the dual responsibilities of career and family, they will not succeed in a market system where unwavering dedication is required for success.[147]

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[142] *Id.* (citations omitted).

[143] Deborah Maranville, New Approaches to Poverty Law, Teaching and Practice: Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce, 4 B.U. Pub. Int. L.J. 291, 293-94 (1995).

[144] Singer, *supra* note 128, at 313.

[145] Ontiveros, *supra* note 8, at 55.

[146] Branch, *supra* note 4, at 120.

[147] *Id.* at 133.

2. The Ideal Family Norm

a. The Ideal Parent Norm: Parent Means Mother

Despite these difficulties faced by women who enter the workforce, women are moving into the job market in growing numbers. Yet there has been no comparable shift of men into the domestic sphere.[148] Although the FMLA affords parental leave to both mothers and fathers, our culture "places a higher ideological value on mothering than on fathering or parenting."[149] While fathers who provide for their children materially are seen as good fathers, "mothers who provide only materially for their children are seen as having deprived their children of the care and attention that they need."[150] Popular perceptions link infant health with maternal care,[151] and a societal presumption of greater maternal skill and knowledge has created a self-perpetuating cycle of maternal responsibility.[152] Good mothering is still defined by "maternal presence."[153]

Myths of motherhood abound, from Biblical stories that tell women to give up power and privilege to achieve the status of mother, to Supreme Court decisions reifying the "noble and benign offices of wife and mother" and regulating women's employment for the "well-being of the race."[154] As women's participation in the labor force increased during the 1970s and 1980s, media images of harm to children of working mothers abounded, and women were "bombarded with stories warning that they should opt for

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[148] *Id.* at 125.

[149] *Id.* at 130.

[150] Odeana R. Neal, Myths and Moms: Images of Women and Termination of Parental Rights, 5 Fall Kan. J.L. & Pub. Pol'y 61, 62 (1995).

[151] Malin, *supra* note 8, at 1054-56.

[152] Malin, *supra* note 8, at 1054-56.

[153] Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 378 (1996). This maternal presumption extends beyond our borders. Almost all international childcare policies are maternity policies; only Sweden offers paid paternal care. *See* International Labor Organization Press Release, *supra* note 2.

[154] *See* Bradwell v. Illinois, 83 U.S. 130 (1872); Muller v. Oregon, 208 U.S. 412 (1908).

motherhood before careerism."[155] Mothers who decide that "any aspect of their lives has greater value than, or is co-equal with their concern for their children," are seen as bad mothers.[156] A working mother is only a good mother "if she would rather be at home raising her children, but must work outside the home out of economic necessity."[157] In fact, "single" mothers, and "working" mothers are viewed as imperfect mothers—mothers whose title has to be modified apologetically. And women of color are seen as naturally being inferior parents "less able to care for their own children, perhaps because they do not operate under the supervision and control of white people as they do when working in the homes of white people."[158]

Mothers themselves, however, do not set the standards for motherhood.[159] Societal norms now replace the father as the entity to whom mothers must answer in creating the future generations.[160] Motherhood has become a "colonized concept," an event "physically practiced and experienced by women but occupied and defined, given content and value, by the core concepts of patriarchal ideology."[161] Mothers are to raise children in a manner consistent with their place in society[162] and may not "challenge patriarchy [or] live their lives outside prescribed codes of conduct."[163]

Patriarchal ideology is at the root of the socially accepted image of motherhood.[164] Even women who are not mothers, even those who never

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[155] Neal, *supra* note 150, at 65.

[156] *Id.* at 61.

[157] *Id.*

[158] *Id.* at 68. *See also* Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy, 104 Harv. L. Rev. 1419, 1436-44 (1991) (examining how women of color have historically been devalued as mothers).

[159] *See* Neal, *supra* note 150.

[160] *Id.*

[161] Fineman, Neutered Mother, *supra* note 92, at 125.

[162] Neal, *supra* note 150, at 66 (arguing that slave children were to be raised to increase their value to the master).

[163] *Id.* at 66.

[164] Martha Fineman, Images, *supra* note 94, at 276.

intend to become mothers, are affected by this rhetoric and ideology, because cultural and social forces create a "unitary, essentialist social understanding of women."[165] This understanding provides a perceived justification for employers to make assumptions about women's commitment to their jobs and attachment to the workforce.[166]

b. The Ideal Family Norm: Sexual, Nuclear, Patriarchal

Patriarchal concepts are central to the way we define and understand families in our culture.[167] Under patriarchal ideology, even informed and remodeled by women's increasing participation in paid labor, the privileged family form in policy discourse involves a nuclear family with a sexual affiliation between a man and a woman.[168] Our system does not accept the notion of a one-parent family and "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."[169] In addition, state intervention, in the form of paternity proceedings and custody hearings, operates to insinuate the state into these non-ideal families,[170] and is an attempt to "normalize" them.

Many government benefits programs are designed "to enhance and entrench, to aid in the restoration of, or to provide a plausible replacement to, the preferred model of the patriarchal family."[171] Because social programs are based on stereotypes and family-role expectations, benefits quickly become accepted as entitlements for the traditional family, and moral

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165 *Id.* at 276.

166 *See* Trezza v. The Hartford, Inc., 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998) (mother passed over for promotions in favor of less qualified colleagues because her employer thought that she would not be interested in a position which involved longer hours since she had children).

167 Fineman, Images, *supra* note 94, at 276.

168 Fineman, Neutered Mother, *supra* note 92, at 16.

169 Branch, *supra* note 4, at 133.

170 *See* Fineman, Neutered Mother, *supra* note 92, at 81, 191, 211.

171 Edward McCaffery, The Burdens of Benefits, 44 Vill L. Rev. 445, 446 (1999).

language is used to stigmatize, blame, and weaken benefits offered to non-traditional families.[172]

The workplace incorporates this rigid, patriarchal conception of family by constructing the ideal worker as a male wage earner in the paid workforce married to a stay-at-home female spouse who performs the unpaid housework and childcare.[173] Market work is structured around an ideal worker who "takes no time off for childbearing, has no daytime child rearing responsibilities, and is available full-time and for overtime at short notice."[174] This norm assumes and depends upon "dichotomies between devotion to family and to career, and that require unswerving fealty to work over all else."[175]

c. The Ideal Child Norm: Children As Individual Commodity, Not Social Good

In American workplace regulation, notions of childbearing as a temporary disability and individual responsibility, to be done privately and costlessly, have infected U.S. attitudes about parenting.[176] The message is that:

> individual choice implied individual obligation. . . . [indicating] the law's failure to consider the inter-subjective aspects of the roles of both worker and parent, and the social value of both. In other words, because the United States has viewed pregnancy and parenthood merely as aspects of personal, individual choice instead of having normative meaning within a social context, their resulting obligations or costs have fallen upon the individual alone.[177]

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[172] *Id.* at 448.

[173] Dowd, *supra* note 119, at 105.

[174] Joan C. Williams, Restructuring Work and Family Entitlements Around Family Values, 19 Harv. J.L. and Pub. Policy 753 (1996).

[175] Mommy Track, *supra* note 130, at 1377.

[176] Branch, *supra* note 4, at 120-21.

[177] Wright-Carozza, *supra* note 2, at 578.

Natural law notions of parental authority maintain that parents, without involvement from the state, have an obligation to care for their children.[178] The state purports to rely on the family to care for and protect society's weaker members and to produce and educate its future citizens.[179] While childcare work is relegated to the family, it is a burden overwhelmingly experienced by women. This gendered work is sentimentalized, resulting in the marginalization of the caretakers as doing something outside of and morally loftier than "work,"[180] thus further perpetuating the gendered segmentation of family and market work.

Contrary to what the rhetoric implies, the nuclear family does not operate independently and self-sufficiently.[181] Instead it is subsidized by a complex fiction which involves masking the dependency of both those needing care and those providing care.[182] The state is actively involved in regulating childrearing and "control[s] the manner in which parents raise their children."[183]

III. INCLUSIONS AND EXCLUSIONS AS MORAL CODE

Having set out the Act's intended purposes, situating these in the context of the structural arrangements in which American social policy is delivered through the employment relationship, and exploring the prevailing gendered work-family norms which influence these policies, Part III will now examine some of the ways in which the Family and Medical Leave Act operates within this gendered, patriarchal hierarchy that separates family from work. This Part will explore the ways in which the Act's provisions entrench our reified social norms while the Act's exclusions demonstrate the hostility

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[178] *See* John Locke, Second Treatise of Government (1966); Neal, *supra* note 150, at 64.

[179] Fineman, Neutered Mother, *supra* note 92, at 226.

[180] Katharine B. Silbaugh, Commodification and Women's Household Labor, 9 Yale J.L. & Feminism 81 (1997); Katharine Silbaugh, Comments, Conference: Unbending Gender, American University Washington College of Law, Nov. 1999.

[181] Fineman, Neutered Mother, *supra* note 92, at 223.

[182] Fineman, Neutered Mother, *supra* note 92, at 163; *see generally* McCaffery, *supra* note 171.

[183] Neal, *supra* note 150, at 64.

that employers and policymakers foster for non-traditional families, privileging some workers and disadvantaging or ignoring others.

The Family and Medical Leave Act provides a cramped solution to work-family problems. It is a vision constructed within the ideologies of patriarchy and domesticity and the norms of the nuclear, sexual family. Adrienne Hiegel has explained, in the context of the Americans with Disabilities Act (ADA),[184] that legislation can establish a moral code for the workplace and society. She explains that "[b]y excluding . . . particular sex and gender disorders, the ADA outlines the boundaries of appropriate masculine sexuality, preserving a vision of manhood that is presumptively heterosexual [and] privileged."[185] Extending Hiegel's notion of a moral code to the FMLA by analogy, we see that by excluding particular groups of individuals and family arrangements, the FMLA circumscribes the boundaries of appropriate family and gender roles, preserving a vision of family that is presumptively nuclear, heterosexual, middle-class and male-headed and a vision of sex roles as male/worker and female/mother.

A. The Employer's Role: Mediating Social Welfare Benefits and Invading Privacy

Under the FMLA, the employer confers benefits on qualifying employees. In order to determine who is deserving of these benefits, the employer may make a detailed inquiry into the employee's situation.[186] Many of the FMLA's provisions fly in the face of the growing jurisprudence favoring employee privacy,[187] denying reasonable privacy expectations and "needlessly sacrific[ing] employee privacy."[188] Under the guise of its role as provider of social benefits, the employer is allowed to pry into private and personal details of employees lives in order to decide whether leave should be granted. The Act requires employers to become more involved in the physical and mental conditions of their employees and their employees' family

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[184] 42 U.S.C. § 12101 (1990) et seq.

[185] Hiegel, *supra* note 26, at 1484.

[186] *See* 29 U.S.C. § 2613 (1993).

[187] Hiegel, *supra* note 26, at 1489. For a detailed discussion of privacy issues in employment, *see* Rothstein and Liebman, *supra* note 102.

[188] Olsen, *supra* note 81, at 1020.

members.[189] It also allows an employer to monitor the employee's schedule.[190] According to the Act, when an employee requests leave, an employer should "inquire further of the employee" to determine whether the leave qualifies under the Act.[191] Employers are able to become closely involved in the lives of employees and their families, obtaining private medical information to determine whether an illness constitutes "a serious health condition" and evaluating whether childcare leave is permissible, so that the "decision to start a family or to have another child is no longer simply a private decision between husband and wife; it also involves their employers."[192]

Employers are required to fulfill certain obligations and responsibilities towards their employees under the Act—posting notices about the Act, providing leave, and protecting jobs. In return, employers are given power and discretion over their employees' schedules, lives, and family arrangements. Though this system may appear both reasonable and symbiotic, employees' responsibilities have been construed quite strictly by the courts, while employers' obligations have been interpreted more leniently. For example, although employers are required to post notices and provide information about the FMLA to employees,[193] courts have refused to penalize employers for failure to notify plaintiff-employees of their rights under the Act.[194] Similarly, while an employer must generally restore an employee to his or her position upon return from leave,[195] the employer may refuse to

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[189] *See generally* 29 U.S.C. § 2601 (1993) et seq.

[190] *See* 29 C.F.R. §§ 825.306(b)(2)(ii)-(5)(ii) (1993).

[191] 29 C.F.R. § 825.208(a) (1993); *see also* Garry G. Mathiason, The Family and Medical Leave Act and Related Parental Rights, CA35 ALI-ABA 1123, 1130 (Feb. 26, 1996).

[192] Schroeder, *supra* note 1, at 302.

[193] 29 U.S.C. § 2619 (1993); 29 C.F.R. § 825.300 (1993).

[194] Catherine K. Ruckelshaus, Selected Recent Developments under the Family and Medical Leave Act, 615 PLI/Lit 471, 474, 489-92 (1999). A defective FMLA notice provision in an employee handbook is curable by an employer providing accurate information when an employee requests leave. Further, an employer's failure to post FMLA information does not confer independent rights to FMLA leave. Additionally, where the employee knew of the FMLA's existence, employer's failure to post the required notice does not excuse proper notice by plaintiff.

[195] 29 U.S.C. § 2614(a) (1993).

reinstate highly compensated "key employees,"[196] may require a fitness for duty certification from a health care provider before allowing an employee to return to work,[197] and may return an employee to an "equivalent" rather than the same position.[198] This equivalent position includes equivalent benefits and pay, but need not concern such conditions as "diminished opportunities for promotion."[199] Finally, while the Act is intended to provide leave to needy employees, the employer may require proof of employee or family member illness through medical certification, including second opinions, third opinions, and rectification before approval,[200] may demand notification at least thirty days prior to leave or as soon as is practicable if thirty days notice is not possible,[201] and may require an employee to use paid sick or vacation leave in place of unpaid leave.[202] An employer may also require that the employee accommodate the employer's schedule in arranging intermittent leave for personal or family medical treatments,[203] and may deny a request for intermittent leave altogether if the leave is intended for childcare.[204]

Thus, the employer is now empowered through the FMLA to approve or deny familial caretaking arrangements in the name of expanding social welfare benefits to citizens *qua* employees. While these employer

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196 29 U.S.C. § 2614(b) (1993).

197 29 U.S.C. § 2614(a)(4) (1993).

198 The term equivalent does not extend to "intangible immeasurable aspects of the job." The perceived loss of potential for future promotional opportunities, for example, is not encompassed in equivalent pay, benefits and working conditions. Mathiason, *supra* note 191, at 1134; *see also* 29 C.F.R. § 825.215(f) (1993).

199 29 C.F.R. § 825.215(c) (1993).

200 29 U.S.C. § 2613 (1993).

201 29 C.F.R. §§ 825.302, 303(b) (1993).

202 29 U.S.C. § 2613 (1993).

203 When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health-care provider. An employer may, for justifiable cause, require an employee to reschedule treatment, subject to the approval of the health-care provider. Mathiason, *supra* note 190, at 1131 (citations omitted); *see also* 29 C.F.R. § 825.302(e) (1993), 29 U.S.C. § 2612 (1993).

204 *See* 29 C.F.R. § 825.203.

determinations are potentially subject to the rulings of the Department of Labor and the courts, employees are unlikely to pursue legal action against an offender who signs their paychecks, and are unlikely to prevail against a law that provides extensive employer discretion.

B. Sick is Not Enough: The Serious Requirements for a Serious Health Condition

The FMLA allows an employer to ascertain the employee's health condition, diagnosis and prognosis.[205] The Act provides for leave for employees to attend to their own, or certain family members', "serious health condition."[206] Such condition is defined and circumscribed, requiring that an illness, injury, impairment or physical or mental condition include either "inpatient care" or "continuing treatment" by a health care provider.[207] In order for an employee to qualify, the employee's healthcare provider must find that the employee is unable to work or unable to perform the functions of his or her position.[208]

Proof of illness is required,[209] providing a great deal of discretion for employers. An employer may require written medical certification from an employee seeking leave for a medically related reason.[210] The certification must contain "the appropriate medical facts within the knowledge of the health care provider regarding the condition."[211] The employer may require a second, and sometimes a third, opinion, at the employer's expense.[212] During leave, an employer may require periodic status reports about

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[205] *See* Patricia A. Shiu & Joannie C. Chang, Litigating Employment Cases Under the Family and Medical Leave Act, 615 PLI/Lit 553, 562 (1999).

[206] 29 U.S.C. § 2612(b)(1) (1993).

[207] *See* 29 U.S.C. § 2611(11) (1993); 29 C.F.R. § 825.114 (1993).

[208] *See* 29 C.F.R. § 825.115 (1993).

[209] *See* 29 U.S.C. § 2613 (1993).

[210] *See id.*

[211] 29 U.S.C. § 2613(b)(3) (1993).

[212] 29 U.S.C. § 2613 (1993).

employee's health and intent to return to work.[213] If the employee requests intermittent leave, details regarding the reasons for that leave may be required.[214]

Although the FMLA was designed to require health care providers to determine whether a health condition is serious, some employers and courts have relied on their own subjective judgments as to whether a condition is serious enough to be covered.[215] Serious health conditions have been strictly construed by the courts and non-serious health conditions are usually not covered by the Act.[216]

Illness must be severe to be covered.[217] Congress assumed that minor ailments would be covered by routine employer sick leave policies.[218] However, this provision operates to penalize parents who currently work at jobs which do not provide sick leave, and fails to address the fact that most employer sick leave policies cannot be used to care for other family members. The Act thus perpetuates the cultural norm that family responsibilities should, as a rule, be handled privately, with the help of federal policy only on an emergency, short-term basis for unusual and extraordinary circumstances, not, as many contend, for the daily problems and concerns that parents of children and caretakers of elderly face.

These provisions, and the resulting invasive nature of employer involvement, point to some of the problems inherent in the Act. While it may seem reasonable, and even necessary, for an employer to obtain information about the employee's health status and work abilities, a policy in which benefits are subject to employer approval, predicated on proof, repeated certification and status reports, exposes the discomfort and distrust inherent in this system. Such requirements allow the employer to pass judgement on

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213 *See* Elizabeth A. Hall, Balancing Work and Family: A Legal Perspective, 32-DEC. Law 18, 20 (1994).

214 *See* 29 CFR. § 825.306(b) (1993).

215 *See* Shiu & Chang, *supra* note 205, at 559.

216 Ruckelshaus, *supra* note 194, at 486.

217 William R. Huffman, Comment, The Family and Medical Leave Act of 1993 and the Current State of Employee Protection: What Type of Protection Can an Employee Expect upon Taking Work Leave for Family or Medical Problems?, 15 Miss. C.L. Rev. 97, 106 (1994).

218 *See* Malin, *supra* note 8, at 1087.

which arrangements are acceptable and which benefits are extended. The employer essentially is allowed to offer protections to certain workers and exclude others, resulting in the employer's ability to discriminate "with the state's blessing."[219]

C. Real American Families: Non-Traditional and Non-Covered

In addition to the fact that the Act requires intimate employer involvement and decision-making in health and family leave decisions, the Act fails to provide protection for families that do not meet the traditional, nuclear family form. Individuals who live in non-traditional family arrangements are ignored or, even worse, denied protection under the Act. The fact that AIDS often affects individuals who are not living in traditional families "underscores the necessity of a family and medical leave for non-traditional families."[220]

1. Facts About Families

In 1992, at the time the Act was passed, there were twelve million families maintained by women in the U.S.[221] This number is more than double the number of such families in 1970, based on increases in divorce, separation, and single mother families.[222] Over 17.5 percent of families in 1992 were families maintained by women, with 7.1 million having children under eighteen.[223] In terms of racial distribution, sixty-four percent were white women, thirty-three percent black women, and twelve percent Hispanic women. Only 1.4 million families with children under age eighteen were maintained by men.[224]

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219 Hiegel, *supra* note 26, at 1479.

220 Maureen Porette and 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. Legal Comment, 587, 599 (1993) (citations omitted).

221 *See* "Women Who Maintain Families," Women's Bureau Fact Sheet, U.S. Department of Labor, June 1993 (visited Nov. 8, 1996) <http://www.dol.gov/dol/wb/public/wb_pubs/wwmf1.htm> [hereinafter Women Who Maintain Families].

222 *See id.* at 1.

223 *See id.*

224 *See id.*

Fifty-six percent of women who maintained families in 1992 were employed.[225] Women with children and no second earner had a high participation rate in the labor force—52.5 percent of mothers who never married, 63.7 percent of married mothers with absent spouses, 80.3 percent of divorced mothers, and 61.4 percent of widowed mothers.[226] Nearly seventy-five percent of women with children under eighteen who maintained families worked full time. However, in 1992, the unemployment rate for women with children who maintained families was twice as high as the rate for women in married-couple families—11.8 percent.[227] Income for these families was lower than income for married-couple families and for families maintained by men. The figures range from $11,414 for black families to $19,547 for white families.[228] While 48.3 percent of married-couple families had children to rear, 68.3 percent of families maintained by women had children to rear.[229]

Clearly, the potential impact of government regulated leave could be significant for single parent families. However, because of the assumption of a traditional, nuclear family inherent in the lawmakers' conceptions of the family, the Act is not responsive to such needs. Women are differentially impacted by such laws, but in an effort to appear egalitarian, policymakers failed to consider the reality of women's experience.

2. The Facts Applied

Unlike the ADA, which extends protection to persons who have a "relationship" with a person with a disability, the FMLA requires a "recognized familial relationship" in order for benefits to be extended.[230] Under the FMLA, an employee may only take leave to care for a "spouse," "son," "daughter," or "parent" with a serious health condition, or because of

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[225] *See* Women Who Maintain Families, *supra* note 221.

[226] *See id.*

[227] *See id.* at 2.

[228] *See id.*

[229] *See id.*

[230] Hall, *supra* note 213.

the birth or placement of a "son" or "daughter."[231] These restrictions on which family members are included has been strictly construed.

If a child's biological parents are alive and involved with the child, another family member or friend who has caretaking responsibility for the child may be precluded from taking leave for such responsibilities. Although the statute includes a biological parent or a person standing *in loco parentis*[232] to be eligible for leave, the "original intent of the *in loco parentis* provision would apply to any individual who has daily responsibility for caring for the child."[233] Thus, if more than one individual is responsible for caretaking, or if the person responsible is not related to the child, this provision "does not ensure that individuals who are not legally related to the child will receive leave for the care of the child. . . . Ultimately, the decision may require use of the employer's discretion" to decide if the employee is eligible under the provision. In addition, only one of two lesbian co-parents can be "genetically related to the child at birth. . . . Thus many lesbians would also be prevented from using the leave to care for their children, who are not legally their sons and daughters."[234]

Similarly, "parent" is defined as "the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter," and, thus, similar concerns could be raised for potential caretakers who are not legally or genetically related to the adult in need of care.[235] Care of in-laws is excluded from the Act,[236] and relatives in extended or non-traditional families are not eligible for leave to care for relatives such as aunts, uncles, nieces or nephews or biologically or legally unrelated family members with whom they live.[237] Since women of color and recent immigrant women are "more likely [than white women] to

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231 29 U.S.C. § 2612(a) (1993).

232 29 U.S.C. § 2611 (1999).

233 Ward, *supra* note 77, at 430.

234 Christine A. Littleton, Does It Still Make Sense to Talk About "Women"?, 1 UCLA Women's L.J. 15, 33-34 (1991).

235 *See* 29 U.S.C. § 2611 (1999).

236 *See* 58 Fed. Reg. 31794-01, at 825.113 (1993).

237 Littleton, *supra* note 234, at 35.

be in such a family setting, this exclusion also has racial, ethnic, and class dimensions."[238]

Although there are a growing number of children who are cared for by extended families,[239] limits on extended and nontraditional families have been strict. Grandparents in need of care have been specifically excluded from coverage under the FMLA.[240] Similarly, although it has not yet been litigated, grandparents who serve as caretakers would be unlikely to qualify for FMLA leave, since they do not fit under one of the enumerated relationships. Currently, almost four million children reside in homes with a grandparent.[241] Additionally, eleven percent of grandparents over age fifty are caregivers, and eight percent provide day care on a regular basis.[242] The exclusion of these caretakers from coverage under the Act demonstrates the real danger of the Act's rigid limits.

These restrictions can also be seen in the Act's application to adult partners. "Spouse" is defined in the Act as a husband or wife, as the case may be,[243] and has been extended only to encompass common law spouses in states that recognize such an arrangement.[244] No other term is included in this provision to cover the variety of sexual affiliations currently existing. Non-married cohabitators are not able to rely on the FMLA to care for their

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[238] *Id.* at 34.

[239] Joan Biskupic, Challenging Legal Notion of Family, The Washington Post, Jan. 9, 2000, at A1. Court battles of interested caretakers have included former boyfriends of a child's mother, former foster parents, the biological mother of an adopted child and gay partners of a child's biological parent. *Id.*

[240] *See* Bauer v. Dayton Walther Corporation, 910 F. Supp. 306 (E.D. Ky. 1996); Krohn v. Forstin, 11 F. Supp. 2d 1082 (E.D. Mo. 1998).

[241] Biskupic, *supra* note 239, at A19.

[242] *Id.*

[243] 29 U.S.C. § 2611(1993).

[244] *See* 29 C.F.R. § 825.113(a) (1993).

partners,[245] and gay men and lesbians are excluded from invoking the Act, since their partners "cannot be 'spouses' under any existing state law."[246]

In a society of varied family arrangements, many involving family members in addition to biological parents or legal spouses in the core family unit, the Act's language clearly privileges the traditional family form, and does not protect those living in alternative family arrangements. At the same time, these provisions have a clear differential impact on employees by race, ethnicity, class and sexual orientation.

D. Financially Challenged: Low-Income Workers, Single Parents and Single Earner Families

Of great statistical significance is the number of workers excluded from leave because of financial constraints. Leave under the FMLA is generally unpaid.[247] While vacation or sick time can be substituted for unpaid leave in some circumstances, this is possible only where an employer has a voluntary program of paid leave,[248] or where an employer approves of such an arrangement.

By failing to provide wage replacement, and providing only unpaid leave, the Act privileges those who have the financial resources to support themselves for twelve weeks. Low-income workers are not protected. In addition, those families with only one income, both single parent families and traditional single earner two parent families, may not be able to afford to take leave. Therefore, parenting rights are denied both to fathers in families where there is a mother who works in the home (or, conversely and less commonly, to mothers when there is a father who works in the home) and to single mothers or fathers who are raising children alone. The result is that low-income parents, and certainly single parents, will find it virtually impossible to take the leave.[249]

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[245] *See* Cong. Rec. S1347, Feb. 4, 1993 (statement of Senator Nickles); 60 Fed. Reg. 2180 (1995); Mathiason, *supra* note 191 (noting that this definition does not entitle an employee to take family care leave or medical leave for a significant other or a registered domestic partner).

[246] Littleton, *supra* note 234, at 33-34.

[247] 29 U.S.C. § 2612(c) (1993).

[248] Littleton, *supra* note 234, at 35.

[249] *Id.* at 35-36.

While the DOL regulation specifying the use of state unemployment trust funds to provide partial wage replacement for parental leave has provided the possibility of paid leave, a number of problems remain. First, the regulation is voluntary for the states, and while some states may choose to follow this path, many states either cannot or will not use their unemployment trust funds for this purpose. In addition, the regulation merely applies to parental leave for a newborn or newly adopted child. No medical leave is covered by the regulation. Further, unemployment insurance payments average $212.00 per month, making the financial feasibility of this program very limited for most workers. Finally, philosophical opposition has been lodged against this approach based on the fact that most maternity leave is not involuntary.[250] As Ellen Goodman of the Boston Globe writes:

> [t]reating the care of newborns as unemployment, treating maternity leave as a layoff, not only stretches the meaning of the unemployment trust fund, it allows us to play let's pretend. We can once again avoid looking at the reality of family caregiving as an essential, ongoing part of every life.[251]

Thus, this solution is neither philosophically nor practically useful for most employees and is not likely to be realized anytime soon.

E. In Name Only: Gender-Neutral Language and Gender-Based Reality

While the drafters of the Act quite self-consciously crafted gender-neutral language,[252] the Act itself, set in the gendered social context of American society, and intended to be administered by employers who are unlikely to challenge these gendered norms, merely creates a legal fiction of gender parity in a highly gender-stratified society in which men are discouraged and hindered from participating in caretaking, while women are penalized for pursuing career success.

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[250] Unsigned Editorial, Keep Jobless Fund for the Jobless, Boston Herald, Dec. 5, 1999, at O24.

[251] Ellen Goodman, Missing the point—again—on parental leave, Boston Globe, Nov. 14, 1999, at D7.

[252] 29 U.S.C. § 2601(b)(4) (1993).

The act assumes gender neutrality where it does not exist and it masks the gendered reality that prevents true equality.[253] This farce of gender neutrality operates throughout the Act to maintain and reify the gendered division of labor. By including gender-neutral language and focusing on the inclusion of some men, the FMLA excludes many women.[254] The FMLA only *appears* to "fulfill the criterion of 'inclusiveness.'"[255] By replacing maternity leave with parental leave, women may gain indirectly through their association with men potentially more able to share in parenting tasks, but "[t]hose women who do not share intimate living arrangements with men are no better off materially. And women *qua* women, women as a class, are no closer to having our own bodies, desires and lives accepted as a legitimate basis from which to criticize and change existing work rules."[256] If the Act had focused on women, it

> would have included many more people among its beneficiaries. Thus what looked like more inclusion (let's add men) could, from a women-centered perspective, be seen as exclusion (what about the women we've left out?). . . . A bill that protected the economic security of Black and Latina women, marginally employed women, lesbians, disabled women, and so on, would have looked quite different, and would have avoided the race and class bias of the bill that reached for inclusiveness by addressing the needs of a few relatively privileged men.[257]

The Act's gender-neutral language operates to exclude many men as well. Fathers are much less likely to take parental leave. Even "liberal estimates place the participation rate of American fathers in parental leave programs at less than ten percent."[258] Talk about work and family is "assumed to be women's talk. . . [i]t is talk about women's lives, our

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[253] Littleton, *supra* note 234, at 51; Fineman, Neutered Mother, *supra* note 92.

[254] *See* Littleton, *supra* note 234, at 19.

[255] *Id.* at 21.

[256] *Id.* at 30.

[257] *Id.* at 33.

[258] Malin, *supra* note 8, at 1050.

experiences, our feelings."[259] Since men rarely use the leave, parental leave becomes de facto maternal leave.[260]

The fact that the leave is unpaid further exposes the myth of gender neutrality. While mothers can sometimes take disability leave following childbirth, which often allows full or partial income replacement benefits, fathers rarely can take paid leave.[261] Without wage replacement, fathers are less likely to be able to take leave, and parental leave is likely to be used primarily by women due to their position in the workforce as compared to that of men. In addition,

> lack of paid leave will affect decisions about caretaking responsibility in families with two workers eligible for caretaking leaves. Because men's wages continue to be significantly higher than women's, it would be economically rational for a married woman to take the leave alone, as she would forgo a smaller income than her husband would, and his larger income would continue. Thus the vision of allowing for more shared responsibility in child caretaking is unlikely to be achieved, regardless of its theoretical possibility, until more parity in wages has been won.[262]

However, even if paid leave is offered, as the DOL regulation may allow, it is unlikely that the gendered nature of caretaking will be affected. Men rarely take advantage of available leave because of the pressures against taking parental leave which exist in the culture of the workplace.[263] Employer hostility to paternal leave is evidenced by the fact that many employers "extend parental leave to fathers so that they can give the appearance of gender-neutral policies, but never intend for fathers to use it."[264] Job security, as well as promotion potential, may be implicated in fathers taking leave. Co-worker peer pressure can also operate to deter fathers

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[259] Dowd, *supra* note 119, at 79.

[260] Malin, *supra* note 8, at 1049.

[261] *Id.* at 1073.

[262] Littleton, *supra* note 234, at 36.

[263] *See* Malin, *supra* note 8.

[264] *Id.* at 1078.

from taking leave.[265] American culture associates masculinity with career success, resulting in fear of stigmatization and social pressures, which dissuade men from taking family leave.[266]

In addition, men's role as breadwinner impedes their ability to be involved with their children.[267] In recent years, men have increasingly taken time off immediately after the birth of their children, using vacation and personal days, in order to "take some time without jeopardizing their careers and subjection to employer hostility."[268] However, because there are greater economic costs associated with a child and with a lower household income, "[f]athers of young children are far more likely to work overtime than similarly situated men without young children,"[269] further segregating the gendered roles of worker and childrearer.

Thus, the Act's assertion of gender neutrality is revealed as a farce by a social reality which operates to discourage men from participating in caretaking and an economic reality which forces women to take leave.

F. Key Employees: High-Powered and Out of Luck

At the highest levels of corporate America, women faced with impossible choices between career and family are often unable to reach the highest echelons of power, choose less high-powered positions, or decide not have children. Because women face the realities of work-family conflict more often than men, roughly sixty-five percent of managerial women have no children by the age of forty.[270] The American workplace, according to the Glass Ceiling Commission Report, "still treats and promotes men and women with significant disparity . . . partially a function of inadequate laws and deep-rooted gender-based stereotypes."[271]

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[265] *Id.*

[266] Duarte, *supra* note 13, at 845.

[267] *See* Malin, *supra* note 8, at 1064-66.

[268] *Id.* at 1072.

[269] *Id.* at 1074.

[270] *See* Williams, *supra* note 131, at 757.

[271] Bohrer, *supra* note 91.

The FMLA does not address or eradicate this concern, but operates to reassert the problem. The Act's key employee exemption operates in a gender-biased way. The Act defines a key employee as "a salaried eligible employee who is among the highest paid ten percent of all employees employed by the employer within seventy-five miles of the employee's worksite."[272] The employer provides leave and health benefits, but may refrain from reinstating the employee if necessary to prevent "substantial and grievous economic injury" to the employer.[273] At the same time, during leave, seniority does not accrue.[274]

The lack of seniority accrual operates to punish those who take family responsibilities seriously, and the key employee exemption results in the few women in upper management, executive, or partner positions being ineligible for, or frightened off from, taking FMLA benefits. This operates as another layer of glass in the ceiling which women continue to hit. Women's forced choice between family and job security "will further stunt female advancement up the corporate ladder."[275] Because women are more often responsible for child rearing and solely for childbearing, this exemption disproportionately affects women in management positions. A woman who "wants to start a family may hesitate to pursue the fast track up the corporate ladder if she will lose her ability to take FMLA leave."[276]

Similarly, there is a "glass ceiling in the family realm" for fathers.[277] As noted above, the combination of economically rational decisions, traditional gender roles, and negative effects on career advancement make men much less likely to take parental leave. Because male senior executives do not take leave, a cycle is perpetuated in which male employees identify success and achievement with minimal disruptions in work life. As long as these highest ranking employees do not take leave, there is an unspoken

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[272] 29 U.S.C. § 2614(b)(2) (1993).

[273] *See* 29 U.S.C. § 2614(b) (1993).

[274] *See* 29 U.S.C. § 2614(a)(3) (1993) ("Nothing in this section shall be construed to entitle any restored employee to (A) the accrual of any seniority or employment benefits during any period of leave.").

[275] Olsen, *supra* note 81, at 1015.

[276] Bohrer, *supra* note 91, at 418.

[277] *Id.* at 406.

message that the top officials neither sanction nor embrace such behavior. Thus, the Act's exclusion of these top executives, the vast majority of whom are men, operates to reinforce the gendered divisions of labor.

At the same time, "career wives whose husbands are in the top ten percent of their company's pay scale will be the spouses to take leave because of the unwillingness to jeopardize the job security of their highly compensated husbands," which results in a perpetuation of the gendered division of labor, and forces these women to forgo career opportunities.[278] Because significant gender disparities in the highest levels of success remain, and men continue to hold the majority of the powerful and highly paid positions,[279] the common scenario is that the key employee will be a husband whose wife will be forced to take the leave in order to avoid any threats to the husband's job security, which forces the couple to adopt the traditional family form—husband at work, mother at home, baby happy and healthy, and society in order. The message conveyed is that "if a man and a woman both have careers, [at least in the highest income brackets], and a family situation arises, it is the duty of the lower-paid spouse to be the caretaker."[280]

IV. POLICY SUGGESTIONS

While some have praised the FMLA as a bold step towards a positive work-family policy, demonstrating a "national determination that employers have a legal duty to accommodate their employees' family responsibilities under certain circumstances,"[281] the Family and Medical Leave Act offers only a limited solution. It is limited in the amount of time offered, the benefits provided, and the employees protected. In addition, the Act accords a great deal of discretion to employers in granting the leave and authorizes employers to function as guardians of family stability. At the same time, gendered norms embedded in the provisions of the Act function to reify gendered divisions of labor and privilege the heterosexual, nuclear family.

Yet there is hope. Estimates that over twenty-four million Americans have taken FMLA leave demonstrate that the Act is working on some level. In addition, the Clinton administration's initiative to provide paid leave

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[278] Olsen, *supra* note 81, at 1015.

[279] *See id.* at 1017.

[280] *Id.*

[281] Malin, *supra* note 8.

indicates that attempts to address problems in the Act are being sought. Thus, in this final section, I will briefly discuss some possible directions to pursue in an attempt to recraft a policy that avoids some of the pitfalls I have identified above.

While a number of proposals have been introduced in Congress to expand upon the benefits provided by the Act, these expansions, none of which have been successful, merely operate to affect the law at the margins—for example, to cover more employers or to cover shorter term leave needs.[282] Some theorists have suggested specific changes such as eliminating the key employee exemption or broadening the definition of "serious health condition."[283] Others have insisted that leave should be paid, by providing unemployment compensation for pregnant women,[284] or through using a Temporary Disability Insurance program to finance a paid leave system.[285] Many authors suggest that paid leave will encourage more men to take leave, diminishing stereotypical gender roles. Finally, alternative work arrangements, such as compressed work weeks, telecommuting, flex-time, job-sharing, reduced time, work at-home, and on-site childcare are all ways in which employers could help balance work and family obligations.[286]

While I support all of these suggestions, I would like to focus on some broader issues I believe need to be addressed in order to create a family and medical leave policy which can truly begin to provide equal caretaking and employment opportunity for all employees.

A. **Function, Not Form**

One of the most important changes required of the Act revolves around the definition of "family" and the family members included in coverage. The FMLA is intended to address the caretaking needs of society,

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[282] For a summary of such legislation, *see* Leslie W. Gladstone, The Family and Medical Leave Act: Proposed Amendments, Library of Congress Congressional Research Service Issue Brief No. 97017, Nov. 9, 1999.

[283] *See* Bohrer, *supra* note 91, at 417.

[284] *See, e.g.*, Jerry L. Mashaw, Unemployment Compensation: Continuity, Change, and the Prospects for Reform, 29 U. Mich. J.L. Ref. 1 (1996).

[285] *See* Bohrer, *supra* note 91.

[286] *See* Hall, *supra* note 213, at 29.

yet it fails to effectively provide for these needs because it sets out rigid definitions and interpretations of family members who are eligible to take leave and receive care. If the goal of the Act is truly to provide caretaking leave, then employees must be able to determine for themselves who should receive their care. Having Congress or one's employer determine whether a particular family member is deserving of one's care is insulting and invasive in a wholly inappropriate way.

Because Americans live in varied, diverse, unique and creative family arrangements that are likely to change and reform throughout our lives, the appropriate role for government is to "strengthen families, without regard to how they are structured."[287] While current policy rewards one form of family and penalizes all others, we can envision a policy where all Americans will be eligible for caretaking leave by expanding the notion of family and granting leave based on the function, rather than the form, of the relationship.

B. **Challenge Gendered Assumptions**

Equally important is the need to create a workplace culture in which one's sex does not dictate one's prospects, opportunity, salary, expectations or experiences. This solution is a foundational element in any attempt to transform work-family policy and has been the subject of countless articles. I will merely point out a few arguments or ideas that I believe are the basis for such a transformation. Joan Williams suggests eliminating masculine norms in the workplace and designing the work world around the average person rather than the average man.[288] Christine Littleton cautions that we must not lose sight of women's concerns because men are not always around, and Nancy Dowd argues that we must both "take account of gender in order to transform the workplace, and get beyond gender" in order to redefine the relationship between work and family.[289] As one author notes, "the best strategy for integrating women into the partnership ranks of large law firms may not be gender-specific. . . . when an option is exercised almost exclusively by women and has rarely if ever been used by an attorney later elevated to partnership," it is not a viable strategy for those who wish to climb

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[287] Schroeder, *supra* note 1, at 301 (noting that the marriage penalty tax penalizes two wage earning couples).

[288] *See* Williams, Unbending Gender, *supra* note 131.

[289] Dowd, *supra* note 119, at 81.

a firm's ladder of success.[290] Fundamental changes in workplace practices, such as a reduction in the required billable hours, can be seen not just as a concession for women, but as an investment in human capital because it improves morale, productivity, and efficiency.[291] At the same time, we must "replace the exceptions and accommodations that put many women on a separate, gendered track."[292]

Next, we need to encourage and adopt creative solutions to this project. One suggestion I am particularly fond of has been advanced by Candace Saari Kovacic-Fleischer.[293] Building on Justice Ginsburg's opinion in United States v. Virginia,[294] Professor Kovacic-Fleischer argues that we must require "institutional accommodations for 'celebrated' differences," including employer accommodation of family obligations in which the employer internalizes some of the costs of family work, "which traditionally have been borne by families without recompense even though childcare benefits the workplace."[295] Justice Ginsburg's opinion, which requires alterations and adjustments of current institutional arrangements and requirements, if necessary, to remove barriers which limit opportunity, has been adapted by Kovacic-Fleischer so that employers would be required to make "institutional alternations to accommodate parenting."[296]

Finally, men need to take leave in order both to alleviate the unequal burden of childcare on their female partners and to transform workplace norms about the traditional worker. Michael Selmi argues that we must induce men to take leave, and that, in order to do so, incentives must be offered. Selmi provides as an example tying eligibility for federal contracts to an employer's paternal leave utilization rate.[297] I am certainly supportive

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[290] Mommy Track, *supra* note 130, at 1377.

[291] *Id.* at 1389.

[292] *Id.* at 1386.

[293] Candace Saari Kovacic-Fleischer, United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII, 50 Vand. L.Rev. 845 (1997).

[294] United States v. Virginia, 518 U.S. 515 (1996).

[295] Kovacic-Fleischer, *supra* note 293, at 849.

[296] *Id.* at 908-15.

[297] *See* Michael Selmi, The Limited Vision of the Family and Medical Leave

of such an idea, but think that perhaps some old-fashioned consciousness raising, through which women with male partners become empowered to encourage their partners to take family leave, is one step. More importantly, the high ranking executives—CEOs, executive vice presidents, managers, supervisors, etc.—need to set an example. These senior managers must stand out front and wave the banner of family leave as acceptable for a valued and successful employee to take, and they must not penalize any employee, male or female, who takes such leave through diminished job prospects or limits to professional opportunity.

C. Employer as Social Benefactor

Finally, we must refocus the trend of privatization of social policy towards progressive ends. While the practice of private social welfare does have some dangerous potential, as discussed above, Nancy Ehrenreich argues that privatization of social regulation can advance progressive goals.[298] She advises that we look at the power relations in the private sphere as well as the background rules that constrain available choices in order to push reformative ends. Ehrenreich contends that where strong public policy is coupled with private response, societal values can be changed and women's advancement can be accomplished.

V. CONCLUSION

The FMLA fails to provide a real opportunity for family and medical leave to many families, and has accomplished little—leave is unpaid, there has been no radical transformation in the work-family relationship or gender roles, and we are still without any comprehensive child-care system. Because of the limits on the Act's usefulness, the benefits it construes may be largely symbolic.

Robert Brookins, looking at antidiscrimination law, claims that although Title VII went far towards eradicating blatant sex and race discrimination in employment through the 1960s and 1970s, a subtler form of discrimination, "neosexism," has developed and persists among employers today.[299] This neosexism pervades the Family and Medical Leave Act as

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Act, 44 Vill. L. Rev. 395, 411-12 (1999).

[298] Ehrenreich, *supra* note 3, at 1251.

[299] *See* Robert Brookins, Mixed-Motives, Title VII, and Removing Sexism From Employment: The Reality and the Rhetoric, 59 Alb. L. Rev. 1, 39 (1995).

well. While appearing egalitarian and progressive by providing parental leave as well as medical leave, the FMLA's subtler exclusions, such as not extending leave for grandparents and non-spouse partners, offering only unpaid leave, providing leave only for short-term, emergency situations, and excluding top executives from coverage, operate as a moral code, which privileges and maintains the traditional, unitary, sexual, middle-class, male-headed family, and withholds benefits to non-traditional family forms through the provision of workplace conferred benefits. Additionally, the Act is to be implemented by employers, allowing discretionary conferral of federally mandated social welfare benefits.

Such constraints on a national family policy render the policy extremely limited in its usefulness. Instead, a policy which incorporates the realities of the varied types of families, and includes a more comprehensive approach to family care, while encouraging leave for all workers is a more realistic solution to the work-family dilemma. Such a solution requires a transformation of current workplace norms, and a repudiation of the hypocrisy inherent in an Act which speaks of the importance of family stability and integrity but grants only emergency leave, which promises to benefit low income workers but fails to offer paid leave, which strives to balance work and family but provides leave only in crisis situations, and which utilizes gender-neutral language but lacks the structural supports or radical change to workplace norms necessary to make this commitment a reality.

Thus, the Family and Medical Leave Act, as it is currently formulated, functions to advance public values and a moral code in which the employer serves as protector of family values, and attempts to further family stability and integrity by conferring benefits to those who fit within the socially acceptable definitions of family and who appropriately perform their gender roles. Without the changes that I have discussed, the law will continue to operate within the gendered and patriarchal social hierarchy. But if radical change can find its way into the interstices of the Act, there may be hope yet.