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Fathers and Parental Leave

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Former Supreme Court Chief Justice Warren Burger reportedly stated that he would never hire a female law clerk because her family responsibilities would interfere with her job.[1] Indeed, the Burger Court once suggested in dicta that an employer could lawfully refuse to hire women with preschool-aged children, although it hired similarly situated men, if the employer could show that the existence of "conflicting family obligations" was "demonstrably more relevant" to a woman's job performance than a man's.[2] It has also been reported that Supreme Court Justice Ruth Bader Ginsburg, while a judge on the D.C. Circuit Court of Appeals, persuaded her colleagues to postpone a rehearing en banc at the request of a male lawyer, whose baby was due home from the hospital the week of the scheduled argument, by asking them how they would react if the lawyer was a woman.[3]

The former Chief Justice's outrageous personnel practices, the Court's incredible suggestion that a policy against hiring women with preschool-aged children could ever be lawful under Title VII of the 1964 Civil Rights Act, and Justice Ginsburg's anticipation of her colleagues' reaction to the new father's postponement request illustrate a view that is commonplace in the law and our society: Questions involving workplace accommodation of family responsibilities are "women's issues." This characterization of work-family conflicts is understandable. Following childbirth, women usually take parental leave and men usually do not.[4] Even when both

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1. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 141 (1979).

2. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

3. Linda P. Campbell & Linda M. Harrington, *Judge Ruth Bader Ginsburg: Portrait of a "Steel Butterfly,"* CHI. TRIB., June 27, 1993, at C7.

4. *See infra* notes 11-16 and accompanying text.

parents are employed outside the home, women tend to carry the predominant responsibility for child care.[5]

The characterization of work-family conflicts as "women's issues" has also been necessary to a certain extent. The maternal role has had a substantial negative impact on the development of women's careers. Whereas the careers of single women without children tend to follow the male pattern, women with children often interrupt their careers, begin them later, or otherwise find that child-care responsibilities limit their career involvements.[6] Recognition that the absence of adequate parental leave policies has inhibited women's roles in the workplace was a major reason for the enactment of the Family & Medical Leave Act (FMLA).[7]

It is time, however, to expand the law's focus to include the need for workplace accommodation of the family responsibilities of men.[8] This Article begins that expansion by focusing on parental leave issues as they affect fathers. In Part I, I analyze the current status and effects of paternal use of parental leave. I argue that the minimal paternal use of parental leave is a major barrier to fathers' involvement with their children. I further argue that as long as parental leave remains de facto maternal leave,

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5. *See* Rosalind C. Barnett & Grace K. Baruch, *Correlates of Fathers' Participation in Family Work*, *in* FATHERHOOD TODAY: MEN'S CHANGING ROLE IN THE FAMILY 66, 72 (Phyllis Bronstein & Carolyn P. Cowan eds., 1988) [hereinafter FATHERHOOD TODAY]; Philip A. Cowan, *Becoming a Father: A Time of Change, an Opportunity for Development*, *in* FATHERHOOD TODAY, *supra*, at 13, 18; Johanna Freedman, *The Changing Composition of the Family and the Workplace*, *in* THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 23, 29 (Edward F. Zigler & Meryl Frank eds., 1988) [hereinafter PARENTAL LEAVE CRISIS].

6. Sylvia F. Fava & Rosalie G. Genovese, *Family, Work, and Individual Development in Dual-Career Marriages*, *in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES: FAMILIES AND JOBS 163, 169-70 (Helena Z. Lopata & Joseph H. Pleck eds., 1983) [hereinafter RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES].

7. 29 U.S.C.A. §§ 2601-2654 (West Supp. 1994). In enacting the FMLA, Congress specifically found that "the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than . . . men." FMLA § 2(a)(5), 29 U.S.C.A. § 2601(a)(5) (West Supp. 1994). Recognition of the absence of parental leave as a barrier to women's participation in the work force also led the Supreme Court to uphold the constitutionality of a California statute that mandated special pregnancy disability leave. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-90 (1987). In addition, reducing the barrier of maternal responsibilities to women's employment was a prime purpose of the Pregnancy Discrimination Act of 1978. *See* H.R. REP. NO. 948, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

8. There have been passing references in the legal literature to the need to accommodate fathers in the workplace. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1166 (1986) (recognizing that traditional workplace structures have excluded men from participation in the family while concurrently excluding women from participation in the workforce); Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 381 (1984-1985) (suggesting that feminists desire increased male participation in parenting).

The subject of fathers' work-family conflicts also has received fleeting attention in the popular media, usually around Father's Day. *E.g.*, Nancy R. Gibbs, *Bringing Up Father*, TIME, June 28, 1993, at 53.

the need to accommodate workers' family responsibilities will remain a significant source of discrimination against women.

In Part II, I focus on why fathers do not take parental leave. I consider and reject the views of some radical feminists that men want it this way—that is, that men use maternal responsibility for child care as a tool to perpetuate male oppression of women. I show that most men desire a greater role in child care but are precluded from it by significant workplace barriers. I then focus on three barriers to paternal use of parental leave. First, employers often do not provide parental leave for men, and when they do, they often hide it under generalized classifications causing many men to overlook its availability. Second, parental leave for men is almost always unpaid; this makes it financially impossible for the father, who is saddled with the traditional role of primary breadwinner, to use it. Third, fathers who wish to take even unpaid parental leave are deterred by a high level of workplace hostility.

In Part III, I examine the FMLA as a tool for lowering these barriers to paternal use of parental leave. I find that the FMLA should solve the availability problem because it mandates availability and communication. I recognize that the FMLA mandates only unpaid leave, but I focus on the ability to substitute other paid leaves as a means for funding childbirth leave. Although the FMLA provides only for substitution of vacation and personal leave for unpaid childbirth leave, I argue for an interpretation of the FMLA that will allow fathers to take the initial portion of childbirth leave as leave to care for their wives' serious health condition and to fund that leave by substituting accrued sick leave. Finally, I focus on the FMLA's prohibition on employer interference with, restraint, and denial of leave rights as a tool for combating workplace hostility toward paternal use of parental leave. I draw on the law developed under Section 8(a)(1) of the National Labor Relations Act (NLRA)[9] and the law of hostile environment sexual harassment developed under Title VII[10] to propose an interpretation of this broad employee-protective provision that will safeguard fathers' ability to use their parental leave rights.

I. Fathers and Parental Leave: The Current State of Affairs

During the mid-1980s, the research group Catalyst conducted an extensive study of family leave policies and practices among large employers.[11] Catalyst found that thirty-seven percent of the 322 employers that

9. 29 U.S.C. § 158(a)(1) (1988).

10. 42 U.S.C. § 2000e to 2000e-17 (1988 & Supp. IV 1992).

11. CATALYST, REPORT ON A NATIONAL STUDY OF PARENTAL LEAVES (1986). The Catalyst study was reproduced in its entirety in the 1986 House hearings on the proposed Family Leave Act. *The Parental and Medical Leave Act of 1986: Joint Hearing, Before the Subcomm. on Labor-*

responded offered unpaid parental leave to men.[12] However, only nine companies were able to report that even one male employee ever took such a leave.[13] More recent evidence confirms the Catalyst finding that it is rare for fathers to take parental leave. A January 1993 survey by DuPont of its almost one thousand salaried employees who participated in its family leave program found that ninety-five percent of them were women.[14] A 1993 Bureau of National Affairs survey found that only seven percent of male workers would take a twelve-week unpaid leave following the birth or adoption of a child whereas forty-three percent of working women would do so.[15] Even liberal estimates place the participation rate of American fathers in parental leave programs at less than ten percent.[16]

Low paternal participation rates in parental leave programs are matched by low paternal participation rates in child-care tasks. There is wide variation among fathers' participation in child care, making it difficult, if not impossible, to characterize a "typical father."[17] Nevertheless, some generalizations appear to hold true for many families.

As might be expected, when only the father is employed outside the home, the mother spends significantly more time on child care than does the father. When both parents are employed outside the home, the mother continues to spend more time on child care than the father.[18]

Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education & Labor, 99th Cong., 2d Sess. 151, 151-228 (1986) [hereinafter *Parental and Medical Leave Act of 1986 Hearings*]. It was also cited favorably in the House and Senate committee reports accompanying the FMLA. *See* H.R. REP. NO. 8, 103d Cong., 1st Sess. 28 (1993); S. REP. NO. 3, 103d Cong., 1st Sess. 15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17.

12. CATALYST, *supra* note 11, at 37.

13. *Id.* at 38.

14. *DuPont Employees Highly Satisfied with Leave Policy, Company Study Finds*, 1993 Daily Lab. Rep. (BNA) No. 246, at A-14 (Jan. 25). Other companies have also experienced low paternal participation rates in parental leave programs. For example, Jeanne F. Kardos, Director of Employee Benefits for Southern New England Telephone Company, testified before the House in 1986 that only 1 of the 199 employees at her company who took parental leave in 1985 was male. *Parental and Medical Leave Act of 1986 Hearings*, *supra* note 11, at 53. At Eastman Kodak, 93% of women, but only 7% of men, have taken advantage of the company's 6-year-old family leave plan. Gibbs, *supra* note 8, at 55.

15. *Family Leave: Four in 10 Working Women Would Take Full 12 Weeks Off Under FMLA, Poll Finds*, 11 Employee Rel. Weekly (BNA) No. 23, at S-7 (June 7, 1993).

16. *See, e.g.*, LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 208 (1992) (noting that while a majority of men take a personal leave to be with their newborns for a short time, less than 10% use existing policies that allow for longer leaves).

17. Charlie Lewis & Margaret O'Brien, *Constraints on Fathers: Research, Theory and Clinical Practice*, *in* REASSESSING FATHERHOOD: NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 1, 6 (Charlie Lewis & Margaret O'Brien eds., 1987) [hereinafter REASSESSING FATHERHOOD].

18. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 271-73 (1989) (summarizing studies that show working mothers assume primary responsibility for child rearing); Barnett & Baruch, *supra* note 5, at 72; Cowan, *supra* note 5, at 18; Freedman, *supra* note 5, at 29.

The differences between maternal and paternal involvement in child care go beyond the number of hours each devotes to the matter. Mothers tend to care for their children's needs to a greater extent than fathers, and fathers tend to play with their children to a greater extent than mothers.[19] Fathers are more likely to regard child care as leisure or recreation, whereas mothers are more likely to regard it as work.[20] Mothers also tend to retain overall responsibility for child-care tasks.[21] Fathers may actually perform a good deal of the work, but it is often the mother who has remembered that the task had to be performed, planned it, scheduled it, and instructed the father what to do.[22] Even in role-reversed families, in which the mother is the primary or sole breadwinner and the father the primary caregiver, mothers often retain responsibility and assert authority over child-care decisions.[23]

Most discussions of greater maternal use of parental leave and greater maternal responsibility for child care accept both as givens. They focus on women's work and role overloads and on the increased stress that comes with work-family conflicts.[24] The debate centers on how to ameliorate the effects of maternal overload on women's development in the workplace. Advocates of special treatment for women on the basis of their maternal roles[25] and advocates of equal treatment[26] share a common goal—restructuring the workplace to accommodate family responsibilities and

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19. *See* Phyllis Bronstein, *Father-Child Interaction: Implications for Gender-Role Socialization*, *in* FATHERHOOD TODAY, *supra* note 5, at 107, 109-10 (noting studies which indicate that mothers engage in more caregiving interactions with their children, such as tending to bodily needs, whereas fathers engage in active and exciting play); Michael W. Yogman et al., *Fathers, Infants and Toddlers: A Developing Relationship*, *in* FATHERHOOD TODAY, *supra* note 5, at 53, 57 (concluding after several studies that fathers engage in more vigorous play with their children than do mothers).

20. Jarmila Horna & Eugen Lupri, *Fathers' Participation in Work, Family Life and Leisure: A Canadian Experience*, *in* REASSESSING FATHERHOOD, *supra* note 17, at 54, 66.

21. HAAS, *supra* note 16, at 2.

22. *Id.*; *see* Barnett & Baruch, *supra* note 5, at 72; Lewis & O'Brien, *supra* note 17, at 8.

23. Graeme Russell, *Problems in Role-Reversed Families*, *in* REASSESSING FATHERHOOD, *supra* note 17, at 161, 163-64.

24. *See, e.g.*, 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, 85-90 (1989) (arguing that stress results from work-family conflicts because of the inequitable burdens placed on women by responsibilities at work and at home and because of the inflexibility of employment schedules).

25. *See, e.g.*, Mary A. Mason, *Motherhood vs. Equal Treatment*, 29 J. FAM. L. 1, 49 (1990) (advocating special treatment for women in the workplace based on a modern, pragmatic view that takes women's differences into consideration without reliance on an "outdated stereotypic view of feminine weakness or dependence"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-85 (1987) (arguing that women can achieve equality in the workplace only through acceptance of differences between men and women instead of focusing on deviations from the male norm).

26. *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (advocating the equal treatment approach and applying it to issues involving pregnant employees).

thereby removing a significant barrier to women's employment.[27] The same can be said for those who advocate special "mommy tracks"[28] and for those who call for flexible scheduling and other arrangements that enable working mothers to pursue their careers.[29]

Largely missing from the debate over maternal work-family conflicts is any discussion of paternal work-family conflicts. The two, however, are linked to a significant extent. Just as the absence of adequate maternal leave policies has been a barrier to women's roles in the workplace, the absence of adequate paternal leave policies has been a barrier to men's roles in the home. Furthermore, as long as parental leave remains de facto maternal leave, work-family conflicts will remain a significant barrier to women's employment and a significant source of discrimination against women.

A. Parental Leave and Fathers' Involvement in Child Care

At first glance, it appears that low paternal participation in family leave and low paternal involvement in child care go hand-in-hand and spring from a common cause. However, further probing reveals that in many cases the former is a significant cause of the latter.

Prior to the Industrial Revolution, both parents worked in the home, their children worked alongside them, child care was generally neglected, and work-family conflicts were not an issue because work and family were merged. Women's conflicting roles as mothers and as workers became public issues in Europe when the Industrial Revolution shifted the location of work and production from the home to the factory. Working mothers placed their children with relatives, older women, or day nurseries for daytime child care. Unfortunately, these surrogate caregivers bottle-fed infants animal milk and soup. Ignorance of infant digestive systems and of bottle sterilization procedures led to a significantly higher mortality rate among infants of working mothers than among infants whose mothers

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27. *See* Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99 (highlighting the differences between those advocating special treatment legislation and those advocating gender neutral legislation).

28. *See, e.g.*, FELICE N. SCHWARTZ, BREAKING WITH TRADITION: WOMEN, MANAGEMENT AND THE NEW FACTS OF LIFE 95 (1992); Barbara Kantrowitz & Pat Winget, *Being Smart About the Mommy Track*, WORKING WOMAN, Feb. 1993, at 48, 51, 80-81 (discussing strategies that allow new mothers to "keep moving forward in their careers"); Felice N. Schwartz, *Management, Women, and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65, 70-74.

29. *See, e.g.*, Mary A. Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 408-10 (1992) (arguing that for women to succeed in the workplace, women's rights rather than equal rights need to be recognized); *cf.* Rebecca Theim, *Working Women and Motherhood*, NEW ORLEANS TIMES-PICAYUNE, Feb. 13, 1993, at B7 (arguing that inflexible work schedules and inadequate leave policies force women to choose between family and career).

stayed at home and breast-fed. As a result, infant health appeared to be directly linked to primary maternal responsibility for child care. Concerns over infant health coupled with concerns for the health of the mother fueled a movement that led to mandatory maternity leaves and related protective legislation in Europe.[30]

The experience in the United States with post-Industrial Revolution maternity-leave laws was similar to that of Europe. The focus was on protecting the health of the mother and child.[31] Thus, early industrial maternity-leave policies were designed to facilitate the movement of mothers out of the workplace.[32] Consequently, American and European societies viewed the ideal family as having a husband as sole breadwinner and a wife who cared for the children.[33]

During the 1960s, attitudes began to change. In the United States and Europe, policymakers began to recognize that women have a basic civil right to equal employment opportunities.[34] In 1974, Sweden enacted its parental leave law as part of a program to promote equal responsibility between men and women in the home and the workplace.[35] In 1978, the

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30. For an overview of changes in child care at the time of the Industrial Revolution, see Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States*, *in* PARENTAL LEAVE CRISIS, *supra* note 5, at 3, 3-6.

31. *Id.* at 10-13.

32. Health concerns were not the only reasons for policies designed to exclude mothers from the workplace. Economics also played a role, particularly during periods of high unemployment, and action was taken to eliminate the competition from married women for the jobs of men and single women. *See id.* at 5-6 (discussing European laws that were originally intended to preserve the health of infants but that actually prevented married women from working for long periods of time after giving birth); Mary Piccirillo, *The Legal Background of a Parental Leave Policy and Its Implications*, *in* PARENTAL LEAVE CRISIS, *supra* note 5, at 293-96 (noting that during industrialization some states adopted laws prohibiting the employment of pregnant women, who were typically married, under the pretense of protecting the health of the women); *cf.* Hartley v. Brotherhood of Ry. & S.S. Clerks, 277 N.W. 885 (Mich. 1938) (holding that a union did not breach its duty of fair representation when it agreed with an employer that all married women would be terminated and that any single woman would be terminated upon her marriage).

33. Illustrative of this view is the Supreme Court's decision in Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872), upholding Illinois's refusal to admit women to the practice of law. In a concurring opinion, Justice Bradley wrote:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Id. at 141 (Bradley, J., concurring).

34. *See* Piccirillo, *supra* note 32, at 298-99 (describing the advent of Title VII in 1964); Frank & Lipner, *supra* note 30, at 10 (describing how leave legislation in Europe was expanded and liberalized throughout the 1960s and 1970s following intense debate over sex roles).

35. *See infra* notes 56-68 and accompanying text.

United States enacted the Pregnancy Discrimination Act,[36] which overturned the Supreme Court's holding in *General Electric Co. v. Gilbert*[37] that discrimination on the basis of pregnancy was not per se discrimination on the basis of sex.[38] The rationale for childbirth leave changed from moving mothers out of the workplace to facilitating their roles in the workplace.

Although the rationale behind the laws concerning childbirth leave and the laws themselves have changed, popular perceptions continue to link infant health with primary maternal responsibility for child care. The idea that a natural maternal instinct makes women better child-care providers remains deeply rooted in popular mythology.[39] Even many role-reversed families believe that biology gives mothers a head start over fathers in child-care skills, although they also believe that fathers can learn to be competent caregivers.[40]

The evidence, however, does not support the myth of the maternal instinct. The scientific, sociological, and anthropological evidence does not indicate that mothers are biologically, genetically, or otherwise inherently superior at nurturing and caring for children.[41] Although some men and

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36. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

37. 429 U.S. 125 (1976).

38. *Id.* at 136.

39. *See, e.g.*, Alvin F. Poussaint, *Introduction* to BILL COSBY, FATHERHOOD 1, 2 (1986) (noting that the general public believes that women possess "mothering" talents that make them better suited than men to raise children); JAMES Q. WILSON, THE MORAL SENSE 166 (1993) (arguing that women have developed a maternal instinct because the evolutionary process favors offspring who are nourished by their mothers). Perhaps the most tragic example of the myth of a biological maternal instinct occurred in April 1993 when federal law enforcement personnel assaulted the compound of Branch Davidian cult leader David Koresh in Waco, Texas. The federal officers believed that maternal instinct would drive the women in the compound to escape the assault with their children. Steve Daley, *Reno's Failing in Texas Standoff: She Followed the Book out the Window*, CHI. TRIB., Apr. 25, 1993, § 4, at 4; Mary McGrory, *Misjudgment and Tender Mercies*, WASH. POST, Apr. 22, 1993, at A2. It did not, and the children died along with the other cult members.

Sometimes the assumption that women are destined to care for newborns to the exclusion of men is subtle. For example, Dr. T. Berry Brazelton's best-selling book on caring for children during their first year of life is titled *Infants and Mothers* whereas his book on ages two and three is titled *Toddlers and Parents*. *Compare* T. BERRY BRAZELTON, INFANTS AND MOTHERS (rev. ed. 1983) [hereinafter BRAZELTON, INFANTS] *with* T. BERRY BRAZELTON, TODDLERS AND PARENTS: A DECLARATION OF INDEPENDENCE (rev. ed. 1989).

40. *See* Russell, *supra* note 23, at 165 (reporting that 50% of parents in role-reversed families believed that mothers had a biological advantage in child raising, while 88% thought fathers could be competent caregivers).

41. *See* HAAS, *supra* note 16, at 3-7 (surveying scientific literature that rejects any notion of a maternal instinct based on female hormones or genetic predispositions). Paternal nurturing and caregiving abilities are not confined to fathers in two-parent families. Single fathers display strong abilities to nurture and provide for their children's needs. Shirley M.H. Hanson, *Divorced Fathers with Custody*, *in* FATHERHOOD TODAY, *supra* note 5, at 166, 182. In one study, children of single fathers rated their fathers as more nurturing than children of two-parent families rated either parent. *Id.* In another, children of single fathers verbalized their appreciation of their fathers frequently whereas children of

women are natural caregivers and nurturers, for most people, parenting is something learned by doing.[42] "Fathering (like mothering) depends on practice and opportunity."[43]

Current practices in the division of family labor reinforce the stereotyped views concerning the relative competence of mothers and fathers in caring for young children. The threshold decision facing new parents is who will take leave from employment to care for the newborn baby. In the typical dual-worker family, the mother will take leave but the father will not.[44] Consequently, the mother has much greater opportunity to participate and gains much more practice in child care than the father. This may lead to greater or more rapid development of the mother's parenting skills than the father's.[45]

More importantly, when the mother exclusively stays home following childbirth, the parents are likely to perceive the mother as developing greater knowledge of the child's needs and greater skill in meeting those needs. Sociologist Kathryn Backett's study[46] of twenty-two middle-class couples in Scotland illustrates how this perception leads to maternal domination of child care.

Backett found that most couples stressed the irrelevance of prior child-care knowledge and the importance of knowledge gained through experience with the child.[47] All couples expressed the view that mutual involvement with the children was very important, and all but one wife believed in fair and equal involvement.[48] But the reality of their situations was that the father returned home from work at the end of the child's brief day, and this made equal involvement impossible. Couples coped with this by an express recognition of the problem, by the father actually getting involved with the child when at home, by an acknowledgement of the potential for

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single mothers rarely did. *Id.* The study also indicated that single fathers reported more satisfaction with their parental roles than single mothers and that children appeared to be happier in single-father households than in single-mother households. *Id.*

42. *See* Pamela Daniels & Kathy Weingarten, *The Fatherhood Click: The Timing of Parenthood in Men's Lives*, *in* FATHERHOOD TODAY, *supra* note 5, at 36, 41 ("Nurturance refers to a range of feelings and skills that can and must be learned and practiced, and themselves nurtured."); BRAZELTON, INFANTS, *supra* note 39, at 46-47 (noting that many new mothers may feel incompetent and that parenting skills can be acquired by both parents).

43. Daniels & Weingarten, *supra* note 42, at 44.

44. *See supra* notes 14-16 and accompanying text.

45. In explaining how greater maternal access to the child in practice affects the division of child-care responsibilities, Daniels and Weingarten give the example of one couple which found that the mother, who was home more with the child, always seemed to be one step ahead of the father in learning to care for the child. She wanted to do everything her way; for the father to play a role in the child's daily care, she had to step back and let him in. *Id.* at 44.

46. KATHRYN C. BACKETT, MOTHERS AND FATHERS: A STUDY OF THE DEVELOPMENT AND NEGOTIATION OF PARENTAL BEHAVIOUR (1982).

47. *Id.* at 54-56.

48. *Id.* at 73.

the father to do all of the things that the mother usually did, and by regarding the situation as a phase that would change in time.[49]

Because the mother spent so much more time with the children, she was regarded as having more extensive knowledge of home and family, and her knowledge was accorded greater legitimacy in the negotiation of parenting behavior.[50] The parents believed that the mother's greater experience with the child gave her greater general skills regarding practical child care. Consequently, even when the father undertook some child-care functions, such as bathing the children, he usually did it under the mother's supervision. Even when the father was viewed as competent, the mother was viewed as better.[51]

Maternal dominance of early child-care responsibilities resulting from perceived greater maternal skill and knowledge became self-perpetuating. Because the couples regarded the mother as more knowledgeable about particular tasks, they reasoned that she was more efficient at the tasks and that it was in everyone's interest for her to continue to be responsible for them.

Mothers exercised most of the authority in arranging for babysitting and, later, in providing for child care when both parents were working. This was justified because mothers were perceived to know the children's needs better and to be more familiar with available babysitters.[52] Overall, mothers exercised responsibility for child care, and fathers were regarded as helpers. As a consequence, practical involvement for fathers became much more optional than it was for mothers.[53]

Differences in the amount of time spent at home also affected how the parents thought their children perceived them. Mothers were perceived as constantly available to children, in contrast to fathers whose time with them was intermittent. As a result, children were likely to turn to their mothers for comfort even when their fathers were present.[54] Fathers felt less pressure to be constantly available than mothers and, therefore, were less likely to feel constraints on their activities. On the other hand, time spent with their father was seen as refreshing to the children and a change of pace from the routine with the mother. Consequently, the fathers' time with the children was seen primarily as play and fun.[55]

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49. *Id.* at 72-76.
50. *Id.* at 182.
51. *Id.* at 181-82.
52. *Id.* at 192-93.
53. *Id.* at 188.
54. *Id.* at 189-91.
55. *Id.* at 219-20. Professor Backett summarized her findings as follows:

> No matter what one might feel about the couples' interpretations of their situation, the fact remains that the woman rapidly became involved in a direct learning situation with the child. This seemed to lay the basis for subsequent decisions. Her situation was perceived as providing the most subjectively satisfactory way of developing the valid understandings

Thus, when fathers do not take parental leave following the birth of their children, they rapidly fall behind their wives in gaining experience with the child and are perceived to be less competent. This results in marginalizing the father's role in child care and in placing the predominant burden on the mother.

If the absence of paternal leave fuels maternal domination of child-care responsibilities, one would expect that significant paternal use of parental leave would lead to a more equal division of child care between mothers and fathers. Evidence from Sweden suggests that it does.

Sweden provides the most extensive parental leave benefits for men of any country.[56] The Swedish parental leave law was first enacted in 1974,[57] providing parental leave at ninety percent of base pay up to a stated maximum.[58] The leave is paid from a fund that is financed through payroll taxes.[59] Fathers may take ten days of leave immediately after childbirth, colloquially referred to as "daddy days."[60] Couples may also divide between them a generous amount of parental leave, provided that only one parent may be on leave at anytime.[61] Initially parents were able to divide six months between them.[62] In 1975, the amount available at ninety percent of base pay was increased to seven months.[63] In 1978, two more months were added,[64] and in 1980, the leave was increased again by one more month.[65] In 1989, the available leave at almost full pay was increased to twelve months.[66] In addition, the parents could divide another three months between them, but compensation was at a low fixed daily rate.[67] On June 1, 1994, Sweden again amended the statute to fur-

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> of the child which were valued by the couples. She was also defined as being more directly knowledgeable about other aspects of the child's world. These images formed the basis for the mother's overall responsibility for the everyday administration of the child. They were supported by further images that the child itself came to rely upon and define the mother in a different way from the father.

Id. at 225-26.

56. *See* HAAS, *supra* note 16, at 59 ("Sweden's parental leave program is the oldest, most generous, and most flexible of its kind in the world.").

57. *Id.* at 59.

58. *Id.* at 59-60.

59. *Id.* at 14.

60. *Id.* at 66.

61. *Id.* at 59-60, 62.

62. *Id.* at 59-60.

63. *Id.* at 60.

64. *Id.* The 1978 amendment also divided the leave between regular leave, taken at childbirth, and special leave, which could be taken anytime before the child's eighth birthday. *Id.*

65. *Id.*

66. *Id.* at 60-62. Although during most of Sweden's leave program history, leave could be taken anytime before children enter school at age seven, 86% of all leave has been used in the child's first year. *Id.* at 62.

67. SWEDISH INST., FACT SHEETS ON SWEDEN, EQUALITY BETWEEN MEN AND WOMEN IN SWEDEN 3 (Feb. 1992) [hereinafter EQUALITY IN SWEDEN].

ther encourage fathers to take leave. Effective January 1, 1995, couples in which only one parent takes leave will receive one month at ninety percent of base pay and ten months at eighty percent. When both parents take leave, each will receive one month at ninety percent and may divide ten months at eighty percent of base pay.[68]

The typical Swedish father takes advantage of his ten daddy days. During 1991, eighty-five percent of all eligible fathers took an average of 9.7 days.[69] Because fathers and mothers are forced to compete for the use of the remaining parental leave, Swedish women still dominate its use.[70] A significant number of Swedish fathers, however, do take sizeable childbirth leaves.[71] Because there is a large pool of Swedish fathers who have taken parental leave, sociologists have studied them to determine the effects of paternal leave on paternal participation in child care.

The most recently published study by sociologist Linda Haas focused on couples in Gothenborg, an industrial city of 500,000 that is Sweden's largest port. Haas found that fathers who took parental leave were significantly more likely to share in child-care responsibilities and in performing specific child-care tasks, including preparing food, shopping, doing laundry, diapering, bathing, getting up at night, reading, comforting, and taking the child to the doctor.[72] The effects of paternal leave were magnified when the father took at least twenty percent of all leave taken by the couple.[73] However, she found no significant differences between men who took leave and those who did not in their involvement in playing and teaching—the two tasks performed most often by fathers—or in arranging for babysitting and clothes shopping—the tasks performed least by all fathers.[74] Haas's findings are consistent with most prior studies of Swedish fathers, which also found a significant relationship between paternal use of parental leave and later paternal involvement in child care.[75]

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68. *Sweden Tries to Encourage Dads to Mind the Kids*, CHI. TRIB., June 2, 1994, § 1, at 14.

69. NATIONAL SOCIAL INS. BD., SOCIAL INSURANCE STATISTICS: FACTS 1992, at 29 (1993).

70. Women take over 90% of the total childbirth leave days used, not including the ten days of childbirth leave for fathers. *Id.* at 26.

71. The most recent estimate available shows that 30% of Swedish fathers take leaves averaging 32 days each. EQUALITY IN SWEDEN, *supra* note 67, at 3.

72. HAAS, *supra* note 16, at 158.

73. *Id.* at 159.

74. *Id.* at 158-60.

75. *See id.* at 155 (reporting that an early study found no relationship between paternal leave and paternal involvement in child care, but that a larger study done later by the same researchers using a random sample found such a relationship, as did a study by the Swedish Census Bureau); Michael E. Lamb et al., *The Determinants of Paternal Involvement in Primiparous Swedish Families*, 11 INT'L J. BEHAVIORAL DEV. 433, 446-47 (1988) (finding that paternal involvement when the child was 28 months old was determined, in part, by the level of paternal involvement when the child was 12 months old and that this involvement increased with both greater paternal leave and less maternal leave).

Significant paternal use of parental leave removes a key barrier to fathers' involvement in child care resulting from the mothers' greater contact with the children when the fathers do not take leave: differences in the actual and perceived levels of competence between fathers and mothers. Haas found that fathers' decisions to take leave significantly affected perceptions of their competence as caregivers, both in absolute terms and in relation to their wives. Fathers who took leave were significantly more likely to be perceived as having child-care skills that were equal to or greater than those of their wives.[76]

The absence of parental leave for fathers thus serves as a significant barrier to men's involvement in the home. Ironically, as developed in the next subpart, the absence of parental leave for fathers also poses a significant barrier to women's involvement in the workplace.

B. Paternal Leave and Workplace Discrimination Against Women

In 1987, the Supreme Court held in *California Federal Savings & Loan Ass'n v. Guerra*[77] that Title VII did not preempt a California statute that mandated special disability leave for pregnant women.[78] The case divided the feminist community between advocates of equal treatment and special treatment.[79] The American Civil Liberties Union (ACLU), joined by a number of women's rights groups, filed an amicus curiae brief urging the Court to hold that the provision of special disability benefits for pregnant workers violated Title VII as amended by the Pregnancy Discrimination Act.[80] Recalling the discriminatory effects of the legislation intended to protect women in their childbearing and childcaring roles, the ACLU argued that special benefits for pregnancy harmed women by reinforcing stereotypes and marginalizing their presence in the workforce.[81] It observed, however, that the California statute at issue did not require employers to violate Title VII: Employers could comply with both the California statute and Title VII by extending the statutory pregnancy benefits

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76. *See* HAAS, *supra* note 16, at 159; Linda Haas, *Gender Equality and Social Policy: Implications of a Study of Parental Leave in Sweden*, 11 J. FAM. ISSUES 401, 405 (1990) (both finding that 40% of fathers who took parental leave were perceived as "very good" at child care compared to 19% of fathers who did not take leave and that 66% of leave-takers were seen to be as capable as mothers compared to 51% of non-leave-takers).

77. 479 U.S. 272 (1987).

78. *Id.* at 292.

79. *Compare* Williams, *supra* note 27, at 109 (advocating the "formal equality" approach mentioned in dicta in *California Federal*) *with* Littleton, *supra* note 25, at 1298-99 (approving the asymmetrical or special treatment argument accepted in *California Federal*). For an excellent summary of the equal treatment versus special treatment debate, see Finley, *supra* note 8, at 1143-48.

80. Brief for the American Civil Liberties Union et al., Amici Curiae, at 5-10, 36-42, *California Fed.* (No. 85-494).

81. *Id.* at 7.

to cover all employee disabilities regardless of the employee's sex.[82] The ACLU urged the Court to hold that Title VII did not preempt the California statute while concurrently declaring that a California employer who did not offer the same disability leave benefits to its nonpregnant employees would violate Title VII.[83]

The National Organization for Women led another group of women's rights organizations in submitting a second amicus curiae brief that took essentially the same position as the ACLU brief.[84] Together, these amici presented the equal treatment position that the best way to remove barriers to women's employment is to improve benefits and leave policies for all employees regardless of gender.

On the other hand, a large group of amici, led by the Coalition for Reproductive Equality in the Workplace (CREW), urged the Court to uphold the statute on the ground that special treatment for pregnant employees was consistent with Title VII's goal of promoting equal employment opportunity.[85] They argued that unlike prior labor protective legislation, the California statute was designed to enable women to maintain their employment despite their pregnancies.[86] Pregnancy, a condition unique to women, makes it physically impossible to have children without taking time off from work. Men, on the other hand, can have families without needing any leave from employment.[87] CREW argued that without the statute, women were forced to choose between having children and maintaining job security—a choice not imposed on men.[88] Thus, they concluded that the California statute complemented rather than conflicted with Title VII.[89] Two other groups of women's rights amici also supported the special treatment position.[90]

The Court's decision had something for both sides. The Court agreed with the special treatment advocates that Title VII did not preempt the

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82. *Id.* at 48-52.

83. *Id.* at 48-58.

84. Brief for the National Organization for Women et al., Amici Curiae, at 26-27, 31, *California Fed.* (No. 85-494) (arguing that the Court should interpret Title VII to make California employers extend the benefits of the California statute to all employees with temporary disabilities, regardless of gender).

85. Brief for the Coalition for Reproductive Equality in the Workplace et al., Amici Curiae, at 23-24, *California Fed.* (No. 85-494) [hereinafter CREW Amicus Brief].

86. *See id.* at 7 (arguing that the California statute created equality between working men and women in their ability to exercise procreative rights without job loss).

87. *Id.* at 3.

88. *Id.* at 3, 14.

89. *Id.* at 23-24.

90. *See* Brief for the California Women Lawyers et al., Amici Curiae, at 13-14, *California Fed.* (No. 85-494) (asserting that because men and women are not similarly situated with regard to childbirth and pregnancy, different policies for the different sexes are appropriate); Brief for the Equal Rights Advocates et al., Amici Curiae, at 5, *California Fed.* (No. 85-494) (arguing that biological differences must be taken into account if the goal of equal employment opportunity is to be achieved).

California statute because both laws shared the same goal of eliminating discrimination and other barriers to women's employment. In the Court's view, the California statute complemented Title VII by ensuring that women would not lose their jobs because of pregnancy.[91]

The Court also observed that even if Title VII might prohibit special treatment of pregnancy, the California statute would not be preempted because an employer could comply with both laws by extending the state-mandated pregnancy disability benefits to all workers afflicted with temporary disabilities.[92] Thus, the Court recognized the equal treatment position and left open the possibility that Title VII could force the extension of disability benefits to all employees regardless of gender or could at least prohibit gender-based disparate treatment beyond pregnancy disability.[93]

The FMLA also offers something for both sides of the special treatment versus equal treatment debate. Although presented in gender-neutral terms, the Act's requirement that employers provide leave following the birth of a child is clearly aimed primarily at working mothers.[94] However, by providing parental leave rights to all workers regardless of gender and by coupling parental leave with leaves for disabling, serious health conditions, the FMLA adopts the equal treatment advocates' approach.

FMLA supporters recognized that providing childbirth leave only to working mothers would encourage employers to discriminate against women of childbearing age.[95] Proponents of the Act argued that the structure of the FMLA would prevent such discrimination because childbirth leave

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91. California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-89 (1987).

92. *Id.* at 291-92.

93. *Cf.* Schafer v. Board of Pub. Educ., 903 F.2d 243, 248 (3d Cir. 1990) (holding that limiting unpaid child rearing leave to women violates Title VII); *EEOC: Policy Guide on Parental Leave*, 8 Fair Empl. Prac. Man. (BNA) 405:6885, 405:6887 (Aug. 27, 1990) (stating that the *California Federal* opinion should not be read as authority for the position that women may be provided with more generous child-care benefits than men). *See generally* Kathryn F. Patterson, Comment, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425 (1994).

94. *See* FMLA § 2(a)(5), 29 U.S.C.A. § 2601(a)(5) (West Supp. 1994) ("[T]he primary responsibility for family caretaking . . . affects the working lives of women more than it affects the working lives of men."). Representative Patricia Schroeder, a primary author and sponsor of the family leave legislation, expressly acknowledged such a purpose:

> With so many women working outside the home, 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. An expectant mother must consider whether she can take leave from work to have her baby; whether the leave will be paid; whether she will continue to receive health insurance; and most importantly, whether there will be a job for her when she is ready to go back to work.

Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 302 (1989).

95. Indeed, Congress expressly found: "[E]mployment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." FMLA § 2(a)(6), 29 U.S.C.A. § 2601(a)(6) (West Supp. 1994).

is equally available to men and women.[96] Many recognized that women use family leave to a much greater extent than men but argued that the FMLA would not encourage employers to favor men in hiring and promotions because a greater percentage of male employees have new children each year than female employees.[97] Furthermore, they argued that when coupled with mandatory disability leave, the overall effects of the FMLA are gender neutral.[98]

Unfortunately, the view that the FMLA will not encourage discrimination against women of childbearing age merely because it is gender neutral is mostly wishful thinking. As long as current patterns of maternal dominance of the use of childbirth leave persist, employers will perceive (correctly) that women are very likely to take leave if they have children and that men are very likely not to do so. This will tempt many employers to hesitate to hire or promote women of childbearing age, particularly because such discrimination will be difficult to detect and prove in individual cases.[99] The temptation will be particularly strong for employers of low-

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96. *See* 139 CONG. REC. S992, S992-93 (daily ed. Feb. 2, 1993) (statement of Sen. Boxer) ("This act does not just apply to women, but to men and women, to fathers as well as to mothers, to sons as well as to daughters."); *Parental and Medical Leave Act of 1986 Hearings*, *supra* note 11, at 108-09 (statement of the Women's Legal Defense Fund) ("[B]ecause employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women."). Professor Susan Deller Ross pointed to the increased paternal use of parental leave in Sweden to support her contention that if the FMLA were enacted, substantial increases in fathers' use of parental leave would guard against discrimination against women. *Parental & Medical Leave Act of 1987: Hearings on S.249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Senate Comm. on Labor & Human Resources*, 100th Cong., 1st Sess. 531, 535-36 (1987) [hereinafter *Parental & Medical Leave Act of 1987 Hearings*] (testimony of Professor Susan D. Ross, Georgetown Law School). Unfortunately, Professor Ross failed to recognize that parental leave in Sweden is paid leave and that the absence of compensation is a major barrier to paternal use of parental leave. *See infra* section II(B)(2). She also failed to recognize that in Sweden women still dominate the use of parental leave and suffer considerable workplace discrimination as a consequence. *See infra* notes 104-05 and accompanying text.

Congress adopted the argument that the FMLA's gender neutrality would guard against discrimination toward women. It expressly stated that a goal of the FMLA is to accomplish its purposes "in a manner that . . . minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis." FMLA § 2(b)(4), 29 U.S.C.A. 2601(b)(4) (West Supp. 1994).

97. *E.g.*, Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 419 (1989) (noting that in 1985, "3.7% of working women gave birth, while 4.6% of working men had wives who gave birth").

98. *E.g.*, *id.* at 420 ("[M]en and women will be almost equally likely to need and take some kind of family or medical leave available under the proposed type of statute."); *Parental & Medical Leave Act of 1987 Hearings*, *supra* note 96, at 535-36 (testimony of Professor Susan D. Ross, Georgetown Law School) ("[T]he important point about this legislation is that it's gender neutral, both for the medical leave . . . and also for the family leave."); *Parental and Medical Leave Act of 1986 Hearings*, *supra* note 11, at 35 (testimony of Irene Natividad, Chairperson, Women's Political Caucus) (stressing the importance of both parental and medical leave to ensure the protection of both men and women).

99. Opponents of the FMLA were fond of citing a Gallup poll in which 40% of employers responded that they would be less likely to hire young women if the FMLA became law. *See, e.g.*, 139

skilled workers because of the large supply of essentially fungible employees.[100]

The mere fact that a greater percentage of male workers than female workers have new babies each year is not likely to affect employer incentives to discriminate against women as long as employer experience suggests that men rarely take leave.[101] Nor will the coupling of childbirth leave with serious-health-conditions leave reduce the incentive to discriminate. Employers inclined to discriminate are not likely to compare all women with all men. Because the greatest incentive for discrimination will be in hiring decisions, employers are likely to compare young women with young men. Rather than balancing out the incentives to discriminate against young women, mandating leave for disabling, serious health conditions is more likely to encourage employer discrimination against hiring older workers if employers perceive them to be more likely to take disability leave than younger workers.[102]

The experience in Sweden reinforces my concerns. Swedish mothers dominate the use of childbirth leave even though the Swedish statute is gender neutral on its face.[103] This has resulted in rampant discrimination against women even though such discrimination is illegal. Swedish mothers returning from leave are treated much more harshly by their employers than Swedish fathers.[104] Employers openly prefer men over young women because mothers are more likely to take leave and take leave for much longer periods of time than fathers.[105]

CONG. REC. S990 (daily ed. Feb. 2, 1993) (statement of Sen. Kassenbaum); *id.* at S1006, S1008 (statement of Sen. Hatch).

100. Maria O. Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 477 (1991).

101. *Id.* at 516.

102. I do not mean to suggest that increased incentives to discriminate against young women or older workers provided a valid reason not to have enacted the FMLA. Nor do I mean to suggest that we should have enacted gender-specific rather than gender-neutral leave legislation. The FMLA's mandate that employers provide leave to fathers as well as mothers is a good first step. A gender-neutral leave law avoids the reinforcement of gender stereotypes that would result from a gender-specific leave law. My point is that the work-family conflict barrier to women's progress in the workplace is not likely to be lowered merely because the leave law is written in gender-neutral language. Rhetoric to the effect that we need not worry about incentives to discriminate because the law gives rights to fathers as well as mothers is self-deceiving; we need to worry about it and need to enforce vigorously Title VII and the Age Discrimination in Employment Act because of it. Furthermore, the thrust of my argument is that we must interpret the FMLA to facilitate greater paternal use of family leave because such an interpretation is necessary to further the FMLA's goal of alleviating barriers to women's employment.

103. *See supra* note 70.

104. HAAS, *supra* note 16, at 175-76.

105. Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 327 (1989); Denise M. Topolnicki, *How to Care for Our Young Ones*, MONEY, June 1993, at 76. The Swedish workplace is extremely segregated by sex. Dowd, *supra*, at 326. Although many factors contribute to a level of sex segregation that is considerably

Thus, the rarity of fathers taking childbirth leave is cause for concern because it inhibits fathers' roles in the home and serves as a barrier to women's advancement in the workplace. In the next Part, I consider why fathers do not take parental leave.

II. Barriers to Paternal Use of Parental Leave

The title of this Part suggests that there are barriers to paternal use of parental leave. That is, implicit in the title is the suggestion that many fathers want to take leave following the birth of their children, but are precluded from doing so by artificial obstacles. Not everyone would agree with this suggestion. Accordingly, before addressing the obstacles to paternal use of parental leave, I will first consider the argument that men do not take parental leave because they do not want to do so.

A. Do Men Want to Take Parental Leave?

The school of thought that has come to be known as radical feminism views relations between men and women in terms of power. It also views societal structures and institutions as sources of men's empowerment over and oppression of women.[106] One institution portrayed as playing an integral role in the dominance of men is the family.

Many radical feminists regard women's roles as mothers to be a primary source of their oppression.[107] The division of labor within the family ensures the oppression and degradation of women.[108] Men control the earning of income and with it the power and prestige that come from

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higher than the U.S., *see* HAAS, *supra* note 16, at 35-36, the discriminatory effects of leave-taking patterns certainly are a contributor.

106. *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 2 (1987) (noting that her feminist approach looks "for answers to the big questions of the subordination of women to men: its roots, damage, pervasiveness, tenacity, enforcement, and capacity for change"); KATE MILLETT, SEXUAL POLITICS (1970) (describing the political aspect of sex through a theoretical, historical, and literary discourse).

107. *See, e.g.*, ADRIENNE RICH, OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 42 (1976) ("Institutionalized motherhood demands of women maternal 'instinct' rather than intelligence, selflessness rather than self-realization, relation to others rather than the creation of self.").

108. *See* MILLETT, *supra* note 106, at 140 (discussing commentators who describe the home as the center of a system of "domestic slavery" and women as nothing more than "bondservants" within marriage); RICH, *supra* note 107, at 183 (asserting that patriarchal divisions of labor and allocations of power create female suffering and divestiture of female sexuality); Azizah Al-Hibri, *Reproduction, Mothering and the Origins of Patriarchy, in* MOTHERING: ESSAYS IN FEMINIST THEORY 81, 86 (Joyce Trebilcot ed., 1983) [hereinafter MOTHERING] (arguing that males' feelings of inadequacy over their exclusion from the process of reproduction and nurturance cause them to restrict the role of women to that of mothers); Jeffner Allen, *Motherhood: The Annihilation of Women, in* MOTHERING, *supra*, at 315, 315, 317, 325-26 (arguing that "[m]otherhood is dangerous to women" as it represents "men's appropriation of women's bodies . . . to reproduce patriarchy" and that women must escape motherhood to make their lives primary).

operating primarily in the public sphere.[109] This division, therefore, consigns women to the domestic sphere. Even when women are employed outside the home, they remain saddled with primary responsibility for child care, an arrangement which ensures that their roles in the workplace will be subordinate to men.[110] This subordination, they argue, also leads to the systematic impoverishment of women. Women are forced to choose between pursuit of a career as the "ideal worker" who does not allow family responsibilities to interfere with the commitment to a job and subordination of their careers to family responsibilities.[111] Men do not face such a choice; they may pursue careers as ideal workers because they assume that women will look after the children.[112] The choice as seen by radical feminists is thus forced upon women—if they do not assume primary responsibility for child care, no one will.[113]

From such a view of the role of motherhood in subjugating women, it is easy for some radical feminists to conclude that men do not want to participate actively in child care. Rather, they conclude that men use their children and families as tools for oppressing their wives and solidifying their monopoly control over income, power, and prestige.[114] Because childrearing is not a source of social power, prestige, or status, its rewards are intangible and censure awaits any evidence of failure. "Thus, the male preference for the breadwinner role may reflect (among other things) an awareness that . . . it's easier to make money than it is to be a good father."[115]

If this radical feminist account of men's passive role in child care were accurate, we would expect to find most men to be consumed emotionally by the power and prestige of their outside employment. This is not the case. There is considerable evidence that fathers are more emotionally involved with their families than with their paid employment and that they derive more satisfaction and self-worth from family involvement than from paid employment.[116]

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109. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 801, 822-36 (1989) (describing the gendered structure of wage labor that forces women to choose between "the traditional male life pattern or women's traditional economic vulnerability").

110. *Id.*

111. *Id.* at 823-30.

112. *Id.* at 831.

113. *Id.*

114. *See, e.g.*, M. Rivka Polatnick, *Why Men Don't Bear Children: A Power Analysis*, *in* MOTHERING, *supra* note 108, at 21 (arguing that men want women to care for children because it preserves the male status as family breadwinners and the accompanying power advantages); SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 8-10 (1970) (asserting that the traditional family unit leads to inherently unequal power distribution between the sexes).

115. Polatnick, *supra* note 114, at 31.

116. *See, e.g.*, Horna & Lupri, *supra* note 20, at 61 (finding that "the overwhelming majority of fathers consider not work but family to be the most important domain in their [lives]"); Ronald F.

Men often report that they experience their wives' pregnancies in emotional ways that are comparable to women, including weight gain and morning sickness.[117] Fathers present during labor and delivery react to their newborns in the same way as mothers: They have the same desire to touch and play with the newborn, are impressed with the baby's movements, are extremely elated and relieved that the baby is healthy, and feel pride and closeness to the baby.[118] During the period immediately following childbirth, fathers are likely to experience postpartum depression.[119] "Furthermore, fathers and mothers display similar behaviors when interacting with their newborns."[120]

Unfortunately for men, their role as breadwinners interferes with their involvement with their children. Childbirth means substantial increases in household expenses and is often accompanied by a decrease in maternal contribution to household income.[121] Fathers caught in this economic squeeze often respond by working more hours to enable the family to make ends meet.[122] Feminists have rightly observed that many women who appear to have chosen to subordinate their careers to child-care responsibilities in reality have no choice.[123] They often assert that men, in contrast, have the freedom to choose to have children without sacrificing their careers.[124] Men's choices, however, are also limited. The father's primary role in providing economic security functions as a barrier to increased paternal involvement in the family.[125] Fathers are often torn

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Levant, *Education for Fatherhood*, *in* FATHERHOOD TODAY, *supra* note 5, at 253, 254 (discussing survey data indicating that men's family roles are more psychologically significant than their wage-earner roles); Joseph H. Pleck, *Husbands' Paid Work and Family Roles: Current Research Issues*, *in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES, *supra* note 6, at 251, 294-98 [hereinafter Pleck, *Husbands' Paid Work*] (surveying various studies which indicate that men place more importance on and derived more satisfaction from their family relationships than their jobs). As Professor Haas reported:

> When a sample of fathers in a large city was asked why they would like to spend more time with their children, the most common response was exemplified by this comment: "Time spent with my child is unique. There is nothing else that can make you that high or offer as much fulfillment."

HAAS, *supra* note 16, at 10.

117. Yogman et al., *supra* note 19, at 54-55.

118. *Id.* at 55.

119. *Id.*

120. *Id.*

121. *See* Julia Brannen & Peter Moss, *Fathers in Dual-Earner Households—Through Mothers' Eyes*, *in* REASSESSING FATHERHOOD, *supra* note 17, at 127, 134 (describing the "immediate household financial squeeze" that results when mothers take time off from work to have children).

122. Daniels & Weingarten, *supra* note 42, at 39; *see infra* notes 161-63 and accompanying text.

123. *See, e.g.*, Williams, *supra* note 109, at 823 (discussing the societal pressures that lead mothers to "choose" systematically against performing as an ideal worker in order to ensure that their children receive high-quality care).

124. CREW Amicus Brief, *supra* note 85, at 3, 14.

125. Michael E. Lamb et al., *Effects of Increased Paternal Involvement on Fathers and Mothers*, *in* REASSESSING FATHERHOOD, *supra* note 17, at 109, 116-17.

between their desires to provide financial security for their families and their desires to establish close relationships with their children.[126] Indeed, fathers commonly express their desires to have more time with their children and to play a larger role in nurturing them.[127]

The father's role as primary income provider limits him to intermittent contact with the children at the same time that the mother usually has continuous contact because she has either dropped out of the labor force, reduced her hours in paid employment, or taken leave from her job. This gives mothers a head start in learning about their children's needs and personalities, fuels parents' perceptions that the mother is the superior caregiver, and leads to a maternal domination of child care.[128] When parents perceive the mother to be the superior caregiver, she often serves a gatekeeping role. The mother begins regulating, perhaps unintentionally, the father's involvement with the children.[129] Furthermore, she begins affecting his involvement even when he is not at home by the way she refers to him in his absence.[130] Numerous studies have consistently found that the mother's characteristics are a more significant determinant of paternal involvement in child care than the father's.[131]

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126. *See id.* (discussing the importance many men place on having satisfying personal relationships with their children and the societal perception that men are responsible for their family's economic provision).

127. *See* HAAS, *supra* note 16, at 11 (remarking that "a large proportion of fathers . . . are interested in a more nurturing role [in their families]"); Peter Moss & Julia Brannen, *Fathers and Employment, in* REASSESSING FATHERHOOD, *supra* note 17, at 36, 44 (noting that over two-thirds of fathers surveyed said they did not feel they had enough time with their one-year-old children). Fathers' actions speak almost as loudly as their words in a significant number of cases. For example, a recent study by the Population Reference Bureau found that the percentage of children under age five whose mothers worked and who were cared for by their fathers increased from 15% in 1988 to 20% in 1991. MARTIN O'CONNELL, WHERE'S PAPA! FATHERS' ROLE IN CHILD CARE 17 (1993) (Table A1: Primary Child Care Arrangement Used by Working Mothers for Preschoolers (Under Age 5), 1977-1991). Among married couples, the percentage of children cared for by their fathers while their mothers worked increased from 17.9% in 1988 to 22.9% in 1991. *Id.*

128. *See supra* notes 46-55 and accompanying text.

129. Yogman et al., *supra* note 19, at 61. Even when mothers return to the workforce, there tends to be a transitional period during which the mother spends more time with the child in the evening, and this is associated with lower levels of father-infant interaction. *Id.*

In Sweden, the maternal gatekeeping function regulates paternal participation in the parental leave program. Women "have trouble giving up traditional authority for child care, feel guilty about relinquishing child care responsibility to their partners, believe men cannot manage alone, and fear a loss of self-respect if they do not make motherhood their primary role." HAAS, *supra* note 16, at 93. This accounts for considerable maternal monopolization of parental leave time, a primary obstacle to men's participation. *Id.* Indeed, with all of the couples interviewed by Professor Haas who shared parental leave equally, the mother was the key to the arrangement. *Id.* at 93-94.

130. Yogman et al., *supra* note 19, at 61.

131. *See, e.g.*, Barnett & Baruch, *supra* note 5, at 73 (finding that a mother's employment status and sex-role attitude are significant factors that affect the father's role in child care); Norma Radin, *Primary Caregiving Fathers of Long Duration, in* FATHERHOOD TODAY, *supra* note 5, at 127, 128 (collecting studies that find such material characteristics as a mother's employment, her income level relative to the father, her relationship with her own father, and her attitudes toward paternal involvement

Advocates of the patriarchal oppression view of child-care responsibilities might respond that if mothers truly were the gatekeepers to paternal involvement, we would see major increases in fathers' roles as more mothers are employed outside the home. Surprisingly, surveys consistently find that only a small minority of mothers desire greater child-care involvement from their husbands, and maternal employment does not make a significant difference in this attitude.[132] It is possible that just as men feel threatened in their traditional roles by the entry of increasing numbers of women into the labor force, women may feel threatened in their traditional roles by the prospect of an increased paternal role in child care.[133]

Advocates of the patriarchal oppression view might observe that in male-dominated workplaces, there is little, if any, provision made to accommodate fathers' parental roles. If fathers truly desired greater family involvement, they would make such demands and would force their employers to respond. In this analysis, patriarchal oppression advocates would find an unlikely ally—free market economists. A free market economist would argue that parental leave and other accommodations are a benefit that workers could demand and receive if they were willing to pay for them by trading off other benefits or taking lower wages.[134] Men do

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as key determinants of a father's level of involvement in child care); Yogman et al., *supra* note 19, at 61 (concluding that a mother's feelings about paternal roles are "the single most important influence" on the father's degree of involvement with his children). Professor Haas's study found a similarly significant relationship between the mother's characteristics and the father's involvement in the Swedish parental leave program. HAAS, *supra* note 16, at 119.

132. *E.g.*, Lamb et al., *supra* note 125, at 112; Pleck, *Husbands' Paid Work*, *supra* note 116, at 276-79; Russell, *supra* note 23, at 170.

In analyzing the impact of maternal employment on the division of child-care responsibilities, it may be necessary to avoid lumping together all couples in which both parents are employed outside the home. It may be important to distinguish between dual-earner couples and dual-career couples. In dual-earner couples, the mother may be working full time, but she defines her employment either as optional—*i.e.*, undertaken to fund luxuries—or temporary—*i.e.*, undertaken out of economic necessity and intended to last only until the husband's salary improves or household expenses decrease. In such circumstances, breadwinning remains the father's role, and the mother's involvement in full-time employment does not create the type of pressure for increased paternal child-care involvement that is created in dual-career couples when both parents are equally committed to their jobs. Brannen & Moss, *supra* note 121, at 132-33. For example, in Sweden, paternal participation rates in the family leave program are highest when the mother is in the highest income category. Karin Sandqvist, *Swedish Family Policy and the Attempt to Change Paternal Roles*, *in* REASSESSING FATHERHOOD, *supra* note 17, at 144, 152.

133. *See* Lamb et al., *supra* note 125, at 112; Pleck, *Husbands' Paid Work*, *supra* note 116, at 279; Russell, *supra* note 23, at 171-72. It is tempting to write off this phenomenon because it may reflect the lack of power and status that women have in the public domain. Maternal resistance to sharing authority over child-care decisions and maternal perceptions of the father as only a secondary caregiver persist, however, even when the mother has a relatively high-status job. *Id.* at 170.

134. *See, e.g.*, JONATHAN GRUBER, THE EFFICIENCY OF A GROUP-SPECIFIC MANDATED BENEFIT: EVIDENCE FROM HEALTH INSURANCE BENEFITS FOR MATERNITY 38 (National Bureau of Economic Research Working Paper No. 4157, 1993) (concluding that wages reflect a specific group's valuation of a certain benefit); DWIGHT R. LEE, THE MISGUIDED POLICY OF MANDATED BENEFITS 5-8 (1983)

not seek out such deals because they have apparently concluded that the benefit is not worth the trade-off.

Market imperfections, however, are endemic in the workplace. One source of labor-market imperfections that has received recent attention from economics and legal scholars is the relationship between wage levels and relative preferences.[135] People pursue higher wages to satisfy their absolute preferences—preferences for greater absolute quantities of goods that increase their satisfaction—and to satisfy relative preferences—preferences for relative economic positions and status. In the latter case, people make comparisons to others and seek to consume at comparable or superior levels or at least seek to avoid falling further behind.[136] Many preferences that at first glance appear to be absolute may actually be relative. People who express their desires for "decent" clothes, a "good" car, and a "nice" house appear to be seeking absolute goods. In reality, however, their definitions of decent, good, and nice often are relative to those possessed by other people who form their basic group for comparison.[137] The adequacy of one's car, for example, will often be determined by comparing it to vehicles possessed by friends, neighbors, relatives, and coworkers.

Another reason why many preferences that appear to be absolute actually are relative is that they are preferences for positional goods. Positional goods give satisfaction, either inherently or incidentally, by virtue of their scarcity.[138] The common parental desire to increase their income to give their children "a better life" often encompasses many positional goods. For example, parents' desire to send their children to "the top" schools may refer to a desire to move to a school district with higher achievement scores or greater resources relative to the one in which they currently live or a desire to send their children to private schools. The opportunities to reside in the district with the better schools are scarce because there are only a limited number of residences in the district.[139]

(asserting "that the vast majority of workers . . . are disadvantaged by the substitution of government mandates for voluntary exchange in the labor market"); *cf.* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 188-89 (1962) (rejecting the idea that government-controlled retirement plans such as Social Security are necessary because workers are free to negotiate with their employers for retirement plans).

135. For an excellent discussion of the economic literature on relative preferences and its application to law, see Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

136. *See id.* at 45-46 ("[T]he desire for relative position pressures consumers to consume (at least) up to the prevailing standard of living.").

137. *Id.* at 42-43.

138. *Id.* at 18-19.

139. Parental desires concerning their children's education reflect both absolute and relative preferences. Parents desire better education in absolute terms. They also view better education as improving their children's future job opportunities and income. In this regard, their desire for better education for their children is relative—they wish their children to be better educated than future competitors.

Because of the scarcity, the ability to acquire such a good depends on relative income as well as on absolute income.

Because workers seek wage increases not only to increase their absolute purchasing power, but also to improve their status in comparison to others or to avoid falling behind others, they may face a prisoner's dilemma that leads to inefficient allocations in the compensation package. Consider, for example, two fathers: John and Joe. Each father places a high absolute value on four months of family leave. Their employer is indifferent to paying them *X* dollars per month without allowing leaves or *X* minus *Y* dollars per month with leaves allowed, where *Y* represents the employer's costs of providing the family leave. If John and Joe value the family leave in an amount greater than *Y*, each should be willing to take it along with a salary of *X* minus *Y*.

The *X*-dollar weekly salary that John and Joe currently receive not only buys them absolute goods, such as four months of family leave, but also buys them relative standing to others, including each other. If their concerns with relative income are stronger than the value they attach to family leave, each would prefer to continue to receive *X* dollars per week while the other receives *X* minus *Y* dollars and takes family leave. Each one's second choice would be that both receive *X* minus *Y* dollars and take family leave. Their third choice would be that both receive *X* dollars and not take family leave. And their last choice would be to receive *X* minus *Y* dollars and take family leave while the other receives *X* dollars. If we assume that John and Joe are rational, each would choose to receive *X* dollars and forego the family leave to have a chance at earning more money relative to the other and to avoid earning less money relative to the other. The result of their individual choices would be that both would have higher absolute incomes with no gains in relative income. The prisoner's dilemma means that each would have received nothing for the *Y* dollars he spent on relative income even though each could have maintained his relative income vis-à-vis the other and increased his absolute satisfaction if both had spent the *Y* dollars to purchase four months of family leave.[140]

Perhaps John and Joe could get together and agree that each will opt for *X* minus *Y* dollars plus family leave. Unfortunately, each would have a strong incentive to cheat on the agreement if he believes that by doing so he could achieve greater relative income. Even if each does not intend to cheat, his fear that the other one will cheat may lead him to abandon the

140. This description of the prisoner's dilemma in the allocation of compensation to family leave benefits is adapted from a similar description of how the prisoner's dilemma impedes efficient allocations between wages and workplace health and safety presented in McAdams, *supra* note 135, at 21. Economist Juliet Schor makes a direct connection between the inefficiencies of relative preferences and the increasing number of hours that Americans spend at their jobs. JULIET SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 122-36 (1991).

agreement and revert to the prisoner's dilemma.

John and Joe might solve the cheating problem by also agreeing to sanctions that take away the incentive to cheat.[141] Unfortunately, their sanctions agreement would not enable them to opt for *X* minus *Y* dollars plus family leave because John and Joe compete not only with each other for relative position, but also with their co-workers. Those co-workers are likely to include childless men and women who do not value family leave at all. Those individuals would always opt for *X* dollars and force John and Joe to do the same.

Perhaps, however, a majority of John and Joe's co-workers are also working parents. They might be able to thrust their collective will on the entire workforce by getting their employer to promulgate a uniform "*X* minus *Y* dollars" wage scale and uniform family leave benefits. Their childless co-workers would not suffer any loss in relative wages in the firm although their absolute compensation would be less than the parental majority.[142] But this still would not solve the problem because John, Joe, and their co-workers would not limit their comparisons of relative wages to each other; they also would compare themselves to friends, neighbors, relatives, and others who are significant in their lives. No two co-workers are likely to compare themselves to the same individuals. Thus, the group that John and Joe would have to agree with in foregoing extra salary and in accepting family leave would be so large that the transaction costs of these agreements would be prohibitive.[143]

Accordingly, we cannot comfortably infer from current employment practices that fathers do not value family leave sufficiently to bargain for it with their employers. Neither the patriarchal oppression view nor the free market economics view firmly supports the conclusion that fathers are not taking parental leave because they do not want to do so.

B. If Men Want Parental Leave, Why Don't They Take It?

The simple answer is that most men do take time off immediately following the births of their children.[144] They do so by using accrued

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141. For example, they could agree that the cheater would pay liquidated damages in the amount of *Y* dollars to the other party who observes the agreement. This would leave the cheater in the worst possible position—lower relative income and no family leave—while placing the observant party in the best possible position—higher relative income and family leave.

142. The most practical way to accomplish this is through collective bargaining. Of course, if John and Joe are supervisors, managers, or otherwise excluded from coverage of the NLRA, collective bargaining will not be available to them. *See* 29 U.S.C. §§ 152(3), 152(11), 157 (1988) (excluding supervisors from coverage of the NLRA); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (declaring that Congress intended for all "managerial" employees to be excluded from coverage of the NLRA).

143. *See* McAdams, *supra* note 135, at 64.

144. *See* CATALYST, *supra* note 11, at 38 ("[I]t is fairly common for fathers to take a few days off at the time of the child's birth . . . .").

vacation and personal days.[145] Fathers take this approach either because it is all they can get—that is, family leave as such is not available to them[146]—or they believe it is all they can get away with—that is, taking a real family leave will jeopardize their careers because of employer hostility.[147] These make-shift leaves are quite short. In this subpart, I focus on three barriers to longer childbirth leaves for fathers: availability, financing, and workplace hostility.

1. Availability.—Fathers cannot take significant leaves following childbirth if their employers do not offer it. Prior to the FMLA, this posed an absolute barrier for many working men. Employers were much more likely to provide childbirth leave to women than men. For example, Catalyst's survey of large employers found that only thirty-seven percent offered parental leave for working fathers[148] as compared with almost fifty-two percent who offered such leave to working mothers.[149] A broader, more recent survey by the Bureau of Labor Statistics found that in 1989, among private sector employers of one hundred or more workers, thirty-seven percent offered parental leave to full-time female employees and only eighteen percent offered it to similarly situated males.[150] At times men have had to resort to litigation to compel their employers to grant them parental leave routinely granted to their female co-workers.[151]

Even when leave was made available to employed fathers, pre-FMLA employer policies tended to hide it from them. For example, Catalyst found that ninety percent of large companies that offered parental leave for men did so under the rubric of personal leaves of absence and made no attempt to inform their workforce that the leaves were available to new fathers.[152] It was rare for a company expressly to advise male employees of the availability of paternity or parental leave.[153] Consequently, many men failed to take parental leave because they were completely unaware

145. *Id.*

146. *See infra* notes 148-55 and accompanying text.

147. *See* Michael S. Kimmel, *What Do Men Want?*, HARV. BUS. REV., Nov.-Dec. 1993, at 50, 57.

148. CATALYST, *supra* note 11, at 37.

149. *Id.* at 30.

150. *See* S. REP. NO. 3, *supra* note 11, at 14-15.

151. *E.g.*, Schafer v. Board of Pub. Educ., 903 F.2d 243 (3d Cir. 1990); Chavkin v. Santaella, 439 N.Y.S.2d 654 (App. Div. 1981); *see* Joseph H. Pleck, *Fathers and Infant Care Leave*, *in* PARENTAL LEAVE CRISIS, *supra* note 5, at 177, 178 [hereinafter Pleck, *Fathers and Infant Care Leave*] (reporting in 1986 that Title VII "has enabled fathers . . . to win at least five recent cases or settlements").

152. Catalyst, *Workplace Policies: New Options for Fathers*, *in* FATHERHOOD TODAY, *supra* note 5, at 323, 328 [hereinafter Catalyst, *Workplace Policies*].

153. *Id.*

that it was an available option.[154] Instead, fathers tended to create makeshift leaves of short duration by using accrued vacation and personal days.[155]

Thus, prior to the FMLA, a father wanting to take a significant leave following the birth of his child most likely did not have such an option or, if he had it, did not know it was available. It is not surprising that few fathers took parental leave under these conditions.

2. Financing Parental Leave.—Paid paternal leave policies are extremely rare.[156] When parental leave is available to men, it is almost always without pay. Many mothers, on the other hand, are able to take the initial part of a leave following childbirth as disability leave, which often includes full or partial income replacement benefits.[157] The rarity of paid leave for fathers means that almost all working parents face one of two situations: initial paid leave available to the mother coupled with unpaid leave available to the father or unpaid leave available to both parents. In both cases, the absence of pay poses a major barrier to the father's ability to take leave.

When the leave available to the mother is paid and the leave available to the father is not, it sends a signal to the parents that the mother is expected to take leave and the father is not. It becomes easy for the father not to take leave by reasoning that the children will be cared for with little or no drop in household income if only the mother stays home.

When the leave available to both parents is unpaid, the situation is worsened. Because very few families can afford to have no one bringing home a paycheck, unpaid leave forces fathers to compete with mothers for its use. Traditional sex roles that assign primary caregiving responsibilities to mothers and primary breadwinning responsibilities to fathers ensure that when both parents compete for taking leaves, the mother will tend to monopolize the leave.[158] The decision to allocate the unpaid leave to the

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154. *Id.*

155. *See supra* notes 144-45 and accompanying text.

156. *See* Pleck, *Fathers and Infant Care Leave*, *supra* note 151, at 180 (noting that fewer than five percent of large companies offer up to two weeks of paid paternal leave); Kimmel, *supra* note 147, at 60 (citing a 1989 survey showing that only one percent of male employees in the U.S. had access to paid paternity leave). Of course, many men create paid parental leave by using vacation and personal days, but these "leaves" are short.

157. *See* CATALYST, *supra* note 11, at 27 (stating that 95% of employers that participated in a national survey granted short-term disability leaves for women, 96.2% of which were at least partially paid).

158. In Sweden, mothers dominate the use of leave that is equally available to men and women but can only be used by one parent at a time. *See infra* notes 176-84 and accompanying text. In contrast, almost all Swedish fathers take the ten daddy days, which are reserved exclusively for their use. *See supra* note 69 and accompanying text.

mother is also economically rational for many couples in which the father earns the higher income.[159]

The birth of a child usually results in an increase in household expenses and is often accompanied by a decrease in maternal contribution to household income.[160] This exacerbates the effects of the lack of adequate funding for paternal parental leaves. As the family's need for absolute goods like diapers and children's clothing increases, its income level relative to other households is threatened.

New fathers facing this economic squeeze tend to react by working more rather than less.[161] Fathers of young children are far more likely to work overtime than similarly situated men without young children.[162] Fathers of young children are also more likely to moonlight than similarly situated men without young children.[163] The effects of the life-cycle squeeze are felt mostly by younger fathers. Older first-time fathers are

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159. Men have considerably higher earnings than women at every age and level of education. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 454 (112 ed. 1992) (Table 713: Mean Money Earnings of Persons, by Educational Attainment, Sex, and Age: 1990). The effects of the gender gap in earnings may be seen on the relative contributions of men and women to household income. As of March 1991, median household income for families in which the husband worked full-time and year-round was $39,083. *Id.* (Table 712: Median Income of Married-Couple Families, by Work Experience of Husbands and Wives and Race: 1990). When the wife also worked full-time and year-round, median household income only rose to $55,068, approximately a $16,000 increase. *Id.* Overall, in 1987, in only 18% of the 29.1 million married couples in which both spouses worked did the wife's earnings exceed her husband's. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 165, EARNINGS OF MARRIED COUPLE FAMILIES: 1987, at 6 (1989).

160. Horna & Lupri, *supra* note 20, at 59; Moss & Brannen, *supra* note 127, at 41-42.

161. Daniels and Weingarten describe the effects of fatherhood in this way:

> For a number of men, first-time fatherhood meant spending extra hours away from home, working longer hours on the jobs they had, going to school, or moonlighting in order to accommodate the new pressures to generate income, acquire some security, and make a success of themselves.
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> . . . .
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> Becoming parents changed women's and men's work *motivation*, in opposite ways. Women were less emotionally involved with their work for a while; they drew back temporarily from the outside work world into the domestic one. By contrast, many fathers felt an additional impetus to make it in their jobs—the need to work more, to be an especially good provider.

Daniels & Weingarten, *supra* note 42, at 39 (emphasis in original).

162. *See* Phyllis Moen & Martha Moorehouse, *Overtime over the Life Cycle: A Test of the Life Cycle Squeeze Hypothesis*, *in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES, *supra* note 6, at 201, 214 (concluding that men with children aged six years or younger were more likely to work overtime than men whose youngest child was older than six); Moss & Brannen, *supra* note 127, at 40 (noting that men under thirty with young children worked four times as much overtime as those without children).

163. *See* Pleck, *Husbands' Paid Work*, *supra* note 116, at 311 (noting that the life-cycle squeeze "was one of the three strongest predictors of male moonlighting"); Hyman Rodman & Constantina Safilios-Rothschild, *Weak Links in Men's Worker-Earner Roles: A Descriptive Model*, *in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES, *supra* note 6, at 219, 222 (noting that in 1979 a higher percentage of married men in the United States held two jobs than did single men).

likely to be more established in their jobs, have higher incomes, and have more job flexibility. This results in a greater level of involvement in child care than their younger counterparts enjoy.[164]

It is possible that the life-cycle squeeze may preclude many men from taking even paid parental leave. Keeping parental leave unpaid, however, poses an insurmountable barrier to almost all fathers. Moreover, Sweden's experience suggests that funding parental leave greatly increases paternal participation.

Because Sweden funds parental leave at close to full base pay, feelings of responsibility for breadwinning have not been a barrier to paternal participation.[165] Instead, the history of the Swedish program has been marked by increased use of leave by fathers. Fewer than three percent of Swedish fathers took parental leave in 1974, the first year it was available, as compared with ninety-eight percent of Swedish mothers.[166] In 1975, the amount of paid leave available to be shared by the couple was increased from six to seven months and paternal participation began to increase.[167] By 1977, it had increased to ten percent.[168] In 1978, it was lengthened by two more months, and twenty-one percent of all eligible fathers took leave, and twenty-three percent took leave the following year.[169] In 1980, three additional months of paid leave were added, but between 1980 and 1987, the paternal participation rate stayed between twenty-two and twenty-four percent.[170]

In 1989, Sweden increased the almost fully paid leave to twelve months.[171] Professor Haas reports that fathers' participation initially jumped to forty-four percent.[172] Another report shows paternal participation at thirty percent.[173]

Interpreting the Swedish experience requires caution. Sweden's extension of parental leave rights to fathers was part of a broader initiative to enhance women's involvement in the workplace and men's involvement in the home.[174] It was accompanied with a substantial public education

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164. Daniels & Weingarten, *supra* note 42, at 50.

165. HAAS, *supra* note 16, at 90.

166. *Id.* at 60.

167. *Id.*

168. *Id.*

169. *Id.* Two types of leave were distinguished in 1978: "regular" and "special." *Id.* Three of the nine months were designated special leave, which could be taken at any time up until the child's eighth birthday. *Id.* Two of these months were to be paid at 90% of the parent's salary, and one month was to be paid at a low rate of approximately five dollars per day. *Id.*

170. *Id.*

171. *Id.*

172. *See id.* at 60-62 (finding that 44% of married fathers with employed wives whose children were born in January or February of 1989 took leave during the child's first year).

173. EQUALITY IN SWEDEN, *supra* note 67, at 3.

174. HAAS, *supra* note 16, at 56.

campaign to encourage men to take parental leave.[175] It could be argued that the increases in paternal participation in parental leave have been caused as much by the public education campaign as by the removal of financial barriers.

On the other hand, the structure of the Swedish system creates new barriers to paternal participation. The restriction of leave to only one parent at a time forces fathers to compete with mothers for leave. Swedish fathers rarely take parental leave during the child's first six months for two reasons: Mothers are allowed to use regular parental leave during the last month of pregnancy, and mothers tend to breast feed for the first five or six months.[176] But even if the mother does not breast feed, fathers may not be able to take early leave because they are required to notify their employers of their intent to take leave two months in advance.[177]

Thus, the pattern that results from the competition between the parents for leave is that the father takes the ten daddy days and then returns to work for six months. The most common pattern thereafter is that the father takes some leave while the mother returns to work, and afterwards the mother takes additional leave while the father returns to work.[178] Although the law guarantees the right to do this, employers commonly oppose the temporary return of mothers to the workplace.[179] Therefore, a father's ability to take leave may depend on his wife's opportunities to return to work temporarily.[180]

More importantly, for a father to take leave under the Swedish system, the parents must go beyond role equality and engage in role reversal. Instead of sharing the income earning and child-care functions, the father must choose to remain at home while the mother is the sole worker.[181] In contrast, Sweden also provides paid leave to parents to care for sick children.[182] Use of this leave calls for role equality rather than role reversal. That is, both parents remain employed with one or the other taking a few days off as necessary due to a child's illness.[183] Paternal participation rates in leave to care for sick children are dramatically higher; some reports show these rates are equal to maternal participation rates.[184]

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175. *Id.* at 69-75. *See generally* HILDA SCOTT, SWEDEN'S "RIGHT TO BE HUMAN" 62-63 (1982) (detailing the Swedish campaign to equalize work and child-care responsibilities).

176. HAAS, *supra* note 16, at 64.

177. *Id.*

178. Sandqvist, *supra* note 132, at 149, 152.

179. *Id.* at 152.

180. *Id.*

181. *Id.* at 151.

182. *Id.* at 149.

183. *Id.* at 151.

184. *See* EQUALITY IN SWEDEN, *supra* note 67, at 3 (reporting that fathers take leave to care for sick children almost as often as mothers, averaging seven to eight days per year). Other reports,

It is quite likely that the barriers to paternal use of parental leave created by Sweden's limitation of leave to one parent at a time more than balance the positive effects from the education campaign. A reasonable conclusion from Sweden's experience is that removal of financial barriers greatly increases fathers' participation in parental leave.

3. Workplace Hostility.—Employer sensitivity to the need to accommodate workers' family responsibilities is increasing steadily.[185] Unfortunately, many employers' willingness to make such accommodations is limited to women workers. Men's accommodation requests are often met by, "Your wife should handle it."[186]

The Catalyst survey graphically illustrates the extent of employer hostility to male employees taking parental leave. Large employers are

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although not claiming equality, show extensive paternal use of sick child leave. *See, e.g.*, HAAS, *supra* note 16, at 67 (reporting that 41% of fathers took time off to care for sick children in 1989 and that fathers have taken between 33% and 37% of all sick children days since 1980); Sören Kindlund, Family Policy in Sweden 6 (May 1984) (unpublished paper presented at a series of seminars entitled *The Working Family: Perspectives and Prospects in the U.S./Canada and Sweden*, on file with the *Texas Law Review*) (reporting that in 1983, 200,000 fathers and 270,000 mothers took leave to care for sick children, and the average time for these leaves was about the same for fathers and mothers); Sandqvist, *supra* note 132, at 148, 151 (reporting that 300,000 Swedish fathers constituted 40% of the users of sick child days and consumed 35% of all days taken).

185. Michele Galen et al., *Work & Family*, BUS. WK., June 28, 1993, at 80. *See generally* NATIONAL RESEARCH COUNCIL, WORK AND FAMILY: POLICIES FOR A CHANGING WORK FORCE 114-54 (Marianne A. Ferber et al. eds., 1991) (reviewing the impact of innovative programs such as altered work schedules, special leave arrangements, and family support services).

186. Professor Michael Lamb has made the same point, albeit somewhat more gently:

> [C]onsider the attitudes of employers (in both the private and public sector) when the demands of family and employment roles conflict. As far as women are concerned, this is an area in which considerable progress has been achieved. Over the last few years, for example, employed women have fought for and in many cases won the right to *maternity* leave. The need for supplementary out-of-home care for young children has led to the development and subsidization of various forms of day care for the children of employed *mothers*. Many employers have come to recognize the responsibilities of parenthood by allowing *female employees* to use their sick leave to stay home with sick children. Other employers have increased the flexibility of work roles by introducing practices such as flexitime and shared jobs. In each case, however, the concern, either explicit or implicit, has been with female employees. With few exceptions, employers have consistently assumed that work and family role conflicts are salient only in the case of wives and mothers; rarely is there concern for what employment demands may be doing to the family involvement and responsibilities of husbands and fathers.

Michael E. Lamb, *Fatherhood and Social Policy in International Perspective: An Introduction*, *in* FATHERHOOD AND FAMILY POLICY 1, 3 (Michael E. Lamb & Abraham Sagi eds., 1983) (emphasis in original); *see also* Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1299 (1982) [hereinafter *Law Firms and Lawyers with Children*] (reporting, after conducting surveys of law firms interviewing at Stanford Law School and Stanford law students, that law firm practices and policies for maternity leave generally matched the expectations of female law students but that firm practices and policies for paternity leave fell well below the expectations of male law students even though men expected to take considerably less leave than women).

least likely to experience negative financial effects from fathers taking parental leave. Yet, Catalyst found that sixty-three percent of large employers considered it unreasonable for a man to take any parental leave, and another seventeen percent considered paternal leave reasonable only if limited to two weeks or less.[187] Even among large employers providing paternal leave, an amazing forty-one percent considered it unreasonable for a man to actually use it, and another twenty-three percent considered a reasonable leave for a man to be two weeks or less![188] It appears 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.[189]

The Catalyst survey responses show glaring and pervasive employer hostility toward men taking parental leave. Confirmation of this problem may be found in other sources. For example, when Catalyst interviewed human resource and other managers, it found them quite candid in their assessments that their companies would take a very negative view of fathers who might take leave to care for their children.[190] Another study found executives more likely to accommodate the family needs of women employees than similarly situated men, including being more likely to grant a female accountant's request for a one-month child-care leave than a male's.[191] Fathers who take parental leave justifiably fear for their jobs and their families' financial security.

Employers are not the only source of workplace hostility. Co-worker hostility can generate powerful peer pressure. Such peer pressure can intimidate and deter fathers from taking leave.[192]

Even when leave is available and communicated to employees and financial barriers are removed, workplace hostility can deter many fathers from taking leave. In Sweden, there is considerable evidence that workplace hostility remains a significant barrier to paternal involvement in the parental leave program.[193] On the other hand, there is anecdotal

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187. CATALYST, *supra* note 11, at 65.

188. *Id.* at 66.

189. Pleck, *Fathers and Infant Care Leave*, *supra* note 151, at 181, 187; *see Law Firms and Lawyers with Children*, *supra* note 186, at 1272 (suggesting that many law firms create parental leave programs for men in order to maintain an appearance of equality with female employees).

190. *See* Catalyst, *Workplace Policies*, *supra* note 152, at 328 (reporting comments from a manager that any father who took leave would see his career take a decline).

191. Benson Rosen et al., *Dual-Career Marital Adjustment: Potential Effects of Discriminatory Managerial Attitudes*, 37 J. MARRIAGE & FAM. 565, 571 (1975).

192. Sheryl Bear et al., *Even Cowboys Sing the Blues: Difficulties Experienced by Men Trying to Adopt Nontraditional Sex Roles and How Clinicians Can Be Helpful to Them*, 5 SEX ROLES 191, 193-94 (1979); *cf.* Radin, *supra* note 131, at 134 (finding that two factors that led role-reversed couples to revert to traditional patterns of child care were residence in a community with very traditional values regarding parenting and family members' pressure to resume traditional arrangements).

193. *See* Linda Haas, *Fathers' Participation in Parental Leave*, SOCIAL CHANGE IN SWEDEN, Nov. 1987, at 5 (suggesting that Swedish employers structure jobs to make it difficult for an employee to

evidence in the United States that when an employer not only provides parental leave, but also sanctions its use, men actively participate in the program.[194]

III. The Family & Medical Leave Act: Reducing the Barriers?

On February 5, 1993, President Clinton signed into law the Family & Medical Leave Act of 1993 (FMLA).[195] The FMLA covers all employers who employ fifty or more employees on each regular workday for twenty or more weeks during the current or preceding year.[196] The Act requires covered employers to allow eligible employees to take up to twelve weeks of unpaid leave per year under the following circumstances: within twelve months following the birth of a baby or adoption of a child; when a serious health condition renders the employee unable to perform the job; or in order for the employee to care for a spouse, parent, or child who has a serious health condition.[197] To be eligible, an employee must have worked for the employer for at least 12 months,[198] must have worked at

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take an extended leave); Pleck, *Fathers and Infant Care Leave*, *supra* note 151, at 187 (reporting that surveys of fathers and employers indicate that employers view paternal leave negatively); Sandqvist, *supra* note 132, at 152 (reporting close to half of the supervisors and more than 25% of workers surveyed in Sweden reacted negatively to paternal leave programs).

194. *See* Catalyst, *Workplace Policies*, *supra* note 152, at 329 (reporting the results of a telephone survey that found increased paternal leave requests as paternity leave policies became more visible and corporations began to sanction them).

195. Pub. L. No. 103-3, 107 Stat. 6 (to be codified at 29 U.S.C. §§ 2601-2654).

196. FMLA § 101(4)(A)(i), 29 U.S.C.A. § 2611(4) (West Supp. 1994). This language is drawn from Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. H.R. REP. NO. 8, *supra* note 11, at 33. The courts have split over whether the minimum number of employees must actually be working on each day of the work week or whether they need only be on the payroll. *Compare* Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634 (1st Cir. 1983) (holding that employees need only be on the payroll to be counted), *cert. denied*, 466 U.S. 904 (1984) *with* EEOC v. Garden & Assocs., 956 F.2d 842, 843 (8th Cir. 1992) *and* Zimmerman v. North Am. Signal Co., 704 F.2d 347, 354 (7th Cir. 1983) (both holding that employees must actually report for work to be counted); *see EEOC: Policy Guide on Whether Part-Time Employees May Be Counted to Satisfy Number Required for Title VII and ADEA Coverage*, 8 Fair Empl. Prac. Man. (BNA) 405:6857, at 24 (Apr. 20, 1990) (taking the position that employees need only be on the payroll to be counted). This issue is particularly important for employers that rely heavily on part-time employees. The legislative history of the FMLA makes clear that employees need only be on the payroll and need not be physically at work each day of the work week. *See* H.R. REP. NO. 8, *supra* note 11, at 33 ("'Employs . . . employees for each working day' is intended to mean 'employ' in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose."). It also makes clear that even employees who are not eligible for leave are to be counted. *Id.*; S. REP. NO. 3, *supra* note 11, at 22. The Labor Department's Interim Final Regulations take the position that an employee need only be on the payroll to be counted. 29 C.F.R. § 825.105(a) (1993).

197. FMLA § 102(a)(1), 29 U.S.C.A. § 2612(a)(1) (West Supp. 1994).

198. FMLA § 101(2)(A)(i), 29 U.S.C.A. § 2611(2)(A)(i) (West Supp. 1994). The statute does not expressly require that they be 12 consecutive months or that they be the immediately preceding 12 months. *Id.*; *cf.* Butzlaff v. Wisconsin Personnel Comm'n, 480 N.W.2d 559 (Wis. Ct. App. 1992) (interpreting a similar provision of the Wisconsin FMLA as not requiring that the 52 weeks of

least 1250 hours within the past 12 months,[199] and must be employed at a worksite where the employer employs 50 or more employees within a 75 radius.[200]

While an employee is on leave, the employer must continue to maintain the employee's coverage in any employer-provided group health plan at the same level and under the same conditions as the employee would have been covered had he or she not been on leave.[201] Upon return from leave, the employer must restore the employee to the same or an equivalent position.[202] The FMLA offers an opportunity to reduce the barriers that block fathers from taking parental leave.

A. The FMLA and Leave Availability

A prime barrier to many fathers who wanted to take parental leave was their employers' failure to offer it. The FMLA destroys this barrier for many fathers. The FMLA does not solve this problem for fathers employed by small employers. It does, however, offer hope for the future because it creates a Commission on Leave charged with the responsibility to study and report to Congress on various aspects of family and medical leave, including leave policies by small employers not covered by the FMLA.[203]

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employment be consecutive). The FMLA's legislative history indicates that the 12 months need not be consecutive. H.R. REP. NO. 8, *supra* note 11, at 35; S. REP. NO. 3, *supra* note 11, at 23. The Interim Regulations agree. 29 C.F.R. § 825.110(a)(1) (1993).

199. FMLA § 101(2)(A)(ii), 29 U.S.C.A. § 2611(2)(A)(ii) (West Supp. 1994). The legislative history makes it clear that the hours that count are those that would count as compensable time under the Fair Labor Standards Act. H.R. REP. NO. 8, *supra* note 11, at 35; S. REP. NO. 3, *supra* note 11, at 23. The Interim Regulations agree and also provide that exempt employees who have worked for an employer for 12 months are presumed to have met the 1,250 hour requirement. 29 C.F.R. § 825.110(c) (1993). The determination is made at the time leave commences, not at the time the employee applied for leave. *Id.* § 825.110(d).

200. FMLA § 101(2)(B)(ii), 29 U.S.C.A. § 2611(2)(B)(ii) (West Supp. 1994).

201. FMLA § 104(c)(1), 29 U.S.C.A. § 2614(c)(1) (West Supp. 1994).

202. FMLA § 104(a)(1), 29 U.S.C.A. § 2614(a)(1) (West Supp. 1994). The legislative history makes it clear that this is a stringent test. The job may not merely be comparable; it must be equivalent because anything less would deter employees from taking leave. *See* H.R. REP. NO. 8, *supra* note 11, at 41; S. REP. NO. 3, *supra* note 11, at 30. Thus, restoring the returning employee to a position with identical pay, hours, and benefits is not enough. *Id.* All working conditions must be equivalent. *Id.* Courts interpreting similar requirements of state laws have held that this includes an employee's authority and responsibility. *E.g.*, Kelley Co. v. Marquardt, 493 N.W.2d 68, 76 (Wis. 1992); D'Alia v. Allied-Signal Corp., 614 A.2d 1355, 1360 (N.J. Super. Ct. App. Div. 1992).

The statute exempts from job restoration rights a salaried employee who is within the highest 10% in pay at the worksite if restoration would cause the employer "substantial and grievous economic injury." FMLA § 104(b), 29 U.S.C.A. § 2614(b) (West Supp. 1994). The legislative history indicates that this is a very narrow exception. The Senate rejected an amendment offered by Senator Gorton of Washington, which would have allowed every employer to designate 10% of its workforce as key employees potentially excluded from the reinstatement provisions. *See* 139 CONG. REC. S1091-93 (daily ed. Feb. 3, 1993) (statement of Sen. Gorton).

203. FMLA § 301, 29 U.S.C.A. § 2631 (West Supp. 1994).

A father who works for a covered employer still may be ineligible if his job tenure is too short. The FMLA's requirement of 1,250 hours, however, averages to only approximately 25 hours per week. The requirement of twelve months job tenure is mitigated by the ability to count months that are not consecutive. Furthermore, eligibility is determined as of the date that leave is to commence, and an eligible employee may take leave anytime within twelve months following childbirth.[204] Thus, an employee who is not eligible on the date the baby is born can wait and begin leave upon attaining eligibility. Childbirth leave rights expire, however, on the baby's first birthday.[205] Thus, an employee who becomes eligible after the baby is forty-weeks old will not be entitled to a full twelve-week leave.

Prior to the FMLA, many employers hid the parental leave that they offered to fathers by calling it personal leave of absence or some other general term.[206] Employees were unaware that these leaves could be used to take time off following the birth of a child. The Labor Department's regulations go a long way toward destroying this barrier with respect to covered employers. They not only require traditional notice posting, but also mandate that employers include statements of FMLA leave rights in employee handbooks and other documents distributed to employees containing information on wages and benefits.[207] Furthermore, the FMLA's enactment received wide-spread publicity. Most fathers who were not aware of their entitlement to leave under employer policies are very likely to be aware of the FMLA. Thus, the FMLA should eliminate the availability barrier with respect to covered employers.

B. Funding Parental Leave Under the FMLA

The FMLA requires only that employers provide unpaid leave with health insurance and job restoration rights. It does not mandate income replacement.

The FMLA grants employees a right to substitute accrued paid vacation and personal leave for childbirth leave.[208] This provision will be of little use to fathers seeking to fund parental leave. Although the statute precludes employer personnel practices that might otherwise restrict the taking of vacation during childbirth leave,[209] most fathers were already

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204. FMLA § 102(a)(2), 29 U.S.C.A. § 2612(a)(2) (West Supp. 1994).

205. 29 C.F.R. § 825.201 (1993).

206. *See supra* note 152 and accompanying text.

207. 29 C.F.R. §§ 825.300-.301 (1993).

208. FMLA § 102(d)(2)(A), 29 U.S.C.A. § 2612(d)(2)(A) (West Supp. 1994). It also allows the employer to require an employee to substitute these leaves for statutory unpaid leave. *Id.*

209. *See* 29 C.F.R. § 825.207(d) (1993).

using vacation and personal leave to create make-shift childbirth leaves of short duration.[210]

The FMLA's concept of leave substitutions as a method for funding otherwise unpaid family leave is a good one. Courts in Oregon and Wisconsin have interpreted the leave substitution provisions of their state statutes to encompass a right to substitute accrued paid sick leave for otherwise unpaid parental leave.[211] Substitution of accrued sick leave often will provide a superior method of funding parental leave because employers commonly allow employees to accumulate sick leave from year to year, subject to no or very generous maximum accruals.[212]

The FMLA also grants employees a right to substitute accrued sick leave for unpaid serious health condition leave.[213] Fathers may try to fund the initial portion of a childbirth leave with accrued sick leave by taking it as serious health condition leave. To do so, they must show that their wives' postpartum recovery is a serious health condition; they must show that they meet the statutory requirement that the leave be taken to care for their wives; and they may have to overcome employer policies that limit the use of sick leave to the employee's own illness.

The FMLA defines a serious health condition as a physical or mental condition requiring in-patient care in a medical facility or "continuing treatment by a health care provider."[214] There is considerable room for reasonable minds to differ over the further refinement of this definition.[215]

It is clear, however, that postpartum recovery qualifies as a serious health condition. The committee reports expressly cited recovery from childbirth as an example of a serious health condition and referred to the legislative history of the Pregnancy Discrimination Act as establishing a medical recovery period of four to eight weeks for a normal delivery and

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210. *See supra* notes 144-45 and accompanying text.

211. *See* Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143 (Or. 1993); Richland Sch. Dist. v. Department of Indus., Labor & Human Relations, 498 N.W.2d 826, 830-37 (Wis. 1993).

212. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS: 1989, at 18 (1990) (reporting that 49% of employees covered by sick leave plans could accumulate benefits from year to year); EMPLOYEE BENEFITS HANDBOOK 35-15 to 35-16 (Jeffrey D. Mamorsky ed., 1992) (describing the allowance of accumulation of unused sick days as a "common arrangement").

213. FMLA § 102(d)(2)(B), 29 U.S.C.A. § 2612(d)(2)(B) (West Supp. 1994).

214. FMLA § 101(11), 29 U.S.C.A. § 2611(11) (West Supp. 1994).

215. *Compare* MPI Wis. Machining Div. v. Department of Indus., Labor & Human Relations, 464 N.W.2d 79, 84 (Wis. Ct. App. 1990) (holding that ongoing care by a health care provider requires direct, continuous, and first-hand contact following the initial outpatient contact) *with* 29 C.F.R. § 825.114(b) (1993) (interpreting ongoing care by a health care provider to include following a regimen of treatment under the provider's supervision as well as suffering from a long-term chronic illness without active treatment by a health care provider because the illness cannot be cured).

longer when surgery is necessary or there are other complications.[216] The Regulations make explicit what is implicit in the statute: Serious health conditions that arise during the twelve months following the birth of a baby are not disqualified from being a basis for leave merely because the employee may also take childbirth leave.[217]

The FMLA is ambiguous concerning the standard for evaluating an employee's request for leave to care for a family member with a serious health condition. Section 102(a)(1)(C) provides for leave "in order to care for" a family member, thereby indicating that a standard of necessity is not imposed.[218] Section 103, however, permits the employer to require a health care provider's certification, *inter alia*, that the employee is needed to care for the family member.[219] This suggests that there is a standard of necessity. The legislative history stresses the psychological and emotional importance of having a parent care for an ill child, a spouse care for an ill spouse, and a child care for an ill parent.[220]

The Regulations also recognize the breadth of care that an employee may take leave to provide. They state that the care provided by the

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216. H.R. REP. NO. 8, *supra* note 11, at 41; S. REP. NO. 3, *supra* note 11, at 29.

217. *See* 29 C.F.R. §§ 825.207(c)(2), .208 (1993). The Labor Department explained that this would benefit employers:

> Employers expressed considerable concern that an employee not be allowed to take an additional 12 weeks of FMLA leave for birth of a child after conclusion of a disability leave period provided under the employer's plan. It appears clear this was not intended. Any period before and after birth where a mother is not able to work for medical reasons may be considered leave for a serious health condition, despite the fact that the period after birth is also leave to care for the newborn child.

58 Fed. Reg. 31802 (1993). The FMLA gives the employer rights to require employees to substitute paid leave for statutory leave that are identical to the employees' substitution rights. The employer may require substitution of paid medical leave only for serious health condition leave. FMLA § 102(d)(2)(B), 29 U.S.C.A. § 2612(d)(2)(B) (West Supp. 1994). How to designate leave immediately following birth of the newborn child, thus, is crucial to the employer's ability to prevent stacking 12 weeks of FMLA childbirth leave on top of paid disability leave. If childbirth leave trumps serious health condition leave when both circumstances are present simultaneously, the employer could not require the mother to substitute paid disability leave. Accordingly, while the mother is on paid disability leave, she would not be using her FMLA leave and, upon the conclusion of her disability, she would be entitled to another 12 weeks of unpaid FMLA leave. Because childbirth leave does not trump serious health condition leave when the two coincide, the employer may require the employee to substitute the paid medical leave for the unpaid FMLA leave. Employer and employee substitution rights are identical under the Act. If the employer does not require the employee to substitute paid medical leave during her postpartum disability, the employee may insist on it.

218. FMLA § 102(a)(1)(C), 29 U.S.C.A. § 2612(a)(1)(C) (West Supp. 1994).

219. FMLA § 103, 29 U.S.C.A. § 2613 (West Supp. 1994).

220. The legislative history indicates:

> The phrase "to care for" in Section 102(a)(1)(C) is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. . . . The same is often true for adults caring for a seriously ill parent or spouse.

H.R. REP. NO. 8, *supra* note 11, at 36; S. REP. NO. 3, *supra* note 11, at 24.

employee may consist of psychological comfort.[221] They allow the employee to satisfy the medical certification requirement by providing a statement of the care the employee intends to give the family member and by providing a certification by the health care provider that the care will be beneficial to the family member.[222]

Fathers seeking to care for their wives during postpartum recovery should have little trouble meeting the FMLA's requirements. In addition to the physical recovery, women must cope with the stress of caring for a newborn while being physically disabled, and many must also deal with postpartum depression. No one is better suited to provide psychological comfort and support to a new mother recovering from childbirth than her husband. Indeed, under these circumstances, care of the child and care of the recovering mother merge—the act of tending to the newborn's physical needs assists the mother's physical recovery.[223]

Nevertheless, employers may challenge a father's claim for leave to care for his wife during postpartum recovery by requiring a second medical opinion. The FMLA permits such a challenge if the employer has "reason to doubt the validity" of the employee-provided certification.[224] This requirement raises many questions. Must the employer's doubts be supported by objective reasons or is subjective good faith sufficient? What must the employer doubt? That is, what is a valid employee-provided certificate? If the certificate complies on its face with Section 103, is the employer bound by it absent a showing of fraud in its procurement or execution? May the employer require a second opinion based on a reason to doubt the credentials of the certifier or a reason to question the certifier's medical judgment? The committee reports shed little light on this issue. They merely state that a second opinion may be required "if the employer has reason to question the original certification."[225]

Examination of other sections of the Act and the legislative history to determine the overall thrust of the FMLA provides some answers. It is clear that Congress was concerned with employer actions that have the effect of deterring employees from taking leave even when those effects are unintentional. Consequently, Congress inserted a stringent standard governing reinstatement following leave.[226] Congress also prohibited any

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221. 29 C.F.R. § 825.116(a) (1993).

222. *Id.* § 825.306(c).

223. Indeed, the trend toward shorter postpartum hospital stays increases the need for the father to take time off from work to care for the mother. Betsy A. Lehman, *Recuperating After Delivery Can Take Some Time*, BOSTON GLOBE, April 26, 1993, at 39.

224. FMLA § 103(c)(1), 29 U.S.C.A. § 2613(c)(1) (West Supp. 1994).

225. H.R. REP. NO. 8, *supra* note 11, at 39; S. REP. NO. 3, *supra* note 11, at 26. The Regulations also fail to address this issue specifically.

226. *See supra* note 202 and accompanying text. As explained in the committee reports, "employees would be greatly deterred from taking leave without the assurance that upon return from leave,

employer conduct that interferes with, restrains, or denies leave rights.[227] Definitive interpretations of a similar provision in the NLRA[228] provide for an objective balancing of the effects of the employer's actions on the exercise of employee rights against the employer's business justification.[229]

An employer's legitimate business interest in requiring a second medical opinion is to protect against abuse of the leave. Congress, however, expressly discounted concerns of widespread abuse of leave to care for family members with serious health conditions.[230] Allowing an employer to require a second opinion based solely on good faith subjective suspicions would be overly broad and could deter employees from taking leave. Employer interests in preventing abuse of the leave are protected by limiting the second opinion requirement to cases in which the employer has an objectively based reason to doubt the employee-provided certificate.

What must the employer doubt? The FMLA's handling of disputes between the employee-provided certification and the second opinion is instructive. The dispute must be presented to a mutually selected third health care provider whose decision will be final and binding.[231] Thus, the statute envisions that employer contests of employee-provided certifications will focus on the medical judgments contained therein. Restricting employers to questioning the facial validity of the certificate is too narrow. Employers should be able to require second opinions when they have objective reasons to doubt the diagnosis, regimen of treatment, and other medical judgments contained in the employee-provided certificate. Congress has determined, however, that as a matter of law, psychological and emotional support are sufficiently beneficial to satisfy the requirement that leave be taken to provide care to the ill family member.[232] Therefore, once the employee states the type of care to be provided and the health care provider certifies that it will be beneficial to the patient, the employer should be precluded from subjecting that portion of the certification to a second opinion.

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they will be reinstated to a genuinely equivalent position." H.R. REP. NO. 8, *supra* note 11, at 41; S. REP. NO. 3, *supra* note 11, at 29-30.

227. FMLA § 105(a)(1), 29 U.S.C.A. § 2615(a)(1) (West Supp. 1994).

228. The NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights to engage in and refrain from concerted activity for mutual aid and protection. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988).

229. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945) (recognizing that employees' undisputed right to self-organization must be weighed against employers' right to maintain discipline in their establishments).

230. *See* H.R. REP. NO. 8, *supra* note 11, at 32; S. REP. NO. 3, *supra* note 11, at 19 (noting that Sweden has implemented a leave plan for caring for sick family members without experiencing abuse of the plan).

231. FMLA § 103(d), 29 U.S.C.A. § 2613(d) (West Supp. 1994).

232. *See supra* note 220.

A father who establishes that his leave is to care for his wife during postpartum recovery is only halfway home to funding the leave. Next, he must establish a right to substitute accrued paid sick leave. The FMLA states:

> An eligible employee may elect . . . to substitute any of the accrued . . . medical or sick leave of the employee for [serious health condition] leave . . . except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.[233]

Has Congress given employees a leave substitution right in the first half of the sentence and then allowed employers to strip them of that right in the second half? The Labor Department's regulations maintain that it has.[234] The Department acknowledged comments from the Women's Legal Defense Fund and several members of Congress that the exception allows employers to deny leave substitution only for serious health conditions that are not eligible for sick leave under their policies, but does not allow employers to otherwise restrict substitution of sick leave for leave to care for an ill family member.[235] The Department rejected those comments, however, reasoning that "the history of this provision lacks an explanation that it is so intended and cannot, therefore, overcome the clearer reading of the statutory language."[236]

The statutory language, however, is far from clear. The sentence creates a general right to substitute accrued paid sick leave for serious health condition leave and then provides an exception that employers need not provide paid sick leave for situations in which they would not normally do so. In general, exceptions carve out circumstances to which the general rule does not apply; they are not intended to swallow the general rule. Under the Labor Department's interpretation, however, the exception is as broad as the rule and renders the substitution language meaningless.

If an employee may use paid sick leave only in accordance with the employer's policy, then the employee merely has to take sick leave—there is no need to substitute sick leave for FMLA leave.[237] When Congress

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233. FMLA § 102(d)(2)(B), 29 U.S.C.A. § 2612(d)(2)(B) (West Supp. 1994).

234. *See* 29 C.F.R. § 825.207(c)(1) (1993) ("An employee has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose.").

235. 58 Fed. Reg. 31794, 31802 (1993).

236. *Id.*

237. It might be argued that the substitution of paid sick leave for FMLA leave gives the employee the protections of the FMLA—such as post-leave reinstatement to the same or equivalent position—that would not necessarily be available under the employer's sick leave policy. The Wisconsin Supreme Court rejected this argument in Richland School District v. Department of Industry, Labor & Human Relations, 498 N.W.2d 826, 835 (Wis. 1993).

believed that employer sick leave policies provided adequate protection, it did not provide for statutory leave. Accordingly, Congress did not mandate leave for minor illnesses because it believed that "even the most modest sick leave policies" would cover those situations.[238]

For serious health conditions, Congress mandated up to twelve weeks of leave. Although the leave is unpaid, Congress recognized that the absence of pay would be a hardship for most employees and, therefore, provided for leave substitutions "in order to mitigate the financial impact of wage loss due to family and temporary medical leaves."[239] Thus, the right to leave substitution forms an intimate part of the right to leave itself. To be consistent with congressional intent, it cannot be left to the sole control of the employer.

The history of the leave substitution provision further suggests that employers may not preclude employees from substituting accrued sick leave for leave taken to care for an ill family member. The FMLA that President Clinton signed was modeled on the two FMLAs that President Bush had vetoed.[240] The FMLA of 1991, as reported out of the Senate and House committees, provided a right to substitute paid sick leave only for leave taken for the employee's own serious health condition while including the exception for situations in which the employer's policy normally did not provide sick leave.[241] As the bill reached the floor of Congress, the exception served to protect employers from having to provide sick leave for serious health conditions that their sick leave policies did not cover.

Although the FMLA's language differs substantially from the Wisconsin statute, courts interpreting the FMLA should follow the *Richland* court's lead. This is because the FMLA reinstatement rights add little, if anything, to the protection available to employees on sick leave under their employer plans. The FMLA's reinstatement rights are subject to a proviso that employees have no rights to positions or benefits that they would not have obtained if they had not been on leave. FMLA § 104(a)(3)(B), 29 U.S.C.A. § 2614(a)(3)(B) (West Supp. 1994). On the other hand, because sick leave plans are welfare benefit plans subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992), employees on sick leave have the protection of ERISA's prohibition on employer discrimination against the exercise of ERISA rights. *Id.* § 1140 (1988). At best, FMLA reinstatement rights provide marginally better protection than ERISA nondiscrimination rights. Nowhere is there any indication that Congress's purpose in providing for leave substitutions was to afford employees a minor increase in job security. Rather, as developed in the text, Congress's express purpose was to give employees a mechanism for funding otherwise unpaid FMLA leave. H.R. REP. NO. 8, *supra* note 11, at 38.

238. H.R. REP. NO. 8, *supra* note 11, at 40; S. REP. NO. 3, *supra* note 11, at 28.

239. H.R. REP. NO. 8, *supra* note 11, at 38; S. REP. NO. 3, *supra* note 11, at 28.

240. H.R. REP. NO. 8, *supra* note 11, at 62, 64.

241. *See* H.R. REP. NO. 134, 102d Cong., 1st Sess. 42 (1991); S. REP. NO. 68, 102d Cong., 1st Sess. 44 (1991). This was consistent with prior versions of family leave legislation that had restricted the right to substitute paid sick leave to leave taken for the employee's own serious health condition. *See, e.g.*, 134 CONG. REC. S13,678 (daily ed. Sept. 29, 1988) (discussing § 104(c)(2) of the proposed Parental and Medical Leave Act of 1988, which provided that "nothing in this Act shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave").

Comments submitted by several members of Congress during the Labor Department's FMLA rulemaking confirm that this was the exception's purpose.[242]

On the floor, the sick leave substitution provision was expanded to include leave taken to care for ill family members, and the exception was not changed.[243] There is no indication that the failure to change the language of the exception was intended to render the expansion of leave substitution rights illusory. Rather, it appears that Congress extended to leaves taken to care for family members with serious health conditions the same sick leave substitution rights that it had already provided for leaves taken for an employee's own serious health condition—that is, a right to substitute sick leave when the serious health condition is not excluded from the employer's sick leave plan.[244] The sick leave substitution language of the Act ultimately passed by Congress and vetoed by President Bush, was identical to the language of the FMLA signed by President Clinton.[245]

To summarize, the FMLA's sick leave substitution provision is facially ambiguous. The Labor Department's interpretation, however, is inconsistent with the structure of the FMLA, the congressional purpose behind leave substitutions, and the history of the provision.[246] Courts should reject it and not allow employers to strip employees of the right to substitute accrued sick leave when taking leave to care for family members

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242. *See* Letter from Representatives Pat Williams, William L. Clay, and William D. Ford, and Senators Christopher J. Dodd, Howard M. Metzenbaum, and Edward M. Kennedy to Charles Pugh, U.S. Dept. of Labor 4-5 (Mar. 31, 1993) (on file with the *Texas Law Review*) [hereinafter Letter from Representative Pat Williams, et al.].

243. *See* 137 CONG. REC. S14,085-91 (daily ed. Oct. 1, 1991). The amendment expanded Section 102(d)(2)(B) to encompass leave taken to care for a family member with a serious health condition. *See id.* at S14,086. It was part of a much broader amendment that rewrote substantial portions of the bill. A similar amendment was introduced in the House. 137 CONG. REC. H9769-74 (daily ed. Nov. 13, 1991). The amendments were designed primarily to address concerns raised by the business community. *See* 137 CONG. REC. S14,132 (daily ed. Oct. 2, 1991) (statement of Sen. Bond); *id.* at S14,141 (statement of Sen. Coats); 137 CONG. REC. H9727 (daily ed. Nov. 13, 1993) (statement of Rep. Roukema) (listing changes that favored employers). The leave substitution expansion, however, improved employee protection. Congress clearly was aware of what it was doing by including the leave substitution in an amendment, which for the most part contained language that was otherwise more restrictive of employee leave rights. *Cf.* 137 CONG. REC. H9725 (daily ed. Nov. 13, 1991) (statement of Rep. Goodling) (Table: Comparison of H.R. 2 (As Reported) and the Gordon-Hyde substitute) (comparing, as an opponent of the FMLA, the amended bill to the bill as reported that includes the expansion of the sick leave substitution provision).

244. This explanation was confirmed by the members of Congress who submitted comments during the Labor Department's FMLA rulemaking. *See* Letter from Representative Pat Williams, et al., *supra* note 242, at 5.

245. *Compare* FMLA § 102(d)(2), 29 U.S.C.A. § 2612(d)(2) (West Supp. 1994) *with* 138 CONG. REC. H7741 (daily ed. Aug. 10, 1992).

246. *See supra* notes 233-42 and accompanying text.

with serious health conditions.[247] Fathers should be able to take the initial leave following the births of their children as serious health condition leave and should be allowed to fund it by substituting accrued sick leave.[248]

C. *Workplace Hostility*

Even if employers offer male employees parental leave, communicate its availability unambiguously, and allow fathers to fund leave following childbirth, many men will not take leave, even though they want to, because of pervasive workplace hostility. Many employers, including many who have progressive policies accommodating family responsibilities of working mothers, believe that working fathers should leave all family responsibilities to their wives.

The "your wife should do it" attitude is based on gender stereotypes and treats working fathers who do not conform to those stereotypes harshly. The FMLA prohibits employers from interfering with, restraining, or denying the right to take leave.[249] Maintaining a work environment hostile to paternal leave deters fathers from taking leave. Because fathers usually are the primary income providers,[250] they are very reluctant to jeopardize their jobs by taking leaves that are frowned on by their employers. If the hostility toward paternal leave that was so pervasive before the FMLA[251] persists, most fathers will continue to confine themselves to taking the few vacation and personal days that they believe they can get away with. In the words of the statute, such hostility clearly interferes with, restrains, and denies male employees the right to take leave.[252]

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247. Because the Pregnancy Discrimination Act prohibits excluding pregnancy and childbirth from a sick leave policy, 42 U.S.C. § 2000e(k) (1988), employers should never be able to preclude fathers from substituting accrued sick leave when they take leave to care for their wives during postpartum recovery.

248. Taking the initial leave as serious health condition leave may also facilitate more flexible leave scheduling by the parents. Intermittent leave under the FMLA requires employer consent or medical necessity. FMLA § 102(b)(1), 29 U.S.C.A. § 2612(b)(1) (West Supp. 1994). The Regulations define intermittent leave as "leave taken in separate blocks of time due to a single illness or injury." 29 C.F.R. § 825.203(b) (1993). Leave taken for different purposes at different times during the same twelve month period would appear to be two separate leaves rather than a single intermittent leave. The only limitation under the statute would be that the total of the two leaves does not exceed twelve weeks. Therefore, the couple might be able to have the mother take the full twelve weeks following childbirth under the FMLA while the father takes the first six weeks to care for his wife during her postpartum recovery. The parents could fund the six week leave by substituting accrued sick leave to the extent that the father has it. After six weeks, the father could return to work. Since he will not yet have taken childbirth leave, he could do so for six more weeks after the mother returns to work when the child is twelve weeks old.

249. FMLA § 105(a)(1), 29 U.S.C.A. § 2615(a)(1) (West Supp. 1994).

250. *See supra* note 159.

251. *See supra* section III(B)(3).

252. Of course, workplace hostility to taking leave is not limited to male use of leave. Because men have been saddled with the primary breadwinner role, they tend to respond to the hostility differ-

The law has developed considerable experience with hostile work environments based on gender stereotypes in its treatment of sexual harassment under Title VII. Courts, understandably, might look to Title VII hostile environment sexual harassment cases for guidance in interpreting Section 105(a)(1). In so doing, however, they must recognize that Title VII is an antidiscrimination statute and that sexual harassment is actionable only when it constitutes discrimination with respect to "compensation, terms, conditions or privileges of employment."[253] Section 105(a)(1)'s prohibition, in contrast, is not limited to discrimination in terms or conditions of employment.[254]

In *Meritor Savings Bank v. Vinson*,[255] the Court held that the actions of the plaintiff's supervisor—which included repeated sexual demands of the plaintiff, sexual intercourse with her, fondling her in front of coworkers, following her into the restroom and exposing himself to her, and raping her—constituted actionable sex discrimination under Title VII.[256] The Court rejected the bank's argument that the plaintiff had no claim because the harassment had not resulted in loss of salary, promotions, or other tangible benefits of employment.[257] It held that when unwelcome sexual advances create a hostile work environment, they subject women to working conditions less favorable than the working conditions of men.[258] The Court cautioned, however, that not all unwelcome advances would be sufficiently pervasive as to alter working conditions.[259]

Thus, workplace sexual harassment becomes actionable under Title VII only when it fits a paradigm of gender-based discrimination in working conditions. This paradigm has limited the instances of harassment that are actionable under Title VII.

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ently than married women with children. Whereas married working mothers tend to take leave and suffer the results of employer hostility, fathers are deterred from taking leave by employer hostility. Thus, for most working mothers the § 105(a)(1) issue will arise when, following their return from leave, their progress in the workplace is slowed or completely stifled. They may be returned to the same or an equivalent position as the FMLA requires, but in contrast to their situations before maternity, they may find themselves stuck there. This raises an issue of retaliation or discrimination. It is an important issue under the FMLA, particularly with respect to issues of proving retaliatory motive.

Those few men who do take leave will also face the retaliation-discrimination issue and are likely to feel retaliatory animus even more harshly than returning mothers. Most men, however, will never face this issue if the threshold issue of an environment hostile to the rights of working fathers deters them from taking leave in the first place. The issue of hostile-environment deterrence requires a conceptually different legal analysis that goes beyond issues of proof.

253. 42 U.S.C. § 2000e-2(a)(1) (1988).
254. 29 U.S.C.A. § 2615 (West Supp. 1994).
255. 477 U.S. 57 (1986).
256. *Id.* at 73.
257. *Id.* at 64.
258. *Id.* at 67.
259. *Id.*

In considering the Title VII requirement of gender-based discrimination, it is necessary to distinguish between gender harassment and sexual harassment. By gender harassment, I mean the use of derogatory epithets, pictures, and other conduct aimed at degrading women. Such harassment is itself a condition of employment based on sex and is no different from racial or ethnic harassment. A single isolated incident, particularly one to which the employer responds promptly, would not alter a condition of employment,[260] but repeated use of gender slurs and other derogatory media is as much a discriminatory working condition as is repeated use of racial slurs and other derogatory media.[261] It is just as illegal for an employer to tolerate workers who call a female co-worker "bitch" or "cunt" as it is for an employer to tolerate workers who call an African-American co-worker "nigger" or "colored."[262]

Sexual harassment differs from gender harassment in at least two ways. First, it may be presumed that all gender-based derogations are as

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260. *See* Gilbert v. City of Little Rock, 544 F. Supp. 1231, 1239 (E.D. Ark. 1982) (holding that incidents of racial harassment did not rise to the level of a Title VII violation because they did not constitute a "standard operating procedure"), *aff'd in part, rev'd in part*, 722 F.2d 1390, 1394-95 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

261. *See, e.g.*, Kate v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (noting that sexual harassment can be "as demeaning and disconcerting as the harshest racial epithets"); *cf.* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993) (commenting that derogatory sexual comments can create a hostile work environment). Courts have generally recognized that racial slurs constitute a discriminatory working condition. *E.g.*, Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986); Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986).

262. Failure to recognize this is, in my view, at the heart of the flaw of the much criticized opinion in Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The plaintiff had been subjected to a continuous display of soft-core pornographic pictures, including one that showed a man teeing a golf ball on a woman's breasts, and to a supervisor's routine use of such terms as "whores," "cunt," "pussy," and "tits." *Id.* at 624 (Keith, J., dissenting). The majority held that, although annoying, the conduct was not sufficiently intimidating or hostile to have had more than a de minimis effect on the work environment. *Id.* at 622.

Most commentators have criticized *Rabidue* for not evaluating the effects of the comments and pornographic pictures from a woman's perspective. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1200-01 (1989) (characterizing the *Rabidue* court's "almost amused tolerance" as a lack of awareness of women's perceptions of gender-based harassment). Although such comments are valid, they are beside the point. The issue with such gender-derisive conduct is not whether it is hostile or intimidating. The conduct itself is the working condition that women, but not men, are subjected to. One would not suggest that an African American, forced to work in an environment with pictures depicting whites' subjugation of blacks and with employer indifference to a supervisor who constantly called blacks "niggers" and other epithets, would not be the victim of discrimination because the work environment was not sufficiently intimidating or hostile. *See* Lisa Rhode, Case Note, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims:* Davis v. Monsanto Chemical Co., 58 U. CIN. L. REV. 779, 812-13 (1989) (criticizing the Sixth Circuit for applying a lesser standard in racial discrimination cases than was applied in *Rabidue*). Moreover, the Supreme Court recently confirmed that such derogatory remarks are actionable discrimination because they subject women to working conditions that are not imposed on men. *Harris*, 114 S. Ct. at 371.

unwelcome as racial-based derogations. Not every request for a date can be subject to a similar presumption. Furthermore, whereas repeated use of derogatory terms such as "bitch" or "cunt" are inherently aimed at women, men as well as women can be the subject of unwelcome sexual advances, although it happens to women far more often than to men. Thus, unwelcome sexual advances correlate with gender, but are not inherently equivalent to gender. Fortunately, the Court in *Vinson* was not deterred by this artificial distinction. It readily recognized that unwelcome sexual advances create an artificial, gender-based barrier in the same way as racial harassment.[263]

Nevertheless, the need to link the alleged harassment to gender has limited the reach of Title VII. Some courts have refused to find causes of action when the harassment was aimed at members of both sexes[264] or when the harassers and the victim were of the same gender.[265]

The need to establish an effect on working conditions for unwelcome sexual advances to violate Title VII has been manifested primarily in the judicial requirement that the advances be pervasive. Courts commonly reject claims based on multiple unwelcome advances on the ground that they were not sufficiently numerous or severe to amount to a change in working conditions.[266]

Title VII sexual harassment law is instructive because it demonstrates that a hostile work environment can violate statutory employment rights. It is also instructive that the source of the hostile environment need not be supervisors or managers for liability to attach.[267] The limitations of Title VII hostile environment harassment law, however, should not constrict an FMLA hostile environment case. Unlike Title VII, Section 105(a)(1) does

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263. *Vinson*, 477 U.S. at 67. The Court appears to have departed from its usual, overly narrow disparate treatment jurisprudence, exemplified by Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1703 (1993) (refusing to equate age discrimination with discrimination based on pension eligibility or other factors that correlate with age) and General Electric Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (refusing to equate discrimination based on pregnancy with gender-based discrimination).

264. *E.g.*, Bowen v. Department of Human Servs., 606 A.2d 1051, 1054 (Me. 1992).

265. *E.g.*, Polly v. Houston Lighting & Power Co., 803 F. Supp. 1, 5-6 (S.D. Tex. 1992).

266. *See, e.g.*, Downing v. Runyon, No. C-92-2964, 1993 WL 79632, at *2 (N.D. Cal. Mar. 15, 1993) (finding that the defendant had not created a hostile work environment by twice asking the plaintiff out for a date three years before supervising her); Boarman v. Sullivan, 769 F. Supp. 904, 909-10 (D. Md. 1991) (holding that a plaintiff failed to show that a working environment was abusive when she could allege only two instances of harassment by her supervisors); Raley v. Board of St. Mary's County Comm'rs, 752 F. Supp. 1272, 1280 (D. Md. 1990) (deciding that isolated incidents of touching and sexual innuendo directed to a female employee did not create a hostile working environment).

267. *See* Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) (finding an employer liable for its line employees' racial harassment of a supervisor), *cert. denied*, 475 U.S. 1015 (1986); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981) (holding that an employer was liable for requiring an employee to wear a revealing costume that subjected her to harassment by customers and other non-employees).

not require gender-based discrimination in working conditions. It merely requires interference, restraint, or denial of family leave rights.[268] The key to an FMLA hostile environment case will not be pervasiveness, but rather deterrence. A single negative statement to an expectant parent can have a substantial deterrent effect on the exercise of leave rights. The inquiry should focus on the nature of the statement and the vulnerability of the employee, considering his position with the employer and his likely need for parental leave in the foreseeable future.

In interpreting Section 105(a)(1), courts may also turn to Section 8(a)(1) of the NLRA[269] because of its similar language. As with sexual harassment law, the law under the NLRA is instructive, provided that courts recognize its limitations. Relevant authority under Section 8(a)(1) makes it clear that discrimination or even intent to interfere with protected rights are not elements of a violation. Rather, there is an objective evaluation of the effects of an employer's action and its justification. For example, nondiscriminatory rules that prohibit employees from soliciting their co-workers to support a labor union during nonworking time are illegal unless the employer can demonstrate objectively that they are necessary to the business.[270] Conferrals of benefits before a union representation election may deter employees from voting for the union and are illegal unless the employer can demonstrate objectively a different purpose for them.[271] Employer polls of employees' union sentiments so interfere with employee rights that they are illegal unless accompanied by precautions that safeguard those rights.[272]

However, not all employer negative statements about a union violate Section 8(a)(1). Section 8(c) protects noncoercive employer speech.[273] Consequently, courts have distinguished coercive employer statements, which violate Section 8(a)(1), from noncoercive expressions of opinion, which do not.[274] Even predictions of negative consequences of

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268. *See* FMLA § 105(a)(1), 29 U.S.C.A. § 2615(a)(1) (West Supp. 1994).

269. 29 U.S.C. § 158(a)(1) (1988) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title.").

270. Beth Isreal Hosp. v. NLRB, 437 U.S. 483, 491-95 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).

271. *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 410 (1964) (finding that the announcement of holiday, overtime, and vacation benefits were intended to induce the employees to vote against the union and thus violated § 8(a)(1) of the NLRA); NLRB v. Hasbro Indus., 672 F.2d 978, 988 (1st Cir. 1982) ("Post-election benefits granted while objections are pending or while there is a possibility of a rerun election may also be regarded as an unlawful interference with an employee's right to support unionization.").

272. Struksnes Constr. Co., 165 N.L.R.B. 1062, 1063 (1967).

273. *See* NLRA § 8(c), 29 U.S.C. § 158(c) (1988) (protecting employer speech if it contains no threat of reprisal or promise of benefit).

274. *Compare* Peabody Coal Co. v. NLRB, 725 F.2d 357, 362-63 (6th Cir. 1984) (finding that the employer's statements regarding the consequences of unionization were not protected under the

unionization are lawful if they are objectively based.[275] Section 8(c) and authority interpreting it recognize that employers have a legitimate interest in voicing their positions concerning unionization of their workforces and balance those interests against employee interests in the free exercise of their rights to unionize.

The FMLA, on the other hand, contains no provision comparable to NLRA § 8(c). This is because under the FMLA, employers have no legitimate interest in persuading employees not to take parental leave or in voicing negative opinions about the consequences of taking parental leave. Therefore, all employer negative statements concerning employee use of FMLA rights should be subject to Section 105(a)(1).

Thus, sexual harassment law and Section 8(a)(1) of the NLRA provide useful analogies for interpreting the FMLA's prohibitions on employer interference with, restraint, and denial of family leave rights, provided that we recognize the limits of each analogy. The key inquiry under the FMLA in judging statements by employers and co-workers should be the deterrent effect of the statements in light of the nature of the statement and the vulnerability of the employee. When considering other employer policies and practices, the inquiry should involve an objective balancing of the degree to which the policy or practice interferes with the exercise of family leave rights and the employer's business justification. Stringent enforcement of Section 105(a)(1) can help reduce workplace hostility, which forms the most significant barrier to paternal use of parental leave.

IV. Conclusion

The *Ozzie and Harriet* and *Leave It to Beaver* model in which the father provides the family income and the mother cares for the children no longer describes the typical American family. An increasingly larger majority of mothers are in the paid work force. Fathers are no longer expected to be just breadwinners and disciplinarians. The "new father" is nurturing and actively involved in child care.

Most fathers desire and recognize the need to be actively involved with their children. But most employed mothers spend more time on child care than their employed husbands, and although mothers usually take parental leave, fathers rarely do.

It is well established that the lack of good maternal leave policies has inhibited women's roles in the work place. Although it receives less attention, it is equally true that the lack of good paternal leave policies has inhibited men's roles in the home.

NLRA due to their coercive effects) *with* NLRB v. Pentre Elec., Inc., 998 F.2d 363, 368 (6th Cir. 1993) (holding that an employer's predictions about the consequences of unionization were protected by § 8(c) of the NLRA because they were not coercive).

275. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

Child care comes naturally to a very small minority of parents. Most mothers and fathers develop their parenting skills "on the job." When mothers are on leave from their jobs and fathers are not, mothers tend to learn more about their children's needs and personalities. This reinforces a mistaken but commonly held belief that mothers are naturally better caregivers and leads to maternal domination of child care. As mothers appear to respond more effectively to their children's needs, the children tend to look first to their mothers for comfort, thereby excluding fathers even more.

The lack of good paternal leave policies also encourages workplace discrimination against women of childbearing age. Gender-neutral parental leave policies will not prevent such discrimination as long as women dominate the use of family leave.

There are three barriers to paternal use of family leave that the FMLA can affect. First, prior to the FMLA, paternal leave was not available, or if it was available, it was hidden from view. Second, paternal leave is almost always unpaid. Finally, there is great workplace hostility to paternal use of parental leave.

The FMLA offers hope for reducing these barriers. The FMLA mandates that leave be made available to new fathers and that employers communicate its availability openly. Although the FMLA requires only unpaid leave, its leave substitution provisions, if interpreted in accordance with congressional intent, offer a potentially effective way for many fathers to fund childbirth leave. Finally, the FMLA's prohibition of employer interference with, restraint, and denial of FMLA rights offers a potentially effective tool for combating workplace hostility to fathers who seek to take leave.