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# Examining Gender Stereotypes in New Work/ Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation

RANGITA DE SILVA DE ALWIS\*

## INTRODUCTION

A formal sex equality model assumes equality of opportunity in that it treats women and men as similarly situated. Despite its intentions, the formal equality model often does not produce equal results.<sup>1</sup> The effects of such a legacy of discrimination are manifest in the numerous gender stereotypes that subordinate women. It is therefore necessary that formal equality paradigms go further than gender neutrality concepts that tend to perpetuate gender segregation in the workplace and discriminate against women. A second model, the substantive equality model, takes a different stance in attempting to remedy the effects of past discrimination by demanding that policies and laws take into account such gender differences in order to avoid gender-specific outcomes and results that are considered unfair.<sup>2</sup> Examples of the substantive equality model include affirmative action<sup>3</sup> and reverse discrimination policies, which are often designed to boost women's participation in historically male dominated fields. Maternity leave provisions, child care leave and assistance, and family leave are examples of measures within a substantive equality framework that are intended to neutralize disadvantages and guarantee women's participation in the labor market. Unfortunately, though intended to help women, these policies indirectly reinforce biological differences, reify social expectations and drive women to lower paying work categories while encouraging their economic

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1. See generally Savitri W.E. Goonesekere, *The Concept of Substantive Equality and Gender Justice in South Asia*, U.N. DEV. FUND FOR WOMEN (Dec. 31, 2007), <http://www.unifem.org.in/PDF/The%20Concept%20of%20Substantive%20Equality%20-final%20-%2031-12-07.pdf>.

2. *Id.* at 3; see also Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27, 32 (2003).

3. See generally Francine D. Blau & Anne E. Winkler, *Does Affirmative Action Work?*, 14 REGIONAL REV., no. 3, 2005, at 38, available at <http://www.bos.frb.org/economic/nerr/rr2005/q1/section3b.pdf>.

dependence on men.<sup>4</sup> These policies indirectly help crystallize historically embedded gender norms including the notion that women are primary caregivers and thus best suited to play a leading role in the private sphere of the family rather than in the public, political and business worlds. Although gender specific legislation such as affirmative action policies have the capacity to alter the power differences and structures between men and women, the outcomes of such legislation may not always ensure just outcomes for women, men and children.

In acknowledging the need for a substantive equality approach that goes well beyond the rigid category of formal equality, it is necessary to emphasize the need for a radical substantive equality approach that looks beyond biological differences and socially constructed roles that reinforce women's subordination in the public sphere and in the marketplace. Such a radical substantive equality approach must ensure that both men and women are similarly situated when protecting both their equal rights to work and family. Consistent with the paradigm's objective, it is necessary that the substantive equality model guarantees equality of results or outcomes so that these work family policies do not result in preferential treatment of one gender over the other. Outcomes must be taken account, as neutral rules alone do not take into account the extent to which historical stereotypes and material realities impact women's lives.<sup>5</sup>

The above models of equality reflect the need to combat stereotypes concerning women's roles in the public and private sphere—stereotypes that share origins with female subordination. A history of negative cultural traditions such as practices of son preference, the devaluing of a female child, unequal inheritance rights, and lack of freedom of choice in marriage and family life devalue and subordinate women in private life. In public life, women suffer a different but connected form of inequality including unequal access to employment, services, benefits, and retirement policies. The wage gap between men and women, labor market segregation, and the glass ceiling are just a few factors that discriminate against women. The International Labor Office (ILO) reports that women earn 20-30 percent less than men worldwide, and are clustered in the lower rungs of the employment ladder.<sup>6</sup> Sex segregation in employment leads to men and women clustering in different occupations or in different sectors of the economy.<sup>7</sup> Such discriminatory practices in both the public and private spheres can be linked to enduring stereotyped ideas about

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4. See generally Catherine Cloud Barré, *The Viability of Maternity Leave Policies Under Title VII and the Equal Protection Clause*, 5 VA. J. SOC. POL'Y & L. 603 (1998); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987). MacKinnon argues that a discourse on gender differences serves to reinforce disparities of power, even as it seems to criticize them. See *id.* This does not mean that MacKinnon claims gender differences do not exist, but rather that it undermines women's interests to use the lenses of domesticity to critique individualistic theory.

5. Rangita de Silva de Alwis, *When Gender Differences Become a Trap: The Impact of China's Labor Law on Women*, 14 YALE J.L. & FEMINISM 69, 93 (2002).

6. Int'l Lab. Org. [ILO], *Agenda of the 90th Session (2002) of the Conference*, at 18 GB.279/3 (Nov. 2000), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-3.pdf>.

7. Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1209 (1988). See generally, e.g., Mary Ellen Guy & Meredith A. Newman, *Women's Jobs, Men's Jobs: Sex Segregation and Emotional Labor*, 64 PUB. ADMIN. REV. 289 (2004).

men and women's roles, strengths, and weaknesses. For example, women are ghettoized into working in low paying child care, education, health care, and personal and household services, while men's employment is concentrated in higher paying industries like construction, utilities, transport, and communications. Over time, these discriminatory practices and stereotypes have proven difficult to erase or overcome. Stereotypes presume that all members of a certain group possess particular attributes or characteristics whether or not those characteristics match individual attributes or characteristics, thus over-simplifying and diminishing what would otherwise be distinct personal attributes.<sup>8</sup>

The stereotypical attribution of caregiving to women has confined women uniquely to this role, thus not only reducing their societal value in the public sphere, but also inhibiting their rights to full citizenship. The concept of full citizenship recognizes the importance of care to society.<sup>9</sup> It is therefore imperative that an egalitarian paradigm of caregiving be used in evaluating labor market outcomes. This Article will explore the implications of parental leave for both sexes within such a framework of citizenship, and offer suggestions on how to design leave so as not to highlight women's distinct qualities and ensure that the outcomes are more egalitarian.

This Article explores both the adverse and the successful outcomes resulting from the formal and substantive equality models of laws by examining family work reconciliation policies internationally. By examining family work reconciliation policies from countries that are re-thinking their work family reconciliation laws, international legislators can better assess how to move forward with a more radical substantive equality approach which seeks to protect the rights of both men and women. Such reconciliation policies and laws are key to combating negative stereotypes that exclusively confine women to caregiving and assume that men cannot provide caregiving. This Article contends that the competing needs of caregiving and gender equality need not be at opposition to each other if they are rooted in a more egalitarian dual earner/dual career model, developed through legislation. While the gendered nature of family leave policies results in subordinating the woman both in the family and in the workplace, this Article will show how gender egalitarian parental leave policies can advance gender equality both in the public and private spheres. This argument helps to resolve the tension in the debate between difference and sameness feminists to posit the theory that both parents have equal rights and duties in caregiving.<sup>10</sup>

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8. John E. Williams & Susan M. Bennett, *The Definition of Sex Stereotypes via the Adjective Check List*, 1 SEX ROLES 327, 327 (1975).

9. Trudie Knijn & Monique Kremer, *Gender and the Caring Dimension of Welfare States: Toward Inclusive Citizenship*, 4 SOC. POL. 328, 350 (1997), available at <http://sp.oxfordjournals.org/content/4/3/328.full.pdf+html>.

10. See Rebecca Ray et al., *Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries*, 20 J. EUR. SOC. POL'Y 196, 197 (2010); see also Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (1991); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1,1-3, 14-15, 58-60 (1988).

This Article will further examine numerous laws that have adopted the dual earner/dual career models, thereby transcending distinctions based on gender. This model celebrates and privileges caregiving by both men and women by placing it at the heart of work family reconciliation policies, allotting the special treatment that is traditionally offered to mothers to both men and women who choose to perform child caring duties, thus beginning to dismantle the many historically embedded gender stereotypes. This Article advances the notion that new laws and policies must consider both men and women as potential caregivers. When we celebrate the value of caregiving, cooperation, and responsibility, we should celebrate the responsibility of both sexes to fill care taking and nurturing roles.<sup>11</sup> Part I of this Article will show how gender neutral policies can have the effect of advancing women's employment opportunities and engaging both men and women in caregiving. Part II of this Article looks critically at some comparative norms concerning women and their confinement to the falsely perceived primary role of caregiving. It examines these attitudes in relation to their pervasiveness, emergence, and negative outcomes to both men and women in the public sphere. This is done in an effort to show how gendered roles resulting from pervasive stereotypes can be restructured by the law.

## I. CURRENT PROBLEMS AND HOW THE LAW CAN BE USED FOR RECONCILIATION

### A. Emphasizing Difference Through Unjust Stereotypes

One of the most prevalent stereotypes in the world is the belief that maternity is women's natural role. Frances Raday has argued that one of the most globally pervasive harmful cultural practices "... is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic."<sup>12</sup> As Raday rightly stated, the assumption that women are the primary or sole caregivers of children is often used to exclude women from the public sphere, especially with regard to political life, promotions and high profile employment opportunities.<sup>13</sup> Yet as much as gender is socially constructed and shaped by underlying structures of power that delineate the relationships between sexes,<sup>14</sup> these gendered roles can be restructured by the law.

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11. De Silva de Alwis, *supra* note 5, at 92.

12. Frances Raday, *Culture, Religion and Gender*, 1 INT'L J. CONST. L. 663, 671 (2003), available at [http://wunrn.com/news/2008/03\\_08/03\\_03\\_08/030308\\_culture\\_files/030308\\_culture.pdf](http://wunrn.com/news/2008/03_08/03_03_08/030308_culture_files/030308_culture.pdf).

13. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In this case, Martin Marietta Corporation informed Ms. Phillips that it was not accepting job applications from women with pre-school-age children. *Id.* at 543. The corporation did not, however, discriminate against men with pre-school-age children. *Id.* The Supreme Court held that "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction," but the factual record was not sufficiently developed to decide whether that was true in this case. *Id.* at 613-14.

14. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1805.

Gender discrimination often appears in the workplace as a form of discrimination against mothers. Scholars in the U.S. have termed this discrimination as caregiving discrimination or the “motherhood penalty.”<sup>15</sup> This “penalty” is characterized by overt denials of promotion to women following childbirth or rejections for new jobs due to a perceived inverse relationship between work productivity and motherhood.<sup>16</sup> Studies show that mothers suffer a substantial wage penalty whereas men are not often penalized for being parents and are, in fact, valued more for their parental role. The case of *Barbano v. Madison County*<sup>17</sup> illustrates how the promotion of unfair stereotypes directly results in discrimination in the workplace. During a job interview, an employer asked a female applicant numerous intrusive questions, including whether the position would interfere with her child care arrangements, her childbearing plans, or her relationship with her spouse.<sup>18</sup> These questions reflect blatant sex stereotypes that can play a powerful role in narrowing women’s career opportunities.<sup>19</sup> As evidenced by the *Barbano* case, sex stereotyping negatively affects the review of a woman’s capabilities and performance.

While honoring the child caring duties and need for parental leave of women, reformers must be wary of reinforcing traditional gender stereotypes that make it difficult for men and women to develop their own individual identities based on their own capacities and interests. These traditional stereotypes disadvantage both men and women and discount an individual’s autonomy. Justice Mokgoro<sup>20</sup> of the Constitutional Court of South Africa has observed that through reliance on stereotypes regarding child care responsibilities, society has “den[ie]d fathers the opportunity to participate in child rearing, to the detriment of both the fathers and their children.”<sup>21</sup> Rebecca Cook agrees with Justice Mokgoro in asserting that:

For example, men, painted with the broad brush of stereotypes are often preconceived to be ill suited to, or unwilling, or unable to fulfill caregiving roles, notwithstanding that men can and do fulfill such roles. Yet, owing to the embeddedness of these impersonal generalizations in popular culture, men face considerable obstacles in carving out identities as primary caregivers; instead

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15. See Lauren Young, *The Motherhood Penalty: Working Moms Face Pay Gap vs. Childless Peers*, BLOOMBERG BUS. WEEK (June 5, 2009), [http://www.businessweek.com/careers/workingparents/blog/archives/2009/06/the\\_motherhood.html](http://www.businessweek.com/careers/workingparents/blog/archives/2009/06/the_motherhood.html).

16. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (female school psychologist denied tenure and laid off post-childbirth due to the presumed incompatibility of motherhood with adequate job performance).

17. 922 F.2d 139 (2d Cir. 1990).

18. *Id.* at 141.

19. See, e.g., *Bass v. Chem. Banking Corp.*, No. 94 Civ. 8833 (SHS), 1996 WL 374151, \*1-2 (S.D.N.Y. July 2, 1996) (Plaintiff claimed that her employer denied her a promotion on the basis that she could not handle the demands of a high-responsibility job while also being a mother to young children.).

20. Justice Yvonne Mokgoro is currently a judge in the Constitutional Court of South Africa, appointed to her position by Nelson Mandela.

21. Dianne Hubbard, *Equality in an Unequal World*, LEGAL ASSISTANCE CENTRE 1, 2 (1997), <http://www.lac.org.na/news/inthenews/pdf/equality.pdf>.

they frequently find themselves forced into breadwinning roles with limited opportunities for active caregiving.<sup>22</sup>

Just as laws modeled under substantive equality are intended to help women but can result in disparities for both genders, female targeted stereotypes can result in the degradation of a male's caregiving capacity and role in the private sphere.

Rather than the rigid and immutable identities scripted to them by society, in reality both men and women adopt many identities. Identities are dynamic and are constantly evolving in relation to multiple factors including gender, race, religion, ability, and interests.<sup>23</sup> Preconceived notions and stereotypes, on the other hand, reduce men and women to caricatures and limit their ability to perform to their optimal potential. Rebecca Cook agrees with Jocelyn Scutt that:

[S]ome of the most . . . sexist behavior is expressed through paternalism . . . . The head of a . . . department who believes women are not physically, physiologically or mentally able to accept responsibility may hold that belief convinced of his very real concern for the well-being of women . . . . He may believe women should not be appointed to positions of responsibility because a senior post means late nights back at work, corporate meetings at odd hours or weekend work . . . . He may think women employees will have to give up activities they prefer, such as meeting the children after school, cooking the evening meal or attending school meetings . . . . [H]e may accept a general notion of women appropriately filling the role of nurse rather than doctor, because women prefer the service role.<sup>24</sup>

Rebecca Cook argues cogently that gendered identities often affect work preferences and that as more women become physicians and more men become nurses, the gendered notions connotations of the terms "physician" and "nurse," respectively, will transform over time, thus illustrating the fact that identities are indeed constantly evolving.<sup>25</sup>

Consistent with the above line of thinking, unless workplace regulations help re-envision and reconstruct an egalitarian sharing of caregiving responsibilities, women will suffer gender bias at recruitment, have unequal access to employment opportunities, and at times be forced to opt out of employment. Traditionally, the private sphere was considered outside the ambit of law. Increasingly, however, new reformist projects are recognizing this concern as pivotal to equality in both the workplace and the home. As a result, such concerns are now being placed at the heart of legal reform, and revisions in the law are capturing both the changing reality of men and women's lives and the growing recognition of a child's need for both parents in their lives. In this Article, new developments in the laws that are adopting a more egalitarian approach to work family reconciliation policies are traced. More must be done by scholars to trace how well de jure compliance creates de facto equality. The laws and policies analyzed throughout this Article reflect a breadth of

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22. REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING 11 (2009).

23. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (6th ed. 1993).

24. JOCELYNNE A. SCUTT, WOMEN AND THE LAW 60 (1990).

25. COOK & CUSACK, *supra* note 22, at 21.

approaches to reconciling work-family obligations whether by addressing the root cause of gender inequality, the resulting symptoms of unfair work policies, or both the cause and its symptoms.

Just as in other areas of the law, naming the legal norm of parental care will help both men and women develop a new legal lexicon to vindicate their rights. The law must serve the purpose of addressing and correcting gender disparities, as unequal caregiving policies are incompatible with equal protection of the law. Direct discrimination as well as a complex pattern of hidden barriers and disguises prevent women from getting their share of political influence.<sup>26</sup> For instance, policies that masquerade under the banner of women's protection, otherwise known as gender specific protectionist laws, disservice women and should be reconceptualized.<sup>27</sup> Only when gender neutral work family reconciliation legislative policies mandate men to share caregiving duties will the playing field be equalized and a more egalitarian model be achieved. A reconceptualization of equality norms will transform the relationship of market and family work so that both genders, men and women, can fulfill family and work ideals and help facilitate the goals of full citizenship. The following section will review and assess several types of work family reconciliation laws, including family responsibilities laws and employment discrimination, laws that specifically attempt to address stereotypes, and laws reconciling work-family obligations.

## B. Family Responsibilities Discrimination

Family Responsibilities Discrimination (FRD) is discrimination against employees because they are caregivers for members of their families, including children, elderly parents, and ill or disabled spouses or partners.<sup>28</sup> FRD is an emerging category of employment discrimination in the United States.<sup>29</sup> In typical FRD cases, an employer's discriminatory action is based on stereotypes and assumptions of how an employee with caregiving responsibilities might act,

26. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (holding that discrimination on the basis of pregnancy is not sex discrimination), *superseded by statute*, Pregnancy Discrimination Act, 42 U.S.C. 2000e (k) (2006) (mandating that pregnant employees be treated similarly to non-pregnant employees for all employment-related purposes).

27. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (examining a company's fetal protection policy that prohibited, absent proof of infertility, women from working jobs with high exposure to lead).

28. Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/LIT 333, 335 (2007).

29. *Id.*; see also, e.g., *Grew v. Kmart Corp.*, No. 05 C 2022, 2006 U.S. Dist. LEXIS 6994, at \*26 (N.D. Ill. Feb. 26, 2006) (Employer terminated pregnant employee to prevent her from using maternity benefits.); *Smith v. Alexander & Alexander, Inc.*, 25 F. Supp. 2d 404, 405 (S.D.N.Y. 1998) (Employer terminated female employee who took FMLA leave after adopting a child with cerebral palsy. During the employee's absence, co-workers observed the employer making numerous discriminatory remarks including, "It is bad enough when something like this happens to somebody, but to choose this, it is not going to be done on my watch."); *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 324 (E.D. Pa. 1997) (Employer allegedly transferred and reduced female employee's responsibilities after employee gave birth to a disabled child).

rather than on the employee's actions and work performance.<sup>30</sup> Not surprisingly, the group most discriminated against are females; pregnant women, mothers (particularly those of disabled children), and women who are viewed by their employers as likely to become mothers, are the most common victims.<sup>31</sup> Other groups likely to be subjected to FRD include employees who work part-time or alternative schedules and employees caring for elderly, disabled, or ill family members.<sup>32</sup>

In the U.S., scholars argue that FRD is the new incarnation of gender discrimination; family responsibility discrimination now constitutes over 60 percent of the cases on gender discrimination.<sup>33</sup> The United States Equal Employment Opportunity Commission (EEOC) guidance on caregiver discrimination issued in 2007 advises that such discrimination can severely discredit women in the workforce.<sup>34</sup> For instance, mothers with young children might be placed at a disadvantage if fathers but not mothers were selected for a training program based on the stereotypical assumption that a woman's primary responsibility would be to her young children.<sup>35</sup> The EEOC also

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30. See, e.g., *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 73-74 (1st Cir. 2001) (Plaintiff was assigned work projects during prescribed pregnancy bedrest and, upon her return from maternity leave, found her job responsibilities drastically diminished, especially her involvement in upper-level board meetings and discussions.); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 855 (8th Cir. 1998) (Employer, upon learning that one of her assistant managers was pregnant, repeatedly urged her to have an abortion, offered to pay for the abortion, made many derogatory statements about having and raising a child, and increased the lifting requirements beyond those specified for employee's position.); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 434 (8th Cir. 1998) (Plaintiff suffered discrimination on the grounds of her pregnancy, while her husband, working at the same company, suffered no comparable discrimination.); *Dimino v. N.Y.C. Transit Auth.*, 64 F.Supp.2d 136, 142 (E.D.N.Y. 1999) (Plaintiff removed from her job as a police officer and forced into medical leave because of her pregnancy.); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 653 (N.D. Ill. 1991) (holding that a policy of discharging all first-year employees who requested long-term sick leave was not justified because it had a disproportionately negative effect on women due to their ability to become pregnant); *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 123 Fed. Appx. 558, 565 (4th Cir. 2005) (holding that the defendant treated female workers more harshly and gave unfounded critical performance evaluations after they had announced pregnancies or given birth); *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991) (holding that ERISA was violated where applicant was not hired because employer expected high medical costs for applicant's sick child).

31. *Williams*, *supra* note 28, at 336; see also, e.g., *Gonzalez v. N.Y. State Office of Mental Health*, No. 28179/07(Sup. Ct. Feb. 25, 2010) (Supervisor allegedly verbally assaulted plaintiff, gave unrealistic deadlines, and locked the plaintiff in her office because of plaintiff's pregnancy. Upon returning from maternity leave, plaintiff faced discriminatory questions from her supervisor, including questions concerning whether her husband wanted the baby and whether she would subscribe to a weight-loss plan.); *Flores v. Buy Buy Baby, Inc.*, 118 F. Supp. 2d 425, 428 (S.D.N.Y. 2000) (plaintiff allegedly fired because of pregnancy).

32. See, e.g., *Van Diest v. Deloitte & Touche, LLP*, No. 1:04CV2199, 2005 WL 2416921, at \*1 (N.D. Ohio Sept. 30, 2005) (Plaintiff, despite allegedly satisfactory work performance, was laid off after taking leave to care for her sick mother.).

33. See generally Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRd": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

34. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.html>.

35. *Employer Best Practices for Workers with Caregiving Responsibilities*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011).

advises that discrimination can take the form of stereotyping, such as giving less desirable assignments to mothers on the assumption that they are not as committed to their jobs.<sup>36</sup>

FRD is just one instance in a plethora of cases in the United States where motherhood has been a key trigger for gender stereotyping and for a presumption of incompetence among women with young children and family needs.<sup>37</sup> Electing to take FMLA is another instance in which women suffer disadvantages in comparison with their male coworkers.<sup>38</sup> Due to the historically embedded stereotypes mentioned above, there is an assumption that parenting, especially motherhood, is incompatible with being an effective employee.<sup>39</sup> The negative assumptions are detrimental to women on both public and private fronts; a working mother is only considered both a bad employee and a neglectful mother.<sup>40</sup> There is also a perception that working mothers are generally not competitive and would prefer non-travel and less-stressful assignments.<sup>41</sup> Finally, employers assume that if a husband makes sufficient

36. *Id.*; see also, e.g., *Senuta v. City of Groton*, Civil Action No. 3:01-CV-475 (JCH), 2002 U.S. Dist. LEXIS 10792, at \*6 (D. Conn. Mar. 5, 2002) (Plaintiff was asked a number of discriminatory questions in her interview based on a false assumption that she would not be as committed to her job since she was a mother. Questions included how her firefighter job would impact her life, the nature of her child-care arrangement, and what would happen to her children if she was ever held up at work.).

37. See, e.g., *Lettieri v. Equant, Inc.*, 478 F.3d 640, 643 (4th Cir. 2007) (Plaintiff was informed that her application for a promotion was unsuccessful because of her family responsibilities.); *Sivieri v. Commonwealth Dep't of Transitional Assistance*, 21 Mass.L.Rptr. 97, 97-98, 100, 102 (Mass. 2006) (Plaintiff alleged that she was passed over for a promotion while pregnant and that a less qualified female with no children was selected. The manager stated that "she was surprised Sivieri was upset at not getting promoted considering her family obligations at home" and that the more junior employees without small children were promoted because they could put in extra hours. The court held that "stereotypical remarks about the incompatibility of motherhood and employment can be evidence of gender discrimination" and that "basing employment decisions on such sex-based overgeneralizations constitutes gender discrimination."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 51 (1st Cir. 2000) (Employee was told by the vice-president of the company that the company had nothing against her, but that they preferred unmarried, childless women because they would give 150 percent to the job.); *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (Mother of a newborn was told she was not dependable, despite fulfilling all job-related duties.); *Cerrato v. Durham*, 941 F.Supp. 388, 391 (S.D.N.Y. 1996) (Plaintiff claimed she was terminated because her employer viewed her pregnancy-related symptoms as a disability.).

38. See, e.g., *Batka v. Prime Charter, Ltd.*, 301 F. Supp. 2d 308, 310, 316 (S.D.N.Y. 2004) (Plaintiff was allegedly terminated in retaliation for taking FMLA leave. The court found the timing of the employer's termination decision telling and denied the defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.).

39. See, e.g., *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 42 (1st Cir. 2009) (Plaintiff was denied a promotion and told, "It wasn't anything you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."); see also *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

40. See, e.g., *Plaetzer v. Borton Auto.*, 2004 WL 2066770, at \*1, \*6 n.3 (D. Minn. Aug. 13, 2004) (Plaintiff, married with four children, was told by her supervisor that she should "do the right thing" and stay home with her children, and that as a woman with a family she would always be at a disadvantage at Borton. The court found that the plaintiff was making a "sex-plus parenthood" claim, explaining that "discrimination law has long been directed at eliminating precisely this type of sex stereotyping from employment decisions.").

41. See, e.g., *Sura v. Stearns Bank, N.A.*, 2002 WL 31898167, at \*1-2, \*5 (D. Minn. Dec. 18, 2002) (Plaintiff alleged that tension beginning during her pregnancy about the terms of her maternity leave culminated in a discriminatory restructuring of her job upon her return to work. The court

money working women are not in need of promotions, bonuses, or even work.<sup>42</sup> Assumptions that fathers are secondary caregivers hurt both men and women as it stereotypes women while shutting men out of the caregiving benefits afforded to women workers.<sup>43</sup> Retaliation based on caregiving is yet another form of discrimination that arises from unequal caregiving policies.<sup>44</sup>

All over the world, women are concentrated in the lower strata of employment or in the informal sector. Many post-socialist countries restrict women from travel related jobs, nighttime and overtime work.<sup>45</sup> The result of this is that women are often relegated to traditionally female jobs and shut out from non-traditional opportunities. Thus, "economic transformation has led to fewer gains or greater losses for women."<sup>46</sup>

### C. Addressing Gender Stereotypes and Direct/Indirect Discrimination Through International Jurisprudence

Law is an important and necessary means of dismantling harmful stereotypes of women and curbing the reinforcement and perpetuation of these

placed a time limit on the protection of the PDA, holding in part that because the plaintiff had returned from maternity leave about six weeks before the adverse employment action occurred, she was no longer a member of the protected class.)

42. *See, e.g., Trezza v. The Hartford, Inc.*, 1998 WL 912101, at \*1-3 (S.D.N.Y. Dec. 30, 1998) (Plaintiff, mother of two young children, claimed that her employer failed to consider her for promotions because she was a mother. Despite her consistently excellent job evaluations, the higher position was offered to less qualified men with children and to a woman without children. In addition, the senior vice-president of her company complained to her about the "incompetence and laziness of women who are also working mothers," while the general counsel of the legal department in which she worked stated that working mothers cannot be both good mothers and good workers, saying, "I don't see how you can do either job well." Finally, the senior vice-president also commented to her that if her husband, who was an attorney, won "another big verdict," she would be "sitting at home eating bon-bons.")

43. *See, e.g., Knussman v. Maryland*, 65 F. Supp. 2d 353, 355 (D. Md. 1999) (Plaintiff-father took leave to take care of his baby and his wife who had fallen ill post-partum, but was denied the full benefits of paid leave allegedly because of gender discrimination.)

44. *See, e.g., Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1042-43, 1045 (7th Cir. 1998) (Employee was terminated after she announced that she was pregnant with her third child. The court found that remarks made by her manager at the time of her firing, mainly that she would be happier at home with her children, were direct evidence of discrimination. In addition, the court found that comments made by the plaintiff's direct supervisor over the years, such as "If you have another baby, I'll invite you to stay home"; "Oh, my God, she's pregnant again"; and "You're not coming back after this baby" also provided circumstantial evidence of discriminatory bias.); *Lewis v. Sch. Dist. #70*, 523 F.3d 730, 735-36, 739 (7th Cir. 2008) (holding that a school district wrongfully retaliated against an employee for taking intermittent FMLA leave to take care of her ailing mother); *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1155-56 (8th Cir. 2003) (Plaintiff alleged that she was a victim of a hostile work environment because when taking maternity leave, her supervisor told her "you better not get pregnant again," threw a telephone book at her with instructions to find a pediatrician that was open after hours, refused to allow her to leave to pick up her sick child, and posted notes on her cubicle when she was absent stating "child was sick." The court upheld a jury verdict for the plaintiff based on a violation of the PDA because she had shown that her supervisor discriminated against her because she had been pregnant, had taken maternity leave, and might become pregnant again.)

45. WOMEN IN THE AGE OF ECONOMIC TRANSFORMATION: GENDER IMPACT OF REFORMS IN POST-SOCIALIST AND DEVELOPING COUNTRIES 1-2, 5 (Nahid Aslanbeigui et al. eds., 1994).

46. *Id.* at 1-2.

stereotypes. The lack of shared caregiving policies, for instance, constitutes both direct and indirect discrimination against women who traditionally bare the brunt of caregiving responsibilities. It is imperative that laws transform the social value attached to child care by including the role of both parents in caregiving equally. There are times when certain gender specific policies can serve a legitimate purpose, however, these must be determined on a case by case basis and should withstand scrutiny under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>47</sup> The Convention on the Elimination of All Forms of Discrimination Against Women is an international convention adopted by the United National General Assembly, having come into force on 3 September 1987. The CEDAW is widely acknowledged as the international Bill of Rights for women, and is the only international institution of its kind. Gender specific laws can be maintained only if they are legitimate, serve a compelling reason and are proportionate to the object sought. Unless these criteria are met, the law must be utilized to serve justice to women who endure the brunt of unfair policies.

In its written convention, the CEDAW Committee has identified several categories of stereotypes, addressed the correlation between stereotypes and gender discrimination both in the public and private spheres, and considered the way they legitimize and normalize unequal gender roles.<sup>48</sup> In General Recommendation 23, for example, the Committee stated that sex role stereotyping has helped confine women to the role of caregivers and homemakers.<sup>49</sup> This has constrained women's active participation in public life. General Recommendation 25 of the CEDAW affirms that combating wrongful gender stereotypes is pivotal to state parties' efforts to eliminate all forms of discrimination against women.<sup>50</sup>

The quintessential goal of CEDAW lies in Articles 2 (f) and 5, as they call for fundamental changes in the traditional roles of men and women in order to bring about gender equality.<sup>51</sup> Article 2 (f) of the Convention states that the counsel should take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.<sup>52</sup> Further, Article 5 (a) of CEDAW calls for state parties to take appropriate measures

47. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW], available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

48. *Id.* at arts. 5, 15(3), 16-17. See also generally Rangita de Silva de Alwis, LEGISLATIVE REFORM ON SELECTED ISSUES OF ANTI-GENDER DISCRIMINATION AND ANTI-DOMESTIC VIOLENCE (2009), available at [http://www.unicef.org/policyanalysis/files/Legislative\\_Reform\\_on\\_Selected\\_Issues\\_of\\_Anti-Gender\\_Discrimination\\_and\\_Anti-Domestic\\_Violence\\_-\\_the\\_Impact\\_on\\_Children.pdf](http://www.unicef.org/policyanalysis/files/Legislative_Reform_on_Selected_Issues_of_Anti-Gender_Discrimination_and_Anti-Domestic_Violence_-_the_Impact_on_Children.pdf).

49. CEDAW Comm., General Recommendation No. 23, U.N. GAOR, 16th Sess., ¶ 8, U.N. Doc. A/52/38 (Jan. 31, 1997) [hereinafter General Recommendation No. 23], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23>.

50. *Id.*; CEDAW Comm., General Recommendation No. 24, U.N. GAOR, 20th Sess., ¶ 17, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter General Recommendation No. 24], available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

51. CEDAW, *supra* note 47, at art. 2(f).

52. *Id.*

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women . . . .<sup>53</sup>

This provision is similarly significant in that it is one of first to challenge cultural patterns of conduct and prejudice against women.

In 2007, in its Concluding Observations for the Democratic People's Republic of Korea, the CEDAW Committee observed that

[t]he persistence of traditional and stereotyped assumptions and attitudes in respect of the roles and responsibilities of women and men, which are discriminatory against women and have a pronounced impact, particularly in the areas of education and employment on the basis of spheres suitable to their characteristics. The Committee is concerned that such expectations of women have serious consequences preventing them from accessing rights and entitlements on an equal basis with men and creating a dependency on men, husbands and family for housing, food entitlements and other services.<sup>54</sup>

In this recommendation, CEDAW acknowledged that stereotyped laws which view women only or primarily in their caregiving functions negatively affect women's advancement in the public and private spheres. One such stereotyped law includes a law adopted by several countries granting a mother with young children special benefits.<sup>55</sup> Although this type of accommodation is welcome, it is necessary that it be extended to the father as well. In the absence of such provisions applying to the father, such substantive modeled laws reinforce stereotypes of women as sole caregivers of children.<sup>56</sup> Equal opportunities must be provided for both men and women to fulfill their caregiving roles in order that men not suffer disadvantages and women not suffer stereotypes.<sup>57</sup>

The equal opportunities called for in the CEDAW are often inhibited by protectionist policies. Around the world, special protections for women have sometimes been used to justify the exclusion of women from holding certain jobs due to the paternalistic and sexist views of employers. In some countries these perceptions have prevented women from employment in jobs that require business travel or night work on the basis that women are the primary care

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53. *Id.* at art. 5(a).

54. CEDAW Comm., *Consideration of Report Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Sixth Periodic Report of States Parties: Republic of Korea*, U.N. Doc. CEDAW/C/KOR/6 (Mar. 5, 2007).

55. RANGITA DE SILVA DE ALWIS, U.N. POPULATION FUND, ADVANCING EQUAL RIGHTS FOR WOMEN AND GIRLS: THE STATUS OF CEDAW LEGISLATIVE COMPLIANCE IN EASTERN EUROPE AND CENTRAL ASIA 21, 31, 49 (2009) (describing gender inequalities in Uzbekistani law).

56. *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities*, supra note 34, § II.A.3.

57. *See, e.g.,* Schafer v. Bd of Pub. Educ., 903 F.2d 243, 244 (3d Cir. 1990) (Plaintiff claimed he was denied a one-year childrearing leave which was available to female employees, forcing him to resign from his teaching job.).

givers for family members.<sup>58</sup> Other forms of protectionist policies include preventing women from working in certain environments.<sup>59</sup> Although it is important to regulate hazardous employment environments, if these protections are not extended to both men and women, women will be perceived as fragile and more deserving of work at home, rather than advancing toward managerial or other superior positions.<sup>60</sup> Protective measures are sometimes perpetuated to bar women from employment and the reasons can be over inclusive.<sup>61</sup> Gender neutral protective legislation, on the other hand, will create more opportunities not just for women, but also for men to assume more equal family responsibilities.

It is evident that there is a tension between protecting the special needs of women and achieving equality of employment between men and women. The key to effectively using law to defeat stereotypes and attain more egalitarian outcomes involves a more dynamic conceptualization of women's roles. Gender equality must be shaped by laws that envision both women and men's roles in gender neutral terms.

Among the countries that harbor protectionist policies is China, where women are prohibited from working high above the ground, under low temperature, or in cold water during their menstrual period.<sup>62</sup> Women's employment opportunities are limited by laws that shut them out of jobs considered physically arduous, such as scaffolding, logging timber, and high altitude work carrying weight over twenty-five kilos.<sup>63</sup> Paternalistic laws also restrict work according to female biological functions including lactating or menstruating women.<sup>64</sup> Women's groups are attempting to address such overprotective, inhibiting legislation. In a famous case in Argentina, a traditional chain of ice cream stores employed only men on the ground that

58. See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (Plaintiff's supervisor admitted that he did not consider Plaintiff for the promotion because she had children, and he assumed she did not want to relocate her family or would be unable to travel for work.).

59. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

60. See, e.g., *Case C-285/98, Tanja Kreil v. Bundesrepublik Deutschland*, 2000 E.C.R. I-69 (Based on European Community Law, the European Court of Justice ruled that the Federal Republic of Germany must allow a woman to work in positions involving armaments, especially on weapons electronics. The court determined that the European Community's Equal Treatment Directive did not permit women to be excluded from certain types of employment. Thus, the court decided that women should not be given greater protection than men against risks.). This decision exploded the stereotype that women are more vulnerable to risk and harm than are men and therefore require laws to protect them against physical dangers.

61. See, e.g., *Butner v. Dep't of State Police*, No. 98-177, 2001 WL 894307, at \*1-3 (Mass. Super. 2001) (Four female troopers became pregnant while employed. In accordance with the police department's policies, the plaintiffs were sent to physicians to determine whether they were still fit for duty. The doctors determined that the plaintiffs were not fit to perform the tasks on the police department's list. Plaintiffs argued that the task list was never adopted by the union and the list was discriminatory. Further, tasks included on the list were those that state troopers rarely, if ever, performed. The court ruled in favor of the plaintiffs, finding pregnancy discrimination that resulted in emotional distress.).

62. *Lao Bu Fa No. 532 [Labor Act]* (promulgated by the Ministry of Labor, Dec. 26, 1994, effective Jan. 1, 1995) 1995 China Law LEXIS 685, at art. 12 § 2(China).

63. *Id.* at art. 12 §§ 1-3.

64. See *id.*

repairing ice cream machinery would be challenging physical labor for women.<sup>65</sup> Although it is important to regulate hazardous employment environments, these regulations must extend to both men and women. Laws must reflect this for jobs that include not just manual work, but scientific and technological work as well.

Tajikistan's Article 7 of the Gender Equality Law indicates that the rights and guarantees belonging to a "person of either sex with family obligations" should be taken into consideration when hiring, promoting, training, and establishing labor regimes, or during retirement of such persons.<sup>66</sup> Though Article 7 is consistent with CEDAW's Article 11 in its equal application to both men and women, the stereotypical image of a woman might nonetheless render the term "family obligation" to be used against her when being considered for hire, a job promotion, or another employment situation. Similarly, other provisions in the Tajik laws calling for "breaks in labor for birth," and raising children, might have a negative impact on women.<sup>67</sup> Laws and policies that call for family responsibility to be taken into consideration (if these laws are directed only towards female employees), will result in gender discrimination.

Women's disproportionate share of family and caretaking responsibilities relates directly to the discrimination they face in the labor market and the subsequent inequalities in their social and economic progress. Sex selective hiring, even when female applicants outperform men, is rampant across the world. The presumption of family responsibility and the female caregiver stereotypes act as barriers to hiring and promotion of women with family responsibilities.<sup>68</sup>

Recognizing the negative implications that stem from stereotype inflicted laws, more and more countries are outlawing discrimination on the ground of family responsibilities.

According to the European Union Policy Equal Opportunity Directive, both direct and indirect discrimination are not only prohibited, but also strictly

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65. Beatriz Kohen, *The Effectiveness of Legal Strategies in Argentina*, in FEMINIST AGENDAS AND DEMOCRACY IN LATIN AMERICA 103 (Jane S. Jaquette, ed. 2009) (describing *Mujeres en Igualdad (MEI) v. FREDDO*, a case in which a chain of ice cream shops was required to hire more women to eliminate an imbalance in the workforce. When a progress report revealed that the ice cream shop employed 107 men and only 26 women, the chain was ordered to pay fines. The case was filed by a woman's organization, *Mujeres en Igualdad (MEI)*, and litigated by a clinic at the Law School of Palermo.). See also Comm. on the Elimination of Racial Discrimination [CERD], *Yilmaz-Dogan v. The Netherlands*, Communication No. 001/1984, U.N. Doc. CERD/C/36/D/1/1984 (Sept. 29, 1988). This case provides an example of a multiple stereotype. Yilmaz, a Turkish national living in the Netherlands, was terminated because of her employer's belief that there was greater absenteeism among foreign female workers with dependent children. *Id.* The employer believed that foreign women have neighbors and family members take care of their children and at the slightest setback disappear under the terms of the Sickness Act. *Id.*

66. On State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights) art. 7 (Taj.).

67. *Id.*

68. See, e.g., *Parker v. Del. Dep't of Pub. Safety*, 11 F. Supp. 2d 467 (D. Del. 1998). The court held that refusing to give a woman a fixed, rather than rotating, work schedule for childcare reasons when men were given fixed work schedules for other reasons was disparate treatment. *Id.* at 471, 474.

defined.<sup>69</sup> Article 2 of the law defines direct discrimination as: “where one person is treated less favorably on grounds of sex than another is, has been or would be in a comparable situation.”<sup>70</sup> The law also defines indirect discrimination as: “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”<sup>71</sup> In a similar vein, Article 2 of the Republic of Lithuania’s Law on Equal Opportunities, provides that both direct and indirect discrimination on the grounds of sex constitute a violation of equal rights for both women and men.<sup>72</sup> Employing a variation on the European Union’s definition of direct and indirect discrimination, Article 2 provides that: “discrimination means passive or active conduct expressing humiliation and contempt, also restriction on rights or granting of privilege by reason of the person’s sex.”<sup>73</sup> This means that discrimination occurs if a law that is facially neutral or meant to benefit women results in a disproportionate impact or an unintended consequence on women.

Article 1 of the Romanian Law on Equal Opportunities between Women and Men also prohibits direct and indirect gender discrimination.<sup>74</sup> Under Article 4(a) of the law, direct gender discrimination is defined “the disfavored difference in treatment of a person due to his/her belonging to a gender or pregnancy, birth, maternity or granting the maternity leave.”<sup>75</sup> Indirect discrimination occurs when apparently neutral criteria or practices affect people belonging to one gender. An exception to this prohibition of indirect discrimination is provided when the criteria or practice can be justified by objective factors, unrelated to gender.<sup>76</sup>

The following laws represent effective ways the law can be used to correct discrimination and injustice in both the private and public spheres. It is necessary that discrimination against women resulting from existing laws must be the primary issue addressed in order for egalitarian outcomes to occur. Additionally, laws must explicitly define the terms for both direct and indirect discrimination.

69. Council and Parliament Directive 2006/54, 2006 O.J. (L204) 23 (EC) (regarding the principle of equal opportunity and treatment in the employment of men and women), at art.2, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>.

70. *Id.*

71. *Id.*

72. Law of the Republic of Lithuania on Equal Opportunities, No. VIII-947, ch. 1 art. 2 (1998).

73. *Id.*

74. Law on Equal Opportunities Between Women and Men, No. 202/2002, at art. 1 (Rom.)

75. *Id.* at art. 4.

76. Caregiving has now become a pivotal policy issue. *See, e.g.*, Basic Law for a Gender-Equal Society, Law No. 78 of 1999, at art. 6 (Japan) (stating that “[f]ormation of a Gender-equal Society shall be promoted so that women and men can perform their roles smoothly as household members in home-related activities, including child-raising and nursing of family members through mutual cooperation and social support, and can thus perform activities other than these.”). The inclusion of men in home-related activities, including child rearing, is an important addition.

#### D. Laws Reconciling Work/ Family Obligations

New revisions in laws are trying to capture the changing reality of both men and women and are attempting to give a voice to the needs of working women and caregiving men. Historically, males drafted laws and caregiving was considered to be outside the lawmaking arena. This trend is changing as new laws are now taking into account women and men being equal professionals and caregivers. Work family obligations, traditionally thought to be private sphere activities outside the realm of the law, are now becoming the lynchpin of gender equality in employment. This is a most necessary task—reformist agendas must re-imagine laws in the image of both women and men. Laws that view women only or primarily in their caregiving functions not only fail to conform to changing times, but more significantly, disadvantage women.<sup>77</sup> What is instead needed is a more dynamic conceptualization of women's roles around which gender equality must be shaped. This can be achieved through gender neutral work family reconciliation laws. The nexus between gender discrimination in the home and subordination in the workplace can be changed only by workplace policies that facilitate greater male engagement in family care. Thus, workplace regulations that support both fathers and mothers to take more responsibility for caring for children is a key pre-determinant of gender equality in the workplace. These family reconciliation policies are in fact the most critical determinant of gender equality.

In attempting to equalize the playing field there is a tension between achieving equality of employment between men and women and protecting the special needs of women. When creating a more egalitarian workplace, it is important that workplace policies do not reinforce conventional gender roles that have hamstrung gender equality. Caregiving laws are being re-envisioned in the image of both men and women. Thus, work family obligations, traditionally thought to be private sphere activities outside the domain of the law, are now being placed at the heart of law reform. Harmonizing work family obligations for both men and women appears to be the rallying cry for many new laws. Unequal caregiving policies undermine the rights of everyone in the family and directly create the feminization of poverty by trapping women in low paying, low ranking jobs.

Several laws are attempting to reconcile work family obligations. The European Union first stated in 1986 that sharing of family responsibilities and occupational responsibilities was pivotal to the promotion of true equality at work.<sup>78</sup> Sweden became one of the first countries to alter the way in which men and women's roles in the family had been traditionally normalized.<sup>79</sup>

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77. See, e.g., *Kuest v. Regent Assisted Living, Inc.*, 43 P.3d 23 (Wash. Ct. App. 2002). In this case Kuest, a female employee, was hired as a general manager and received positive feedback for several months. *Id.* at 25. Two weeks after admitting to her supervisors that she planned to have children she was fired and replaced by a 60-year-old woman. *Id.* Kuest may have been discriminated against on the basis of her potential to become pregnant. *Id.* at 26.

78. De Silva de Alwis, *supra* note 48, at 14.

79. Katrin Bennhold, *In Sweden, Men Can Have it All*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html>.

Responding to a United Nations request to report on the status of women, Sweden argued: “[n]o decisive change in the distribution of functions and status as between the sexes can be achieved if the duties of the male in society are assumed *a priori* to be unaltered.”<sup>80</sup> Sweden’s questioning of sex role stereotypes and socialization of boys and girls created a paradigm shift around the world in the thinking of the dual roles of men and women in work and family. The objective of the Swedish Gender Equality Policy is that in order for women and men to enjoy human rights on equal terms, it is necessary to be aware of and work against power structures that allocate a superior position to men and a subordinate position to women.<sup>81</sup> Special measures for women and girls are also necessary in the pursuit of gender equality and in the fight to eliminate discrimination of women and girls.

Sweden’s latest efforts at work family reconciliation policies include a government bill submitted to the Riksdag in March of 2006 and passed by the Riksdag on the 16<sup>th</sup> of May 2006.<sup>82</sup> The Bill proposed new objectives for gender equality policy, including creative measures such as introducing paid parental leave, that reflect a desire to change male attitudes and behavior.<sup>83</sup> Its overarching objective was for men and women to have equal power to shape both society and their own lives. The Bill highlights that women and men must take the same responsibility for household work and have the same opportunities to give care on equal terms.<sup>84</sup> What is seen here is that the equal distribution of unpaid care and household duties is critical in achieving gender equality in the public sphere.

The Bill also confirms that gender mainstreaming remains the optimal strategy for achieving gender equality objectives. Additionally, the government cites proactive measures for enforcement, including its intention to establish a public agency responsible for contributing to effective gender equality policy.<sup>85</sup> Other initiatives include the government’s intention to strengthen gender equality work on all levels: national, regional, and local.<sup>86</sup> This will be done by studying gender equality between different groups in society as part of its follow-up of the subsidiary objectives of the Bill. The Bill goes further to address the deeply embedded stereotypes that threaten equality from a young age.<sup>87</sup> The law makes clear that gender equality policies apply to everyone, in all different situations and all stages of life. The law states:

There are to be no systematic differences in women’s and men’s opportunities to shape society and their own lives. Nor are there to be systematic differences in the conditions in which girls and boys grow up, either with regard to their share

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80. GAIL WARSHOFKY LAPIDUS, *WOMEN IN SOVIET SOCIETY* 343 (1978).

81. *See* Act on Equality Between Women and Men [The Equal Opportunities Act] (SFS1 1993:433) (Swed.).

82. Proposition 2005/06:155 Swensk författningsamling [government bill] (Swed.).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

of society's resources or their opportunities to grow up free from the limitations imposed by gender stereotypes.<sup>88</sup>

Iceland's Act on the Equal Status and Equal Rights of Women and Men also puts work-family reconciliation and the concept of the freedom to grow up without limitations at the forefront of the national agenda.<sup>89</sup> The Act emphasizes gender equality in coordinating family life. As Article I makes plain, the aim of the Act is to "establish and maintain equal status and equal opportunities for women and men, and thus promote gender equality in all spheres of the society."<sup>90</sup> In terms of employment, the Act states that "[e]mployers shall take the measures necessary to enable women and men to reconcile their professional obligations and family responsibilities" and that measures should make it easy for parents to return to work after maternity/paternity leave.<sup>91</sup> Iceland's Act contains a special provision on the reconciliation of family and occupational obligations and a provision stating that institutions and enterprises with more than twenty-five employees must develop equality programs or make special provisions regarding gender equality in their employment policies. By stressing that employers should address employees' occupational and family obligations, the Act seeks to foster equality among women and men.

Finland's Act on Equality between Women and Men makes equal caregiving in family a priority.<sup>92</sup> The law states that an employer has a duty to "develop working conditions so that they are suitable for both women and men, and facilitate the reconciliation of working life and family life for women and men."<sup>93</sup> Such a provision is reflective of the growing necessity to make work family reconciliation policies a priority in the national agenda. Finland's law uses both a formal and substantive equality model in lawmaking—while the law seeks to promote equality between women and men, it also makes clear its intention to improve the status of women.<sup>94</sup> In Section 6 the law articulates that working conditions should be developed so as to facilitate the reconciliation of work and family life for both men and women.<sup>95</sup> The fact that men have a right and obligation to reconcile work family obligations advances the equal rights of women in the family and at work, and also allows men to share in the caregiving role.

In addition to Sweden, Iceland, and Finland, several other countries, including Slovenia and the Ukraine, enshrine in their gender equality laws that workplace equality is dependent on equality at home and family life. Slovenia's

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88. *Id.*

89. *See* Act on the Equal Status and Equal Rights of Women and Men, No. 95/2000, at § 1 art. 1 (Ice.).

90. *Id.*

91. *Id.* at art. 21.

92. *See* Act on Equality Between Women and Men, No. 609/ Revised 2004 (Fin.).

93. *Id.* § 6.

94. *Id.* § 1 (stating that "[t]he aim of the Act is to prevent discrimination on the basis of sex and to promote equality between women and men, and, for this purpose, to improve the status of women, particularly in working life").

95. *Id.* § 6.

2002 law on Equal Opportunities for Women and Men refers in Article 4 to the term “private life” and denotes that equal opportunities must extend to private life as well.<sup>96</sup> Several laws including the law of the Republic of Tajikistan<sup>97</sup> and the Kyrg Republic law<sup>98</sup> have included directly in legislation the need for the consideration of family responsibilities of employees of both sexes. The Kyrg Republic’s, On the Basics of the State Guarantees of Gender Equality Law of 2003, is specific about the provision on sharing household work, focusing on the principle that gender equality in labor can also apply to household work.<sup>99</sup> A special provision of Article 19 of the law focuses on “Sharing of Household” which states that: “Persons of both sexes shall bear equal obligations with regard to household work.”<sup>100</sup> Sensitive to the way in which gender segregated housework can reinforce women’s subordination in the public sphere, the law states that: “[h]ousehold work may not be used as a means of gender discrimination, and it may be performed equally by men and women.”<sup>101</sup> Further fortifying this provision, Article 20 provides that household work will be regarded as a form of social, productive work.<sup>102</sup> Although this is a novel concept, it remains unclear how this provision will factor into the actual law. One way to understand this concept is to take household work into account in property allocation and contributions to the marriage at divorce.

This series of laws enforcing the egalitarian model of outcomes is critical for positioning women to succeed both socially and economically. Women’s disproportionate share of family and caretaking responsibilities directly relates to the discrimination they face in the labor market and subsequent inequalities in their social and economic progress.<sup>103</sup> As evidenced by the laws outlined above, gender discrimination in the home and workplace can be combated by workplace policies that facilitate greater male engagement as caregivers in the lives of children. Labor laws that equalize employment opportunities for men and women by redistributing family leave benefits create an environment in which women are neither discriminated against nor stereotyped and men are better able to share family and caregiving responsibilities.

The recently drafted Gender Equality Law in Vietnam, which became operationalized in July 2006,<sup>104</sup> is a valuable case study as it provides insights into holistic systems of support services for family and work and for defeating stereotypes that vitiate both parents need for engagement.<sup>105</sup> Article 1 of the law states that the law “provides for principles of gender equality in all fields of

96. Act on Equal Opportunities for Women and Men, No. 700-01/02-70/1 art. 4 (Slovn.).

97. On State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights art. 7 (Taj.) (calling for the consideration of family responsibilities of employees of either sex while carrying out service and labor duties).

98. Law of the Kyrgyzstan Republic, On the Basics of the State Guarantees of Gender Equality Law (Kyrg.).

99. *Id.* at art. 19.

100. *Id.*

101. *Id.*

102. *Id.* at art. 20.

103. See Williams, *supra* note 28, at 382.

104. Law on Gender Equality, No. 73/2006/QH11, Dec. 25, 2001 (Vietnam).

105. See *id.*

social and family life, measures ensuring gender equality, responsibilities of agencies, organizations, families, and individuals in exercising gender equality.”<sup>106</sup> This law is unique in its solicitation of equal cooperation between men and women. The basic principles on gender equality set forth in Article 6 state that: “[m]an and woman are equal in all fields of social and family life” and that “[e]xercising gender equality is the responsibility of agencies, organizations, families and individuals.”<sup>107</sup> Article 7 requires state policies to address the root causes of gender inequality, thus ensuring social and government organizations address cultural stereotypes that hamstring women.<sup>108</sup> This approach encourages agencies, organizations, families, and individuals to take part in activities that promote gender equality gender equality.

Not only is the wife and husband’s relationship based on equality in Vietnam’s law, but Article 18 provides that the wife and husband have equal rights in using appropriate family planning measures and taking care of sick children.<sup>109</sup> Article 18 further requires that an egalitarian approach begin from youth, stating that “[m]ale and female members in the family have the responsibility to share housework,” and “[b]oys and girls are given equal care, education and provided with equal opportunities to study, work, enjoy, entertain and develop by the family.”<sup>110</sup> Further emphasizing the egalitarian approach to the law, Article 7 focuses on the need to pay special attention to ethnic minority groups in areas of extremely difficult socio-economic conditions and to provide necessary supports to increase Gross Domestic Income (GDI) in the industries, fields, and localities where GDI is lower than the average level of the entire country.<sup>111</sup> Moreover, the law requires the government to cooperate with the “Central Committee of Vietnam Fatherland Front” and the “Central Vietnam Women’s Union” to “direct concerned agencies in communication, dissemination and education of the law and in raising the public awareness on gender equality.”<sup>112</sup>

Although Vietnam’s Gender Equality Law is a constitutive force that can be hortatory in effect, it is weakened by the absence of strong implementing mechanisms. For instance, one of the most complicated provisions is Article 14 pertains to gender equality in the field of education and training.<sup>113</sup> The law calls for “[f]emale officials, public servants bringing along their children at less than 36 months of age when participating in the training and fostering courses are given assistance and support as provided by the Government.”<sup>114</sup> Though the law provides for accommodation, the conflict emerges as the benefit is only provided to female officials and not to their male counterparts. This again perpetuates the notion that women are the sole caregivers. This provision of the

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106. *Id.* at art 1.

107. *Id.* at art. 6.

108. *See id.* at art. 7.

109. *Id.* at art. 18.

110. *Id.*

111. *Id.* at art. 7.

112. *Id.* at art. 25.

113. *Id.* at art. 14.

114. *Id.*

law would be enhanced if this benefit was extended to both men and women. In conclusion, even in countries which have taken the lead in passing egalitarian based legislation, much is left to be done in the area of attaining egalitarian outcomes.

## II. NECESSARY PROVISIONS AND METHODS TO ADDRESS INJUSTICES IN THE PUBLIC/PRIVATE SPHERE AND TO ESTABLISH WORK FAMILY RECONCILIATION POLICIES

### A. Mandatory Parental Leave Should be Necessary for Fathers

Work family policies are sometimes a double edged sword. Does parental leave, even when job protected, influence gender inequality?<sup>115</sup> Furthermore, does the length of leave inform gender inequalities in caregiving? Although job protected parental leave enhances women's labor market opportunities, extended parental leave (over one year) can actually provide a disincentive for employers to hire women.<sup>116</sup> As a result, these policies actually increase gender inequality. Women who spend extended lengths of time in caregiving activities lose value in the labor market.<sup>117</sup>

The United States government has adopted a laissez faire approach to caregiving and work family reconciliations.<sup>118</sup> The United States passed the Family and Medical Leave Act (FMLA) in 1993.<sup>119</sup> This was a historic moment for American families. For the first time, the federal government required employers to provide twelve weeks of job protected leave for new parents and caregivers.<sup>120</sup> For the first time, the United States government recognized the competing demands of work and family obligations and endorsed the need for flexibility for workers.

As significant as this Act was for the United States, European countries have a history of providing more generous provisions to women than the FMLA. Since 1979, Germany has offered federal paid maternity leave for at least 14 weeks.<sup>121</sup> In 1986 these policies were revised to allow nearly a year's leave,

115. See, e.g., *Knussman v. Maryland*, 16 F. Supp. 2d 601 (D. Md. 1998), *motion for new trial granted in part, denied in part by*, 65 F. Supp. 2d 353 (D. Md. 1999); *award vacated & remanded*, 272 F.3d 625 (4th Cir. 2001). Knussman was denied leave after submitting a written request to his supervisor asking that he be permitted to take four to eight weeks of paid "family sick leave" to care for his wife and spend time with his family following the birth of his child. *Id.* at 605. The case established that an employer must comply with the Family and Medical Leave Act (FMLA) notice requirements before making any defense that an employee did not comply with the FMLA or forfeited his rights under the Act. *Id.* at 601.

116. Torben Iversen et al., *Women and the Service Sector: Memo for UCLA Postindustrial Working Group*, (Apr. 18-19 2004), *available at* <http://www.international.ucla.edu/cms/files/Women%20and%20the%20Service%20Sector1.pdf>.

117. *Id.*

118. Ann S. Orloff, *From Maternalism to "Employment for All": State Policies to Promote Women's Employment Across the Affluent Democracies*, in *THE STATE AFTER STATISM* 230, 255 (Jonah D. Levy, ed. 2006).

119. 29 U.S.C. §§ 2601-2654 (2006).

120. *Id.* § 2612.

121. *Bundeserziehungsgeldgestez [Law on Granting Child-Care Money and Leave]* (1986) (Ger.).

nearly two-thirds of which is paid.<sup>122</sup> Germany provided compensation for middle to high earning families for income loss incurred by leave taking and, most importantly, the policy encouraged fathers to share equally in child rearing. This relieved Germany of the consequences of the double-edged sword resulting in unintentional stereotyping, as was the case of Vietnam. Parental leave in the Czech Republic was recently extended to allow parents to take a leave until their child reaches the age of three.<sup>123</sup> Still, the adverse consequences resulting from prolonged maternal leave are obvious from the above analysis of gender-specific legislation, and are unfortunate to say the least. Becky Pettit and Jennifer Hook wrote that “Germany’s lengthy federally supported parental leave is associated with dramatic labor force withdrawals by women with young children across the economic spectrum.”<sup>124</sup> Though the law is intended to encourage both men and women to share parental leave responsibilities, the burden nonetheless falls disproportionately on women.

Research reveals that not all men make use of family leave policies. For example, although French law allows both parents to take time off or work reduced hours during the first three years of a child’s life, 97 percent of the workers who did so were women.<sup>125</sup>

Given that not all men make use of parental leave benefits, many countries revised their laws in an attempt to encourage fathers to participate more actively in the care of their children and to undo leave policies that place an unequal emphasis on female parental leave. Transferable leave, for instance, often reinforces gender hierarchies, as the tendency is to transfer the leave to the parent earning less, which is often the woman.<sup>126</sup> The “use it or lose it” approach, however, compels fathers who are otherwise reluctant to take leave to assert their equal rights and duties to caregiving. Nontransferable leave for men results in what is called “fatherhood by gentle force”—such mandated leave that is exclusively for men is compatible with a gender egalitarian parental leave, as laws that differ in what is offered to mothers undermine gender equality. Currently, Sweden, Finland, and Norway have the most gender egalitarian policies as they mandate nontransferable leave to fathers.<sup>127</sup> Although Sweden’s laws are currently some of the most progressive in this area, it still took much time before men made use of these equal protection guarantees. Though these provisions were introduced in 1974, only 4 percent of fathers took any leave at all. In 2002, the total leave available for fathers increased to 480 days. If men don’t take this leave before a child’s eighth birthday, they stand to lose the

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122. *Id.*

123. *Id.* § 196.

124. BECKY PETTIT & JENNIFER L. HOOK, GENDERED TRADEOFFS: FAMILY, SOCIAL POLICY, AND ECONOMIC INEQUALITY IN TWENTY-ONE COUNTRIES 65 (2009).

125. Lisa Belkin, *Calling Mr. Mom?*, N.Y. TIMES MAG., Oct. 24, 2010, at 2.

126. REBECCA RAY ET AL., CTR. FOR ECON. & POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY 2 (2009), available at [http://www.cepr.net/documents/publications/parental\\_2008\\_09.pdf](http://www.cepr.net/documents/publications/parental_2008_09.pdf).

127. Sweden and Norway lead the way in offering fathers paid use-it-or-lose-it leave entitlements. Finland incentivizes fathers to utilize transferable leave through a wage replacement of two-thirds their salaries. *Id.*

dates. In 2006, approximately 90 percent of fathers in Sweden took some time off for caregiving of children.<sup>128</sup>

In Norway, fathers are allowed four weeks of leave of absence—if they don't take it, they lose it.<sup>129</sup> Similarly, in Iceland, fathers' independent nontransferable entitlement is now three months.<sup>130</sup> Kosovo law goes even further in embodying the principles of gender equality in child care responsibilities by taking into consideration the need for parental leave for both parents in the event a child is hospitalized due to sickness. Iceland's Maternity/Paternity Leave and Parental Leave Act, which became enforceable in 2000, aims to create conditions in which both men and women are able to participate equally in paid employment and work outside the home.<sup>131</sup> Additionally, the law guarantees children time with both parents.<sup>132</sup> This is intended to make it easier for both parents working outside the home to strike a balance between the demands of their careers and the demands of their families. It thus promotes the sharing of parental responsibilities and furthers gender equality in the labor market.

Other programs in Iceland that have attempted to equalize parental responsibilities are the guidance and prenatal preparation programs aimed at enabling fathers to be present at the birth of their children, assuming that the delivery proceeds normally.<sup>133</sup> One of the roles of the present program of action is to establish special preparatory materials to offer to prospective fathers. A special campaign is planned to ensure that health service employees are aware of the importance of fathers as active participants during prenatal care, childbirth, and postnatal care of their children.

It is evident that Iceland has taken the lead in making family leave neutral. From 2001 to 2003, Iceland enacted parental leave reform. In that reform, "[p]aternity leave was abolished and both parents received non-transferable parental leave quotas of 3 months each, with 3 new months available as transferable parental leave."<sup>134</sup> Maternity/paternity leave can consequently be lengthened up to a total of seven months in the case of the illness of a child.<sup>135</sup> The mother's maternity leave can also be extended by up to two months due to a

128. Linda Haas & C. Philip Hwang, *Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden*. 7 *FATHERING* 303, 314 (2009).

129. Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], at art. 11.2b (Nor.).

130. SUSAN KELL ASSOCS., *PARENTAL LEAVE AND CARERS LEAVE: INTERNATIONAL PROVISION AND RESEARCH* 5 (2007).

131. Act on Maternity/Paternity Leave and Parental Leave, No. 95/2000, as amended by Act No. 72/2003, No. 90/2004, No. 129/2004, No. 22/2006, No. 65/2006, No. 155/2006, No. 167/2006 and No. 74/2008, at art. 2 (Ice.). In 2004, the law was changed to put a ceiling in place on the amount of salary paid. INGÓLFUR V. GÍSLASON, *PARENTAL LEAVE IN ICELAND* 12 (2007).

132. See Act on Maternity/Paternity Leave and Parental Leave at art. 36.

133. *Id.* at art. 5.

134. Anita Haataja, Fin. Research Dep't, *Fathers' Use of Paternity and Parental Leave in the Nordic Countries*, (2009), available at [https://helda.helsinki.fi/bitstream/handle/10250/8370/FathersLeaves\\_Nordic.pdf?sequence=1](https://helda.helsinki.fi/bitstream/handle/10250/8370/FathersLeaves_Nordic.pdf?sequence=1). "Fathers can take their leave wholly or partially at the same time as the mother, just as was the case with the traditional paternity leave, or wholly or partially after the mother's leave, i.e. as a parental leave." *Id.*

135. See Act on Maternity/Paternity Leave and Parental Leave, at art. 8.

serious illness suffered in connection with the birth.<sup>136</sup> Maternity/paternity leave taken in accordance with the Act is calculated as working time for purposes of calculating employment-related rights, e.g. for vacation entitlement, rights connected with length of service, sick leave, etc.<sup>137</sup> Child care benefits are also gender neutral. Iceland's Act guarantees parents who are not active in the labor market, or who are in formal studies, an independent right to government money for child care (a birth grant) for up to three months each in connection with the birth, first-time adoption, or permanent fostering of a child.<sup>138</sup> Furthermore, such parents have a joint right to receive a birth grant for a further three months. This may be paid to either parent or divided between both.

It is necessary that these laws take into account egalitarian work-family reconciliation policies that take into account the role of parents in the home. Laws that view women only as mothers or primarily in their maternal function do disservice to women's advancement in both the public and private spheres. For example, the Bosnia and Herzegovina Labour Code may grant a mother, at her request, special leave to care for a child until the child reaches his/her third birthday, with payment of a monthly state allowance during that period.<sup>139</sup> Because the law lacks a similar provision for the father, these provisions reinforce stereotypes of women as sole or primary caregivers of children. According to The Belarus Labor Code, the same benefits granted by law to working mothers are granted to fathers only if they are raising children without their mother (owing to her death, deprivation of parental rights, hospital stay exceeding one month, or on other grounds).<sup>140</sup> In Bosnia and Herzegovina, the Law on Labor similarly allows for a father of the child to use the right to maternity leave only in the case of the child's mother's death, the abandonment of the child by the mother, or if the mother is prevented from exercising this right due to valid reasons.<sup>141</sup> As evidenced from the provisions described above, this law does not comprehend the possibility of both parents sharing parental leave.

The problem of stereotypes in laws also emerges in the Uzbekistan Law.<sup>142</sup> The law provides that all benefits granted to women may also be provided to fathers, guardians, grandmothers, grandfathers and other relatives who take actual care of a child.<sup>143</sup> Such benefits include limiting night labor, overtime work during the weekends, business trips, and providing additional leave.<sup>144</sup> This law is severely limited in that the above state provisions only come into force in the instance when the child is deprived of the mother's care.<sup>145</sup> This significantly undermines the notion of the joint care of children and equal

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136. *See id.* at art. 17.

137. *See id.* at art. 14.

138. *See id.* at art. 19.

139. Law on Gender Equality, No. 161/2003 (Bosn. & Herz.).

140. Code, HDIM.DEL/50/06, Oct. 3, 2006 (Belr.).

141. *Id.*

142. Family Code, Sept. 1, 1998 (Uzb.).

143. *Id.* at art. 117.

144. *Id.*

145. *Id.* at art. 6

parenting rights and duties as enshrined in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>146</sup> Here again, in the case of the Uzbek law, the law reinforces the stereotype of women as primary caregivers. For the following reason, it is vital that the laws be reformulated to view both parents in their equal caregiving role and provide equal opportunities for work and family responsibilities to both genders.

Countries including Tajikistan,<sup>147</sup> Kosovo,<sup>148</sup> and the Kyrg Republic<sup>149</sup> have directly addressed the need to consider family responsibilities of both sexes. The Kosovo Law on Gender Equality of 2004 allows for parental leave to both parents even if they are engaged in the informal sector or part time work, i.e., persons who are engaged in active labor less than 25 percent of the time.<sup>150</sup> This Act also applies to parents who are not active in the labor market and parents attending full-time educational programs. Once again, all of these parents are eligible to receive a maternity/paternity grant.<sup>151</sup> In addition, Kosovo's law provides for leave for both parents in the event that the child is sick.<sup>152</sup> The Vietnam Gender Equality Law of 2007 similarly mandates that household duties should be the shared responsibility of both men and women, thus addressing gender stereotypes in the family.<sup>153</sup> It directs the state to set up support services for both men and women and encourages both parents to take time off to care for sick children. The law allows for male employees to have full paid leave when wives give birth, in effect encouraging men to fulfill the caregiving role. Spain's law of 2007 also takes the lead in transforming gender roles. Here, paternity leave is mandatory and it cannot be transferred.<sup>154</sup> In Turkey, a draft law on parental leave proposes to extend six to twelve months to be shared by both men and women.<sup>155</sup>

Constructing care as a policy issue must become central to the issue of work-family reconciliations and must animate any revision or lawmaking on gender equality. Men must play an integral role in constructing these equalizing policies. By asking the Fatherland Front<sup>156</sup> of Bulgaria to engage in gender

146. See General Recommendation No. 23, *supra* note 49.

147. On State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights) art. 7 (Taj.).

148. Law on Gender Equality, No. 2004/2 (Kos.).

149. Law of the Kyrgyzstan Republic, On the Basics of the State Guarantees of Gender Equality Law (Kyrg.).

150. Law on Gender Equality, No. 2004/2 § 213 (Kos.).

151. *Id.* § 14.

152. *Id.* § 13.9.

153. Law on Gender Equality, No. 73/2006/QH11 (Vietnam).

154. Act of March 22 for Effective Equality Between Women and Men, Constitutional Act 3/2007 (Spain).

155. Nurhan Süral, *Anti-Discrimination Rules and Policies in Turkey*, 30 COMP. LAB. L. & POL'Y J. 245, 253 (2006).

156. See Law of the Vietnam Fatherland Front (Vietnam).

The Vietnam Fatherland Front constitutes a part of the political system of the Socialist Republic of Vietnam, led by the Communist Party of Vietnam. *Id.* Its members hold consultative meetings and coordinate and unify their actions to carry out the causes of national industrialization and modernization, so as to achieve the objective of a prosperous people, a strong country, and an equitable and civilized society. See *id.*

mainstreaming<sup>157</sup> to achieve equality of the sexes, for example, the law is valuing the importance of the Fatherland Front in the equalizing effort. Furthermore the law is recognizing the engagement of men in actualizing both gender equality and equal participation in family responsibility.

#### B. Prohibiting Retaliation and Unequal Treatment Upon Parental Leave

Despite the availability of family leave, women are often reluctant to take advantage of it for fear of perceived risks to their career advancement. Unless the law addresses this reality, these intended benefits will do more harm than good. If these laws are to benefit both sexes, they must prevent retaliation and punishment.<sup>158</sup>

Several countries have prohibited retaliation against women or individuals exercising leave to fulfill family responsibilities. The Swedish Gender Equality Act of 2000 contains a special provision that prohibits punitive punishments as a consequence of taking time off for family responsibilities.<sup>159</sup> This provision applies to both men and women.<sup>160</sup> Article 8 of the Gender Equality Law in Bosnia and Herzegovina of 2003 prohibits gender discrimination and, among other things, requires employers to allow employees to return to the "same job or another job of the same seniority with equal pay after the expiry of maternity leave . . ." <sup>161</sup> Norway's Gender Equality Act now includes an absolute prohibition against actions that place a woman or a man in a weaker position due to the exercise of leave-of-absence entitlements.<sup>162</sup>

The Japanese Law revising the Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave prohibits unfair treatment on the grounds of taking child care leave.<sup>163</sup> The Gender Equality Law in Bosnia and Herzegovina of 2003 similarly outlaws any unfavorable treatment of a parent or guardian in balancing their commitments in family and professional life . . . . <sup>164</sup> Under the

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157. Gender mainstreaming involves identifying gaps in gender inequality in order to bring about economic, social, and political equality between the genders. See U.N. DEV. PROGRAMME, WHAT IS GENDER MAINSTREAMING? 2, available at <http://www.undp.org/women/mainstream/whatis.shtml>.

158. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (Female track laborer filed discrimination claim with the EEOC and was subsequently suspended without pay. Plaintiff was awarded a remedy for retaliatory action.); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998) (Pregnant plaintiff who missed work for days not related to pregnancy was told by her employer that "her body was trying to tell her something" and was told to accept a discharge from Bay State. In response to plaintiff's complaint with the Massachusetts Commission Against Discrimination and with the EEOC, her employer responded that she had been terminated for poor attendance.).

159. See Act on Equality Between Women and Men [The Equal Opportunities Act] (SFS1 1993:433) (Swed.).

160. See *id.* §22.

161. Law on Gender Equality, No. 161/2003 (Bosn. & Herz.).

162. Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], at art. 11.2b (Nor.).

163. Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members, Including Child Care and Family Care Leave, Law No. 76 of 1991, at art. 3 (Japan).

164. Law on Gender Equality, No. 161/2003 (Bosn. & Herz.), at art. 8.

Act, a person may not be dismissed solely because of the family responsibilities he/she bears.

### C. Gender Quotas and Affirmative Action in Employment

While hortatory legal reform will remain weak, a carrot and stick approach will help with strict compliance with law. An example of the way in which laws can be normative as well as effective is the Norwegian law.<sup>165</sup> In 2002, Norway passed a law requiring all companies ensure that women comprise 40 percent of their boards.<sup>166</sup> If the board has two or three members, both sexes must be represented. Under these rules, the Register of Business Enterprises can refuse to register a company board if its composition does not meet the requirements provided by statute. Although seventy-seven companies were found to be in violation of gender representation rules as of January 2008, none of those companies faced dissolution due to their noncompliance.<sup>167</sup>

Other countries mandating employment quotas in their laws include Tajikistan, Kyrgyz, Lithuania, Spain and Kosovo. Article 3 of the Tajik Gender Equality Law, for instance, specifically allows for quotas to help women by allowing for “practical measures undertaken for the implementation of provisions of the law.”<sup>168</sup> Article 6 of the Kyrgyz Gender Equality Law states that gender discrimination does not include the “adoption of temporal special measures based on this law with the view to achieve actual equality in gender relationships.”<sup>169</sup>

Relevant quota provisions of the 2004 Law of Gender Equality in Kosovo provide for the extension of parental leave and the joint right to the extension of maternity/paternity leave by three months for each child after the first in a multiple birth, and/or in the case of illness of a child or illness of the child’s mother.<sup>170</sup> If a child or mother’s illness results in a hospital stay for more than seven days directly following birth, the law permits the parents to extend their “joint right to maternity/paternity leave by the number of days the child has to stay in hospital, prior to its first homecoming, by up to four months.”<sup>171</sup> Parents may also extend their “joint right to maternity/paternity leave by up to three months in the case of a serious illness of the child which requires more intensive parental attention and care.”<sup>172</sup>

Legislation like the Law on Guaranteeing Equality between Women and Men in Spain, passed in March 2007, stipulates that Spanish companies

165. Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], at art. 11.2b (Nor.).

166. *See id.* §21.

167. AAGATH STROVIK & MARI TEIGEN, FRIEDRICH EBERT STIFTUNG, WOMEN ON BOARD: THE NORWEGIAN EXPERIENCE 9 (2010), available at <http://library.fes.de/pdf-files/id/ipa/07309.pdf>.

168. On State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights) art. 3 (Taj.).

169. Law of the Kyrgyzstan Republic, On the Basics of the State Guarantees of Gender Equality Law, Jan. 31, 2003 (Kyrg.).

170. Law on Gender Equality, No. 2004/2 (Kos.) § 18.

171. De Silva de Alwis, *supra* note 48, at 16.

172. *Id.*

achieving a more balanced male-female ratio among their executives and at lower levels of staffing will receive favorable treatment when they bid for government contracts.<sup>173</sup> Moreover, the law obligates all companies with more than 250 employees to put in place gender equality policies and to have 40 percent of women on their boards within eight years, or face foreclosure.<sup>174</sup> The new regulations also attempt to achieve a reconciliation of work-family balance by allowing parents the right to reduce work time by as much as half in order to care for children under the age of twelve years and for family members with disabilities.

#### D. Legislating State Responsibility for Child Care

State mandated child care enhances both the participation of women in the labor market and the well-being of the child. In fact, child care is seen as a critical gender equality issue in many countries. In contrast to part-time work availability, which marginalizes women and prevents them from fully participating in the market, publicly provided child care is more likely to foster women's labor market inclusion by providing real and symbolic support to all working parents, both men and women.

Denmark leads the way in child care provisions. 48 percent of Denmark's children under the age of three are in public daycare.<sup>175</sup> In France, nearly one-third of the children are in some sort of a publicly supported daycare.<sup>176</sup> Publicly provided child care socializes the costs of children by shifting some of the burdens to the employer. Other countries are attempting to establish such child care provisions by setting dated targets. In 2002, the Barcelona European Council set child care targets, recommending that member states provide care for at least 90 percent of the children between three years old and mandatory school age, and mandatory care for at least 33 percent of the children under three years of age by 2010.<sup>177</sup>

As mentioned *infra* under the Vietnam Law, female officials and public servants are given assistance and support from the government and can bring children less than thirty six months old with them when participating in training and fostering courses. Although this is a positive step, it is again necessary that lawmakers be wary of laws which stereotype women as the sole caregivers of children. As illustrated in this Article, at times even good faith efforts to achieve gender equality can have the reverse effect of reinstating gender stereotypes. By not extending these benefits to male employees, the law reinforces the social construct of women as primary caregivers.

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173. Act for Effective Equality Between Women and Men, Constitutional Act 3/2007, at art. 33 (Spain).

174. *Id.*

175. Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 FUTURE OF CHILD. 99, 104-05 (2001).

176. Philippe Choné et al., *Female Labor Supply and Child Care in France* 6 (CESifo, Working Paper No. 1059, 2003) available at [http://www.ifo.de/pls/guestci/download/CESifo%20Working%20Papers%202003/CESifo%20Working%20Papers%20Oktober%202003/cesifo1\\_wp1059.pdf](http://www.ifo.de/pls/guestci/download/CESifo%20Working%20Papers%202003/CESifo%20Working%20Papers%20Oktober%202003/cesifo1_wp1059.pdf).

177. *Childcare Services in the EU – What Future?*, EUROFOUND, [http://www.eurofound.europa.eu/emcc/content/source/eu06015a.htm?p1=ef\\_publication&p2=null](http://www.eurofound.europa.eu/emcc/content/source/eu06015a.htm?p1=ef_publication&p2=null) (last updated May 26, 2006).

In 1985, Sweden passed a law mandating that all children between eighteen months and school age receive access to child care by 1991.<sup>178</sup> This law has helped to transform gender roles and increase women's participation in the market place. A recent survey of Norway revealed that 79 percent of mothers with children under the age of six are gainfully employed.<sup>179</sup> In addition to allowing women to participate in the marketplace, the law has also contributed to changes in the father's role in the family by instituting the idea of child rearing as a parental right and duty of men and women. Today, most children in Sweden are raised in families where child caring and child rearing are shared responsibilities.<sup>180</sup> These laws, which the article argues constitute perhaps the most radical social engineering effort and are at the heart of the gender-equality debate, have resulted in 85 percent of men taking parental leave.<sup>181</sup>

As a result of these laws, the Article argues, what is perhaps the most radical social engineering effort, 85 percent of men take parental leave and are at the heart of the gender equality debate.

### III. CONCLUSION

In order to transform the workplace, it is imperative to recognize the role both parents play in child bearing and child rearing responsibilities. It is equally important to transform gender roles so that parenting becomes a shared responsibility and both parents are able to claim their equal rights to give care. Law making must help transform gender roles by creating a structure wherein both men and women can realize their work and family aspirations equally. In this regard, far-reaching and pro-active steps must be taken in order to transform gender roles both in the family and at work. Furthermore, gender equality education, beginning in youth, must be provided for in new legislation.

Historically, male hierarchies have drafted laws in their image and created a divide between the public and the private spheres. It is important to re-envision laws in the image of the woman and child and reshape public attitudes. Personal laws, family laws, and labor laws should embody personal narratives and must capture the reality of women's lives.

Establishing special measures in labor laws to protect women does not necessarily facilitate equal participation of men and women in the work force. A look at the protective labor regulations reveals an analogous cause and effect relationship between protective labor laws and gender bias in the hiring and firing of employees. Protectionist provisions can only reinforce notions that motherhood is the natural role for women. These laws continue to confine women to the homes and men to their offices.

178. Linda Ärlig, *Taking of Children into Care in Sweden*, NORDISKA KOMMITTÉN FÖR MÄNSKLIGA RÄTTIGHETER (Gillian Thylander trans. 1997), [http://www.nkmr.org/english/taking\\_children\\_into\\_care\\_in\\_sweden.htm](http://www.nkmr.org/english/taking_children_into_care_in_sweden.htm).

179. See AUGUSTO LOPEZ-CLAROS & SAADIA ZAHIDI, WORLD ECON. FORUM, WOMEN'S EMPOWERMENT: MEASURING THE GLOBAL GENDER GAP (2005), available at [http://members.weforum.org/pdf/Global\\_Competitiveness\\_Reports/Reports/gender\\_gap.pdf](http://members.weforum.org/pdf/Global_Competitiveness_Reports/Reports/gender_gap.pdf).

180. Bennhold, *supra* note 79 (noting that 85 percent of fathers take parental leave).

181. *Id.*

Although a significant sector of the economic markets accommodates women's dual roles, assumptions that women are the primary caretakers disadvantage women in the marketplace. Women tend to self-select work that allows them to balance such dual roles. Men, on the other hand, are not always confined to jobs that allow for balancing work and family responsibilities. Joan Williams states: "Schoolteachers and mothers who own small home-based businesses do not run the world."<sup>182</sup> Women are excluded from employment mostly due to their real or presumed caregiving roles. Only if the market place helps both men and women balance these dual roles will this inequality be redressed.

In order to achieve gender equality in society, gender equality must be reproduced in the family. Therefore, a paradigm shift must occur in order to restructure the workplace and allow mothers as well as fathers the opportunity to perform and compete equally in the workplace. Both women and men should be able to advance in the public sphere and undertake traditional caregiving roles. Women have long entered the market, and men are increasingly playing an equal role in caregiving. Translating these realities into the language of feminist theory, this generational shift means that the time is ripe to challenge the masculine norms that frame market work. The provision of parental care is not only about equal opportunities in the workplace, but it is also about giving equal caregiving opportunities to both men and women. It is for the following reasons that in order to destabilize traditional gender roles, laws drafted to protect caregivers should be designed to give rights to all caregivers despite their sex.

Joan Williams further argues that taking children's needs for parental care seriously requires supporting the adults who must provide it.<sup>183</sup> It is important to deconstruct the image of the traditional care giver and the ideal worker. Equality requires recreating the worker in a gender-neutral image: the image of one who has to work full-time in both the public and private spheres. Family friendly policies that help balance these roles advance the full citizenship of both men and women. The journey to gender empowerment must allow women to compete equally with men in the labor market and men the right to care for their children and families. Only then will men and women enjoy full citizenship in the family and in the public sphere.

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182. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 83 (2000).

183. *See id.* at 63.