

# THE MATERNAL DILEMMA

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## INTRODUCTION

*The Family and Medical Leave Act (FMLA) aims to protect the right to be free from gender-based discrimination in the workplace . . . .*

*By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. "By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that all women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."<sup>1</sup>*

In recent decades many Western countries promoted significant reforms in parental policies, largely characterized by a shift from traditional mother-oriented protections to gender-neutral supports.<sup>2</sup> As part of this trend the U.S. Congress enacted the Family and Medical Leave Act (FMLA) in 1993.<sup>3</sup> The FMLA provides working parents irrespective of gender up to twelve weeks of unpaid leave per year to care for a newborn baby or a sick child. Its motivation was gender-equity concerns, on the assumption that parental policies affording men the same parental benefits as those traditionally reserved for women could effectively encourage them to assume more caretaking responsibilities and relieve the burdens and costs of motherhood. Gender-neutral leave policies were thus perceived essential for undermining the gendered division of parental work at home by encouraging men to step in; this would combat the gender stereotype that women are mothers first and workers second, and it would remove a major barrier to gender equality in the workplace. Chief Justice Rehnquist highlighted the significance of these goals in *Nevada v. Hibbs* when affirming the constitutionality of the FMLA on equal protection grounds.

This Article questions the sufficiency of contemporary parental policies in undermining the gendered division of carework. It reveals that while gender-neutral parental reforms are firmly in place in the statute books, in reality, parenting and

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<sup>1</sup> Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729, 737 (2003).

<sup>2</sup> See *infra* subpart I.B.

<sup>3</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612–2654 (2012)) [hereinafter FMLA].

caretaking at home are still predominantly maternal. Despite the optimistic expectations that accompanied the enactment of gender-neutral leave legislation such as the FMLA, and the provision of equal care opportunities for men, a marked gap separates the law's target of equal parenting from the persistence of a maternal reality in most families. Moreover, because women remain responsible for family caregiving much more than men, the same old problems persist. The stereotype that women are less competent workers continues to thrive, and gender bias and discrimination still shape women's experiences in the workplace. Despite the formal legal insistence on gender neutrality and similar treatment in the allocation of leave benefits, women are still singled out as "different" and the goal of reducing employers' incentives to engage in discrimination against them is far from being accomplished. This discriminatory reality is often masked by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual products of contemporary parental policies. Gendered patterns of care and work are thus legitimized as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice largely shape these preferences.

The Article suggests naming this problem "the maternal dilemma" and calls for reevaluation of current policy solutions designed to address it. It adds a comparative analysis, with a specific focus on the telling example of Israel, to illustrate that the maternal dilemma is not a unique American problem, with its very "thin" model of parental supports, restricted to narrow and primarily negative protections. The maternal dilemma prevails also under more progressive regimes of parental policies that provide additional incentives for men to assume greater caretaking responsibilities at home. This insight is particularly intriguing as scholars often criticize the narrow American scheme of parental benefits for its inability to encourage more men to share caretaking responsibilities. Advocates of gender equality have thus argued for a more generous regime of parental benefits, such as paid leave, as a means to undermine the gendered division of domestic care-work.<sup>4</sup> But the comparative analysis rebuts these arguments and casts doubt on the sufficiency of these moves in addressing maternal patterns of care and promoting significant changes in the family.

Building on comparative lessons as well as on the scope and significance of the maternal dilemma in the American con-

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<sup>4</sup> See *infra* notes 128–29, 260–62 and accompanying text.

text, the Article argues that in their efforts to recruit men to the task of caretaking at home, feminists, legislators, and policy makers have neglected an additional and equally important set of issues relating to the structures and forces that shape women's decision to remain the primary caretakers at home. Restoring the focus to women and addressing their specific needs and concerns are thus crucial for moving forward. Naming this problem the maternal dilemma serves as a reminder of where the core of the problem is; it also signals that the path to gender equality might require more than gender-neutrality and similar treatment.

The Article proceeds in five parts. Part I contextualizes the American move away from traditional maternal regimes to gender-neutral parental entitlements in recent decades, by juxtaposing these developments in the United States to similar changes in Israel. This Part discusses and explains the different social and legal factors that have contributed to the evolution of the very scanty American regime of parental supports that is restricted to narrow and primarily negative protections, in contrast to its much more progressive Israeli counterpart. As opposed to the United States, which is the only industrialized country that does not provide its working parents federally paid parental leave,<sup>5</sup> Israel has embraced a relatively comprehensive and progressive legal scheme of parental entitlements in the last three decades.<sup>6</sup> The Israeli scheme seems to address many of the deficiencies of contemporary American family policies and therefore represents what many American advocates of gender equality aspire to: a comprehensive gender-neutral system of family supports that guarantee paid parental leave, and also allocate other gender-neutral entitlements such as the right of working parents to a shorter workday or to a paid leave to care for a sick child. Yet while existing parental supports for working parents in the United States and Israel differ significantly in scope, their legislative history reveals a similar focus on men's parental choices and a commitment to affect these choices by allocating gender-neutral parental protections and benefits. More precisely, policy makers and legislators in both countries have chiefly explored legal measures that could target and affect men's parental choices; the underlying assump-

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<sup>5</sup> OECD, SOCIAL POLICY DIVISION, DIRECTORATE OF EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS, PF2.1: KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS 2 (2017), [http://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) [https://perma.cc/A659-J6RR].

<sup>6</sup> See *infra* note 32.

tion is that change can be accomplished once men start utilizing their parental benefits.

Part II analyzes comparative data of the scope and significance of contemporary maternal patterns of care in Israel and the United States. It highlights parallel patterns in the two countries and reveals that a significantly more generous system of parental supports, like that embraced by the Israeli legislature, has by no means undermined gendered patterns of care at home. In fact, seen against the legal benefits and protections that fathers officially enjoy in Israel, the maternal dilemma is far more pronounced.

Part III exemplifies how the existing gendered reality in which American women continue to be the primary caretakers at home is often disguised by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual products of contemporary parental policies. These narratives are shown to date back to the legislative deliberations over the FMLA. Its enactment was accompanied by optimistic predictions regarding its likely positive role in encouraging rising numbers of men to gradually assume more caretaking responsibilities at home. Over the years, and despite past and present data that could cast doubt on these expectations, the image of the FMLA as an important agent of change in the family has been promoted by legislators, commentators, and the media. These narratives often blur the line between egalitarian parenting as an ideal and its actual realization in real life. They also mask the deeper gendered structures and forces that still perpetuate a reality of gender inequality and deflect public attention from the larger legal changes that must be made.

Part IV explores the current implications of the maternal dilemma through the lens of a recent employment discrimination case: *EEOC v. Bloomberg L.P.*<sup>7</sup> This Part shows that despite the existence of gender-neutral leave policies at Bloomberg, gendered patterns of care and work among the company's employees persist. It also exemplifies how this gendered reality sustains the same old stereotypes about the unique role of motherhood in women's lives, ultimately rationalizing gender-discriminatory employment decisions.

Part V analyzes *Nevada Department of Human Resources v. Hibbs*<sup>8</sup> against two other cases: *California Federal Savings and Loan Ass'n v. Guerra*<sup>9</sup> and a recent Israeli Labor Court decision

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<sup>7</sup> 778 F. Supp. 2d 458 (S.D.N.Y. 2011).

<sup>8</sup> 538 U.S. 721 (2003).

<sup>9</sup> 479 U.S. 272 (1987).

*State of Israel v. Dan Bahat*.<sup>10</sup> In reference to this analysis this Part suggests restoring arguments of gender difference. It highlights the intriguing relationship between the 1987 *Cal Fed v. Guerra* and the recent case of *Dan Bahat* in challenging the conventional wisdom that gender neutrality and similar treatment of men and women should be the sole legal means for achieving gender equality. This Part explains the particular significance of the Israeli *Bahat* case in challenging global trends in the context of parental policies and argues that without naming it specifically, *Bahat* puts the maternal dilemma on the table for the first time, and develops a more comprehensive framework for rethinking the scope and substance of legal measures in the family and work context. This Part draws on the central holding of *Bahat* to explore additional directions to address the dilemma. In deliberating these issues the Article suggests acknowledging that gendered patterns of care-work at home are not simply the product of women's subordination. They also reflect the complex relationship between women's disempowering experience in the labor market and the historical and contemporary significance of motherhood in their lives. Women, and not only men, should thus be offered incentives to change and exchange their roles in the household.

## I

### FROM MOTHERHOOD TO PARENTHOOD: A COMPARATIVE PERSPECTIVE

#### A. Maternal Domains

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth, and the care and feeding of the child in the early months of its life.<sup>11</sup>

Until the mid-1970s all Western countries confined their parental policies to mothers.<sup>12</sup> While these maternal legal regimes varied from one country to another, they were similarly

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<sup>10</sup> File No. 361/08 Nat'l Labor Court, (Apr. 18, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>11</sup> *Cohen v. Chesterfield Cty. Sch. Bd.*, 474 F.2d 395, 398 (4th Cir. 1973) (en banc), *rev'd sub nom*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

<sup>12</sup> See Linda Haas, *Equal Parenthood and Social Policy: Lessons from a Study of Parental Leave in Sweden*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 375 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991).

fed by stereotypical assumptions about the appropriate maternal role of women in society, stemming from the physical fact of pregnancy and childbearing. These assumptions reproduced and thereby legitimated a traditional vision that all women need to be mothers and that all children need their mothers.<sup>13</sup> Accordingly, childcare was perceived as the primary responsibility of women, and if paid employment was taken up, it must take second place to the woman's responsibilities within the home. This vision that is usually labeled the "ideology of separate spheres"<sup>14</sup> was reflected in court decisions and legislative debates at the time, constructing a normative model of women and gender differences resting on the perceived natural, universal, and unchanging nature of the maternal role. As Judge Haynsworth, quoted above, explained in *Cohen v. Chesterfield County School Board*: "How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course."<sup>15</sup> Based on arguments of gender difference, the court thus upheld the constitutionality of a regulation that required pregnant teachers to go on unpaid maternity leave at the end of their fifth month and allowed reemployment the next school year upon submission of a medical certificate from the teacher's physician.<sup>16</sup> The court further clarified: "No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood."<sup>17</sup>

Along the same ideological lines, the Israeli legislature endorsed a strict prohibition against night work for women.<sup>18</sup> Rationalizing the significance of such a law, one member of the Israeli parliament (Knesset) of the ruling labor party explained:

The male worker who comes home after a night shift can rest during the day, sleep and prepare for his next night shift the following day. The woman who comes home after a night

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<sup>13</sup> See generally Dorothy McBride Stetson, *The Political History of Parental Leave Policy*, in PARENTAL LEAVE AND CHILD CARE, *supra* note 12, at 406, 407–09 (discussing the underlying rationale of labor laws designed to protect women in the workplace).

<sup>14</sup> Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1119 (1986).

<sup>15</sup> *Cohen*, 474 F.2d at 398.

<sup>16</sup> See *id.* at 399.

<sup>17</sup> *Id.* at 397.

<sup>18</sup> See Leora F. Eisenstadt, *Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 VAND. J. TRANSNAT'L L. 357, 368 (2007).

shift has to take care of the children, clean the house, cook and then go back to work.<sup>19</sup>

These manifestations of an entrenched ideology of motherhood provided the normative frameworks wherein maternal regimes were first established and later legitimized in both countries. Yet, due to markedly distinct economic, social, and cultural factors, these regimes evolved differently in Israel and the United States and therefore varied in scope and content. In Israel, established in 1948, demographic concerns over the small size of the Jewish population, coupled with a state interest in women's employment in the early days of statehood, led to the enactment of a set of laws designed at once to enhance women's productive and reproductive roles.<sup>20</sup> Besides being seen as contributing to meeting the dire need for workers in the state-building project in the 1950s, Israeli women were perceived by the founding generation first and foremost as wives and mothers whose primary task was to bear and rear children.<sup>21</sup> These perceptions were nurtured primarily by the existing national ethos inherent in the founding of the State of Israel: the rejuvenation of the Jewish people in their homeland.<sup>22</sup> The perception of women as child bearers and mothers was designated a central role in the realization of that vision. A strong legal infrastructure was thus created to ensure that women would be able to combine paid work and reproduction.<sup>23</sup> Moreover, in its early years, Israel was striving to establish itself as a welfare state.<sup>24</sup> Legislation ranging from paid sick leave to maximum hours was enacted and provided a comprehensive network of workers' protections that further assisted working women in their dual task.<sup>25</sup> This pro-welfare

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<sup>19</sup> DK (1963) 2256 (Isr.) (statement of MK Victor Shem Tov). This comment was made in response to a rare legislative initiative that proposed to alter the absolute prohibition on night work for women and to create some exceptions to this rule in 1963.

<sup>20</sup> See Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J.L. & FEMINISM 327, 339–40 (2017).

<sup>21</sup> See Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUDS. INT'L F. 605, 607 (1997); Rimalt, *supra* note 20, at 344.

<sup>22</sup> Rimalt, *supra* note 20, at 340.

<sup>23</sup> Noya Rimalt, *Good Mother, Bad Mother, Irrelevant Mother: Parenthood in Law Between the Ideal of Equality and the Reality of Motherhood*, 39 MISHPATIM 573, 581–84 (2010).

<sup>24</sup> See generally RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 98–106 (2004) (providing a detailed discussion of how Israel's welfare state relates to women in the family and in the workforce).

<sup>25</sup> See, e.g., Sick Pay Law, 5736–1976, SH No. 814 p. 206 (Isr.) (instituting sick leave under Israeli law).



orientation of the young state also facilitated the development of gender-specific benefits and protections for working mothers.

In 1954, the Knesset enacted the Employment of Women Law.<sup>26</sup> It accorded only women many benefits and protections to accommodate maternity with workplace requirements. A pregnant worker was given the right to a twelve-week paid maternity leave.<sup>27</sup> The employer was prohibited from employing her during that period, or from dismissing her, and she was given the right to payment in lieu of salary from the National Insurance Institute.<sup>28</sup> After her maternity leave, the mother was given the right to take up to a year's leave without pay,<sup>29</sup> or to resign with entitlement to severance pay.<sup>30</sup> Special accommodations for working mothers were also added to various collective agreements that provided that women could use part of their own sick leave to care for children and work-reduced hours if they had two children or more under a certain age.<sup>31</sup> In formatting these benefits, Israel became one of the leading countries in the Western world with regard to the scope of its parental entitlements for working mothers.<sup>32</sup> At the same time,

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<sup>26</sup> Employment of Women Law, 5714-1954, SH No. 160 p. 154 (Isr.).

<sup>27</sup> *Id.* § 6.

<sup>28</sup> *Id.* §§ 6, 8, 9.

<sup>29</sup> *Id.* § 7.

<sup>30</sup> Severance Pay Law, 5723-1963, SH No. 404 p. 136 § 7 (Isr.).

<sup>31</sup> See, e.g., Lilach Lurie, *Do Unions Promote Gender Equality?*, 22 DUKE J. GENDER L. & POLY 89, 102 (2014) (discussing the nature and scope of parental rights in various collective agreements and explaining that each agreement has a different age requirement for children for the purpose of exercising these rights. For instance, as part of the doctor's collective agreement parents can work reduced hours if they have two children younger than twelve.); see also Ifat Matzner-Heruti, *Dare to Care: The Complicated Case of Working Fathers Alleging Sex and Parental Discrimination*, 23 J.L. & POL'Y 1, 26-28 (2014) (discussing fathers' objections to these women-only benefits).

<sup>32</sup> In formatting its maternal policies Israel followed the Swedish model that started to develop at the beginning of the twentieth century. Sweden introduced a mandatory unpaid leave of four weeks after giving birth for women engaged in industrial occupations as early as 1900. In 1912, this maternity leave was extended to six weeks. Up until the 1930s these policies were justified primarily as an attempt to lower infant mortality by fostering breast feeding. Elizabeth Jelin, *Gender and the Family in Public Policy: A Comparative View of Argentina and Sweden*, in GLOBAL PERSPECTIVES ON GENDER EQUALITY: REVERSING THE GAZE 40, 50-51 (Naila Kabeer, Agneta Stark & Edda Magnus eds., 2008). In 1931, the first Swedish maternal insurance was introduced providing working mothers of newborn children with compensation for one month's loss of income. In 1938, employers were forbidden from dismissing female workers because of their pregnancy and in 1955, the maternity leave provision was extended to six months' leave: half paid and half unpaid. In the following years a growing public focus on the possibilities for caring for children at home led to several extensions of the parental leave period. In 1963, the six months maternity leave became fully paid.

these special accommodations were accompanied by some specific restrictions on women's employment such as preventing women from working at night and denying pregnant women the option of working overtime.<sup>33</sup> The outcome was the establishment of a legal infrastructure, which on the one hand facilitated the integration of motherhood and paid work, and on the other hand perpetuated the stereotyping of women as primary homemakers and secondary employees.

In the United States, as opposed to Israel, maternity leave and job protection for working mothers was not a pertinent legislative concern throughout most of the twentieth century. Historically, public policies were structured around the assumption that men were regularly employed breadwinners on whose earnings women depended.<sup>34</sup> Relative to this assumption was the normative idea that women should stay at home and shoulder all domestic responsibilities including child-care.<sup>35</sup> In addition, employer opposition to labor regulation and to social insurance plans has a long history in the United States.<sup>36</sup> The result is a nation with extremely underdeveloped social provisions. These factors can explain the almost absolute lack of positive benefits or protections for working mothers on the state or federal level in the relevant era. While as early as the 1950s, Israeli women were provided financial and legal means to pursue the double task of motherhood and paid employment, American mothers were largely discouraged from labor market participation.<sup>37</sup> Moreover, when some work-related

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The leave period was extended to seven months in 1975, nine months in 1978, twelve months in 1980, and fifteen months in 1989. Anders Chronholm, *Sweden: Individualization or Free Choice in Parental Leave?*, in *THE POLITICS OF PARENTAL LEAVE POLICIES 227, 228-33* (Sheila Kamerman & Peter Moss eds., 2009). Later on, further governmental concerns such as pro-natalist considerations, a desire to protect and promote the family, and a decision to improve the participation of women in education and the labor market shaped the development of additional maternal legislation. Haas, *supra* note 12, at 377-85.

<sup>33</sup> See *Employment of Women Law*, § 10(a); Eisenstadt, *supra* note 18, at 368.

<sup>34</sup> See generally ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 56-63 (2001) (discussing the influence that this assumption had on depression-era employment policies).

<sup>35</sup> Though the breadwinner/homemaker model never reflected a universal reality in America, it described most middle-class and some working-class families in the 1950s and 1960s. See Jane Lewis, *The Decline of the Male Breadwinner Model: Implications for Work and Care*, 8 *SOC. POL.* 152, 153 (2001).

<sup>36</sup> RUTH MILKMAN & EILEEN APPELBAUM, *UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY* 21-22 (2013). See generally JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 1-11 (2003) (exploring the New-Deal welfare policies and employer reactions to increased demand for Social Security).

<sup>37</sup> Stetson, *supra* note 13, at 408-09.

benefits initially developed in the United States in the post-war era, it was in response to men's needs and concerns as workers. In the 1940s, several American states started to provide wage replacement for sickness or disability in the form of insurance.<sup>38</sup> When these programs were established there were no parallel benefits for disabilities associated with pregnancy or childbirth.<sup>39</sup> As a result, the first set of maternity leave-related policies to emerge in the late 1960s, as more women joined the workforce, were created as part of temporary disability insurance laws that protected employees from income loss in the event of a temporary medical disability.<sup>40</sup> New mothers were granted leave corresponding to the benefits that other employees received for temporary illness or disability.<sup>41</sup> Yet these programs were not common. In 1969, only five states provided such maternity benefits to working mothers, while many others excluded pregnancy and childbirth-related disabilities from their insurance programs.<sup>42</sup> Another set of policies prevalent in the United States in the 1960s and early 1970s burdened working women with pregnancy-related restrictions. One clear example is school boards' policies that forced pregnant teachers to take unpaid maternity leave several months before the expected day of childbirth and prevented them from returning to work immediately after.<sup>43</sup>

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<sup>38</sup> *Id.* at 410–11.

<sup>39</sup> Dorothy McBride Stetson notes in this context that Rhode Island was the first state to provide temporary disability insurance (TDI) for workers. Rhode Island's law, passed in 1942, covered pregnancy as a disability. However, as many women claimed pregnancy related benefits, costs grew and the legislature decided to exclude pregnancy from coverage. Based on this experience, other states excluded pregnancy from the outset. *Id.* at 411. These states included California, which enacted its TDI law in 1971, New Jersey, in 1962, New York, in 1965, and Washington, in 1949. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1985) [hereinafter W. Williams].

<sup>40</sup> Sakiko Tanaka, *Parental Leave and Child Health Across OECD Countries*, 115 ECON. J., Feb. 2005, at F7, F8.

<sup>41</sup> See Lawrence M. Berger & Jane Waldfogel, *Maternity Leave and the Employment of New Mothers in the United States*, 17 J. POPULATION ECON. 331, 332–33 (2004); Tanaka, *supra* note 40, at F8–F9.

<sup>42</sup> *Supra* note 39 and accompanying text; see also *Geduldig v. Aiello*, 417 U.S. 484, 486 (1974) (discussing California's disability insurance system that excluded pregnancy related disabilities from coverage).

<sup>43</sup> Susan Deller Ross, *Legal Aspects of Parental Leave: At the Crossroads, in PARENTAL LEAVE AND CHILD CARE, supra* note 12, at 93, 94. School boards' opposition to the presence of visibly pregnant women in classrooms rested on health-related as well as moral considerations. They feared a potential injury to mother or child and also that a pregnant teacher's mind would not be on her work or that she could not meet the physical demands of teaching. In addition, they feared that the sight of pregnant women would unfavorably influence students. These rules were eventually struck down by the Supreme Court in *Cleveland Board of*

In sum, a relatively “thin” and restrictive set of social policies in the US created a maternal regime which denied pregnant women job security and health insurance on the one hand and positively undermined their ability to work before or after childbirth on the other. This regime can explain the relatively low American rate of labor participation of mothers with very young children in the 1960s and early 1970s.<sup>44</sup>

## B. From Motherhood to Parenthood

In the 1970s growing concern with issues related to equal opportunity for women stimulated a reevaluation of the policy of protective legislation and special benefits for working mothers in various Western countries. Advocates of gender equality argued that mother-oriented measures were a major hindrance to women’s integration and advancement in the workforce, as they encouraged maternal patterns of care at home and perpetuated gender stereotypes.<sup>45</sup> In 1974, Sweden was the first Western country to start a process of transition toward more gender-neutral parental leave policies replacing the maternity leave policy with a parental insurance system.<sup>46</sup> Other Nordic countries soon followed with comparable reforms.<sup>47</sup> These typically focused on parental leave, and allowed

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*Education v. LaFleur*, 414 U.S. 632 (1974) (invalidating the forced leave policies of two school boards on due process grounds after determining that these policies were based on irrebuttable presumptions about pregnant women’s incapacity for work).

<sup>44</sup> Between 1961 and 1965, only 14% of mothers actually participated in the workforce within 6 months of their child’s birth. In 1976, the relevant rate for mothers with children under the age of one was 31%. KRISTIN SMITH ET AL., U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961-1995, at 14 (2001). However, the proportion of all women in the labor force in the United States was higher than in Israel in the relevant decades. For instance, in 1970, 43.3% of American women participated in the workforce in contrast to 29.7% women in Israel. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950–98 and 1998–2025*, MONTHLY LAB. REV., Dec. 1999, at 1, 4–5; see also SHLOMO SWIRSKI ET AL., ADVA CTR., WOMEN IN THE LABOR FORCE OF THE ISRAELI WELFARE STATE (2001), <https://adva.org/wp-content/uploads/2014/09/Women-in-the-Labor-Force.pdf> [<https://perma.cc/XKC2-PRFN>].

<sup>45</sup> See, e.g., W. Williams, *supra* note 39, at 331 (explaining that “[t]he goal of the feminist legal movement that began in the early seventies . . . never was the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”).

<sup>46</sup> Haas, *supra* note 12, at 383; Anders Chronholm, *supra* note 32, at 227.

<sup>47</sup> See, e.g., Thorgerdur Einarsdóttir & Gyda Margarét Pétursdóttir, *Iceland: from Reluctance to Fast-Track Engineering*, in THE POLITICS OF PARENTAL LEAVE POLICIES, *supra* note 32, at 157, 165 (detailing Iceland’s transition towards more gender-neutral parental leave policies).

men to take part of the leave after the birth of a child.<sup>48</sup> The assumption was that a legal structure that gave either parent her or his portion of parental leave would eventually lead to more equal sharing of childcare responsibilities at home, hence to greater gender equality in the workplace.

Inspired by these reforms and motivated by similar gender equality concerns, advocates for gender equality in Israel started to push for a dual process of replacing maternal rights with parental rights and abolishing specific legal restrictions on women's employment.<sup>49</sup> In 1986, the absolute prohibition on night work for women was abolished, and in 1988, the Knesset passed legislation which started the process of converting various maternal rights into parental rights.<sup>50</sup> Subsequent legal reforms took place in the following decade.<sup>51</sup> As part of this process old legislation was amended and new legislation was formulated. The right to sick leave to care for a sick child, to resign with severance pay in order to care for a baby, and to unpaid leave after the termination of the three-month maternity leave were all converted into parental rights.<sup>52</sup> The formula was that rights not exploited by the mother would devolve to the father. This reform gave parents for the first time the option to choose who would take advantage of these rights. In addition, new legislation provided all employees irrespective of gender the right to sick leave to care for a seriously ill parent.<sup>53</sup> In 1997, the maternity leave provision was also amended to allow the couple to decide who would take the second half of the paid maternity leave; two years later this move was supplemented by the extension of maternity leave from 12 to 14 weeks. Recently, the period of paid leave was extended to 15 weeks and the law now allows new fathers to

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<sup>48</sup> For developments in Finland, see Johanna Lammi-Taskula & Pentti Takala, *Finland: Negotiating Tripartite Compromises*, in *THE POLITICS OF PARENTAL LEAVE POLICIES*, *supra* note 32, at 87. For developments in Iceland, see Einarsdóttir & Pétursdóttir, *supra* note 47, at 157. For developments in Norway, see Berit Brandth & Elin Kvande, *Norway: The Making of Father's Quota*, in *THE POLITICS OF PARENTAL LEAVE POLICIES*, *supra* note 32, at 191.

<sup>49</sup> HALPERIN-KADDARI, *supra* note 24, at 36; Dafna N. Izraeli, *Women and Work: From Collective to Career*, in *CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL* 165, 175 (Barbara Swirsky & Marilyn P. Safir eds., 1991).

<sup>50</sup> HALPERIN-KADDARI, *supra* note 24, at 36.

<sup>51</sup> *Id.* at 36–37, 120–21.

<sup>52</sup> The Equal Employment Opportunity Law, 5748-1988, SH No. 1240 p. 38 §§ 4, 22, 23 (Isr.); Sick Pay Law (Absence Due to a Sick Child), 5753-1993, SH No. 1427 p. 134 (Isr.).

<sup>53</sup> Sick Pay Law (Absence Due to a Sick Parent), 5754-1993, SH No. 1442 p. 33 (Isr.).

take one week of the leave together with the mother.<sup>54</sup> A similar reform in the late 1990s awarded the father or the mother paid parental leave in the case of adoption of a child.<sup>55</sup> Furthermore, the Israeli legislature included a prohibition against discrimination based on workers' status as parents in the Equal Employment Opportunity Law.<sup>56</sup>

The United States took a path significantly different from Israel's when reforming its maternal regimes. Rather than embracing the scheme of positive parental benefits and protections for both parents, such as paid parental leave, the United States adopted a narrow disability model as part of the effort to undermine the maternal stereotype of women and their traditional image as caregivers at home. First, in 1978, as part of the Pregnancy Discrimination Act (PDA),<sup>57</sup> pregnant workers were guaranteed the same treatment as other disabled workers, and discrimination based on pregnancy, childbirth, or related medical conditions was defined as a form of sex discrimination. This move was supplemented in 1993 with the passage of the FMLA,<sup>58</sup> which mandates up to twelve weeks of unpaid leave per year for childbearing or family care over a twelve-month period for eligible employees.<sup>59</sup>

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<sup>54</sup> Today, the first 6 weeks of the paid leave are reserved to the women for the purpose of physical recovery from childbirth. The remaining 9 weeks can be taken by either parent. The period of paid leave can be supplemented by a period of 11 weeks of unpaid leave that either parent can take. Employment of Women Law, 5714-1954, SH No. 160 p. 154 § 6 (Isr.). To be eligible for paid leave fathers must take at least one week of leave. Like women they are paid based on their actual salary and are fully reimbursed for any loss of income during the leave. Social Security Law, 5755-1995, SH No. 1522 p. 210 § 49(c)(3), 50(a)(1) (Isr.). In addition, men can use up to seven days of their sick leave as an additional period of leave for purposes related with their spouse's pregnancy or childbirth. Sick Pay Law (Absence Due to a Pregnancy and Childbirth of a Spouse) 5760-2000, SH No. 1744 p. 222 § 1 (Isr.); see also MATERNITY LEAVE, ALL-RIGHTS [http://www.kolzhut.org.il/en/Maternity\\_Leave](http://www.kolzhut.org.il/en/Maternity_Leave) [<https://perma.cc/DD3S-QYBE>].

<sup>55</sup> Originally granted to only women, the relevant provision was amended in 1998 to replace the maternal oriented benefit with a gender-neutral arrangement that enabled the adoptive parents to decide how they divide the leave between the two of them. Employment of Women Law (Amendment No. 15), 5758-1998, SH No. 1650 p. 114 (Isr.).

<sup>56</sup> The Equal Employment Opportunity Law, 5748-1988, SH No. 1240 p. 38 § 2 (Isr.).

<sup>57</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2012)).

<sup>58</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612–2654 (2012)).

<sup>59</sup> Eligible employees are defined as those who worked at least one year for their current employer, and who worked for at least 1,250 hours during the previous twelve months, and who worked for a business employing 50 or more employees. The minimum hours provision effectively excludes from coverage part time workers. For critical analysis of the limited coverage of the FMLA, see

This “thin” federal model of gender-neutral parental benefits and protections stands in sharp contrast to its Israeli counterpart. As aforesaid, countries like Israel, which on account of a diverse set of concerns were trying to encourage childbirth and women’s employment at the same time, had a head start in adopting positive maternal supports that enabled women to combine paid work with active motherhood. When these legal structures were replaced by a gender-neutral set of entitlements, the outcome was a legal regime that provided fairly generous benefits and protections to both working parents. But in the United States in the 1950s and 1960s, a common expectation of women, especially middle-class women, was that they would leave work on becoming pregnant.<sup>60</sup> Maternal policies that evolved in the relevant period reflected this reality. These policies denied pregnant women financial benefits that were otherwise available to disabled workers or actively pushed them out of paid work. Against this narrow and restrictive maternal regime, advocates of gender equality were pushing for its reform in the early 1970s,<sup>61</sup> and this led to the adoption of a gender-neutral parental regime that was significantly limited compared with its Israeli counterpart. Moreover, in the United States, advocates for gender equality were also demanding basic protections for pregnant women that were already well established in other countries, such as job security or wage replacement for temporary work absences due to pregnancy and childbirth. Strategic choices made in this context contributed to the formation of unique legal structures unparalleled in other countries. One important example is the comparison of pregnancy to disability and the formation of a legal framework that ties parental leave to sick leave and mandates similar benefits in both contexts.

In the early 1970s, several U.S. states provided a disability insurance system for private employees temporarily disabled

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Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER, SOC. POL’Y & L. 459 (2008).

<sup>60</sup> See Joan C. Williams et al., “Opt Out” or Pushed Out?: How the Press Covers Work/Family Conflict, THE CENTER FOR WORKLIFE LAW (2006) [hereinafter “Opt Out” or Pushed Out?], <http://www.worklifelaw.org/pubs/OptOut-PushedOut.pdf> [<https://perma.cc/PQ3L-3Y9C>] (describing the workforce of the 1950s as one “in which male breadwinners were married to housewives who took care of home and children”).

<sup>61</sup> See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV 1, 10 (2010) (discussing the history of pregnancy and childbirth related rights in the United States and judicial and legislative efforts to expand these rights.).

due to illness or injury.<sup>62</sup> These schemes were initially established with a primary focus on male employees' health needs, excluded disabilities attributed to pregnancies, and were basically the only insurance plans available to female employees at that time. Under these circumstances, a theory that pregnancy was the same as other temporary medical conditions that disabled employees was seen as an effective argument in establishing a legal claim of sex-based discrimination and in winning pregnant women a benefit already recognized for other workers.<sup>63</sup> Initially the efforts to extend existing temporary disabilities insurance plans to cover work absences due to pregnancy focused on litigation.<sup>64</sup> However, these efforts failed when the Court rejected discrimination claims in this context. In 1974, the Supreme Court concluded in *Geduldig v. Aiello*<sup>65</sup> that discrimination against pregnancy and childbirth under a state insurance disability plan was not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>66</sup> Two years later the Court applied this reasoning to the Civil Rights Act of 1964, ruling in *Gilbert*<sup>67</sup> that the exclusion of pregnancy from a private employer's disability plan did not violate Title VII. As a result, reform efforts were channeled to the legislative arena.

In 1978, Congress overruled *Gilbert* by passing the Pregnancy Discrimination Act (PDA).<sup>68</sup> The PDA amended Title VII to define sex-based discrimination as including discrimination "on the basis of pregnancy, childbirth, or related medical conditions."<sup>69</sup> It also specifically required that "women affected by pregnancy, childbirth, or related medical conditions shall be

<sup>62</sup> KLEIN, *supra* note 36, at 5.

<sup>63</sup> The idea that under an equality model pregnancy should be treated neither worse nor better than other physical conditions that affect one's ability to work was initially formulated as a policy recommendation by President Johnson's Citizen's Advisory Council on the Status of Women in 1970. Two years later, the EEOC issued guidelines heavily influenced by this concept. See W. Williams, *supra* note 39, at 332-36.

<sup>64</sup> For instance, in 1971, Women's Bureau Director Elizabeth Duncan Koontz argued: "It seems certain that the courts, after full consideration, will adopt the obvious conclusion that pregnancy is a temporary disability and that women are entitled to the same autonomy and economic benefits in dealing with it that employees have in dealing with other temporary disabilities." Elizabeth Duncan Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480, 501 (1971); see also W. Williams, *supra* note 39, at 335.

<sup>65</sup> 417 U.S. 484 (1974).

<sup>66</sup> *Id.* at 485.

<sup>67</sup> Gen. Elec. Co v. Gilbert, 429 U.S. 125 (1976).

<sup>68</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2012)).

<sup>69</sup> *Id.*



treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .”<sup>70</sup> The concept that pregnancy was the same as any temporary disability thus became an official legal framework. Once embedded in legal thinking, it also influenced the subsequent development of parental leave legislation in the next decade and a half.

In 1993, eight years after it first considered a bill requiring employers to provide parental leave, Congress enacted the FMLA. At its core the FMLA requires employers to render employees a limited amount of unpaid leave when necessary to accommodate personal illness or family caregiving responsibilities.<sup>71</sup> The leave afforded under the FMLA has three important characteristics: it is gender-neutral; it provides similar treatment to sick leave and to parental leave; and it is unpaid.

The decision to embrace a gender-neutral scheme was based on similar rationales that triggered the transition from maternity leave to gender-neutral parental leave in countries such as Israel. The legislative record reveals that Congress, just like the Knesset, was concerned that laws focused on motherhood would trigger discrimination against women in hiring and promotion based on gender-role expectations about work/family obligations.<sup>72</sup> Congress also worried that non-

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<sup>70</sup> *Id.*

<sup>71</sup> Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 9 (1993) (codified at 29 U.S.C. § 2601 (2012)).

<sup>72</sup> See H.R. REP. NO. 103-8, pt. 2, at 14 (1993) (“While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping . . . .”). When Congress eventually enacted the FMLA in 1993, its text made clear that the gender neutrality of the leave was a key element in the legislative effort to combat gender-based discrimination in the workplace. Specifically the Act determines that a key finding that triggered its enactment was Congress’s acknowledgement that: “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” FMLA, 29 U.S.C. § 2601 (a)(5). It also adds that in response to this finding, one of the Act’s goal is to minimize “the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.” FMLA, 29 U.S.C. § 2601(b)(4); see also Matzner-Heruti, *supra* note 31, at 484 (quoting a Member of the Knesset as supporting the introduction of paternity leave laws in order to help women to “return to work” and “make progress at work”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2016 (2003) (pointing out that states which offered extended maternity leave but no paternity leave “offered a de facto

neutral laws would discourage men from sharing greater child-care responsibilities with their female partners.<sup>73</sup> Feminist groups and activists involved behind the scenes in promoting this bill shared these concerns and insisted on the equal treatment principle: that the right to leave be granted to fathers as well as mothers.<sup>74</sup> Gender neutrality and the similar treatment of men and women were thus central to Congress's purpose of achieving gender equality. It left a deep imprint on the statute that was ultimately enacted in a manner that resembles the formation of comparable legislation in other countries.

At the same time, linking the treatment of parental leave to sick leave and settling for unpaid leave for all workers is a unique American development. The FMLA was inspired by the PDA legacy, namely that family leave and medical leave should be treated as one legal unit that cannot be disaggregated. In addition, many feminist activists and scholars around this time had become concerned about the wisdom of applying gender-specific measures to regulate parental leave entitlements. A case working its way through the federal court system in the early 1980s divided the feminist community.<sup>75</sup> At issue was whether the State of California could require employers to give only women four months leave for childbirth without violating the PDA.<sup>76</sup> Critics of the California statute argued that the PDA should be interpreted to require that employers treat pregnant women the same as comparably disabled workers, assuming that this equation was the best formula for protecting women from discrimination in the workplace.<sup>77</sup> They feared that a gender-specific measure in the context of pregnancy and childbirth would perpetuate the stereotype of women as less dedicated workers. Although the Supreme Court eventually upheld

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form of childcare leave to women, not men, effecting benefits discrimination against men, creating incentives for discrimination against women in hiring and promotions, and entrenching stereotypical gender-role expectations about family/work obligations").

<sup>73</sup> See H.R. REP. NO. 103-8, pt. 2, at 14 (1993) ("[A] policy that affords women employment leave to provide family care while denying such leave to men . . . impedes the ability of men to share greater responsibilities in providing immediate physical and emotional care for their families.").

<sup>74</sup> See RONALD D. ELVING, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* 39 (Touchstone ed., 1996).

<sup>75</sup> See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); Ross, *supra* note 43, at 96.

<sup>76</sup> See *Guerra*, 479 U.S. at 275.

<sup>77</sup> See Brief for the National Organization for Women (NOW) et al. as Amici Curiae Supporting Neither Party at 12-13, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494).

the gender-specific statute,<sup>78</sup> the equal treatment position played a significant part in shaping the final scope of the FMLA. Feminist groups and activists involved in promoting this legislation insisted that in addition to both parents enjoying an equal right to parental leave, the law had to apply to medical situations.<sup>79</sup> In their view the medical element was a crucial addition because it made the legislation truly gender-neutral and immune to gender stereotypes.<sup>80</sup> This position played a prominent part in the genesis of the combined medical and parental gender-neutral provisions of the FMLA. Hence, the strategic linkage between pregnancy and disability that facilitated the enactment of the PDA in the 1970s later provided the normative framework for the issue of parental leave, leading to the creation of a simultaneous federal entitlement to (unpaid) parental and sick leave.

As a result of the pregnancy-disability correlation and the allocation of similar entitlements to the two types of leave, the estimated overall cost of the new legislation was high and the decision to restrict the proposed benefit to unpaid leave was reinforced.<sup>81</sup> These monetary concerns also played a significant role in subsequent years in undermining efforts to reform the FMLA and to provide paid family and medical leave.<sup>82</sup>

In addition, the FMLA was constructed in the setting of an employment culture in which models of parental leave that already existed were usually restricted to unpaid leave.<sup>83</sup> Only two percent of American workers were entitled to paid leave in 1989 and this leave was typically restricted to a few days.<sup>84</sup> By contrast, countries like Israel promoted the shift from strictly maternal regimes to gender-neutral parental policies at a time

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<sup>78</sup> See *Guerra*, 479 U.S. at 292.

<sup>79</sup> See ELVING, *supra* note 74, at 39.

<sup>80</sup> See *id.*

<sup>81</sup> See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 162–64 (1993) (discussing cost concerns raised by small businesses resulting in restrictions on leave for medical care and birth and raising of the employer exemption from fifteen to fifty employees); ELVING, *supra* note 74, at 30 (documenting that proponents of the Family Employment Security Act, a precursor to the FMLA, decided early on not to push for a paid leave because it seemed to be a political impossibility).

<sup>82</sup> See Suk, *supra* note 61, at 17–24 (documenting various legislative efforts to reform the FMLA and to add paid leave).

<sup>83</sup> Cf. Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 *COMP. LAB. L.J.* 373, 374–75 (1996) (discussing the scope and nature of maternity and paternity leave policies in the United States in the late 1980s and noting that most of these policies provided unpaid leave).

<sup>84</sup> *Id.* at 375.

when paid maternity leave was an already established and deeply accepted idea. This significant difference made the establishment of paid parental leave in these countries a natural move, taken for granted by all sides of the political spectrum.

Nevertheless, when the FMLA was enacted, expectations for social change in the division of childcare at home as a direct result of legal reform were high.<sup>85</sup> The vision of men assuming greater caretaking responsibilities at home was not perceived as utopian. Instead, it was assumed that the provision of a gender-neutral leave will encourage “fathers and mothers . . . to participate in early childrearing and the care of family members who have serious health conditions.”<sup>86</sup> The congressional record reveals that the discriminatory nature of existing maternal schemes and the lack of formal opportunities for men to enjoy paternity leave were identified as the main barrier stopping men from taking parental leave.<sup>87</sup> When some opponents expressed concerns that the bill “may lead to discrimination against younger women of childbearing age” who are “most likely to take advantage of this mandate,”<sup>88</sup> proponents refuted these claims:

The act does not just apply to women, but to men and women, to fathers, as well as to mothers, to sons as well as to daughters. So to say that women will not be hired by business is a specious argument, unless you assume that men are not caring parents and men are not loving sons. I believe that they are.<sup>89</sup>

The underlying assumption was clear: working fathers wished for parental leave to care for a newborn or a sick child but were not given a legal right to it, or were deterred from taking advantage of existing policies by workplace practices that discriminated against such fathers. Hence the legal move of equalizing the availability of parental leave for both sexes was portrayed as responding to an existing and pressing social

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<sup>85</sup> See Post & Siegel, *supra* note 72, at 1987–89.

<sup>86</sup> Family and Medical Leave Act, 29 U.S.C. § 2601(a)(2) (2012).

<sup>87</sup> Bureau of Labor Statistics figures, issued in 1990 with data from 1989, indicated that 37% of full-time employees working in private business with more than 100 workers were covered by unpaid maternity leave policies, while only 18% were covered by unpaid paternity leave policies. S. REP. NO. 103–3, at 14–15 (1993). Congress also heard testimony that “[w]here child-care leave policies do exist, men, both in the public and in private sectors, receive notoriously discriminatory treatment in their requests for such leave.” Post & Siegel, *supra* note 72, at 2016 n.228; see H.R. REP. NO. 103–8, pt. 2, at 14. .

<sup>88</sup> 139 CONG. REC. 1713 (1993) (statement of Sen. Hatch).

<sup>89</sup> 139 CONG. REC. 1697 (1993) (statement of Sen. Boxer).

need, opening up the way for male workers to share caretaking tasks at home.

This optimistic perception of the FMLA's supposed role in promoting gender equality was shared by commentators as well. Susan Deller Ross for instance, argued in the early 1990s when earlier versions of the FMLA were still being debated in Congress:

The federal FMLA has some significant strengths that should be discussed—strengths derived from its equal-treatment approach to the problems of both medical disability and parenting. . . . It helps to set the stage for a more complete integration of fathers at home by allowing them substantial time off to care for seriously ill children and their own parents as well as for newborns. . . . *And because the FMLA provides medical leave that equal numbers of men and women will take, and family leave that a significant number of men will take, it also eliminates the incentive that special-treatment, female-only, state laws give employers not to hire women.*<sup>90</sup>

Similar expectations accompanied the enactment of the corresponding parental legislation in Israel.<sup>91</sup> Indeed, significant differences appeared in the scope and substance of parental policies developed in the two countries in the 1990s. Nevertheless, the assumption that the availability of gender-neutral parental leave would soon change gendered patterns of care at home by encouraging men to share caretaking tasks was a common theme that served as the central rationale for promoting these policies.

However, recent data clearly indicate that these expectations remain remote from reality. The next Part discusses the gap between these optimistic assumptions and the gendered division of care-work at home that still persists.

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<sup>90</sup> Ross, *supra* note 43, at 104 (emphasis added) (citations omitted).

<sup>91</sup> In 1996, when the legislature debated the proposal to transform maternity leave to parental leave, MK Abraham Poraz, who initiated this proposal, highlighted the relationship between his proposal and current reality, explaining: "I think that in our society there is a growing willingness of men to take care of babies. . . . Today men can derive great joy from taking a leave to care for the new born." DK (1996) 3785 (Isr.). In subsequent years, other proponents of this legal shift further stressed its significance in responding to a changing reality in which men desire to stay at home. MK Gozanski noted: "I think the principle here is very important—to provide both partners the opportunity to be equally responsible for the new born." Moreover, taking on the theme that portrays equal parenting as something that is relevant to current reality she added: "men's desire to stay at home and care for the home seems to me like a positive refreshing change." DK (2001) 5394 (Isr.).

## II

## THE PERSISTENCE OF MOTHERHOOD

In 2012, the United States Department of Labor's Chief Evaluation Office, continuing the work of the Commission on Family and Medical Leave, published the third in a series of surveys on the impact of the FMLA on both the rate and type of employee leave-taking and on employers.<sup>92</sup> Similar surveys were conducted in 1995<sup>93</sup> and 2000,<sup>94</sup> and together they provide a highly detailed picture of leave-taking patterns that have developed since the enactment of the FMLA. The overall picture that emerges from two decades of experience with the FMLA is that the Act exerted a significant effect on employers, encouraging addition to or extension of leave available to fathers, which only a minority of companies provided prior to its enactment.<sup>95</sup> The first years of the FMLA were especially transformative in this context.<sup>96</sup> At the same time, the Act did relatively little to change the gender-based allocations of caregiving and leave-taking that were solidly established before its enactment. Empirical data available prior to the enactment of the FMLA demonstrated that even when employers offered new fathers job-guaranteed leave of several weeks, under state parental leave statutes, the average they took was three to five days.<sup>97</sup> Working mothers however had almost always taken time off from work for childbirth and new parenting, averaging 12.6 weeks even in the absence of mandatory leave policies.<sup>98</sup>

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<sup>92</sup> See JACOB ALEX KLERMAN, KELLY DALEY & ALYSSA POZNIAK, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 4-6 (Cambridge, MA: Abt Associates, Inc., 2012 (revised 2014)).

<sup>93</sup> *Id.* at i. In 1995, the Commission on Family and Medical Leave commissioned two surveys: an employee survey and an establishment survey. The results of both were presented with other Commission findings. COMM'N ON FAMILY & MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES *passim* (1996).

<sup>94</sup> U.S. DEPT OF LABOR, WAGE & HOUR DIV., THE 2000 SURVEY REPORT (2000), <https://www.dol.gov/whd/fmla/toc.htm> [<https://perma.cc/EN9R-X7RT>]; KLERMAN, *supra* note 92, at 1.

<sup>95</sup> The 1995 survey found that only 30% provided policies comparable to the FMLA voluntarily prior to its enactment. KLERMAN, *supra* note 92, at 1.

<sup>96</sup> In the years following the enactment of the FMLA, two-thirds of employers covered by the Act changed some aspect of their family or medical leave policies to come into compliance with the Act's requirements. See THE 2000 SURVEY REPORT, *supra* note 94. At the same time, as of 2001, the FMLA only covered 60% of American workers and 6% of the work establishments, leaving 40% of workers without any federal parental leave support. See Anthony, *supra* note 59, at 474-75.

<sup>97</sup> See James T. Bond et al., *Beyond the Parental Leave Debate: The Impact of Laws in Four States*, 47 YOUNG CHILDREN 39, 39-42 (1991).

<sup>98</sup> *Id.*

Similar gendered patterns of leave-taking are still evident today. The 2012 FMLA final report reveals that of all female employees, 3.9% took leave by reason of having a new child and 3.5% took a leave by reason of taking care of a family member's health condition (spouse, child, or parent).<sup>99</sup> The corresponding numbers for male employees are 2.5% and 2%.<sup>100</sup> While these numbers show some gender difference, they mask a much greater disparity that can be traced in supplementary data on length of parental leave by gender. These data indicate that the vast majority of male parental leave-takers (70%) take leave for parental reasons for a negligible period of zero to ten days.<sup>101</sup> Female employees on the other hand tend to take much longer leaves for parental purposes. 38% percent of female employees (as opposed to 6% of male employees) take leave of more than 60 days for parental reasons, and a further 18% (as opposed to 9% of men) take leave of 41 to 60 days.<sup>102</sup> Hence, two decades of a federally guaranteed right to a gender-neutral parental leave have not changed traditional leave-taking patterns, wherein working women take relatively long leaves for parental reasons while men take negligible leaves.<sup>103</sup>

These gendered patterns of parental leave-taking shed light on a broader picture of important gender role differences in the family and societal attitudes to women's tendencies as primary caretakers. A recent analysis of time-use data among working parents with children under the age of eighteen still shows a significant gender-based difference in the amount of time spent with children on a weekly basis.<sup>104</sup> The time parents spend on housework varies by gender as well. Mothers spend eighteen hours weekly doing household chores while the average weekly housework hours for men is ten.<sup>105</sup> This descriptive fact—that women do much more child-care and family work—is nurtured and reinforced by stereotypical normative judgments that still

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<sup>99</sup> KLERMAN, *supra* note 92, at 138.

<sup>100</sup> *Id.* at 138.

<sup>101</sup> *Id.* at 140–41.

<sup>102</sup> In addition, 18% of females versus 9% of males take a leave of forty-one to sixty days. *Id.* at 141–42.

<sup>103</sup> See BRAD HARRINGTON, FRED VAN DEUSEN & BETH HUMBERD, BOS. COLL. CTR. FOR WORK & FAMILY, THE NEW DAD: CARING, COMMITTED AND CONFLICTED 15 (2011); Ann Bartel et al., *Paid Family Leave, Fathers' Leave-Taking, and Leave-Sharing in Dual-Earner Households* 6 (Nat'l Bureau Econ. Research, Working Paper No. 21747, 2015).

<sup>104</sup> KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 6 (2013) (The exact figures for 2011 are 13.5 hours per week spent with children for mothers, as opposed to 7.3 hours for fathers.).

<sup>105</sup> The exact figures are 45% of mothers and 41% of fathers. *Id.*

persist. Around forty percent of parents—mothers and fathers alike—believe “the best thing for a young child is to have a mother who works part time.”<sup>106</sup> One third of adults think “it’s best for young children if their mothers do not to work at all outside of the home.”<sup>107</sup> Relatively few adults (16%) say that having a mother who works full time is best for children.<sup>108</sup> As for what working parents of young children value most in a job, it turns out that “a high-paying job” is fathers’ central concern, while working mothers rate “having a flexible schedule” as their first priority.<sup>109</sup> These attitudes about parenthood and work appear to contribute to a gendered reality of labor-force participation. Recent data indicates that only 69.9% of mothers with children participate in the labor force, as opposed to 92.8% of fathers.<sup>110</sup> The least likely to work outside the home are women with children younger than one year, and the most traditional pattern of “he earns she cares” is apparent among married-couple families with at least one child younger than six.<sup>111</sup> Labor-force participation statistics also reveal that 63.9% of those working part-time are women, and it is more likely that their decision to work that way is related to child-care problems or family obligations, in contrast to male part time workers, whose main reason for working part-time is related to their own health issues.<sup>112</sup> There is also a clear correlation of women’s fertility and child-rearing years with their patterns of employment. Unemployment rates for mothers are highest among those of children younger than three.<sup>113</sup> Finally, of all age groups, women aged twenty-five to fifty-four are the ones most likely to work part time.<sup>114</sup> Gendered patterns of familial work and paid work are thus most pronounced in parents of children younger than eighteen. Mothers remain much more likely than fathers to take parental leave, to work part

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<sup>106</sup> *Id.* at 5. The authors explain that the term ‘young children’ applies to children younger than 18. *Id.* at 1 n.1.

<sup>107</sup> *Id.* at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Mothers and Families*, U.S. DEP’T OF LABOR, [http://www.dol.gov/wb/stats/mother\\_families.htm](http://www.dol.gov/wb/stats/mother_families.htm) [<https://perma.cc/B9N4-WEWS>] (last updated Aug., 2014).

<sup>111</sup> *Id.* In 37.2% of these families the father is employed and the mother is not.

<sup>112</sup> See *Full-Time and Part-Time Employment*, U.S. DEP’T OF LABOR, FULL-TIME AND PART-TIME EMPLOYMENT (2016), [hereinafter *Full-Time and Part-Time Employment*] <https://www.dol.gov/wb/stats/NEWSTATS/latest/parttime.htm#one> [<https://perma.cc/3DP9-589L>]; Anthony, *supra* note 59, at 480.

<sup>113</sup> U.S. DEP’T OF LABOR, WORKING MOTHERS IN THE U.S. (2013), [hereinafter WORKING MOTHERS] [http://www.dol.gov/wb/Infographic\\_on\\_working\\_mothers.pdf](http://www.dol.gov/wb/Infographic_on_working_mothers.pdf) [<https://perma.cc/J7T9-MFGB>].

<sup>114</sup> *Full-Time and Part-Time Employment*, *supra* note 112.



time, and to make different professional concessions in an effort to adapt their professional work to their parental responsibilities. Consequently, a mother with children younger than eighteen earns less than seventy-five cents for every dollar that fathers make.<sup>115</sup> The wage gap between fathers and mothers is larger than the wage gap between men and women at large.<sup>116</sup> It also increases with age and education.<sup>117</sup> Moreover, the fact that women continue to be the primary caretakers at home apparently contributes to the ongoing gender segregation of the workplace: 74.6% of those employed in the traditional pink-collar industries of educational and health services are still women.<sup>118</sup>

In Israel, despite its far more comprehensive system of parental supports, a very similar picture emerges with regard to the persistence of maternal patterns of care. The formal shift from paid maternity leave to paid gender-neutral parental leave has not at all undermined the unequal division of care-work in the family. Practically, parental leave continues to be maternity leave: fathers take parental leave only at a very negligible rate. Moreover, as time goes by, we see no change whatsoever in the number of women exercising this benefit, in contrast to the number of men. For example, in 1999—the first full year in which men and women could share parental leave—only 218

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<sup>115</sup> WORKING MOTHERS, *supra* note 113 (The exact wage gap for mothers and fathers is 25.3 cents.).

<sup>116</sup> *Id.* (The exact wage gap for men and women at large is 17.9 cents.).

<sup>117</sup> See U.S. BUREAU LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2015 at 2–3, 5 (2016), <https://www.bls.gov/opub/reports/womens-earnings/2015/pdf/home.pdf> [<https://perma.cc/VJ9R-JVHT>]. Several studies also reveal that working fathers as opposed to working mothers actually profit from being a parent, for example through using their position as the main breadwinner for wage negotiation strategies. In contrast, mothers tend to get collectively penalized, earning around 4% less per child, 10% less if they are high wage workers. See Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616, 618–20 (2010); Irene Boeckmann & Michelle Budig, *Fatherhood, Intra-Household Employment Dynamics, and Men's Earnings in a Cross-National Perspective 1* (Lux. Income Study, Working Paper No. 592, 2013); Samantha Samel, *How to Fight the 'Motherhood Penalty'*, FAIRYGODBOSS, <https://fairygodboss.com/articles/how-to-fight-the-motherhood-penalty> [<https://perma.cc/LJ3V-WTBK>] (last visited Oct. 1, 2017).

<sup>118</sup> See U.S. BUREAU OF LABOR STATISTICS, BLS REPORT 1059, WOMEN IN THE LABOR FORCE, A DATABOOK 64 (2015); Paul E. Gabriel & Susanne Schmitz, *Gender Differences in Occupational Distributions Among Workers*, 130 MONTHLY LAB. REV. 19, 22 (2007); see also ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN'S POL'Y RES., OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE 4, 15 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C419.pdf> [<https://perma.cc/8HFA-LNL3>] (indicating that there has been “little change in the gender balance of some of the most common occupations for either women or men during the last forty years”).

men did so compared to 65,963 women: a mere one-third of one percent.<sup>119</sup> Roughly the same figure holds for 2016: 520 men in contrast to 126,266 women, which is a negligible rate of four men to every one thousand women.<sup>120</sup> Official data also reveal that 34% of working women who give birth extend their maternity leave beyond the paid weeks and take an additional lengthy unpaid leave from several months to a year.<sup>121</sup> The legal extension of paid parental leave from twelve to fourteen weeks in 2000 intensified this dynamic, causing a greater number of women not to go back to work immediately after the end of the paid leave.<sup>122</sup> Working mothers are also more than twice as likely as working fathers to take leave of absence from work to care for a sick child.<sup>123</sup> Finally, the vast majority of families in Israel (73%) report that most or all household chores are performed by women.<sup>124</sup>

These patterns of leave-taking explain the low labor force participation rates of women with young children.<sup>125</sup> The vast majority of women of fertility age (thirty-five to forty-four) who do not work outside the home report that the reason is to take

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119 TAMI ELIAV, SOC. SEC. INST., ADMIN. OF RESEARCH & PLANNING, MATERNITY BENEFITS COLLECTORS IN 1996–1999 at 9, 17 (2001) (Isr.).

120 CHANTEL WASSERSTEIN, SOC. SEC. INST., ADMIN. OF RESEARCH & PLANNING, RECIPIENTS OF MATERNITY BENEFITS IN 2016 at 10–12 (2017) (Isr.). As the first six weeks of leave are reserved for the mother for the purpose of physical recovery from childbirth, the father can take up to nine weeks of paid leave. Like women, men are fully reimbursed for any loss of income during the leave. See *supra* note 54.

121 CHANTAL WASSERSTEIN & ESTER TOLEDANO, SOC. SEC. INST., ADMIN. OF RESEARCH & PLANNING, THE OCCUPATIONAL BEHAVIOR OF POSTPARTUM WOMEN FOLLOWING THE EXTENTION OF THE MATERNITY LEAVE at 3 (2014) (Isr.). In the period of five years from 2006 to 2010, 66.4% of the women went back to work right after the end of the paid maternity leave, 25.5% went back to work within the first 12 months after the maternity leave, and 8.1% didn't go back to work until after the first year after the maternity leave. In 2017, the period of paid leave was extended once again and it is now 15 weeks long. See *supra* note 54 and accompanying text.

122 WASSERSTEIN & TOLEDANO, *supra* note 121, at 3. In 2006, 71.4% of women returned to work immediately after the end of the paid leave. In 2010, this number decreased to 61%.

123 OSNAT PICHTELBERG-BARMETZ & MEIRAV GREENSTIEN, THE MINISTRY OF INDUS., COMMERCE & LABOR, RESEARCH & ECON., PARENTS' ABSENCE FROM WORK DUE TO CHILDREN'S ILLNESS 14 (2013).

124 RONIT HARIS-OLSHAK, THE MINISTRY OF ECONOMICS, THE INTEGRATION OF WORK AND FAMILY, THE DIVISION OF HOUSEHOLD CHORES 14 (2015).

125 Only 60% of females with children aged zero to one and 68% of females with children aged two to five are employed. See PETER MOSS, INT'L NETWORK ON LEAVE POLICIES & RESEARCH, 11TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2015 at 9 (2015), [http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual\\_reviews/2015\\_full\\_review3\\_final\\_8july.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2015_full_review3_final_8july.pdf) [<https://perma.cc/6PFB-7N4C>]. The equivalent figure for American women is 54% and 74%. *Id.*

care of the family and children.<sup>126</sup> Relevant data also indicate that mothers of young children, just like their American counterparts, tend to work part time in much greater numbers than men, and that their career choices are much more affected by familial considerations.<sup>127</sup>

In sum, however parenting is defined, women in both countries still do much more than men, with legal reforms in this area having surprisingly little impact in undermining traditional gendered patterns of care-work and paid work. To be clear, generous systems of benefits and protections for working parents such as the Israeli system have some obvious positive consequences for women's employment: they encourage mothers' participation in the labor market and provide job security that women lack in countries like the United States that has a relatively poor system of supports. However, with regard to the persistence of maternal patterns of care, the United States barely differs from countries like Israel, with significantly different and far more progressive parental policies. In fact, seen against the legal support that fathers officially enjoy in Israel, the maternal dilemma in Israel is far more pronounced.

This insight is particularly revealing as scholars often criticize the narrow American scheme of parental benefits for its insufficient encouragement of more men to share caretaking responsibilities. This scholarship stresses the fact that the United States is the only industrialized country that does not provide its working parents federally paid parental leave.<sup>128</sup>

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<sup>126</sup> The exact figure is 74.4%. RUTH HAPERIN-KADDARI ET AL., RACKMAN CTR. FOR THE ADVANCEMENT OF THE STATUS OF WOMEN, WOMEN AND FAMILY IN ISRAEL, BI-ANNUAL STATISTICAL REPORT 122 (2014).

<sup>127</sup> 31.7% of women with children aged 0–5 (in contrast to 6% of men) work between 20 to 34 hours per week and additional 31.8% (in contrast to 18.8% of men) work between thirty-five to forty-two hours per week. 19.2% of women of all ages who work part time report that they do so because of family and household concerns. The corresponding figure for men is 0.9%. Interestingly the percentage of women who work part time due to maternal and household tasks increases over the years rather than decreases. *Id.* at 128, 144–45.

<sup>128</sup> See, e.g., Bartel et al., *supra* note 103, at 5 ("Currently, all industrialized countries other than the United States have some kind of national paid parental leave policy."); OECD Family database, *supra* note 5, at 3, 7 (indicating that the United States is the only country without paid leave entitlements available to mothers or fathers). Only a few states have started introducing statewide paid parental leave in recent years, among those are California (2004), Washington (2007), New Jersey (2008) and Rhode Island (2013). According to a recent study these new policies are not sufficient to meet the needs of working parents. Stated reasons are short leave periods (4–6 weeks), insufficient financial compensation, lack of job security during leave taking, and overwhelming complexity of the parental leave system. Jay L. Zagorsky, *Diverging Trends in US Maternity and*

When the persistence of maternal patterns of care is discussed it is therefore attributed to the uniquely “thin” American parental regime. Commentators and advocates for gender equality argue in favor of a much more generous regime of positive gender-neutral parental benefits and protections such as paid leave.<sup>129</sup> Yet as this Part reveals, the comparative analysis casts doubt on the sufficiency of these moves in addressing maternal patterns of care and promoting significant changes in the family.

The following Part highlights that despite the magnitude of the maternal dilemma, images of change and progress continue to feed the legal discourse and media images of working parents. The depth of the problem is disguised, and the line between equal parenthood as a desired social and legal goal and its actual realization is blurred.

### III

#### THE RISE OF THE GENDER-NEUTRAL PARENT

##### A. The FMLA as an Agent of Change

In the years that followed the enactment of the FMLA, its image as an agent of social change was embraced by both commentators and the Court. The FMLA was described as “a

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*Paternity Leave, 1994–2015*, 107 AM. J. PUB. HEALTH 460, 461 (2017). Also the promised six weeks of paid parental leave by the Trump administration, mostly due to pressure by Ivanka Trump, need to be analyzed against the bigger picture of billions of dollars being cut in social welfare and thus not improving the situation for working parents on balance. Emily Peck, *Ivanka’s Maternity Leave Plan Is a Cruel Joke*, HUFFINGTON POST (May 23, 2017, 12:05 PM), [https://www.huffingtonpost.com/entry/ivankas-maternity-leave-plan-is-a-cruel-joke\\_us\\_59243975e4b094cdba578fcd](https://www.huffingtonpost.com/entry/ivankas-maternity-leave-plan-is-a-cruel-joke_us_59243975e4b094cdba578fcd) [<https://perma.cc/6QC7-PJUA>].

<sup>129</sup> For some representative examples of this diverse body of literature, see Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 61–62 (2004) (arguing that paid leave programs have the potential of affirmatively pressing men “into service” as once leave is paid, the primary disincentives for men disappear); Grill, *supra* note 83, at 383–90 (discussing barriers to paid leave in United States); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 1, 62–68, 93–96 (2000) (advocating for organizational incentives that can successfully encourage men to take leave such as reward programs for employers that support family leave among their employees or mandatory paternity leave); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 143–44 (1998) (noting the lack of incentive in the FMLA for men to take parental leave); Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1536–37 (2001) (pointing to European systems as potential models for paid leave); Mary Kane, *Paternity Leave Gains Acceptance in Work World: New Dads Take Time to Bond with Babies*, TIMES-PICAYUNE, June 16, 2002, at 1 (noting a long term trend in which more firms offer paid paternity leave and more men take advantage of it).

far-reaching statutory reform of the workplace,”<sup>130</sup> “vindicating equal citizenship values,”<sup>131</sup> and a vivid implication of the fact that “the days of Ozzie and Harriet are over.”<sup>132</sup> In *Nevada Department of Human Resources v. Hibbs*,<sup>133</sup> the Court affirmed the constitutionality of the FMLA on equal protection grounds and further strengthened the vision of the Act’s contribution to gender equality.<sup>134</sup>

William Hibbs was an employee in a unit of Nevada’s state government. He sought unpaid leave from his job to care for his ailing wife. Nevada granted him the leave under both the FMLA and a “catastrophic leave” policy, but later fired him. Hibbs sued under the FMLA, but Nevada argued for dismissal on the grounds that the sovereign immunity provided by the Eleventh Amendment precluded Hibbs’s action.<sup>135</sup> The Court rejected Nevada’s claim and upheld Hibbs’s right to sue his employer for the alleged violation of the FMLA.<sup>136</sup> Justice Rehnquist, writing the opinion of the Court, determined that Congress acted within its Section Five power when it enacted the family-leave provisions of the Act, since these provisions were an appropriate response to a history of state-sponsored gender discrimination.<sup>137</sup> He explained that prior to the enactment of the FMLA, men were denied parental accommodations that were given to women or were discouraged from taking parental leave.<sup>138</sup> This suggested that the fact that the Act mandated caretaking leave on gender-neutral grounds removed the primary barrier to an equal share of parental responsibilities between fathers and mothers.

Feminist scholars portrayed the Court decision in *Hibbs* as sending a clear message that “[p]roviding men with family leave” can “change underlying gendered patterns of family

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<sup>130</sup> Post & Siegel, *supra* note 72, at 2008.

<sup>131</sup> *Id.* at 2019.

<sup>132</sup> *Id.* at 2020.

<sup>133</sup> 538 U.S. 721, 725, 734–35 (2003) (upholding provisions of the Family and Medical Leave Act of 1993 as a valid exercise of Congress’s section 5 power of the Fourteenth Amendment and concluding that states can be sued for monetary damages in federal court for violating the family care provisions of the FMLA).

<sup>134</sup> *See id.* at 738 (noting that “in light of the evidence before Congress, a statute mirroring Title VII, the simply mandated gender equality in the administration of leave benefits, would not have achieved Congress’ remedial object. Such a law would allow States to provide for no family leave at all.”).

<sup>135</sup> *See id.* at 725.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.* at 735.

<sup>138</sup> *See id.* at 736.

care,”<sup>139</sup> further enhancing the image of the FMLA as a significant agent of change. That this case involved a man who took family leave to care for his ailing wife contributed to the image of a changing reality induced by the Act, in which traditional gender roles gradually disappear and men in ever greater numbers engage in care-work at home. Rehnquist was complimented for understanding the significance of the FMLA in undermining gender-role stereotypes.<sup>140</sup> The majority opinion was described as a “radical”<sup>141</sup> decision that is “helping people envision transformative change: a society where the ‘breadwinner’ and the ‘primary caregiver’ models are discarded in favor of a model in which both parents are equally involved in care work and market work . . . .”<sup>142</sup> More broadly, the present era in which Court decisions like *Hibbs* are delivered was referred to as “a time when modest but increasing numbers of men are more deeply engaged in day-to-day domestic labor . . . .”<sup>143</sup> The *Hibbs* decision was also heralded in gender-neutral terms as an important addition to a growing body of case law, in which *parents sue employers for family responsibility discrimination*.<sup>144</sup>

These images of a growing number of men engaged in the daily tasks of parenthood at home represent well-intentioned feminist attempts to reaffirm the significance of the gender-neutrality of the FMLA in changing the allocation of care-work within the family and promoting gender equality. Moreover, the enactment of the FMLA seemed to have generated a broader shift in legal discourse. As part of this shift, gender-neutral talk that focuses on “working parents” and on “family responsibilities” dominates the discussion of the work-family conflict and highlights its contemporary relevance to both men and women. Although empirical data suggest that this conflict is still primarily maternal, as women’s market-work is far more affected by their primary role as caregivers at home, legal dis-

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<sup>139</sup> Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 231 (2012).

<sup>140</sup> See Reva B. Siegel, “You’ve Come a Long Way, Baby”: Rehnquist’s New Approach to Pregnancy Discrimination in *Hibbs*, 58 STAN. L. REV. 1871, 1886 (2006) (noting that “*Hibbs* is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes.”).

<sup>141</sup> Mezey & Pillard, *supra* note 139, at 231.

<sup>142</sup> Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 381 (2004) [hereinafter C. Williams, *Hibbs as a Federalism Case*].

<sup>143</sup> Mezey & Pillard, *supra* note 139, at 234.

<sup>144</sup> C. Williams, *Hibbs as a Federalism Case*, *supra* note 142, at 366.

course often emphasizes the emergence of egalitarian patterns of parenting in an attempt to sustain the significance of the FMLA as an agent of change.

This shift in legal discourse is also exemplified by the emergence of a relatively new legal theory of discrimination on the basis of sex: Family Responsibilities Discrimination (FRD).

### B. The Theory of FRD and the Rise of the Gender-Neutral Parent

The legal theory of discrimination based on family responsibilities draws on the claim that when an employee, male or female, is treated adversely because of his or her family responsibilities, such practices can constitute family responsibility discrimination (FRD) in violation of Title VII. Despite its gender-neutral framing, as applicable to all workers with caretaking responsibilities, in practice this theory primarily protects working mothers and mothers-to-be. The most comprehensive analysis of FRD lawsuits from 1971 to 2004 found that women filed the overwhelming majority (92.27%).<sup>145</sup> This is not surprising in light of data discussed in the foregoing Part indicating that American women are still the primary caregivers at home.<sup>146</sup> Indeed, the growing numbers of FRD cases since the early 1990s clearly correlate with the percentage of mothers in the labor force.<sup>147</sup> Nevertheless, the fact that in practice the concept of FRD is primarily relevant to working mothers is often disguised by the gender-neutral conceptualization of this legal framework, and by a growing body of literature that stresses the significance of FRD for working parents irrespective of gender.

The concept of FRD has its origins in a 1971 Supreme Court case holding that an employer could incur Title VII liability by rejecting female job applicants because they had pre-school-age children.<sup>148</sup> The theory was developed in the influential work of Joan Williams that highlights the relation

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<sup>145</sup> MARY C. STILL, *CTR. FOR WORKLIFE LAW: U.C. HASTINGS C. OF L., LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES* 8 (2006) <http://www.worklifelaw.org/pubs/FRDreport.pdf> [<https://perma.cc/2AF5-YGKN>].

<sup>146</sup> See *supra* Part II.

<sup>147</sup> See STILL, *supra* note 145, at 15.

<sup>148</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that Title VII does not permit employers, in the absence of business necessity, to have "one hiring policy for women and another for men—each having pre-school-age children").

between work–family conflict and sex discrimination.<sup>149</sup> In 2007, the EEOC recognized the relationship between discrimination based on family responsibilities and sex discrimination, when the Agency issued an Enforcement Guidance on *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*.<sup>150</sup>

Initially, Williams developed what she termed the “maternal wall” theory, which focused on the discrimination against women with young children in the workplace.<sup>151</sup> The argument was that the maternal wall applies to cases where employers presume that a mother, particularly the mother of a young child, will have more family responsibilities than other workers and will prioritize those responsibilities over her work.<sup>152</sup> Based on the simple fact of motherhood, rather than work performance, women with young children are then passed over for promotions and other opportunities. In later years, this argument was expanded to apply to all instances where family caregivers irrespective of gender were discriminated against on the job. The EEOC official guidelines, which recognized the maternal wall theory, defined the problem as “the disparate treatment of workers with caregiving responsibilities.”<sup>153</sup> They clarified that the adverse treatment of an employee with family responsibilities amounts to sex discrimination when the employer resorts to gender stereotypes about caregivers.<sup>154</sup>

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149 See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 67–74 (2000) [hereinafter UNBENDING GENDER]; Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–98 (2003).

150 See EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 1 (2007) [hereinafter EEOC, ENFORCEMENT GUIDANCE] <https://www.eeoc.gov/policy/docs/caregiving.html> [<https://perma.cc/QB95-TJNH>]. In April 2009, the EEOC issued a supplemental document on “Employer Best Practices for Workers with Caregiving Responsibilities” giving employers concrete advice on how to avoid family responsibilities discrimination. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009), <https://www.eeoc.gov/policy/docs/caregiver-best-practices.html> [<https://perma.cc/7JTE-4QUJ>].

151 See UNBENDING GENDER, *supra* note 149, at 69–70.

152 See *id.* at 70.

153 EEOC, ENFORCEMENT GUIDANCE, *supra* note 150, at 2.

154 Specifically the guidelines explain: “Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. . . . Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work. Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.” *Id.*; see Joan C. Williams & Stepha-



The rhetorical shift from the terminology of a maternal wall theory to that of a FRD theory is of course necessary and reasonable in light of legal developments. The FMLA enables both men and women to take family leave to care for a newborn child or a sick family member. Antidiscrimination law dictates that employers apply the same standards to fathers and mothers. Therefore, both genders should be protected from discrimination when exercising leave benefits. Indeed, several men who experienced discrimination as a result of their efforts to take family leave have filed suits in recent years. William Hibbs, who requested family leave to care for his ailing wife, is one prominent example. Two other important examples that are often mentioned in this context are *Schultz v. Advocate Health and Hospitals Corp.*<sup>155</sup> and *Knussman v. Maryland*.<sup>156</sup> *Schultz* involved a maintenance employee of a hospital who was fired from his job after taking leave to care for his aging parents.<sup>157</sup> *Knussman* involved a Maryland state trooper whose request for parental leave to care for his newborn child was denied on account of his supervisor's view that caring for a newborn is a woman's job.<sup>158</sup> All three became high-profile cases. Hibbs's trial led to a Supreme Court precedent that affirmed the constitutionality of the FMLA on equal protection grounds.<sup>159</sup> *Schultz*'s family leave suit drew a record-high award of \$11.65 million.<sup>160</sup> *Knussman* has become the symbol of a new generation of fathers who struggle to assume more caregiving responsibilities.<sup>161</sup> In legal scholarship, these cases are often cited as

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nie Bornstein, *The Evolution of "FRD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1349–53 (2008).

<sup>155</sup> No. 01-C-702, 2002 U.S. Dist. LEXIS 9517, at \*5 (N.D. Ill. May 28, 2002).

<sup>156</sup> 272 F.3d 625 (4th Cir. 2001).

<sup>157</sup> See Joan C. Williams & Consuelo A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. L. 293, 323 (2007).

<sup>158</sup> In its decision, the court relied on evidence that Knussman's supervisor told him that "God made women to have babies and unless [he] could have a baby, there is no way [he] could be primary care [giver]." *Knussman*, 272 F.3d at 629–30. His supervisor also stated that Knussman's wife had to be either "in a coma or dead" before he could "qualify as the primary caregiver." *Id.* at 630. He was ultimately awarded \$40,000 in damages along with over \$625,000 in attorney's fees and costs.

<sup>159</sup> Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

<sup>160</sup> Dee McAree, *U.S. Case—\$11.65 Million Jury Award: U.S. Emotional Distress Case Draws Record \$11.65 Million Jury Award*, WORKPLACE BULLYING INST. (May 15, 2009), <http://www.workplacebullying.org/iied-us-2002/> [<https://perma.cc/36LL-8NUD>].

<sup>161</sup> For instance the EEOC guidelines refer to *Knussman* in support of the proposition that men with caregiving responsibilities just like women may encounter the maternal wall through employer stereotyping. EEOC, ENFORCEMENT GUIDANCE, *supra* note 150. Similarly, Joan Williams and Stephanie Bornstein cite

clearly illustrating that men and women are now suing successfully for discrimination on the basis of caregiving responsibilities.<sup>162</sup> These cases in addition to a few others have also been linked to broader societal changes, where “younger generations of men are less interested in sacrificing involvement in their families’ lives for their careers.”<sup>163</sup> However, these cases are the exception and not the rule. As maternal patterns of care persist, women continue to be the great majority of plaintiffs in FRD cases. It is also important to note that both *Hibbs* and *Schultz* involved care of a spouse or an aging parent, not young children. This distinction is significant as the care of aging parents or an ailing spouse is often a onetime episode, while the care of young children is an ongoing burden that can affect the life of a working parent for many years. The only comprehensive survey of FRD cases mentions the total of 43 cases of men suing for family responsibilities discrimination in the last four decades.<sup>164</sup> The survey provides no details of these cases and it is impossible to know how many of them concern fathers seeking parental leave as opposed to husbands or sons seeking family medical leave. However, the fact that *Knussman*, in addition to very few other cases, serve as the reference in legal scholarship to propositions regarding the stereotypical barriers experienced by working fathers attempting to do more care-work at home can indicate that such cases are rare.<sup>165</sup>

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*Knussman* as illustrating that “[w]hen FRD litigation is viewed as a whole, it includes not only mothers . . . but also fathers who were denied parental leave to which they were entitled.” See Williams & Bornstein, *supra* note 154, at 1347.

<sup>162</sup> For references to *Hibbs*, see C. Williams, *Hibbs as a Federalism Case*, *supra* note 142; Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 859 (2004); see also Matzner-Heruti, *supra* note 31, at 41–44; Kristin M. Malone, *Using Financial Incentives to Achieve the Normative Goals of the FMLA*, 90 TEX. L. REV. 1307, 1314 (2012). For references to *Schultz*, see Williams & Bornstein, *supra* note 154, at 1311–13; Williams & Cohen Cooper, *supra* note 162, at 861; Williams & Segal, *supra* note 149, at 146. For references to *Knussman*, see Malone, *supra* note 162, at 1314; Matzner-Heruti, *supra* note 31, at 38–41; Suk, *supra* note 61, at 15; Williams & Bornstein, *supra* note 154, at 1311; Williams & Cohen Cooper, *supra* note 162, at 861; Williams & Segal, *supra* note 149, at 146–47.

<sup>163</sup> Williams & Bornstein, *supra* note 154, at 1313.

<sup>164</sup> STILL, *supra* note 145, at 8.

<sup>165</sup> A few other cases involving fathers as caregivers that are mentioned in legal scholarship include: *Willard v. Ingram Constr. Co. Inc.*, 194 F.3d 1315 (6th Cir. 1999); *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711 (E.D. La. 2002); *Blohm v. Dillard’s Inc.*, 95 F. Supp. 2d 473 (E.D.N.C. 2000). See *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51 (D. Mass. 2012); Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393 (2007); see also Matzner-Heruti, *supra* note 31, at 38.

The problem then is not that the theory of FRD accounts for the grievances of the few fathers who suffered discrimination when attempting to take leave to care for a newborn or a sick child. Instead, the overemphasis on the significance of these cases as reflecting a broader societal change constitutes the problem. Policy makers and scholars often acknowledge that women continue to be most families' primary caregivers. But concomitant references to what is depicted as a new trend of families, where women are "increasingly relying on fathers as primary childcare providers"<sup>166</sup> undermine the significance of this gendered reality within the family by creating an image of a substantial ongoing social change. Just as the FMLA enactment was justified and promoted by rhetoric stressing its relevance to a changing reality in which men increasingly assume caretaking responsibilities, similar images feed arguments in favor of further developing the theory of FRD. These images justly portray the FMLA, as well as the evolution of FRD case law, as important legal developments for promoting gender equality. At the same time, the portrayal of these developments as responding to family responsibility issues, which men and women now equally confront, masks a very clear gendered reality behind a veil of gender-neutrality. It blurs the line between egalitarian parenting as an ideal and its actualization in real life. Consequently, the deeper gendered structures and forces that perpetuate a reality of gender inequality are disguised, and public attention is deflected from the larger legal changes that must be made.

### C. Media Images of Egalitarian Parenting and the Emerging Paradigm of Choice

Contemporary legal images of emerging egalitarian patterns of parenting are often nurtured by popular media depictions of modern families in the twenty-first century. Shared parenting or even reversed gender roles in caretaking are presented as the new characteristics of a growing number of these families. Images of families in which "Mom and Dad Share It All,"<sup>167</sup> or "stay-at-home husbands"<sup>168</sup> mind the kids while their fast-track wives go to work, contribute to the vision of an egalitarian revolution in the family.

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<sup>166</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 150.

<sup>167</sup> Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES, June 15, 2008, at 44.

<sup>168</sup> *Id.*; see also Betsy Morris, *Trophy Husbands*, FORTUNE, Oct. 14, 2002, at 79.

Another intriguing theme that shapes public images of modern parenthood is “maternal choices.” Popular media depictions of high achieving women choosing to return home as a result of changing preferences can be traced back to the 1980s.<sup>169</sup> However, in recent years these images have reemerged with a pseudo feminist twist. One notable example is Lisa Belkin’s piece in the *New York Times* several years ago entitled *The Opt-Out Revolution*.<sup>170</sup> It featured high-achieving, college-educated women who chose motherhood over a professional career. The article depicted these measures as a proactive revolution, the product of women’s relative empowerment and newly attained freedom to make these decisions. “Why don’t women run the world?” the article asked. Its answer: “Maybe it’s because they don’t want to.” The article provoked unprecedented commentary and critique.<sup>171</sup> Some questioned Belkin’s depiction of the phenomenon as a real trend, and argued that at-home moms in fact formed a distinct minority;<sup>172</sup> others questioned more broadly the basic thesis of the opt-out revolution.<sup>173</sup> However, Belkin’s piece succeeded in defining the terms of the debate.<sup>174</sup> “Opting out” remains a powerful

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<sup>169</sup> PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 3 (2007).

<sup>170</sup> Lisa Belkin, *The Opt Out Revolution*, N.Y. TIMES, Oct. 26, 2003.

<sup>171</sup> See, e.g., STONE, *supra* note 169; WOMEN WHO OPT OUT: THE DEBATE OVER WORKING MOTHERS AND WORK-FAMILY BALANCE (Bernie D. Jones ed., 2012) [hereinafter Bernie D. Jones]; Beth A. Burkstrand-Reid, “Trophy Husbands” & “Opt-Out” Moms, 34 SEATTLE U. L. REV. 663 (2011).

<sup>172</sup> For instance, Joan Williams and others argued that the media discourse of opting out mainly focuses on highly educated women, who make up only 8% of the female workforce. Relying on relevant data they noted that only 5% of women regard opting out as an active choice while most working women (86%) report that they end up staying at home due to being pushed out in connection with incompatibility of work and family life. “Opt Out” or Pushed Out?, *supra* note 60, at 10–11.

<sup>173</sup> Belkin’s piece was criticized on three primary grounds. First, it was argued that in most instances women are actually pushed of the workplace. Second, Belkin’s piece was criticized for its focus on highly educated professional women and its implicit assumption that all women share the same work-family conflicts. Finally, Belkin’s piece was criticized for its failure to consider the significance of class and race in affecting women’s participation in the workplace. See, e.g., E.J. Graff, *The Opt-Out Myth*, 45 COLUM. JOURNALISM REV. 51, 52–54 (2007) (critiquing Belkin’s article on a variety of grounds). For a collection of critical essays that question the basic thesis of Belkin’s piece, see generally Bernie D. Jones, *supra* note 171.

<sup>174</sup> A recent Harvard Business School study notes that Belkin’s piece “added the term ‘opt out’ to the ‘cultural lexicon.’” Robin J. Ely, Pamela Stone & Colleen Ammerman, *Rethink What You “Know” About High-Achieving Women*, HARV. BUS. REV., Dec. 2014, at 100, 103. One example of the manner in which Belkin’s terminology continues to define the terms of the debate is Joni Hersch’s recent study that embraces the term “opting out” to describe working patterns among

image of professional women going home;<sup>175</sup> it contributes to the image of a new phenomenon, distinct from the past traditional and discriminatory gendered division of care-work at home.<sup>176</sup>

Interestingly, the theme of motherhood as a new choice that women can now make can be logically linked to the theme of egalitarian parenting. If the image of a growing number of men shouldering care-work at home is portrayed in legal and popular discourse as representing a noteworthy contemporary social trend, presumably assuming more or fewer parental responsibilities is now a matter of individual choice, shaped exclusively by lifestyle preferences.<sup>177</sup> Sure enough, Belkin's influential piece was supplemented several years later by another portrayal of modern parenthood: *When Mom and Dad Share It All*.<sup>178</sup> This piece implicitly connected women's new possibilities for parental choices to an emerging reality of gender equality. This link between emerging patterns of egalitarian parenting and motherhood as a choice can be traced in legal scholarship as well.<sup>179</sup> Hence, what is in fact a reflection of old gendered structures that were not undermined by legal reforms is now re-conceptualized as a new product of a liber-

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women graduates of elite institution. See Joni Hersch, *Opting Out Among Women with Elite Education*, 11 REV. ECON. HOUSEHOLD 469, 470 (2013).

<sup>175</sup> Ten years after the publication of Lisa Belkin's piece, Judith Warner wrote a follow up article on the "opt-out generation" reporting that now these women want to be "back in" the labor market, thus affirming the original "opt-out" depiction of the relevant trend. Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES, (Aug. 7, 2013), <http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html> [<https://perma.cc/ECC7-XT7A>].

<sup>176</sup> Nancy Levit notes in this context that that "press-constructed narratives have enormous staying power" in part because most Americans rely on popular media as their main source of information. Nancy Levit, *Reshaping The Narrative Debate*, 34 SEATTLE U. L. REV. 751, 760, 764 (2011).

<sup>177</sup> In criticizing the choice narrative that underlies the "opt-out" characterization of some women leaving the labor market, Nancy Levit explains that "the opt-out story locates the solution to the work-family debate in individual choice. Individual women can 'choose' to resolve the tensions between work and family by just electing to stay home with the kids. It is a resolution that is not desired by most women, won't work for many women, and one that completely omits institutional and social responsibility for the architecture of the workplace." *Id.* at 763.

<sup>178</sup> Belkin, *supra* note 167.

<sup>179</sup> One notable example is Naomi Mezey and Cornelia Pillard's article *Against the New Maternalism* in which the authors criticize various mother groups for embracing traditional concepts of motherhood "and not parenthood or caregiving" despite the fact that these groups "understand that women can, to a significant extent, choose or eschew those roles." This critique is articulated in light of what the authors describe as a changing reality in which "modest but increasing numbers of men are more deeply engaged in day-to-day domestic labor, and there is, broadly speaking, a much less rigidly gendered allocation of the actual, pervasive work of parenting." Mezey & Pillard, *supra* note 139, at 233-34.

ated world in which women can now freely choose to assume more caretaking responsibilities than their male partners. This theme of choice-based motherhood supplements the theme of egalitarian parenthood in disguising the magnitude of the maternal dilemma and the social and economic structures that still perpetuate a reality of gender inequality within the family. Moreover, if the rise of egalitarian and choice-based patterns of parenting is presented as an important characteristic of a growing number of families, the image of existing legal mechanisms such as the FMLA as important agents of change is implicitly strengthened, and the need for further legal reforms is thereby disguised.

The next Part analyzes a recent employment discrimination case that provides an important illustration of the manner in which unequal patterns of care-work at home continue to shape and affect mothers' participation in the workplace. This case also reveals the discriminatory consequences for women when gendered patterns of care and work are portrayed as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice shape these preferences.

#### IV

##### *EEOC v. BLOOMBERG*: GENDER DISCRIMINATION UNDER THE GUISE OF GENDER-NEUTRALITY AND THE PARADIGM OF INDIVIDUAL CHOICE

In 2007, the EEOC filed a wide-ranging lawsuit against Bloomberg, the financial news and information company.<sup>180</sup> The EEOC accused Bloomberg of engaging in a pattern or practice of discrimination against pregnant employees or those who had recently returned from maternity leave, and generally fomenting a culture of discrimination against mothers.<sup>181</sup> The EEOC alleged that Bloomberg reduced pregnant women's or mothers' pay, demoted them in title or in number of directly reporting employees, reduced their responsibilities, excluded them from management meetings, and subjected them to stereotypes about female caregivers.<sup>182</sup> This high-profile case, which involved a class action as well as individual claims of discrimination and retaliation, never went to trial. In a series of decisions in the course of seven years, Judge Preska of the

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<sup>180</sup> Complaint, *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011) (No. 07 Civ. 8383).

<sup>181</sup> *See id.* at 3.

<sup>182</sup> *Id.*

Southern District of New York dismissed all legal claims in this case and granted summary judgment for Bloomberg, effectively ending the case at the district court level.<sup>183</sup>

For the purposes of this Article, I focus primarily on the court decision in the class action suit,<sup>184</sup> as well as its decision in one of the individual lawsuits: that of Jill Patricot, who was one of six Bloomberg employees who joined the EEOC gender discrimination suit on their own behalf.<sup>185</sup> I argue that, analyzed together, both lawsuits offer important insights into dilemmas of gender inequality in the workplace that result from the fact that, despite parental policies' gender neutrality, women continue to be the primary caretakers at home and gender-role stereotypes flourish. The court neglected to recognize these dilemmas because it was captured by images that portrayed contemporary parenthood as a domain of equality and individual choice, thus masking the discriminatory consequences for women when unequal patterns of care-work at home shape mothers' participation in the workplace, especially in male-dominated environments.

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<sup>183</sup> The class action lawsuit was denied because the court determined that the EEOC evidence was not sufficient to raise a genuine issue of material fact about whether Bloomberg had engaged in a pattern or practice of sex or pregnancy discrimination. See *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 480–81 (S.D.N.Y. 2011). The individual claims were dismissed because the EEOC failed to meet its statutory duty to conciliate. See *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 815 (S.D.N.Y. 2013). Some were also declared to be time-barred. See *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 650 (S.D.N.Y. 2010). The claims of the six women who joined the lawsuit as plaintiff-intervenors were dismissed because the court held that they failed in making out a prima facie case of discrimination and retaliation. *Bloomberg*, 778 F. Supp. 2d at 486–87. One exception was Jill Patricot, whose discrimination claim initially survived summary judgement but was later dismissed because she failed to mitigate damages by voluntarily resigning from Bloomberg. See *EEOC v. Bloomberg L.P.*, 29 F. Supp. 3d 334, 344 (S.D.N.Y. 2014). The EEOC filed an appeal in the Second Circuit but later withdrew the appeal. See Ben James, *2nd Circ. EEOC Appeal Pulled in Bloomberg Pregnancy Fight*, LAW360 (Feb. 13, 2015, 4:45 PM), <https://www.law360.com/articles/621222/2nd-circ-eecoc-appeal-pulled-in-bloomberg-pregnancy-fight> [<https://perma.cc/48F8-K9KG>]. For all district court decisions in this matter, see *Bloomberg*, 29 F. Supp. 3d 334; *EEOC v. Bloomberg L.P.*, 07 Civ. 8383 (LAP), 2014 U.S. Dist. LEXIS 18133 (S.D.N.Y. Jan. 23, 2014); *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816 (S.D.N.Y. Sept. 9, 2013); *Bloomberg*, 967 F. Supp. 2d at 802; *Bloomberg*, 778 F. Supp. 2d 458; *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 2010 U.S. Dist. LEXIS 129186 (S.D.N.Y. Dec. 2, 2010); *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 2010 U.S. Dist. LEXIS 113798 (S.D.N.Y. Oct. 25, 2010); *EEOC v. Bloomberg L.P.*, 2010 U.S. Dist. LEXIS 92511 (S.D.N.Y. Aug. 31, 2010); *EEOC v. Bloomberg L.P.*, 07 Civ. 8383 (LAP), 2010 U.S. Dist. LEXIS 80113, (S.D.N.Y. Aug. 4, 2010).

<sup>184</sup> See generally *Bloomberg*, 778 F. Supp. 2d 458.

<sup>185</sup> *Bloomberg*, 967 F. Supp. 2d 816 (dismissing claims of all plaintiff-intervenors except Jill Patricot); *Bloomberg*, 29 F. Supp. 3d 334 (evaluating Jill Patricot's claims).

In support of its claim that Bloomberg discriminated against new mothers, the EEOC submitted evidence that pregnant women and mothers who had recently returned from maternity leave incurred statistically significant lower base pay rate changes and were given smaller grants than other employees with the same company tenure, job tenure, and pre-Bloomberg experience. Nonetheless, the court determined that this was not a valid comparison because women who took maternity leave should be compared to other employees who took a long leave of absence from work—60 days or longer—for whatever reason. The court explained that this latter group of employees “serve[d] as the closest comparators to the Class Members” because “[l]ike women who took maternity leave, they have been continuously absent from work for an extended period of time.”<sup>186</sup>

Once the judicial focus shifted from employees with similar credentials to employees who took long leaves for whatever reason, Bloomberg’s statistical evidence indicated that everyone at Bloomberg who took a long leave for whatever reason, experienced lower compensation growth than did non-leave or short-leave takers with the same tenure and experience.<sup>187</sup> Based on this, the court concluded:

Bloomberg’s standard operating procedure was to treat pregnant employees who took leave similarly to any employee who took significant time away from work for whatever reason. The law does not create liability for making that business decision.<sup>188</sup>

In justifying this conclusion, the court added that the “Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees . . . .”<sup>189</sup>

Setting aside the question whether reducing leave takers’ pay did not constitute retaliation for exercising rights afforded under the FMLA,<sup>190</sup> the primary dilemma in this case was ap-

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<sup>186</sup> *Bloomberg*, 778 F. Supp. 2d at 481–82.

<sup>187</sup> Specifically Bloomberg’s expert concluded that there was “no statistical evidence that Class Members’ level of responsibility . . . decreased to any significant degree as compared to other employees when taking time on leave into account.” *Id.* at 482.

<sup>188</sup> *Id.* at 486.

<sup>189</sup> *Id.* at 473 (quoting *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)).

<sup>190</sup> The Court decision in *Bloomberg* refrains from discussing this issue, and it is unclear whether the EEOC raised this legal question at all. For a case in which



parently not how new mothers were treated while on maternity leave. A close reading of the relevant facts reveals that an important feature of women's employment that triggered the unfavorable treatment of new mothers was not necessarily their maternity leave but their requesting, on returning to work after the birth of a child, flexible schedules in an attempt to combine family and professional work.

Jill Patricot exemplified these dynamics, showing how pregnancy, childbirth, and motherhood affected working women's lives completely differently from their male counterparts' and the professional consequences of these gender differences. Patricot was hired by Bloomberg in 1998.<sup>191</sup> For seven years she worked ten or eleven hours a day.<sup>192</sup> In 2004 she became pregnant with her first child. She took five months' maternity leave, and, upon her return, she left the office every day at approximately 4:45 PM but was always available by phone.<sup>193</sup> Her supervisors soon became worried and approached her about her hours. She was asked to stay until 5:30 PM at least two days a week, but she refused.<sup>194</sup> In an attempt to satisfy the requirement for longer hours, Patricot offered to arrive at the office an hour early, but Bloomberg refused to make the necessary arrangements to accommodate this change in the regular working schedule.<sup>195</sup> This resulted in her demotion from Head of Global Data to Data Analyst.<sup>196</sup> Patricot took a second maternity leave in 2006. When she returned to work she asked the Head of Sales for the North and South Americas whether any Team Leader positions were available and was told

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this legal argument was made and discussed, see *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51, 54–56 (D. Mass. 2012) (discussing a male attorney's claim that his law firm retaliated against him for taking FMLA leave by withholding work assignments, thus decreasing his billable hours for the year, and, ultimately, terminating him on the ground that his billable hours were too low). See also Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 *HASTINGS L.J.* 1267, 1294–95 (2011) (arguing that employers violate the FMLA's prohibition on retaliation by acting on the assumption that employees who take leave under the FMLA are less productive when they return to work compared to employees who did not take leave).

<sup>191</sup> *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 838 (S.D.N.Y. 2013).

<sup>192</sup> See *id.* at 839.

<sup>193</sup> See *id.* at 838–39, 844.

<sup>194</sup> *Id.* at 839–40.

<sup>195</sup> The court notes in this context that because "Patricot's supervisees in the New York office generally started at 8:00 A.M., . . . the Company wanted to limit supervisory coverage to when it was necessary." *Id.* at 840. (citations omitted). Apparently, employees' parental needs were not defined as "necessary" under this policy; indeed, Patricot "could not name any Global Data manager" who came to work an hour earlier. *Id.*

<sup>196</sup> See *id.*

there were none; but over the next three years, 39 non-managerial employees, including some who once reported to Patricot, were promoted to Team Leaders.<sup>197</sup> Patricot began her third maternity leave in 2008; in 2009 she resigned from Bloomberg while still on leave.<sup>198</sup>

Patricot's experience at Bloomberg implies that leave in itself was not the decisive factor in the company's personnel decisions.<sup>199</sup> She was demoted as a result of her refusal to stay at the office later than 4:45 PM after her return from maternity leave. From Bloomberg's perspective, what clearly made her a less dedicated worker was her decision to spend fewer hours at the office, not the leave she took. Setting new mothers beside other employees who took long leave from work for whatever reason was therefore not the only—and certainly not the most compelling—comparison. New mothers should have been compared with new fathers who demanded flexible schedules to accommodate their new parental responsibilities. However, the demand for flexible schedules seems to have been strictly a women's issue.<sup>200</sup> One can only assume that in most instances new fathers at Bloomberg did not need or request flexible schedules because their female partners attended to the needs of their newborns, enabling the men to raise children without

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<sup>197</sup> See *id.* at 840–41.

<sup>198</sup> *EEOC v. Bloomberg L.P.*, 29 F. Supp. 3d 334, 337 (S.D.N.Y. 2014).

<sup>199</sup> Interestingly, the EEOC made a similar argument in an attempt to discredit Bloomberg's expert evidence that compared long leave takers in general to women who took maternity leave as irrelevant. The EEOC asserted that "its claim is really about Bloomberg's animus toward pregnancy and mothers in general, not about the treatment of maternity leave takers." However, Judge Preska determined that this argument was "not persuasive" because the EEOC's complaint makes mothers "who took maternity leave the centerpiece" of its claims. Therefore, she concluded that by showing "that its regular practice was to treat women who took maternity leave the same as others who took similar amounts of leave for non-pregnancy related reasons," Bloomberg proved "that it did not engage [in] a pattern or practice of discrimination as alleged by the EEOC." *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 484 (S.D.N.Y. 2011).

<sup>200</sup> The experiences of the other women who intervened in the EEOC lawsuit reveal similar patterns in which pregnancy or the birth of child often led a female employee to request flexible working schedules. For instance, Tanys Lancaster "requested to work seven hours per day, instead of the customary ten, per her doctor's recommendation" after she became pregnant. *Bloomberg*, 967 F. Supp. 2d at 853. Monica Prestia "began experiencing medical problems related to her pregnancy in May 2005." She indicated to a representative in Human Resources that "she would need to take intermittent leave one to two days per week . . . until the birth of her child and that her workload must be shortened . . . to fit shorter work days because she could not work five days a week" for ten hours. *Id.* at 868. Similarly, Maria Mandalakis met with a representative from HR in 2008 "to discuss Bloomberg's hours in light of the fact that she had a son with special needs who required therapy." At the end of 2008 she started to work from home one day a week. *Id.* at 879.

an appreciable career interruption.<sup>201</sup> Moreover, these gendered patterns of work are particularly intriguing in light of other noticeable gender differences among Bloomberg employees.

Relevant data provided by Bloomberg in response to the EEOC request indicated that patterns of parental leave-taking among Bloomberg employees were highly gendered. During the class action period, 665 maternity leaves were taken by 512 women (some took more than one maternity leave).<sup>202</sup> Bloomberg offered twelve weeks of paid parental leave and four additional weeks of unpaid leave for all of its employees in its U.S. offices who were primary caregivers,<sup>203</sup> but apparently only, or mostly, its female employees used this benefit.<sup>204</sup>

Hence, gender differences among Bloomberg employees started to develop once female employees became pregnant. When new mothers returned to work after maternity leave, these differences grew more pronounced. Female professionals, such as Jill Patricot, Tanys Lancaster, Monica Prestia, and Maria Mandalakis, who regularly worked long hours and excelled in their jobs, could no longer work ten or eleven hours a day once they became pregnant or gave birth.<sup>205</sup> Pregnancy-related health complications and gendered patterns of care-work within the family that developed following the birth of a child, led to disability and maternity leaves that only female employees took and to requests for flexible schedules made by mothers.<sup>206</sup> In this respect, the birth of a child had long-term

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201 A recent Harvard Business School study affirms this assumption. The study surveyed three generations of Harvard Business School graduates—primarily MBAs. The study reveals that a strong majority of men who participated in the survey expected to be in a “traditional” partnership, in which their career would take precedence. They also expected their female partners to take primary responsibility for child care. Both of these expectations were met and exceeded. See Ely et al., *supra* note 174, at 106–07.

202 See *Bloomberg*, 778 F. Supp. 2d at 482.

203 *Id.* at 464.

204 *Id.*

205 See *supra* note 200 and accompanying text.

206 Tanys Lancaster began working for Bloomberg in 1994. In August 2004, she received a paid medical leave for in vitro fertilization and became pregnant with her first child shortly after. She took a disability leave for medical issues associated with her pregnancy for eight weeks from March 2005 to May 2005 and then went on maternity leave until August 2005. *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 852–55 (S.D.N.Y. 2013). Janet Loures, who also intervened in the EEOC lawsuit on her own behalf, began working for Bloomberg in 1989. She became pregnant with her first child in 2001 and left for a four-month maternity leave from October 2001 to February 2002. In 2003, she became pregnant for a second time. She went on a short disability leave in September 2003 and did not return until after her second maternity leave in April 2004. *Id.* at 863–64. Monica

effects on the working patterns of new mothers—in contrast to new fathers. Gendered patterns of care-work within the family that developed following the birth of a child led new mothers who returned from maternity leave to require flexible schedules that would accommodate their new and distinct maternal roles. As a result, this group of women was singled out as less productive and less dedicated. Consequences in terms of pay reduction or job demotion immediately followed.

The court decision in *EEOC v. Bloomberg* did not dispute these facts. However, it masked their gendered significance by embracing two supplementary themes: gender-neutrality and individual choice. The court first portrayed current tensions between family and work—what Judge Preska terms the desire for a “work-life balance”<sup>207</sup>—as a gender-neutral dilemma that dominates the life of all working parents—men and women alike. Focusing on Bloomberg’s work environment, Judge Preska noted that “[o]ne manager stated that ‘everyone at Bloomberg has . . . a work/life balance issue because [everyone] work[s] very hard.’”<sup>208</sup> The suggestion was that Bloomberg’s policies are equally onerous for all parents of young children. Indeed, the court concluded that “men and women have complained about their ability to balance family life and their workload at Bloomberg.”<sup>209</sup> Judge Preska also implied that the distinction between “employees who take off long periods of time in order to raise children and those who . . . are able to raise them without an appreciable career interruption” was gender-neutral, and therefore a policy may discriminate between these two groups of (gender-neutral) employees.<sup>210</sup>

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Prestia was hired by Bloomberg in 1997. She became pregnant in February 2005. Prestia began experiencing medical problems related to her pregnancy in May 2005. Her doctor placed her on complete bed rest beginning September 2005, so she began paid maternity leave on September 1 and returned from leave on February 21, 2006. *Id.* at 868–69. Maria Mandalakis, who joined Bloomberg in 1998, became pregnant in 2003 and took a five-month maternity leave. She became pregnant with her second child in December 2004. She took intermittent leave for six months due to medical complications and then another six months of maternity leave. In 2007, she took two intermittent leave periods to care for her son. *Id.* at 877–79. Finally, Marina Kushnir, another plaintiff-intervenor began working for Bloomberg in 2000. She began her first maternity leave in August 2005 and returned to work about five months later. Her second maternity leave lasted from September 2007 to April 2008. *Id.* at 887–89.

<sup>207</sup> *Bloomberg*, 778 F. Supp. 2d at 485.

<sup>208</sup> *Id.* at 463.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 482. Specifically, she determined that “[a] policy may discriminate between those employees who take off long periods of time in order to raise children and those who . . . are able to raise them without an appreciable career

At the same time, because the gendered significance of working patterns among Bloomberg employees could not be completely ignored, the court eventually supplemented the equal treatment and gender neutrality reasoning with a logic of individual choice. The court explained that by taking maternity leave or demanding flexible schedules, working mothers indicate that they “choose to attend to family obligations over work obligations”—willingly placing themselves in a disadvantaged position as compared with other, more dedicated (male), workers:

In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. . . . To be sure, women need to take leave to bear a child. And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. . . . Employment consequences for making choices that elevate non-work activities (for whatever reason) over work activities are not illegal. . . . A female employee is free to choose to dedicate herself to the company at any cost, and, so far as this record suggests, she will rise in this organization accordingly.<sup>211</sup>

According to this narrative, current gendered patterns of care and work among Bloomberg employees reflect the individual lifestyle preferences of women who decide “to attend to family obligations over work obligations.” The underlying presumption is that working women who take maternity leave or request a flexible schedule at work signal that they value their motherhood more than they value their professional work. In this respect the theme of “choice” powerfully supplements the theme of “equal treatment” and “gender neutrality” by justifying the adverse treatment of mothers as such, irrespective of any group of comparators. It enables the court to conclude that mothers at Bloomberg simply chose to be lesser workers by elevating their family responsibilities over their work responsibilities. In an attempt to specifically demonstrate how new mothers neglect their professional responsibilities, the court further explains that long hours and physical presence in the office are key for meeting Bloomberg’s “very high standards” of “hard work, cooperation, loyalty up and down, [and] customer service.”<sup>212</sup> This perceived gender-neutral standard

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interruption.” *Id.* (quoting *Fisher v. Vassar College*, 70 F.3d 1420, 1448 (2d Cir. 1995)).

<sup>211</sup> *Id.* at 485–86.

<sup>212</sup> *Id.* at 463 (citations omitted).

for evaluating loyalty, productivity, and dedication at work is then applied specifically to mothers: “[i]n terms of career-specific factors only, women who take maternity leave, work fewer hours, and demand more scheduling flexibility likely are at a disadvantage in a demanding culture like Bloomberg’s.”<sup>213</sup>

In essence then, Judge Preska determines that commitment and performance should be measured by the number of hours you spend at your workplace and that mothers’ own choices to work fewer hours and their demands of flexible schedules necessarily make them less dedicated workers, thereby justifying Bloomberg’s practices of reducing their pay and demoting them in title and status. Indeed, if women are given all the options, just like their male counterparts, and they still insist on choosing motherhood over work, there can be no inference of discrimination.

However, some significant facts in this case cast doubt on this apparently objective judgment regarding the necessary relationship between flexible schedules and the portrayal of new mothers as less committed and productive employees. These facts imply that under the guise of impartial standards, the court resorts to old stereotypes to justify the employment discrimination of mothers. Jill Patricot provides again a telling example in this context. As described above, for years she would work ten or eleven hours a day. After returning from maternity leave she started leaving the office no later than 4:45 PM, but was always available by phone. Her supervisor, who told Patricot prior to her taking maternity leave that she was doing a “fabulous” and “great” job, soon approached her about her hours and argued that she was setting “a bad example on the floor.”<sup>214</sup> Patricot was asked to work until 5:30 PM at least a couple of days a week. In an attempt to satisfy the requirement for longer hours, Patricot offered to arrive at the office an hour early, but Bloomberg refused to make the necessary arrangements to accommodate this change in the regular working schedule.<sup>215</sup> Her refusal to remain in the office until 5:30 PM on a regular basis resulted in her demotion to Data Analyst. In defending this step, Bloomberg asserted that the nature of her original role as Head of Global Data required her physical presence in the New York office.<sup>216</sup> Bloomberg also argued that in her absence, Patricot’s subordinates were forced to approach

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<sup>213</sup> *Id.* at 486.

<sup>214</sup> *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 839–40 (S.D.N.Y. 2013).

<sup>215</sup> *Supra* note 195 and accompanying text.

<sup>216</sup> *Bloomberg*, 967 F. Supp. 2d at 839–40, 844.

others for guidance. However, nothing in the record corroborated these claims. Patricot testified that she was never informed about her subordinates looking for her as the reason why she needed to stay later than 4:45 PM.<sup>217</sup> Relevant evidence also indicated that Patricot's first and second successors worked in Bloomberg's Princeton office and visited the New York office only several times a month. In fact, the court corroborated Patricot's assertion of "a double standard" by determining that, even when Patricot's successors visited the New York office, they hardly stayed past 4:45 PM, and, despite this conduct, Patricot's successors were never confronted by Bloomberg about the time they did not spend in the office where their subordinates worked.<sup>218</sup> Moreover, the company's concern with Patricot's hours seems to have originated from long hours being the norm in Bloomberg, unrelated to any specific indication that she actually neglected her professional responsibilities as a result of her becoming a mother. In fact, there was no indication that Patricot's request for a flexible schedule reflected her choice "to attend to family obligations over work obligations,"<sup>219</sup> but precisely the opposite. Patricot contended that she was always available to her subordinates by phone even after she physically left the office and was never informed that her subordinates were looking for her.<sup>220</sup> "As a result of her resignation, Patricot forfeited a guaranteed bonus of about \$150,000," and was also unsuccessful in applying for positions at several other companies.<sup>221</sup> Eventually, she remained the last plaintiff in this wide-ranging lawsuit after all other claims were dismissed. Her discrimination and retaliation claims with respect to the events subsequent to her return from maternity leave initially survived summary judgment, leaving her the only plaintiff able to continue pursuing damages. However, her lawsuit too was eventually dismissed because she failed to mitigate damages by voluntarily resigning from Bloomberg, not because the court rejected the substance of her allegations regarding her demotion from Head of Global Data to Data Analyst.<sup>222</sup>

Patricot's trials at Bloomberg can thus challenge the general pronouncements of the court regarding the necessary relationship between workers' flexible schedules and their lesser

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<sup>217</sup> *Id.* at 844.

<sup>218</sup> *Id.* at 844–46.

<sup>219</sup> *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 485–86 (S.D.N.Y. 2011).

<sup>220</sup> *Bloomberg*, 967 F. Supp. 2d at 844.

<sup>221</sup> *EEOC v. Bloomberg L.P.*, 29 F. Supp. 3d 334, 337 (S.D.N.Y. 2014).

<sup>222</sup> *See supra* note 183.

dedication and productivity. These trials also hint that the court's pronouncements amount to no more than a stereotyped judgment of working mothers. Moreover, the stereotype that "women tend to choose to attend to family obligations over work obligations . . . more often than men" appears to underlie Bloomberg's decision to demote Patricot simply because she refused to stay longer hours in the office, effectively subjecting her to adverse treatment compared with her male counterparts.<sup>223</sup>

The reflection of this stereotyped judgment of working mothers as less competent workers in the court decision in *EEOC v. Bloomberg* is particularly revealing. Women have long been subjected to stereotypes that depicted mothers as inherently less competent workers. Stemming from beliefs about motherhood as women's natural destiny, these stereotypes have justified restrictions on women's employment and exclusion from the public sphere.<sup>224</sup> As discussed in subpart I.B, the feminist desire to undermine these stereotypes was the primary motivation for the enactment of gender-neutral parental legislation such as the FMLA. This desire also explains the feminist resistance to any gender-specific measures in this context. Feminists argued, and still do, that the sex-neutrality of the law of parenting is one of the most valuable achievements of the feminist movement.<sup>225</sup> It encourages men to assume more caretaking responsibilities and promotes a more egalitarian division of care-work at home, which can undermine traditional stereotypes of women as lesser workers. *Hibbs* affirms these convictions. However, if, despite the law's gender-neutrality, maternal patterns of care persist, this gendered reality can sustain the same old stereotypes about the unique role of motherhood in women's lives. The court decision in *EEOC v. Bloomberg* exemplifies this problematic process. It highlights how, despite the existence of gender-neutral leave policies at Bloomberg, gendered patterns of care and work among the company's employees persist, and also how the court relies on this gendered reality to conclude that

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<sup>223</sup> *Bloomberg*, 778 F. Supp. 2d at 485–86.

<sup>224</sup> *Supra* notes 11–17 and accompanying text. In a recent Supreme Court decision, Justice Ginsburg explained the origin and harmful consequences of legislation that relies on stereotypes about women's domestic roles. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1691–98 (2017) (Ginsburg, J.) (invalidating on equal protection grounds a gender-based distinction that favors the mother in the law governing acquisition of U.S. citizenship by a child born abroad).

<sup>225</sup> See, e.g., Mezey & Pillard, *supra* note 139, at 230 (characterizing "[t]he official de-linking of presumptive parenting roles from a parent's sex" as "hard won and valuable"); see also *Morales-Santana*, 137 S. Ct. at 1691–98.



mothers have been justly singled out as less productive workers, ultimately rationalizing gender-discriminatory employment policies.

## V

### FROM *HIBBS* BACK TO *CAL FED*: RESTORING ARGUMENTS OF GENDER DIFFERENCE

#### A. From *Cal Fed* to *Hibbs*

In 1987 the Supreme Court issued its decision in the case of *California Federal Savings & Loan Association v. Guerra* (“*Cal Fed*”).<sup>226</sup> This case involved a California law that required employers to provide female employees an unpaid pregnancy disability leave of up to four months and reinstatement against what appeared to be the mandate of the PDA to treat pregnancy no differently from any other disability.<sup>227</sup> An employer charged with violating this state law raised the claim of federal preemption, arguing that a law that was designed to benefit only pregnant workers discriminated against men and therefore violated Title VII.<sup>228</sup> The issue presented by *Cal Fed* split the feminist community and triggered an intense dispute among theorists and activists, reviving the debate between guardians of gender neutrality and those endorsing protective legislation for women in the context of pregnancy and childbirth.<sup>229</sup> The former position that was based on arguments of equal treatment was embraced by numerous groups, including the National Organization of Women. Briefs filed in *Cal Fed* by a consortium of groups and individuals led by the National Organization of Women, argued that state legislative efforts to provide special benefits to pregnant workers constituted protective legislation that was adverse to the interests of women in equal treatment with men because any distinction based on pregnancy would perpetuate the negative stereotypes long used to disadvantage women.<sup>230</sup> These groups thus agreed that the state statute was in conflict with the provisions of the PDA, which mandated equal treatment, but added that the Court could interpret this statute so as to make its terms consistent with Title VII by ordering that their benefits be extended to all

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<sup>226</sup> 479 U.S. 272 (1987).

<sup>227</sup> *Id.* at 275–77.

<sup>228</sup> *See id.* at 279.

<sup>229</sup> W. Williams, *supra* note 39, at 328, 351–52 (labeling the debate “The Equal Treatment/Special Treatment Debate”).

<sup>230</sup> Brief for the National Organization for Women, *supra* note 77, at 14–17.

disabled workers.<sup>231</sup> Only one group, led by the Equal Rights Advocates, joined the California Department of Fair Employment and Housing, a defendant in *Cal Fed*, in arguing that the state law was consistent with the PDA in that both state and federal laws were designed to provide equal employment opportunities to pregnant women.<sup>232</sup> Equal Rights Advocates and its allies believed that the PDA left the state free to enact additional measures to place pregnant workers on an equal basis with all other workers.

Justice Marshall, delivering the opinion of the Court, embraced the latter position, and concluded that the California law was not preempted by Title VII as amended by the PDA because it was not inconsistent with the purposes of the federal statute. Specifically, the Court explained that both statutes were designed “to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”<sup>233</sup> The Court cited, with agreement, the Court of Appeals’ conclusion that Congress intended the PDA to be “a floor beneath which pregnancy disability benefits may not drop[—]not a ceiling above which they may not rise.”<sup>234</sup> It added that, “[b]y ‘taking pregnancy into account,’ California’s pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.”<sup>235</sup> Moreover, the Court rejected arguments that any type of preferential treatment for pregnant employees reflected stereotypical notions about pregnancy and the abilities of pregnant workers; it explained that special treatment could sometimes “achieve equality of employment opportunities” for women and “remove barriers that ha[d] operated in the past to favor” men.<sup>236</sup> In reference to the specific legislation, the Court noted that the California statute was “narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions” and concluded:

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<sup>231</sup> *Id.* at 20.

<sup>232</sup> Brief for Equal Rights Advocates et al. as Amici Curiae Supporting Respondents at 4–9, *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494).

<sup>233</sup> *Cal. Fed. Sav. & Loan Ass’n*, 479 U.S. at 289 (citations omitted).

<sup>234</sup> *Id.* at 280 (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

<sup>235</sup> *Id.* at 289 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).

<sup>236</sup> *Id.* at 288–89 (citations omitted).

Employers are free to give comparable benefits to other disabled employees, thereby treating “women affected by pregnancy” no better than “other persons not so affected but similar in their ability or inability to work.”<sup>237</sup>

The Court opinion in *Cal Fed* is particularly important because it challenges the conventional assumption that gender neutrality and similar treatment of men and women should be the sole legal means for achieving gender equality. A decade after this assumption shaped the formation of the PDA, the Court declared that gender-specific legal measures were not necessarily discriminatory and that the PDA did not prohibit accommodating the different needs of women on account of pregnancy and childbirth. The Court distinguished different treatment of pregnant women based on sex-role stereotypes about their abilities from different treatment that was designed to equalize a discriminatory reality and promote equal opportunities for women. It was thus able to define the California statute as falling within the latter category.

*Cal Fed* has never been officially overruled. Yet, its central holding has been effectively undermined by two subsequent legal developments: the enactment of the FMLA and the Court’s decision in *Nevada Department of Human Resources v. Hibbs*. When enacting the FMLA, Congress reaffirmed the principle that gender equality was best achieved when similar-treatment and gender-neutrality set the standard for allocating pregnancy and childbirth-related benefits. Parental leave was thus linked to sick leave and both were guaranteed in identical terms. *Hibbs* provided the Court an opportunity to interpret the FMLA and its significance from a gender-equality perspective. As explained in subpart III.A, Justice Rehnquist, who wrote the Court’s opinion, surprised many when he affirmed the constitutionality of the FMLA as a valid exercise of Congress’s equal protection power and concluded that the law aimed “to protect the right to be free from gender-based discrimination.”<sup>238</sup> Commentators characterized his opinion as “remarkable”<sup>239</sup> and “pathbreaking.”<sup>240</sup> Some speculated that Rehnquist’s own family circumstances might have been a factor that moved him to a sympathetic understanding of the

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<sup>237</sup> *Id.* at 290–91.

<sup>238</sup> *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *see also supra* notes 139–44 and accompanying text (discussing reactions from commentators to *Hibbs* decision).

<sup>239</sup> C. Williams, *Hibbs as a Federalism Case*, *supra* note 142, at 365.

<sup>240</sup> Siegel, *supra* note 140, at 1872–73.

FMLA.<sup>241</sup> Yet, when compared with the Court decision in *Cal Fed*, Rehnquist's opinion seems less surprising. Chief Justice Rehnquist joined the dissent in *Cal Fed*. Rejecting Marshall's expansive interpretation of the PDA, the dissent determined that the PDA "leaves no room for preferential treatment of pregnant workers."<sup>242</sup> The dissenting justices White, Rehnquist, and Powell therefore concluded that the California law purported to authorize employers to commit an unfair employment practice forbidden by Title VII, rejecting the argument that the preferential treatment provision "can be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers."<sup>243</sup> *Hibbs*, as opposed to *Cal Fed*, did not challenge special treatment legislation; it dealt with and affirmed the constitutionality of equal treatment legislation. However, in emphasizing the significance of the equal-treatment and gender-neutrality standards of the FMLA for the provision of leave benefits, Rehnquist implicitly rejected the central holding of *Cal Fed*. As previously discussed, he reviewed the legislative history of the FMLA and explained that what triggered the enactment of this federal legislation was the preferential treatment of women in many state laws that discriminated against men in the allocation of parental leave benefits. Rehnquist further noted that many of these laws and policies offered women "extended 'maternity' leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth."<sup>244</sup> He concluded that all these practices reflected the "pervasive sex-role stereotype that caring for family members is women's work" and were therefore justly perceived by Congress as violating the prohibition on sex stereotyping.<sup>245</sup> In reaching this conclusion, he failed to mention *Cal Fed* or recognize that a four-month pregnancy disability leave available only for women was affirmed by the Court as a valid exercise of state power that promoted the Title VII ban on sex-based discrimination. However, his broad proposition that extending special leave benefits to women necessarily constituted gender-based

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<sup>241</sup> See Linda Greenhouse, *Ideas & Trends: Evolving Opinions; Heartfelt Words From the Rehnquist Court*, N.Y. TIMES (July 6, 2003), <http://www.nytimes.com/2003/07/06/weekinreview/ideas-trends-evolving-opinions-heartfelt-words-from-the-rehnquist-court.html> [<https://perma.cc/6MHE-PJBT>]; see also C. Williams, *Hibbs as a Federalism Case*, *supra* note 142, at 374-75 (noting that Justice Rehnquist "has had ample opportunity to experience first-hand various kinds of family caregiving").

<sup>242</sup> *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 297 (White, J., dissenting).

<sup>243</sup> *Id.* at 298 n.1.

<sup>244</sup> *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003).

<sup>245</sup> *Id.* at 731.

discrimination clearly undermines *Cal Fed's* more nuanced holding that different treatment can sometimes have the impact of equalizing a discriminatory reality and promoting equal opportunities for women. The Court opinion in *Hibbs* also narrows significantly *Cal Fed's* definition of a reasonable pregnancy disability leave by restricting this period to 4 to 8 weeks. Hence, notwithstanding *Hibb's* significance in upholding the constitutionality of the FMLA on equal protection grounds, it is important to acknowledge that this ruling implicitly revives and resettles the equal treatment/special treatment debate by giving priority to the former.

### B. Restoring Female-Specific Entitlements

*Hibbs* does not stand alone in its uncompromising commitment to similar treatment and gender neutrality. Several years earlier, the Israeli Labor Court had engaged in similar rhetoric affirming men's right to enjoy the same parental benefits as those historically reserved for women. In the case of *Menachem Yahav*, an attorney working for the police and father of three young children, the court adopted a broad interpretation of existing legislation to determine that the right to a shorter workday originally reserved for female employees should be extended to men as well.<sup>246</sup> Highlighting the centrality of the anti-stereotyping principle in shaping the gender-neutrality principle in the allocation of parental benefits, the Court explained: "We again point out that as more men undertake the care of children [this] will expand the circle of women working in senior positions, which will eventually reduce or even cancel the stereotype of the past where the woman's main role is caring for and raising children."<sup>247</sup>

Four years later, in a similar case, the Labor Court reached the same conclusion.<sup>248</sup> This time however the court did not stop at affirming the principle of gender-neutrality on anti-stereotyping grounds but proceeded to explain how these gender-neutral measures already facilitated a changing reality in which egalitarian patterns of child care at home were gradually becoming the norm:

In the last quarter of the 20th century the perception of equality in society has changed . . . and now prevails the concept of shared parental responsibility, that both parents

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<sup>246</sup> File No. 31993/96 District Court of Labor (Tel Aviv) *Yahav v. State of Israel* (Nov. 25, 1999), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>247</sup> *Id.* at 9.

<sup>248</sup> LaborA (BS) 1155/02 *State of Israel v. Moscolenco* 39 PD 337 (2003) (Isr.).

are jointly responsible for household management and the care of the family. This imposes an additional burden on both [parents'] shoulders [and it adds] to the burden of being employed, but this burden should be smaller [now] as it is divided between two people and is not the sole responsibility of the woman.<sup>249</sup>

The current image of parenthood that is “divided between two people and is not the sole responsibility of the woman” might have been inspired by yet another father demanding his equal parental benefits in court.<sup>250</sup> However, just as in the United States, these few cases are the exception, not the norm.

Against these cases, a more recent Labor Court decision marks an intriguing change. *State of Israel v. Dan Bahat*<sup>251</sup> concerned a collective bargaining agreement provision entitling working mothers and fathers to a shortened workday. However, if they decided to stay more hours at work, only mothers would be “compensated” with a supplement to their salary. The plaintiff, Dan Bahat, a father working as a state attorney, claimed that although he stayed beyond the shortened workday, he did not receive extra payment, whereas his female colleagues in the same situation were entitled to it. The Regional Labor Court decided in favor of the plaintiff and concluded that not paying fathers for extra hours, while paying mothers for them, constituted prohibited discrimination against fathers.<sup>252</sup> On appeal, the National Labor Court disagreed and reversed the lower court’s holding.<sup>253</sup> The Court determined that the bonus could be perceived as an affirmative action for women, designed to give them additional incentives to work longer hours and equalize their status at work to men’s status. The

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<sup>249</sup> *Id.* at 353–54.

<sup>250</sup> Interestingly, in a recent Supreme Court case that held that daycare expenses should be deductible for tax purposes, the Israeli Court embraced a similar rhetoric, emphasizing the relevance of its holding to a changing reality in which working mothers and fathers now share the burden of care-work at home. While the specific lawsuit was filed by a female private lawyer arguing that without proper care-arrangements for her children she could not earn a living, the Court emphasized the importance of phrasing the dilemma in gender-neutral terms explaining: “No need to say much about it, many spouses are sharing now work together in raising their children much more than before, so that the man’s share in the family care and the ramifications of it on the ability to work outside the home . . . is almost equal in many cases to that of the woman.” File No. 4243/08 Court of Civil Appeals, *Israel IRS v. Perri* 1, 41 (Apr. 30, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>251</sup> File No. 361/08 Nat’l Labor Court, *State of Israel v. Bahat* (Apr. 18, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>252</sup> File No. 2456/03 Court of Appeals (Tel Aviv), *Bahat v. State of Israel* (May 5, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

<sup>253</sup> File No. 361/08 Nat’l Labor Court, *State of Israel v. Bahat*.

primary rationale for this intriguing decision was the Court's sheer acknowledgment that a working father like Dan Bahat who "comes home early to take care of his kids while the mother remains at work"<sup>254</sup> is the exception and not the norm. The Court also highlighted the relation of gender-based employment discrimination to women's still being the primary caretakers at home. It referred to data indicating that women in the public sector still earned far less than men for comparable work and were often restricted to lower management jobs. The Court noted that differentiating fathers from mothers as to the right of receiving a bonus for spending longer hours at work was desirable legal policy because it had the potential of promoting female employees' status and income. According to the Court, fathers did not need a comparable incentive, because they already worked longer hours than women and spent less time at home. Drawing a distinction between the right to a shorter working day for parents of young children and monetary benefits for those who decided to forgo this benefit and work full time, the Court explained that only the former encouraged men to spend more time with their children, thereby advancing the goal of undermining the unequal division of care-work at home. If fathers received such a monetary benefit, they would choose to stay longer at work, which would result in their spouses having even greater responsibility to care for their children. In sum, the Court perceived retaining the "mothers only" benefit as a desirable policy of affirmative action for women that accorded with the principle of gender equality.

*Bahat* is an intriguing decision because it continues and further develops *Cal Fed's* different-treatment approach in two important respects. First, it outlines a more complex perception of gender difference that justifies setting gender neutrality and similar treatment aside. While *Cal Fed* was formally restricted to "the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions,"<sup>255</sup> *Bahat* recognized the unequal social reality in which women continue to be the primary caretakers at home, and are consequently discriminated against at work, as a relevant factor of gender difference that cannot be sufficiently addressed by gender-neutral legal tools. Without naming it specifically, *Bahat* places the maternal dilemma on the table for the first time and develops a more comprehensive framework for rethinking the scope

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<sup>254</sup> *Id.* at 21 (section 27 to the majority opinion).

<sup>255</sup> *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987).

and substance of legal measures in the context of family and work. Second, in addressing the maternal dilemma, the Israeli Court implicitly replaces *Cal Fed's* terminology of “special treatment” with the term “affirmative action,” which in the Court’s opinion indicates that a gender-specific entitlement that focuses on women’s (and not men’s) needs and concerns can be a crucial supplementary positive measure for undermining a persistent gendered reality and promoting gender equality.<sup>256</sup>

Moreover, *Bahat* challenges contemporary global trends in the context of parental policies by shifting the focus from men back to women. Aiming to impel men to assume greater care responsibilities at home, countries like Sweden have taken their gender-neutral parental leave schemes one step farther already two decades ago. Realizing that most caregiving and childrearing is still done by women, and acknowledging the adverse effect of these patterns on workforce equality, Sweden has formulated policies wherein, beyond paid gender-neutral parental leave (usually taken by women), they offer fathers additional state-paid paternal leave for a designated period; these policies are usually referred to as “daddy quotas.”<sup>257</sup> In recent years several other Western countries adopted similar schemes.<sup>258</sup> Sweden has also introduced a “gender equality

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<sup>256</sup> Cf. *id.* at 284 (characterizing California’s approach to pregnancy discrimination as a “special treatment approach”).

<sup>257</sup> See, e.g., Andrea Rangelcroft, *Where New Dads Are Encouraged to Take Months Off Work*, BBC (Jan. 6, 2016), <http://www.bbc.com/news/magazine-35225982> [<https://perma.cc/K6WE-XSVC>]. The first father’s month was introduced in 1995. A second father’s month was introduced in 2002. Until 2016, Sweden offered a paid parental leave of 480 days, sixty days reserved each for the mother and the father. See Anders Chronholm, *supra* note 32, at 227, 234. A third month dedicated only to fathers was recently introduced in 2016, reserving 90 days out of 480 paternal leave days solely for the father, while establishing the same right to mothers in line with principles of equal treatment. If a father (or a mother) does not take the designated leave of 90 days, such entitlement is lost. Rangelcroft, *supra* note 257; see also *10 Things That Make Sweden Family Friendly*, SWEDEN (Mar. 10, 2017), <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> [<https://perma.cc/PT5V-FL8L>].

<sup>258</sup> For instance, Norway reserves ten weeks for fathers, ten weeks for mothers (in addition to three weeks before giving birth), and the rest of the remaining of 26 or 36 weeks of parental leave can be divided individually. See *Paternal Quota (Paternal Leave), Maternal Quota and Shared Period*, NAV (Feb. 11, 2017), <https://www.nav.no/en/Home/Benefits+and%services/Relatert%informasjon/paternal-quota-paternity-leave-maternal-quota-and-shared-period> [<https://perma.cc/JH8Q-CA86>]. Iceland initiated a tripartite model with designated leave for mothers and fathers and an additional leave for the family to determine its taker. Thorgerdur Einarsdottir & Gyda Margret Petursdottir, *Iceland: From Reluctance to Fast-Track Engineering*, in *THE POLITICS OF PARENTAL LEAVE POLICIES*, *supra* note 32, at 159. Finland provides twelve extra bonus days to fathers who take at least two



bonus” as an economic incentive for families to divide their parental leave more equally.<sup>259</sup> These reforms in family policies place daddy quotas at the forefront of leave policies that seek to encourage equal sharing of child care between men and women. In line with these models, scholars have called for the adoption of similar incentives for men in the United States.<sup>260</sup> In addition to paid leave, daddy quotas are now perceived as a potential solution to the persistence of maternal patterns of care at home.<sup>261</sup> As part of this male-centered focus, the literature often explores the question of why men do not take parental leave and evaluates suggested measures in light of their potential impact on men’s parental choices.<sup>262</sup>

However, on closer scrutiny it is apparent that even in countries with daddy quotas the overall picture regarding the maternal dilemma is mixed. Daddy quota measures clearly

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weeks of the parental leave. Johanna Lammi-Taskula & Pentti Takala, *Finland: Negotiating Tripartite Compromises*, in *THE POLITICS OF PARENTAL LEAVE POLICIES*, *supra* note 32, at 87. Germany provides twelve months of paid parental leave. If the father takes at least two months, the overall length of paid leave is extended to fourteen months. Daniel Erler, *Germany: Taking a Nordic Turn?*, in *THE POLITICS OF PARENTAL LEAVE POLICIES*, *supra* note 32, at 119. For a comparative overview, see generally *OECD Family Database*, OECD, [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) [<https://perma.cc/WS84-UBFL>].

<sup>259</sup> This monetary scheme that was launched by the Swedish center-right government in 2008 was abolished in 2016 for all parental leave days used after December 31, 2016. See Ann-Zofie Duvander, Linda Haas & C. Philip Hwang, *Sweden: Country Note*, in 13th INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2017 392, 396 (Sonja Blum, Alison Koslowski & Peter Moss eds., 2017) [hereinafter *Sweden: Country Note*] [http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual\\_reviews/2017\\_Leave\\_Review\\_2017\\_final2.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2017_Leave_Review_2017_final2.pdf) [<https://perma.cc/7HSL-7KT9>]. As of 2014, Germany also provides a financial bonus to parents who take joint leave and work part time. Pia S. Schober, *Daddy Leave: Does It Change the Gender Division of Domestic Work?* 4 (Dep’t of Educ. & Family, DIW Berlin, Working Paper, 2014), [http://www.diw.de/documents/publikationen/73/diw\\_01.c.489439.de/diw\\_roundup\\_46\\_en.pdf](http://www.diw.de/documents/publikationen/73/diw_01.c.489439.de/diw_roundup_46_en.pdf) [<https://perma.cc/KQ56-LBP3>].

<sup>260</sup> See, e.g., Haas, *supra* note 12, at 376 (showing how the Swedish parental leave system tries to undermine the traditional role of women as the main caretakers of children and suggesting this approach as a legislative model also for the U.S.).

<sup>261</sup> See, e.g., Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 2–8 (2015) (arguing for the introduction of father bonuses to create more gender equality among parents); Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers’ Participation in Childcare and Relationships with Children: Lessons from Sweden*, 11 COMMUNITY, WORK & FAM. 85, 99–101 (2008) (arguing for the necessary policy pressure on fathers to engage in parental leave in order to achieve gender equality); Selmi, *supra* note 129, at 770–81 (proposing amendments to the FMLA that would incentivize fathers to take leave).

<sup>262</sup> See, e.g., Grossman, *supra* note 129, at 34–36 (exploring why men are discouraged from taking paternity leave); Haas, *supra* note 12, at 391–99 (discussing “[p]otential barriers to fathers’ involvement in child care”).

increase men's parental leave take-up rates, but women still take most of the leave.<sup>263</sup> In general, fathers usually take the minimum time designated specifically to them.<sup>264</sup> With respect to leave in Norway, two scholars recently observed that "[n]ow it is in the form of long leave for mother, short leave for dad."<sup>265</sup> Comparative research also casts doubt on the long-term effects of fathers' parental leave-taking and suggests that the gendered division of care-work and household work has not changed in a fundamental way as a result of fathers taking some parental leave.<sup>266</sup> Consequently, women's participation in the labor market is still shaped by maternal patterns at

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<sup>263</sup> For instance, a recent country report on Sweden indicates that in 2016, mothers took on average 89 days of parental leave and fathers took only 39 days. While the proportion of total parental leave days used by men slowly increases it is still low. In 2016, 74% of all parental leave days used that year were taken by women. The report also reveals that Swedish mothers of children born in 2008 took on average three times more days of parental leave than fathers during the eight years they could use the leave (342 days compared to 106 days). For parents of young children born in 2013, only 14.1% of couples were sharing leave relatively equally (60% mothers and 40% fathers). Moreover, Swedish fathers are also more likely to take parental leave for the first child. As the family grows, father's take-up rates of parental leave thus decrease. See *Sweden: Country Note*, *supra* note 259, at 397–98. In Norway, relevant data from 2011 indicates that only 10% of fathers took a parental leave that was longer than the father's quota. Moreover, with the reduction of the length of the father's quota in 2014, father's average take-up rates also decreased. See Berit Brandth & Elin Kvande, *Norway: Country Note in 13th INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2017*, *supra* note 259, at 304, 310; see also Carmen Castro-García & Maria Pazos-Moran, *Parental Leave Policy and Gender Equality in Europe*, 22 *FEMINIST ECON.* 51, 60–64 (2016) (summarizing data from twenty-one European countries); Anders Chronholm, *supra* note 32, at 227 (summarizing Swedish data); Ann-Zofie Duvander & Mats Johansson, *What are the Effects of Reforms Promoting Fathers' Parental Leave Use?*, 22 *J. EUR. SOC. POLY* 319, 322 (2012) (summarizing Swedish data); John Ekberg, Rickard Eriksson & Guido Friebel, *Parental Leave—A Policy Evaluation of the Swedish "Daddy-Month" Reform*, 97 *J. PUB. ECON.* 131, 139 (2013) (same).

<sup>264</sup> See Schober, *supra* note 259, at 1–2; *Sweden: Country Note*, *supra* note 259, at 397–98; see also *Why Dads Take Parental Leave: Fact Sheet About the Parental Insurance Systems in the Nordic Countries*, NIKK, NORDIC INFO. ON GENDER (2016), [http://www.nikk.no/wp-content/uploads/nikk\\_foraldraledighet\\_eng\\_webb.pdf](http://www.nikk.no/wp-content/uploads/nikk_foraldraledighet_eng_webb.pdf) [<https://perma.cc/V57F-A7DN>].

<sup>265</sup> Brandth & Kvande, *supra* note 48, at 204. Similarly, in Germany, relevant data for 2012 reveal that on average the length of paid leave for mothers with partners also taking parental leave amounted to eleven months (out of a total paid leave of twelve months). Mareike Bünning, *What Happens After the 'Daddy Months'? Fathers' Involvement in Paid Work, Childcare, and Housework After Taking Parental Leave in Germany*, 31 *EUR. SOC. REV.* 738, 740 (2015).

<sup>266</sup> For instance, in 2016, Swedish mothers took 62% of all days used for temporary leave to care for a sick child. *Sweden: Country Note*, *supra* note 259, at 398; see also Ekberg et al., *supra* note 263, at 140–43; Schober, *supra* note 259, at 3–4.

home, and the goal of obtaining gender equality is far from being achieved.<sup>267</sup>

Against this across-the-board policy focus on influencing men's parental choices, and in light of its limited implications for gender equality, *Bahat* restores the focus on women. It suggests that, in addition to motivating men to assume greater responsibilities at home, it is important to explore the structures and forces that shape women's decisions to remain the primary caretakers at home. Yet *Bahat* does not delve into these issues; while acknowledging the problematic persistence of maternal patterns at home, the Court's opinion is restricted to upholding the specific affirmative action monetary benefit. It thus leaves open the questions of how and why women contribute to this gendered reality, and what additional (women-oriented) measures are necessary in order to advance change in this context.

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<sup>267</sup> Part-time work among women in the Nordic countries still rates very high. A 2015 report indicates that the number of women working part-time in Norway amounted to 36%. In Sweden the respective number was 31%, in Denmark 29%, and in Iceland 26%. In comparison, the highest percentage for men working part-time was 10% in Norway. See Alma Wennemo Lanniger & Marianna Sundström, *Part-Time Work in the Nordic Region I*, NIKK, NORDIC INFO. ON GENDER (2014), [http://www.nikk.no/wp-content/uploads/NIKKpub\\_deltid1\\_temanord.pdf](http://www.nikk.no/wp-content/uploads/NIKKpub_deltid1_temanord.pdf) [https://perma.cc/53G8-MCGH]. The main reason for part-time work among women is still family responsibility. In 2007, 36% of women working part-time in Iceland and 56% in Denmark attested to this fact. In 2012, 30% of part-time working women in Norway as well as 48% in Finland gave the same reason. In Sweden women earn 87% of what men earn, suggesting that women work for free after 4 PM (of a regular eight-hour working day). See SWEDEN AND GENDER EQUALITY, <https://sweden.se/society/sweden-gender-equality/> [https://perma.cc/9BLR-26KK]. In Finland the percentage is 82%, in Norway 83%, in Iceland 87%, and in Denmark as well as in Germany 78%. *Global Gender Gap Report 2017*, WORLD ECONOMIC FORUM, <http://reports.weforum.org/global-gender-gap-report-2017/western-europe/> [https://perma.cc/JX7L-55V2]. The pay gap is especially large among women with children in all respective countries. Similarly, occupational gender segregation prevails. In Norway, for example, relevant data for 2009 show that men were represented in twice as many occupations than women. In Sweden, out of 355 occupational categories only 72 were gender balanced. Women tend to be concentrated in the health industry as well as in the education sector. In all Nordic countries 43% of the employed women concentrated in these two occupations. See NORDEN, NORDIC GENDER EQUALITY IN FIGURES 2015 (2015), <http://norden.diva-portal.org/smash/get/diva2:790696/FULLTEXT02.pdf> [https://perma.cc/3KUA-3Y5M]; see also *Swedish Occupational Register With Statistics 2007*, STATISTICS SWEDEN (Mar. 5, 2009, 9:30 AM), <http://www.scb.se/en/Finding-statistics/Statistics-by-subject-area/Labour-market/Employment-and-working-hours/The-Swedish-Occupational-Register-with-statistics/Aktuell-Pong/59071/Behallare-for-Press/The-Swedish-occupational-register-with-statistics1/> [https://perma.cc/ZWA9-NYGD] (tracking sex segregation in the labor market from 2002 to 2007).

### C. The Empowerment of Motherhood

In her book *The Myth of Motherhood*, the French philosopher Elisabeth Badinter reviews child-rearing practices in France over the past 300 years.<sup>268</sup> She concludes that maternal love is an essentially conditional sentiment largely contingent on women's interests and the cultural milieu. Against patterns of maternal neglect and indifference that were prevalent in the seventeenth century and were accompanied by high infant mortality rates,<sup>269</sup> she identifies the rise of the "new mother" in the eighteenth century, when baby and child were gradually becoming the center of the mother's attention.<sup>270</sup> She explains that once the survival of children had become a priority problem for the ruling class due to demographic concerns,<sup>271</sup> women for once became "men's partners in a serious undertaking."<sup>272</sup> Women, more precisely mothers and wives, were thus "promoted to the level of 'those in positions of responsibility.'"<sup>273</sup> Influential philosophical works of the era such as *Emile* written by Jean-Jacques Rousseau in 1762<sup>274</sup> nurtured these perceptions and contributed to the rise of a new image of ideal motherhood.<sup>275</sup> Most intriguing in Badinter's analysis is the argument that embracing this new ideal of a mother who breastfeeds and dedicates herself completely to her children actually served women's interests. It was dictated by the hope of "playing a more gratifying role within the family unit and society at large."<sup>276</sup> Rousseau promised nursing mothers great bonuses including "a solid and constant attachment on the part of their husband."<sup>277</sup> Indeed, "[t]he good mother was reassured that her husband would be . . . more

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268 See generally ELISABETH BADINTER, *THE MYTH OF MOTHERHOOD: AN HISTORICAL VIEW OF THE MATERNAL INSTINCT* (1981).

269 *Id.* at 61-64. There seems to be no doubt that mothers in the past reacted differently towards their children from mothers today. Children, if they survived, did not stay long with their parents. They were sent away early to other households as servants or apprentices. Infants were not considered important because chances were high that they would not survive anyway. In one of the early works on the average family in Western society, historian Edward Shorter argues that the fact that mothers in the past did not care about their children led to high infant mortality rates, thus drawing a link between the lack of maternal love and high death rates among infants and children. See EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* 203 (1975).

270 BADINTER, *supra* note 268, at 168-80.

271 See *id.* at 120-31, 150.

272 *Id.* at 150-51.

273 *Id.* at 151.

274 See generally JEAN-JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* (1762).

275 See BADINTER, *supra* note 268, at 180-82.

276 *Id.* at 168.

277 *Id.* at 162 (quoting ROUSSEAU, *supra* note 274, at 258).

faithful and that their union would be more tender”;<sup>278</sup> she was also promised “the esteem and the respect of the public.”<sup>279</sup> Without affirming any real equality between men and women, the eighteenth century’s societal quest for a more protective and caring motherhood narrowed the gap between husbands and wives; reconstructed women’s identities; and gave them a sense of empowerment, control, and influence over men, children, and society at large. Moreover, Badinter adds that something else had “changed profoundly”: “when [women] could not assume their [maternal] duties, they believed themselves guilty.”<sup>280</sup> Hence, empowerment and guilt were inseparable aspects of the social endeavor designed to reconstruct women’s identities as mothers.

Badinter’s historical analysis brings to the surface the often neglected aspect of empowerment that is integral to the work of motherhood.<sup>281</sup> Women’s work within the family—more particularly mother’s work—is more often referred to as a domain of gender inequality and subordination.<sup>282</sup> However, if modern motherhood was initially shaped in an era in which women have been denied other sources of power, eighteenth-century writings that aimed at recruiting women to the task of active motherhood and stressed its benefits not only established a disciplinary and subordinating regime for women but also made the household a potential source of women’s power.<sup>283</sup> Moreover, in light of women’s continued inferiority in the labor market and the persistence of gender discrimination and lack of equal employment opportunities, maternal work may still be a significant source of power, control, and self-esteem in women’s lives,<sup>284</sup> counter to workplace disempower-

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278 *Id.*

279 *Id.* at 163 (quoting ROUSSEAU, *supra* note 274, at 259).

280 *Id.* at 201. Badinter concludes in this context that “[i]n this sense Rousseau had won a very significant battle. Guilt had invaded women’s hearts.” *Id.*

281 For one exception, see Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 190–92 (2000) (noting that women also gained respect and authority from increased household responsibilities).

282 Cf. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) (equating gender difference with gender dominance).

283 The historian Nancy Cott reaches a similar conclusion by arguing that, as the domestic sphere became increasingly important in the late eighteenth century, it preserved for women “the avenues of domestic influence, religious morality, and child nurture.” NANCY F. COTT, THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1835 at 200 (1997).

284 For a personal narrative exploring the gratifying aspects of motherhood written by a woman who gave up her full time job once she became a mother, see generally IRIS KRASNOW, SURRENDERING TO MOTHERHOOD: LOSING YOUR MIND, FINDING YOUR SOUL (1997).

ment. As a result, women are more likely than men to structure their lives to accommodate childcare, especially if they are still socially constructed to feel more responsible for their children and therefore guilty if they cannot assume their duties.

#### D. The Disempowerment of the Labor Market

A 2015 *Bloomberg Businessweek* survey that tracked MBA graduates from 2007 to 2009 found that women with the same educational achievements as their male counterparts ended up making less money, managing a smaller amount of people, and being less satisfied with their career development.<sup>285</sup> The survey, which evaluated answers from MBAs at more than 2,500 companies, showed the consistency of the gender gap across most businesses.<sup>286</sup> Income inequities were particularly significant among graduates of elite programs.<sup>287</sup> Large year-end bonuses that men received significantly contributed to the pay gap.<sup>288</sup> The survey's authors suggest that a possible reason for the pay gap is the lesser likelihood for women to be bosses.<sup>289</sup> Indeed, in the business world, women make up only five percent of S&P 500 CEOs.<sup>290</sup> The Bloomberg survey also found that male MBA graduates tended to settle in professions that

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<sup>285</sup> Natalie Kitroeff & Jonathan Rodkin, *The Real Payoff from an MBA Is Different for Men and Women*, BLOOMBERG BUSINESSWEEK (Oct. 20, 2015), <https://www.bloomberg.com/news/articles/2015-10-20/the-real-cost-of-an-mba-is-different-for-men-and-women> [https://perma.cc/WHS6-9NRQ]. This survey was based on 12,773 responses from MBAs working in a variety of industries. The survey reveals that the salary of women and men starting their post-MBA careers is rather similar: \$98,000 for women and \$105,000 for men. However after five to seven years the difference grew to men earning a median of \$175,000 and women, a median of \$140,000. *Id.* This means that after five to seven years employers paid women 80% of what men with the same degree earned.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* For instance, women in the survey said they were responsible for a median of three employees while men on average reported managing five. In addition, 27% of women said they had no direct or indirect reports, as opposed to 20% of men. *Id.*

<sup>290</sup> *Pyramid: Women in S&P 500 Companies*, CATALYST (Aug. 22, 2017), <http://www.catalyst.org/knowledge/women-sp-500-companies> [http://perma.cc/LUE3-3B5V]. Moreover, women hold just 20% of board seats at *Fortune* 500 companies. DELOITTE, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *Fortune* 500 Boards 10 (2017); see also Alison Cook & Christy Glass, *Women and Top Leadership Positions: Towards an Institutional Analysis*, 21 GENDER, WORK & ORG. 91, 91 (2014) (citations omitted) (discussing the underrepresentation of women in top leadership positions in American corporations, and pointing to the existence of a glass ceiling, which invisibly prevents women's advancement).

paid more,<sup>291</sup> but even women who went into high-paying fields were underpaid by comparison.<sup>292</sup> Among those who wrote these smaller paychecks for women were some of the country's top MBA employers.<sup>293</sup> The survey also found close correlation between pay and fulfillment among both genders; those stating the highest levels of satisfaction were consequently also the top (male) earners.<sup>294</sup>

The Bloomberg Businessweek survey did not ask the polled alumni whether they had children, so the authors could not infer parenthood's impact on earning power. Nevertheless, they noted that a higher percentage of women participating in the survey were unemployed.<sup>295</sup> They also cited data from a Harvard Business School study showing that a much higher percentage of female MBA alumni took a leave in order to take care of children.<sup>296</sup> Referring to "experts" who indicated that taking time off from work to care for children could "stall salary growth," they also quoted the Dean of Michigan Ross School of Business: "When you return, you don't get paid at the same level as your peers . . . . It's not gender-based. It would happen to anyone who stopped out, but women stop out a lot more."<sup>297</sup> The survey's implicit suggestion is clear: women choose motherhood over career, and this factor can explain the persistence of a significant gender gap in top management even among high achieving men and women. This assumption is particularly revealing because it echoes Judge Preska's general propositions in *EEOC v. Bloomberg* regarding women's lesser commitment to their workplace. As previously discussed, the judge's belief that women's primary career obstacle is themselves, provided the normative framework within which she interpreted and justified the statistical data that revealed that mothers at Bloomberg earned less than other employees with the same credentials:

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<sup>291</sup> Among the alums in the survey, 43% of men worked in the five most lucrative industries, such as real estate and consulting, as opposed to 32% of women. Kitroeff & Rodkin, *supra* note 285.

<sup>292</sup> In finance, on average, women earned \$53,200 less than men. This gender-based difference in earning could be found in other job categories as well, such as marketing at a bank, where women earned \$7,000 less than men or among investment bankers, where women earned \$115,000 less than men. *Id.*

<sup>293</sup> For instance, "Google paid the 21 female alums [that were] surveyed a median of \$36,000 less than the 68 male alums." Similarly, the 14 women surveyed at Bank of America "made a median of \$61,000 less than the 81 men at the company." *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* The exact figures are 6% of women versus 1.4% of men.

<sup>296</sup> *Id.* The exact figures are 28% of women versus 2% of men.

<sup>297</sup> *Id.*

In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. . . . And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. . . . Employment consequences for making choices that elevate non-work activities (for whatever reason) over work activities are not illegal.<sup>298</sup>

The assumption that high-potential women are apt to discard their career after parenthood is widespread. As discussed earlier, it is reflected in the narrative of choice that depicts these women as opting out.<sup>299</sup> A recent Harvard Business School survey of 25,000 of its graduates found that 73 percent of men and 85 percent of women thought “that ‘prioritizing family over work’ [was] the number one barrier to women’s career advancement.”<sup>300</sup> The study explored the validity of this belief and concluded that it was misguided.<sup>301</sup> Analyzing relevant data, the study found that only a small proportion of HBS alumnae had left their jobs to care for children. Moreover, most of these women gave up their jobs “reluctantly and as a last resort,” after “find[ing] themselves in unfulfilling roles with dim prospects for advancement.”<sup>302</sup> Finally, the study concluded that such career decisions could not account for the fact that women were less likely to be in senior management.<sup>303</sup> Although more women than men were likely to make professional decisions to accommodate family responsibilities, none of these factors explained the gender gap in senior positions.<sup>304</sup> The study also examined “whether simply being a parent,” aside from any career decisions made to accommodate family responsibilities, made a difference and concluded that it did not.<sup>305</sup> HBS female alumnae attained senior management positions at lower rates than men irrespective of parenthood-related factors.<sup>306</sup>

The Harvard study refrains from delving deeper into why women are less likely to be in top management. It implies that the misguided assumption that mothers value career less than

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298 *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 485–86 (S.D.N.Y. 2011).

299 *See supra* notes 169–77 and accompanying text.

300 Ely et al., *supra* note 174, at 104.

301 *See id.* at 104–05.

302 *Id.* at 105.

303 *Id.*

304 *Id.*

305 *Id.* at 106.

306 *Id.* at 105–06.



men raises another obstacle to women's progress in the workplace. But it leaves this issue to future studies, concluding only that "the conventional wisdom doesn't tell the full story."<sup>307</sup> Personal accounts of high achieving women shed further light on this issue and provide some necessary insights for uncovering the full story. One intriguing example is the personal account of Maureen Sherry, a former managing director at Bear Stearns Investment Bank and author of the recently published novel *Opening Belle*, in which she describes the many indignities suffered by Wall Street executive Isabelle "Belle" McElroy.<sup>308</sup> While Belle's on-the-job trials are fictional, many of them were inspired by Sherry's real-life experience and by stories other women shared with her. Writing in the *New York Times*, Sherry explained:

Many women have shared their stories with me, and they go far beyond exclusion from meetings and golf courses. There was the young banker who was groped publicly to settle a bet about whether her breasts were real, and the senior deal makers who found out their pay was a fraction of their male counterparts'.<sup>309</sup>

As to her own experience, Sherry recalled returning from maternity leave to find a co-worker poaching her client accounts, heading to the nurse's office with a breast pump while hearing the "moo" sounds that traders made, and an incident in which a colleague, on a dare, drank a shot of the breast milk that she had stored in the office fridge.<sup>310</sup> She also remembered "the guy known for dropping Band-Aids on women's desks when the trading floor was cold because he didn't 'want to be distracted,'" as well as the many times she witnessed a female co-worker formulate an idea in a meeting, only to see a man get credit for the same idea at a later stage.<sup>311</sup>

These personal accounts provide an important framework for revisiting Jill Patricot's claims of gender discrimination and retaliation against Bloomberg. Recall that Patricot was one of six female employees who joined the *EEOC* suit as intervening plaintiffs. She remained the last plaintiff in this once wide-

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<sup>307</sup> *Id.* at 106.

<sup>308</sup> *See generally* MAUREEN SHERRY, *OPENING BELLE* (2016).

<sup>309</sup> Maureen Sherry, *A Colleague Drank My Breast Milk and Other Wall Street Tales*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/opinion/a-colleague-drank-my-breast-milk-and-other-wall-street-tales.html> [http://perma.cc/67NJ-YSJ6].

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

ranging lawsuit after all other claims had been denied.<sup>312</sup> Hers was ultimately denied as well, when the court determined that she was not entitled to post-resignation back pay because she failed to mitigate her damages by voluntarily resigning from Bloomberg. Her discrimination allegations regarding her demotion to Data Analyst and compensation decrease did survive summary judgment; still, the court determined that Patricot had “to attack her discrimination within the context of her existing employment at Bloomberg.”<sup>313</sup> Because Patricot chose to resign, the court concluded, “the law does not allow her to recover post-resignation backpay.”<sup>314</sup>

True, Patricot eventually chose to resign from Bloomberg. However, it is important to acknowledge her experiences at Bloomberg prior to her resignation and also to relate these experiences to those of other high-achieving women such as Maureen Sherry. In her lawsuit, Patricot recalled being denied her own desk and telephone upon returning from her second maternity leave, allegedly in retaliation against her for filing a discrimination charge with the EEOC.<sup>315</sup> The court dismissed the significance of this event by embracing Bloomberg’s assertion that “standing alone, the denial of one’s own desk and telephone line has never been held to be a retaliatory adverse action.”<sup>316</sup> Similarly the court denied the magnitude of her mistreatment by senior management between the time she filed her discrimination charge in 2006 and her resignation in 2009. Patricot argued that senior managers, who were initially friendly and responsive to her, started to ignore her after her pregnancy—passing her in the hallways on several occasions while avoiding eye contact with her altogether.<sup>317</sup> However, the court concluded that these incidents amounted to no more than “petty slights, minor annoyances, and simple lack of good manners.”<sup>318</sup> Patricot also recalled that a week after filing her complaint to the Human Resources department at Bloomberg, her supervisor Beth Mazzeo showed up unannounced at Patricot’s office. Mazzeo turned her head and ignored Patricot whenever they passed each other in the hallway. She also sat next to Patricot throughout the entire next day in “a clear at-

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<sup>312</sup> See *supra* note 183.

<sup>313</sup> EEOC v. Bloomberg L.P., 29 F. Supp. 3d 334, 344 (S.D.N.Y. 2014).

<sup>314</sup> *Id.* at 345.

<sup>315</sup> See EEOC v Bloomberg L.P., 967 F. Supp. 2d 816, 847 (S.D.N.Y. 2013).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* (citations omitted).

<sup>318</sup> *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

tempt to intimidate and harass Patricot.”<sup>319</sup> “While such behavior, if true, is childish and reflects poor leadership skills,” the court determined, “it is yet another example of behavior best dealt with by a general civility code within the workplace.”<sup>320</sup> The court reached the same conclusion with regard to an event in which Patricot’s boss publicly “yelled at her on the sales floor.”<sup>321</sup> Summarizing the significance of all these events, Judge Preska determined that, while “Patricot subjectively perceived her workplace to be abusive, [she did] not demonstrate that the few isolated events alleged in her complaint are ‘severe or pervasive enough to create an objectively hostile or abusive work environment.’”<sup>322</sup>

This final conclusion is dubious. The sequence of events described by Patricot appears to constitute a pattern rather than a “few isolated events.” Its magnitude in terms of creating hostile or abusive work environment should also be measured against Patricot’s discriminatory demotion and resultant compensation decrease that predated the alleged events. Moreover, can the issue of hostile work environment at Bloomberg be determined without reference to the experiences of its other female employees? As part of the class action lawsuit, the EEOC presented several statements from upper management as evidence of Bloomberg’s bias, negative stereotypes, and disregard for women.<sup>323</sup> According to these allegations, the Head of News said that “half these [expletive] people take the [maternity] leave and they don’t even come back. It’s like stealing money from Mike Bloomberg’s wallet. It’s theft. They should be arrested.”<sup>324</sup> Upon receiving a complaint by a female employee in 2003 regarding these negative comments expressed by the Head of the News Division on women not returning to the company after having taken paid maternity leave, the CEO

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<sup>319</sup> *Id.* at 847–48 (citations omitted).

<sup>320</sup> *Id.* at 848.

<sup>321</sup> *See id.* As a result of this incident, “Patricot bec[a]me so distraught that it was necessary for two of her colleagues to walk her off the floor.” EEOC, v. Bloomberg L.P., 29 F. Supp. 3d 334, 337 (S.D.N.Y. 2014). She contended that they took her to the company nurse. *Id.* at 337 n.3.

<sup>322</sup> *Bloomberg*, 967 F. Supp. 2d at 849 (quoting *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004)).

<sup>323</sup> *See EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 478–79 (S.D.N.Y. 2011).

<sup>324</sup> Williams, *supra* note 190, at 1289–90 (citing EEOC’s Memorandum of Law in Opposition to Defendant Bloomberg L.P.’s Motion for Summary Judgment as to EEOC’s Pattern-or-Practice Claim at 4, *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011) (No. 07-8383)).

said, "Well, is every [expletive] woman in the company having a baby or going to have a baby?"<sup>325</sup>

The court dismissed most of these statements as inadmissible hearsay and concluded that the few admissible comments could not make up a pattern or practice claim in a company with 10,000 employees and more than 600 women who took maternity leave in the relevant period.<sup>326</sup> Nevertheless, even if the admissible comments from a handful of Bloomberg managers are insufficient to demonstrate a policy of discrimination at Bloomberg, they still provide crucial insights for uncovering the "full story" that the Harvard study searches for.<sup>327</sup> They supplement the trials of Maureen Sherry and Jill Patricot in exemplifying how high achieving women are disempowered and humiliated in the workplace and consequently leave as a last resort. They also explain another key finding of the Harvard study regarding a gender gap in career satisfaction. While male and female MBAs start their career with similar expectations as to what they value and hope for in their lives and careers, their ability to realize these goals has played out very differently according to gender. More than half (50% to 60%) of men across three generations reported very high levels of satisfaction with regard to their experiences of meaningful work, professional accomplishments, opportunities for career growth, and compatibility of work and personal life. In contrast, less than half of the women (40% to 50%) expressed similar levels of satisfaction concerning the same parameters.<sup>328</sup> In light of these data it is possible to see why even high-achieving women can still perceive motherhood as an empowering domain in which they find satisfaction, control, and self-esteem. Drawing a link between women's disempowering experiences in the labor market<sup>329</sup> and the power of motherhood thus adds a cru-

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<sup>325</sup> *Bloomberg*, 778 F. Supp. 2d at 479.

<sup>326</sup> *See id.*

<sup>327</sup> Ely et al., *supra* note 174, at 106; *see also supra* note 201 and accompanying text (describing Harvard study as it relates to *Bloomberg* case).

<sup>328</sup> Ely et al., *supra* note 174, at 103.

<sup>329</sup> The recent rise in allegations of sexual harassment in the workplace (Hollywood and beyond) clearly highlights another set of obstacles that women still face in the workplace. In a recently conducted study by ABC News, 68% of women reported that they experienced unwanted sexual advances in the workplace, and 75% experienced them by someone in a higher position of power. Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story*, *Poll Finds*, ABC NEWS (Oct. 17, 2017), <http://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721> [<https://perma.cc/M6DH-D847>]. The general numbers cut across all industries, with only slight variations. Alanna Vagianos, *1 In 3 Women Has Been Sexually Harassed at Work, According to Survey*, HUFFINGTON POST (Feb. 19, 2015), <https://>

cial aspect to thinking about the maternal dilemma and reevaluating the sufficiency of current policy solutions.

#### E. Domesticating the Workplace, Dignifying Women's Work

Contemplating the gap between the law's ideal of equal parenting and the persistence of maternal reality in most families, which lies at the core of the maternal dilemma, we should recognize the many ways women and men still differ in needs and concerns.<sup>330</sup> More precisely, it is time to acknowledge the significance and implications of gender differences in both the public and the domestic sphere. In the male dominated work environment of many businesses, women still feel "less worthy, less valued, [and] less important."<sup>331</sup> Moreover, in that culture, organized around male norms of behavior and ways of doing things, women have fewer opportunities for career advancement. The built-in systems for advancement that work for men do not work for women. Against this reality, gender difference at home persists as the role of motherhood remains rewarding and meaningful and a source of power and control. Hence, gendered patterns of care-work at home are not simply the product of women's subordination in the domestic sphere. They also reflect the complex relation of women's disempowering experience in the labor market with the historical and contemporary significance of motherhood in their lives. Consequently, gender-neutral policy solutions that focus on encouraging men to assume more caretaking responsibilities at home are not sufficient. Some of the attention should be diverted to women's (different) professional and parental needs and to thinking about how to encourage women to enable men to fulfill a more significant role in the household.

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[www.huffingtonpost.com/2015/02/19/1-in-3-women-sexually-harassed-work-cosmopolitan\\_n\\_6713814.html](http://www.huffingtonpost.com/2015/02/19/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814.html) [<https://perma.cc/7Q33-DZH3>].

<sup>330</sup> Deborah Anthony has noted in this context that "[o]ne need not hold that the 'differences' between women and men are innate or biological to take this approach; whatever their original source, our social norms make those differences real, and legal policy must take account of them to be truly effective." Anthony, *supra* note 59, at 481.

<sup>331</sup> Rosabeth Moss Kanter & Jane Roessner, *Deloitte & Touche (A): A Hole in the Pipeline*, HARV. BUS. SCHOOL 6 (May 2, 2003). Kanter and Roessner discuss the findings of a task force that was appointed in the early 1990s by accounting firm Deloitte & Touche's Board. The task force was charged with the mission of finding out why women were leaving the firm at a faster rate than men and developing recommendations to reverse the trend. The final report identified three primary obstacles to the advancement and retention of women: male-dominated work environment, lack of opportunities for career advancement, and insufficient work-life balance. *Id.* at 4-6.

In diverting the focus from men to women, the goal is to establish alternative sources of power for women in the public sphere and to restructure the workplace to accommodate women's current (different) parental needs. If mothering (and maternal guilt) still plays a critical role in women's lives maybe the choices that confront women should not be reduced to opting out to care for children or relinquishing motherhood for professional work.<sup>332</sup> A third option can be domesticating the workplace so that parental work is not confined to the domestic sphere. Domesticating the workplace entails going beyond allowing a more reasonable work-life balance in the form of flexible hours, part time work, or telecommuting.<sup>333</sup> It also requires enabling parents to exercise some of their parental tasks at work. For instance, a nursery in the workplace that allows parents, more especially mothers, to take young children with them to work, to be able to breastfeed them while at work, or to spend some time with them, can relieve the struggle of having to choose between family and work.<sup>334</sup> In addition to telecommuting, which enables workers to take work home, taking parenthood to work should also be made possible in order to incentivize women to depart the domestic sphere without conceding the benefits of motherhood and without feeling guilty for not attending to their children's needs.<sup>335</sup>

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<sup>332</sup> For a similar argument with regard to Israel's parental policies, see NOYA RIMALT, *LEGAL FEMINISM FROM THEORY TO PRACTICE: THE STRUGGLE FOR GENDER EQUALITY IN ISRAEL AND THE U.S.* 183–88 (2010).

<sup>333</sup> For a brief review of such suggestions for workplace reforms, see Cahn, *supra* note 281, at 217–19.

<sup>334</sup> Interestingly, childcare became an important issue to employers during World War II, when women had to work in the factories to replace the men who were off to war. Stimulated by federal legislation that gave matching funds to day care centers, many employers sponsored on-site nurseries to care for the children of their female employees. These centers closed when the war ended and male workers resumed their place in the factories. See SHEILA B. KAMERMAN & ALFRED J. KAHN, *THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE* 190 (1987); Erica B. Grubb, *Day-Care Regulation: Legal and Policy Issues*, 25 SANTA CLARA L. REV. 303, 312 (1985).

<sup>335</sup> For some initial initiatives and existing measures in this context, see RACHEL CONNELLY, DEBORAH S. DEGRAFF & RACHEL A. WILLIS, *KIDS AT WORK: THE VALUE OF EMPLOYER-SPONSORED ON-SITE CHILD CARE CENTERS 4–9* (2004) (offering quantitative and qualitative arguments for the benefits of on-site childcare for employees); CATHERINE HEIN & NAOMI CASSIRER, *WORKPLACE SOLUTIONS FOR CHILD-CARE* 93–128 (2010) (evaluating various solutions to accommodating parenthood at the workplace); Lisa Belkin, *Bringing Baby to Work*, N.Y. TIMES (Oct. 30 2008), <https://parenting.blogs.nytimes.com/2008/10/30/bringing-baby-to-work/> [<https://perma.cc/QGY2-43SB>] (interview with the founder of the Parenting in the Workplace Institute, which “helps companies design programs that allow workers to bring new babies to the office regularly”).

Still, women's professional work has to be dignified; they have to be provided a supportive environment in which they might get ahead and realize that their work counts and contributes. Affirmative gender-specific measures in terms of financial incentives such as the one discussed and affirmed in *Bahat*—the Israeli case—might be crucial in turning the workplace into an empowering domain for women. Moreover, building on *Bahat's* broader rationale, affirmative action plans for promoting women to top management positions could be similarly justified on gender-equality grounds. While gender-neutral parental entitlements as well as daddy quotas remain a valid and important legal tool for encouraging men to assume more caretaking responsibilities, it is equally crucial to address women's parental choices and to undermine the structures and forces that shape those choices and cater to a reality of gender inequality. The ultimate goal should be to have an inclusive policy that represents the needs of both men and women and takes realistic account of their divergent positions in society.

#### CONCLUSION

When enacting the FMLA and setting a minimum standard of family leave for all eligible employees, Congress was particularly cautious about attacking the stereotype that all women are responsible for family caregiving. As Justice Rehnquist explained in *Nevada v. Hibbs*, the goal was to encourage men to assume more caretaking responsibilities at home, thus reducing employers' incentives to discriminate against women by basing hiring and promotion decisions on the stereotype of women as mothers. Indeed, the likely contribution of the gender-neutral parental leave legislation to the promotion of gender equality in the division of care-work at home, hence to equal employment opportunities for women, was part of the official FMLA narrative. It was meant to strengthen the expectation of a transformative era, when "a significant number of men"<sup>336</sup> would take family leave.

However, more than twenty years after the enactment of this law, women remain the primary caretakers at home. They are still singled out as different, and gender stereotypes of women as less competent workers flourish, nurturing a reality of gender discrimination in the workplace. This discriminatory reality is often masked by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual

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<sup>336</sup> Ross, *supra* note 43, at 104.

products of contemporary parental policies. Gendered patterns of care and work are thus legitimized as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice shape these preferences.

This Article has suggested naming this problem the maternal dilemma and has called for acknowledging the gap between law's ideal of equal parenting and the persistence of maternal patterns of care at home. It has revealed that the expansion of traditional mother-oriented protections to gender-neutral parental benefits, designed to encourage men to assume more caretaking responsibilities at home, have not been effective in undermining the unequal division of care-work at home, irrespective of how generous these supports are. The American model of very narrow parental supports thus resembles the far more progressive Israeli model in terms of the scope and significance of the maternal dilemma. Similarly, even in countries that put extra pressure on men to participate equally in the division of domestic labor by mandating leave, women still take most of the leave and are more likely to adjust their working routine to accommodate childcare.

The magnitude and persistence of the maternal dilemma calls for a reevaluation of current policy solutions that focus primarily on recruiting men to engage in caretaking at home as a means of undermining the gendered division of parental work, thus removing a significant barrier to gender equality in the workplace. Focusing on reshaping men's parental choices has made feminists, legislators, and policy makers neglect another, no less important, set of questions about the structures and forces that shape women's decision to remain the primary caretakers at home. Shifting the focus back to women and addressing their specific needs and concerns is thus crucial for moving forward. A first step in this direction is naming the problem "the maternal dilemma." It serves as a reminder of where the core of the problem lies; it also implies that the path to gender equality entails more than gender-neutrality and similar treatment.