

Who's Bringing Up Baby: The Need For A National Uniform Parental Leave Policy

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In the past several decades the demographics of the U.S. workforce and the American family have radically changed.¹ Women, particularly those of childbearing age, have flooded the workforce,² eroding the traditional image of the two-parent male breadwinner family. While this trend is not unique to our society, the U.S. remains the only industrialized nation with no national maternal or parental leave program.³ Unfortunately, the American system operates today much as it has in the past: as if workers do not have family care responsibilities. By failing to guarantee employees a parenting leave with safeguards to protect salary, benefits, position, and seniority upon return to work, the U.S. labor system reinforces inaccurate gender stereotypes, perpetuates the economic deprivation of women in the workforce, and seriously underestimates the value of parental child care.

This article explores the need for a national uniform parental leave policy in the wake of societal and workforce changes. Part I examines the inaccurate gender stereotypes upon which the

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1. Four major trends are cited in family statistics, including:

- 1) increasing labor force participation by women
- 2) increasing incidence of two or multiple earner families
- 3) divorce and remarriage
- 4) the fading of stereotypical behaviors associated with different stages in the life cycle due, in part, to women's longer life spans.

National Comm'n on Labor Statistics, U.S. Dep't of Labor, *The Implications of Changing Family Patterns and Behavior for Labor Force and Hardship Management* 3 (1978) [hereinafter *Changing Family Patterns*].

2. Since 1980, women, especially those in their childbearing years, have made up the fastest growing segment in the labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings* 9 (July 1985) [hereinafter *Employment and Earnings*.] The past decade marks the first era in history with no noticeable decline in the labor force participation by women in their childbearing years. This suggests that women are a committed and permanent part of the labor force. Sheila Kamerman & Alfred Kahn, *Child Care, Family Benefits, and Working Parents* 25 (1981) [hereinafter *Child Care*].

3. One hundred seventeen nations offer some type of guaranteed maternity or parental policy protecting seniority and benefits. Sheila Kamerman, *Pregnancy Leave: A Dilemma of Women and Equality*, L.A. Times, Apr. 2, 1984, § II, at 7, col. 1.

workforce is currently based: that men are the principal breadwinners, while women are solely responsible for child care and domestic duties. Part I will also expose the damage such stereotypes inflict upon women, men, and children. Part II explores the history of legislative and judicial action concerning maternity and the workforce. Part II then argues that both the legislature and the courts have inappropriately placed the issue of childrearing within the scope of pregnancy and special treatment for women. Current programs appear inadequate to meet the economic, psychological, and social needs of parents participating in the workforce. Part II also sketches "parental insurance" programs offered by other western nations, particularly Sweden.

Part III introduces recent attempts by members of Congress to alleviate the child-care problems of working parents, particularly the Family and Medical Leave Act of 1987.⁴ This bill, currently before Congress, seeks to guarantee parents the right to an eighteen-week parental leave with protections for salary, benefits, and seniority upon return to the workforce.⁵ Part III then addresses the implications, both positive and negative, such a nationwide program could have on the family and the workplace.

I. The Traditional Family and the Workforce: An Outmoded Stereotype.

The stereotypical Norman Rockwell portrait of the American family paints the female as "maintainer of the home and family" and the male as the "sole workforce participant." This idealistic portrait, however, is rapidly disintegrating. Moved by economic, social, and psychological necessity, women no longer focus the majority of their time on home and family.⁶ Instead, as the fastest growing segment of the labor market, women must now balance the demands of family and career. In June, 1986, 54 percent of the adult female population was employed full time in the

4. H.R. 925, 100th Cong., 1st Sess. (1987). S. 249, 100th Cong., 1st Sess. (1987).

5. H.R. 4300, the 1986 version of the bill, was introduced by Representatives William Clay, Patricia Schroeder, Mary Rose Oakar, and Austin Murphy. On June 11, 1986, it was passed by the Committee on Post Office and Civil Service. Schroeder, Parental and Medical Leave H.R. 4300 Briefing Paper, 99th Cong., 2d Sess. 7 (1986) [hereinafter Briefing Paper]. Unfortunately, the bill never reached a vote on the House floor. A similar fate befell the Senate version, S. 2788, 99th Cong., 2d Sess. (1986). The 100th Congress considered similar bills requiring employers with 15 or more employees to guarantee 18 weeks of unpaid leave over a 24 month period for fathers as well as mothers in the case of a birth, adoption, or seriously ill child. See *supra* note 4; *infra* note 253.

6. See Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. Rev. 55 (1979). See also *infra* notes 26-29 and accompanying text.

civilian labor force.⁷ In 1975, that figure was 34 percent.⁸ Between 1950 and 1985, the number of women in the labor force increased 178 percent.⁹ This trend is predicted to continue until women's participation in the workforce is roughly equivalent to men's participation.¹⁰

Nowhere is the change more evident than in the workforce participation rate of women of childbearing age,¹¹ where levels have risen steadily from 45.7 percent in 1960 to 66 percent in 1980.¹² This trend continues even after women of childbearing age have children. A recent study by the Department of Labor indicates that fewer and fewer women drop out of the workforce after giving birth.¹³ In fact, 55 percent of all children had working mothers in 1982,¹⁴ and since 1980 most of the increase in participation has been among mothers with preschool aged children.¹⁵ The statistics also show that, today, women are more inclined to work after the birth of children and that they re-enter the workforce much sooner after childbirth.¹⁶

Economic need has fueled the dramatic rise in women's workforce participation.¹⁷ Its impact is felt both among two-par-

7. Employment and Earnings, *supra* note 2, at 9.

8. *The Numbers Game: More and More Mothers Leave the Nest for a Job*, Nat'l J., Oct. 19, 1985, at 8, col. 1.

9. See Briefing Paper, *supra* note 5, at 5.

10. By 1990, 67% of women will participate in the labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, *Women at Work: A Chartbook 4* (1983) [hereinafter *Chartbook*]. One reason for this trend is that six out of ten women who were full time homemakers in 1982 were 45 years or older.

11. In June of 1976, the U.S. Dep't of Labor reported that 74.6% of women ages 20-24, 64.8% of women ages 25-34, 66.9% of women ages 35-44, 60.6% of women ages 45-54, and 39.5% of women ages 55-64 were employed. The corresponding figures for men are: 78.5%, 88.8%, 90.2%, 87.2%, and 65.4%. Employment and Earnings, *supra* note 2, at 11.

12. See Frug, *supra* note 6, at 56.

13. See *Chartbook*, *supra* note 10, at 10.

14. *Id.* at 20.

15. In 1960, approximately 25% of mothers with children younger than three were participating in the labor force. Today that number is approximately 50%. By 1990 it is expected to reach 80%. Edward Zigler, *Parental Leave For Men Too*, N.Y. Times, June 14, 1986, § 8, at 10, col. 3.

16. The participation rate for women with children under three has nearly tripled since 1960. Child Care, *supra* note 2, at 7. The figures show that in 1972, 45% of mothers of all youngsters below age six were in the work force. *Chartbook*, *supra* note 10, at 20.

In March, 1985, 60% of mothers with children between three and five years old participated in the work force while 67% with children under three years old worked, 48% of mothers with children less than one year were in the work force. Briefing Paper, *supra* note 5, at 10.

17. Nearly two-thirds of working women in 1984 were single, widowed, separated, or divorced or had husbands whose 1983 earnings were less than \$15,000. National Black Women's Health Project Testimony Before the Subcommittee on

ent and single parent families. Two-income households are becoming a necessity.¹⁸ Over one-half of the 45.6 million children in two-parent households have both parents in the workforce.¹⁹ Forty percent of married working women have husbands who earn less than \$15,000 per year.²⁰ Consequently, any loss of income or future income due to absence or loss of a job caused by childbirth can cripple an already financially-burdened family.

The possible economic impact of childbirth is even more profound upon the one-parent, one-income household. In 1981, one out of every five children was living exclusively with his or her mother or father.²¹ One child in six was supported solely by a woman.²² While several factors have led to the dramatic increase in single-parent families,²³ single parents find that they have fewer options in dealing with affordable child care.²⁴ For most, the only choices that exist are welfare or work. Both prove economically insufficient in many cases.²⁵

Societal changes have contributed to the dramatic increase in female workforce participation. Women are now encouraged to pursue careers which do not assume a secondary role to family responsibilities. While in the past women were directed into nursing, teaching, and service occupations amenable to their domestic functions, contemporary women are much more likely than their

Children, Families, Drugs and Alcoholism on Senate Bill 249, at 2 (1987) [hereinafter Health Project] (on file with Law & Inequality).

18. See Changing Family Patterns, *supra* note 1, at 13-14. In 1966 there were 19 million two-income households in the U.S. In 1986, there were close to 29 million families, a 50% increase. Statement of Senator Christopher J. Dodd, Subcommittee on Children, Families, Drugs and Alcoholism Hearing on Parental and Medical Leave 4 (1987) [hereinafter Hearing] (on file with Law & Inequality).

19. Briefing Paper, *supra* note 5, at 3.

20. *Id.*

21. Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 2158, Children of Working Mothers 1 (1983).

22. From 1972-1982 this figure rose 57% to 9.7 million. Chartbook, *supra* note 10, at 24. Fifty-one percent of Black families were headed by a woman. Health Project, *supra* note 17, at 2.

23. These factors include the growing divorce rate, especially among the young, the lower remarriage rate, and the growing number of births out of wedlock. Of the women without partners nurturing children in 1984, 17.6% had never married, 18.7% were married but the fathers were absent, 37.5% were divorced, and 28.6% were widowed. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1986, at 46 (106th ed. 1985) [hereinafter Statistical Abstract].

24. Three out of five single mothers are currently in the work force; one out of three at the poverty level. Nationally, one person in sixteen lives at the poverty level. Chartbook, *supra* note 10, at 24-26.

25. See Child Care, *supra* note 2, at 251. Forty-two percent of women who alone supported their family, or one-fifth of the female work-force, worked in the paid labor force and were still unable to raise themselves above the poverty level. Health Project, *supra* note 17, at 2.

predecessors to choose the more traditionally "male" fields such as architecture, law, and forestry.²⁶ Women are also living longer²⁷ and having fewer children.²⁸ As a result, women no longer spend a majority of their years raising young children.²⁹

The above discussion proves false the assumption that a woman's role is domestic rather than career-oriented. Women are joining the workforce in larger numbers, and continuing to work through their childbearing years and well into their old age.³⁰ Increased awareness by women of the potential instability of marriage and the inadequacy of a one-income household³¹ also warrants their continued participation in the labor force.

Not only is the stereotype of women as domestic, non-labor participants incorrect, it also has a harmful effect on society. The present labor system, bolstered by the stereotype that women are primarily homemakers, perpetuates economic and social disparity between women and men.³² As Nancy Chodorow points out in *The*

26. In just ten years there has been a marked change in gender demographics of traditional "male" and "female" occupations. In 1970, women comprised only 4% of the nation's architects, 4.9% of the lawyers, and 9% of the farmers, foresters and fishermen. In 1980, those figures were 8.3%, 13.8%, and 14.9%, respectively. A decline in the percentage of women in nursing and elementary education — two fields considered "traditionally female" — also occurred. In 1970, women made up 60.6% of health care professionals (excluding doctors) and 83.9% of school teachers. In 1980, those figures were 50.8%, and 75.4%, respectively. Statistical Abstract, *supra* note 23, at 400.

27. The life expectancy for women was 54.6 years, in 1920, compared to 78.3 years today. *Id.* at 68.

28. The number of expected births in the U.S. dropped steadily from 3 per family in 1967 to 2.2 in 1979, and it is continuing to drop. The number is even lower for working women. Sheila B. Kamerman, Alfred J. Kahn, & Paul Kingston, *Maternity Policies and Working Women* 10 (1983) [hereinafter *Maternity Policies*].

Technological advances mean less time is required to meet many of today's domestic tasks such as laundering and food preparation. The resulting decreased need for a spouse to remain in the home enables more women to seek outside employment.

29. While the average woman bears and raises young children during the ages of twenty to thirty-five, the average working woman labors from ages twenty to sixty-five. See *supra* note 11 and accompanying text. She dedicates approximately forty-five years to participation in the workforce as opposed to fifteen years to primary child care. A century ago, parenting lasted from the beginning of marriage until a spouse's death. Families had more children and the age differentials between each child were greater. Women often died during childbirth or from the effects of childbirth. Modern technology, birth control, and prenatal care have sharply decreased the number of childbirth related deaths, the number of children per couple, and the age differentials between the first and last child. Today parenting is much more a stage of adulthood rather than encompassing adulthood in its entirety. Nancy Chodorow, *The Reproduction of Mothering* 4 (1978).

30. See *supra* notes 11-16 and accompanying text.

31. See *supra* note 18 and accompanying text.

32. In *Women, Culture, and Society*, Ortner believes that women's relegation to the home and domestic sphere of society insures that women remain socially, cul-

Reproduction of Mothering, "as long as the labor market is hostile to parents and as long as the roles in the American family continue to be allocated on the basis of gender, the labor market gap between the sexes will continue."³³

Gender stereotypes hinder men, women and children. Although society has encouraged men to be fathers, the labor market has insisted that men forego the responsibilities and pleasures of childrearing.³⁴ The result of stereotyping men as labor force participants has been to reinforce the woman's role as sole family caretaker.³⁵ This has had an adverse effect on women because women are not encouraged to engage in activities outside the home. Instead, because survival of the species insists that women bear children, and the survival of the children depends on women's participation in the rearing process, women are perpetuated in their role as nurturers. As a result, "child care has been an unacknowledged cost in our traditional economic policies, largely because women have provided these services for free."³⁶

Of course, not everyone sees the "woman as nurturer" ideal negatively. Proponents of the traditional stereotype argue that

turally, and economically less powerful than men. See generally Sherry B. Ortner, *Is Female to Nature as Male is to Culture?* in *Women, Culture, and Society* (Michelle Rogaldo & Louise Lamphere eds. 1974).

33. Chodorow, *supra* note 29, at 180.

34. Most men will become husbands and fathers during their lifetimes, but few will assume primary responsibility for child care. This is revealed in the attitudes men and women take toward domestic duties. The male polices the garage and the yard — "manly duties," while the woman is in charge of the home and the children — "womanly duties." A father "babysits" his child. Women do not. *Id.* at 179.

35. Psychologists warn against women assuming total or near total responsibility for child care, not only for the harm it does the child, but for the harm it does the mother. Women tend to overinvest in their children. "Girls who grow up in family settings which include neither other women besides their mother nor an actively present father tend to have problems establishing a sufficiently individuated sense of self." *Id.* at 212. They in turn have problems in experiencing a separation from their own children. *Id.*

This may explain the higher alcoholism rate among housewives, see Joan Curlee, *Alcoholism and the 'Empty Nest,'* Bull. Menninger Clinic 165-71 (1968), the greater incidence of depression and anxiety among single mothers than any other marital status group, Paternal Absence and Fathers' Roles: Hearing Before the Select Comm. on Children, Youth, and Families, H.R. Doc. No. 33-939, 98th Cong., 1st Sess. 133 (1984) [hereinafter *Paternal Absence*], and the higher incidences of women than men who kill their own children, Otto Pollack, *The Criminality of Women* 84 (1950). This last statistic is especially startling since women generally commit a low number of violent crimes. The number, however, is increasing. *Id.*

36. Frug, *supra* note 6, at 101. Margaret Polatnick argues that "[m]en don't rear children because they do not want to rear children." Margaret Polatnick, *Why Men Don't Rear Children: A Power Analysis*, 18 Berkeley J. Soc. 60 (1973) (emphasis in original). Men perpetuate women in the role of caretaker because men have power in the male hierarchical structure of society. *Id.*

history evidences a "maternal instinct" inherent in the female.³⁷ Conversely, as Dr. Michael E. Lamb points out, "[w]ith the exception of pregnancy, partuition, and lactation, there is no reason to believe that men are inherently less capable of child care than women, although these potential skills often remain undeveloped or underdeveloped."³⁸ Women originally may have accepted and perpetuated the nurturing role because they lactated.³⁹

Supporters of the "woman as exclusive nurturer" stereotype are not hard to refute. Strict and exclusive nurturing roles for women are not pervasive in all cultures, especially the most primitive. In tribal communities, it is quite common for more mature children and older persons of both sexes to play an active part in child care.⁴⁰ Only in the advent of a more single-family community culture have women assumed sole responsibility for child

37. Sociologist Alice Rossi claims that because sexual division of labor is essential to human survival, it is built into human physiology. For example, women, because they lactate and bear children, are instinctively prone to raise children. For a complete study of the instinctual theory of women's mothering, see Alice Rossi, *Biosocial Perspective* (1977). See also Roy D'Andrade, *The Development of Sex Differences* (Eleanor Maccoby ed. 1966).

38. Paternal Absence, *supra* note 35, at 88. Warren Farrell points out that "our culture teaches women, discourages men, and then claims the instinct for parenting is unique to women." Warren Farrell, *The Liberated Man* 31 (1974). According to specialists such as Money, Hampson, and Chodorow, Farrell explains, gender roles and mothering roles are learned sociologically and are not products of economics or biology. See generally *id.* at 32-35.

Chodorow discards the three traditional arguments for women's mothering: 1) the evolutionary or functionalist theory, 2) the instinctual theory, and 3) the role training theory, in favor of a socialization theory. Women become mothers because they are mothered by women which causes them to grow up with stronger relational capacities and needs. While men seek location in the public sphere and non-familial roles, Chodorow postulates that "[w]omen's roles are basically familial, and concerned with personal, affective ties." Chodorow, *supra* note 29, at 178.

39. Historically, a child's sustenance required her mother's presence or immediate availability. It was not imperative for men to remain near the child because men did not lactate. This biological difference manifested itself in convenience and culture, which created the norm of woman as "caregiver". Mothers, consequently, remained with their children while men and other non-mothers hunted and gathered food. Traditionalists have used this argument to assert that because women lactate, they are naturally equipped to care for children and therefore, should do so. See Rossi, *supra* note 37, at 3.

John Nash points out, however, that the common belief that breast feeding is psychologically better for children than bottle-feeding is not supported by evidence. See John Nash, *The Father in Contemporary Culture and Current Psychological Literature*, 36 *Child Dev.* 261-97 (1965).

40. For example, in the Chuckchee society, women, men, girls, and boys all herd reindeer. The division of labor is "[n]ot sexually determined, but, divided according to child watching and non child-watching members." In this community both sexes assume responsibility for child care. Judith Brown, *A Note on the Division of Labor by Sex*, in *American Anthropologist* 1073, 1076 (1970), cited in Chodorow, *supra* note 29, at 20.

care.⁴¹

Nurturing, despite arguments to the contrary, is not an inherently female function.⁴² Both men and women possess the ability to nurture.⁴³ Unfortunately, the inaccurate presumption that women are natural nurturers to the exclusion of other abilities adversely affects perceptions of women in the employment sector. This can be evidenced by women's statistics in the labor market. While women have made great strides regarding participation in the labor force, economic equality has evaded them. The wage gap between the sexes in the United States is greater than in any other industrialized nation.⁴⁴ In 1939 women in America earned sixty-three cents compared with each dollar a man earned.⁴⁵ Today they earn sixty-four cents.⁴⁶ In 1984 the median wage of women working full time, was \$14,489. Similarly employed men averaged \$23,218.⁴⁷

One reason women's value in the workforce is underestimated is because many employers consider women with children to be marginal employees. If a mother takes time off to care for her child, upon her return to employment she often discovers that her economic situation has worsened as a result of having chil-

41. It can be argued that societal changes caused women to be regarded as primary caretakers, and that society perpetuated the role. In *The Reproduction of Mothering*, Nancy Chodorow asserts that mothering is reproduced on a number of different levels, built developmentally into the feminine psyche while children develop a society in which women have mothered them. Chodorow, *supra* note 29, at 30-39. Chodorow rejects the common "role training" argument because she feels a person cannot be coerced into mothering. *Id.* at 16-17. She argues that women became more domestic as society became more capitalistic; women came to accept their role as homemaker in the more male-dominated societies and that women's mothering to the exclusion of male mothering, or fathering, did not manifest itself from the beginning of time. Here Chodorow adds to Marx's and Engels' theories hypothesizing that male-dominated society organized the nuclear family and has since used it as an agent of oppression against women. *Id.* at 11, 13, 37.

42. Psychologists assert that a person's childhood experiences with early mother-infant relationships create a foundation for parenting in both men and women. Unfortunately, because women nurture most persons, society upholds expectations that women will "mother." It is all too easy and incorrect, argues Lancaster, to label "killer" and "maternal" instincts in men and women, respectively, in order to explain their social roles. Jane Beckman Lancaster, *Sex Roles in Primitive Societies*, in *Sex Roles* 47 (Michael S. Teitbaum ed. 1976).

43. According to Dr. Michael W. Yogman, Associate Chief, Division of Child Development, Children's Hospital, Harvard Medical School, "[f]athers can and do form significant and meaningful relationships with their infants right from birth. Fathers start out quite similar to mothers in their competence, and in their capability to interact with young infants." Paternal Absence, *supra* note 35, at 3.

44. See Sylvia Hewlitt, *A Lesser Life* 46 (1986).

45. *Id.* at 71.

46. *Id.* at 83.

47. *Id.* at 84.

dren.⁴⁸ She is seen as a mother first, a worker second. When a mother rejoins the workforce, she often will find that either she has been replaced, she has lost her seniority, or her new wage is substantially lower.⁴⁹ The same presumption that fathers are marginal employees does not exist, even though men regularly take time off for military service. Women, then, are victims of a double-edged sword. First, they are disadvantaged because they, unlike men, must take a leave for physical reasons to bear children, and once having taken the leave they are stigmatized as being less dedicated than male employees who did not need such a leave. Second, they suffer economically from the costs of bearing and raising children. Both profoundly impact the economic situation of women in the United States.⁵⁰

Economics often dictates the assignment of parental duties in households. Because women on the average earn less than men, women with incomes lower than their husbands are more likely to drop out of the workforce to raise children. Single mothers with low incomes drop out of the workforce because welfare becomes the more attractive alternative.⁵¹ Women, then, are primarily affected by the economics of childrearing. This in turn is one of the causes for the disparity in income between the sexes.⁵² The cycle perpetuates. Women continue to earn less than men.

Women are victims of prejudicial notions in the work force and in the home. In a society where no worth is placed on child care, those parents engaged in such endeavors are taken for granted.⁵³ As a result, children view their stay-at-home parent as

48. A two to four year break in employment lowers women's earnings by 13%. *Id.* at 82. As economist Lester Thorow relates in Sylvia Hewlitt's *A Lesser Life*: "The years between 25 and 35 are prime years for establishing a successful career. These are the years when hard work has the maximum payoff. They are also the prime years for launching a family. Women who leave the job market completely during those years may find they never catch up." *Id.* at 83.

49. The wage disparity creates a vicious cycle, crossing even educational backgrounds. A woman with four years of college still earns less than a male high school dropout. *Id.* at 84. See *supra* notes 44-47 and accompanying text.

50. Earnings losses for years 1985-1987 of employed women who gave birth or adopted a baby in 1985, as opposed to employed women and men who did not have a baby are estimated at \$13,309 per woman or \$28,547,805 for all employed women who had children in 1985. Institute for Women's Policy Research, *Costs to Women and Their Families of Childbirth and the Lack of Parental Leave* chart 1 (1987) [hereinafter *Costs to Women*] (on file with Law & Inequality). This figure does not include medical costs for bearing a child.

51. See Chartbook, *supra* note 10 and accompanying text.

52. See Hewlitt, *supra* note 44, at 89.

53. By the age of four, children note their favor for the man's role in society and the family. A survey of kindergartners showed that only one half of the girls and one quarter of the boys surveyed favored the mother's role. Jerome Kagan &

lacking status and power in larger society.⁵⁴ This in turn shapes the value which the next generation places on child care.

Primary, exclusive parenting by women also has a negative impact upon a child's development.⁵⁵ Too often a child will have most or all of his needs met by the mother while there is an absence of such nurturing by the father.⁵⁶ As Kamerman, Kahn, and Kingston point out in *Maternity Policies and Working Women*, "the early weeks and months of a child's life are a critical time for familial and societal investment in the opportunity for direct care by parents."⁵⁷ It should be a critical time for the father as well as the mother. Individual, mother-dominated mothering creates total dependence on the mother,⁵⁸ thereby causing severe anxiety in the

Howard Moss, *Birth and Maturity: A Study in Psychological Development* 162 (1962).

54. The child views its mother as part of itself, with the same interests. The child knows that the father, in most cases, has outside interests and he is therefore idealized. The father's arrival is perceived as a break in the monotony of the day and from the mother-child relation. See Chodorow, *supra* note 29, at 79-80.

55. Chodorow argues that the absence of the father results in "a wife in as much need of a husband as the son of a father." *Id.* at 104 (quoting Grete Bibring, *On the Passing of the Oedipus Complex* 281 (1953)). If the father is noticeably absent there is likewise no one to interrupt the mother-daughter boundary confusion. *Id.* There is also no one present to prevent the mother's seductiveness or the son's "reciprocated incestuous impulses." *Id.* at 105. The mother thereby sees her son as a "definite other." *Id.* For an explanation of what happens to a child's views of male and female when raised primarily by the mother, see *id.* at 81-83.

Dr. Lamb, Professor of Psychology, Psychiatry, and Pediatrics at the University of Utah, relates that "[t]here is now fairly persuasive evidence that when fathers have close, positive relationships with their children, children tend to evidence higher achievement motivation and cognitive competence, better social skills (e.g. in heterosexual relationships), better psychological adjustment, and (at least when these characteristics are valued) more sex-stereotyped sex-role attributions." *Paternal Absence, supra* note 35, at 89.

56. This is especially prevalent in the United States. "On average, fathers in two-parent families spend about a third as much time as mothers do actually interacting with their children . . ." *Paternal Absence, supra* note 35, at 85. For the average father, this period is between fifteen and ninety minutes per day. *Id.* at 88.

57. *Maternity Policies, supra* note 28, at 13. Kamerman, Kahn, and Kingston point out three important consequences: "1) a good physical start including less mortality in the first year; 2) cognitive-perceptual, and socio-emotional development; and 3) emotional bonding and attachment, with its long-range implications for personality and character." *Id.* at 13-14. Emily Schrag, M.S.W. and Associate Director of the National Center for Clinical Infant Programs, points out that attachments are formed with infants through daily feeding, diapering, comforting, and communication. These give the infant "a sense that life is ordered, expectable, and benevolent." Emily Schrag, *Parental Leave: An Investment in Strong Families*, Testimony Presented to the Subcommittee on Children, Families, Drugs and Alcoholism Hearing on S. 249, The Parental and Medical Leave Act of 1987, at 2 (1987) (on file with Law & Inequality).

58. See Chodorow, *supra* note 29, at 60-61. Chodorow refutes the argument that one-sex mothering is natural or healthy. She believes that single parent mothering is "bad for the mother and child alike". *Id.* at 217. As Rudolph Schaffer points out, "there is . . . nothing to indicate any biological need for an exclusive primary bond;

child should the "mother" become absent, hospitalized, or deceased.⁵⁹ As a result, the importance of dual parenting for children of both sexes cannot be overemphasized.⁶⁰ The lack of dual parenting damages the child's definition of the sexes and the normal Oedipal/anti-Oedipal stages which are so vital in a child's development.⁶¹

The stereotypes of man as breadwinner and woman as caretaker burdens men as well. Besides losing out on the rewards of childrearing, they are hurt in other discernible ways.⁶² Because society encourages, even demands, that men forego child care responsibilities, men are much less likely to continue as members of a child's household.⁶³ Men are also less likely to gain custody of their children following a divorce.⁶⁴ In the early stages of a child's life the father is often regarded by the child as the absent parent, the disciplinarian, the outsider, or as competition for the mother's attention.⁶⁵ Men, because they are not encouraged to take part in family care responsibilities, miss out on the bonding relationship which builds through time between a child and its caretaker.⁶⁶

nothing to suggest that mothering cannot be shared by several people." Rudolf Schaffer, *Mothering* 175 (1977). See also Michael Rutter, *Maternal Deprivation Re-assessed* 62 (1972).

59. See *supra* note 57, and accompanying text. Interestingly, when a father is gone for the day and his child remains at home with its mother, the anxiety or remembered loss is not the same as when the mother is away. See Chodorow, *supra* note 29, at 80.

60. The father's influence, as well as the mother's, is vital to a child's development. Dr. Yogman reports that the influence of the father-infant relationship on personal development, especially in the male, is associated with greater social responsiveness at five months and with higher infant developmental scores at nine, twelve, sixteen, and twenty-two months. Father absence on the other hand, "particularly prior to the age of five has been shown to influence masculine sex role adoption and cognitive style among boys and heterosexual roles among girls." *Paternal Absence*, *supra* note 35, at 10.

61. Because women raise boys and girls, boys must distinguish and differentiate themselves from their caretaker. Men repress relations which affect their ability to cultivate friendships and increase their emotional dependence on their spouse. Women, by comparison, are less dependent on their spouses for emotional support. See Chodorow, *supra* note 29, at 134 & 198-200. Relational capacities are curtailed in males as a result of the Oedipus complex but are sustained in girls. *Id.* at 93.

62. For an explanation of how the Oedipus complex in mother-son relationships curtails men's relational capacities and idealizes masculinity, see *id.* at 105-10.

63. See *Paternal Absence*, *supra* note 35, at 144. In 1979, twenty percent of children, approximately 11 million, lived in one-parent households. Only two percent of these children lived with their fathers. *Id.*

64. From 1970 to 1979, the number of children living with a divorced mother doubled. Mothers were awarded custody of children in 90% of custody cases. *Id.*

65. The favoritism demonstrated by children for their mother over their father begins in the child-parent relationship and evidences itself into the pre-teens. In a survey of 308 children, mostly 10-12 years of age, 14% preferred their father, while 32% preferred the mother. See Nash, *supra* note 39, at 267.

66. Dr. Yogman suggests that "[a] meaningful relationship between a father and

The father, though an economic necessity in many cases, is too easily seen as the breadwinner rather than as fulfilling emotional needs of the child. As a result, society needs to re-evaluate the importance it places on the father-child relationship and the negative connotations that stereotypical gender roles have on women, men, and children. If misguided and archaic stereotypes are perpetuated, men will be encouraged to remain apathetic regarding the nurturing and care of their children. The perception of a woman's worth on the job and in the home will also remain undervalued and children will be taught to perpetuate such notions by example.

II. A History of Judicial and Legislative Action Concerning Maternity and the Workforce.

A. *The Early Stages: Before Title VII*

Unfortunately, the courts and the legislature have regarded child care as primarily the mother's concern. The first court-mandated maternity leaves occurred in the beginning of this century. In 1910, Justice Brewer of the Supreme Court articulated the representative view of the era, stating: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her."⁶⁷ Thus began a period of protectionist legislation for women.⁶⁸ By the 1920s and 1930s women were expected and often forced to leave the labor force upon marriage.⁶⁹ In the 1940s, with women's increased participation in the workforce, the Women's Bureau of the United States Department of Labor recommended that pregnant women not work six weeks prior to and two months after delivery.⁷⁰ Some states adopted laws prohibiting employment of pregnant women,⁷¹ while most unemployment insurance programs

his infant requires psychological availability as well as physical availability. Neither alone will suffice." Paternal Absence, *supra* note 35, at 3. Agreeing with Dr. Yogman, Dr. Michael Lamb feels it is especially vital that the father be present during the first three to five years of a child's life. Close positive relationships between fathers and their children tend to produce higher achievers, more competent and socially-oriented children, and better adjusted youth. *Id.* at 89.

67. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

68. During the *Muller* era, sixteen states restricted women's working hours. See Maternity Policies, *supra* note 28, at 32.

69. Working married women were considered to be stealing jobs from men who were "heads of the family." *Id.* at 33-34.

70. Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Bull. No. 240, Maternity Protection of Employed Women 7 (1952).

71. Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U.L. Rev. & Soc. Change 325, 334 n.35 (1985).

deemed pregnant women ineligible for benefits.⁷²

During the next twenty years, working women who became pregnant were fired, received little or no pregnancy sick leave, or were denied sufficient medical coverage, thereby effectively forcing them to resign from the workforce.⁷³ Precious little legislation protected maternity status in any work environment.⁷⁴ In fact, in 1960, thirty-five states explicitly prohibited pregnant women from unemployment insurance benefits.⁷⁵ In sum, from the beginning of this century until the early 1950s, the attitude toward any type of guaranteed maternity or child care leave was hostile.⁷⁶

B. Due Process, Equal Protection, Title VII and the Pregnancy Discrimination Act

In the 1960s and early 1970s, discrimination claims by pregnant women were brought either under the due process and equal protection clauses of the Constitution⁷⁷ or under Title VII of the Civil Rights Act of 1964.⁷⁸ To state a constitutional claim, plaintiffs had to demonstrate that a nexus existed between the employer and the state and that the employer's challenged act was discriminatory in purpose or intent.⁷⁹ Supreme Court opinions during this period essentially skirted the sex discrimination issue.⁸⁰

72. *Id.* at n.37.

73. *Id.* at 335.

74. For a complete history of maternity legislation in the U.S., see *id.* at 333-35.

75. Maternity Policies, *supra* note 28, at 37.

76. In Maternity Policies, reference is made to a letter of inquiry written to the Equal Employment Opportunity Commission in 1966 questioning whether excluding pregnancy and childbirth as a disability would violate Title VII. The EEOC General Counsel issued a response stating, "an insurance or other benefit plan may simply exclude maternity as a covered risk, as such an exclusion would not in our view be discriminatory." *Id.* at 40.

77. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (a conclusive presumption that pregnant women cannot work past the fifth month held a violation of due process); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (the equal protection clause is not violated when pregnancy disabilities are not covered by an insurance program); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (denial of pre-leave seniority to women returning after pregnancy leave violates Title VII).

78. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e-2 (1982). This act prohibits discrimination on the basis of race, color, religion, sex, or national origin by an employer with more than fifteen employees. 42 U.S.C. §§ 2000e-2(a) (1982). Title VII was amended in 1972 to cover employees of state government.

79. See, e.g., *Geduldig*, 417 U.S. at 496.

80. See *Williams*, *supra* note 71, at 335-47. These decisions prompted a debate over special treatment versus equal treatment for pregnancy which to this day has feminists as well as conservatives divided. Under the special treatment or positive action rationale, accommodations are made for women's special makeup and needs. Because women are not similarly situated with men, they need not be subject to the same rules as men. This rationale treats childbearing leaves differently from other

In 1974, the Supreme Court in *Geduldig v. Aiello*⁸¹ eliminated the equal protection attack on special treatment for pregnancy, holding that pregnancy distinctions did not discriminate on the basis of sex.⁸² Under this rationale, discrimination against pregnant women was not deemed a violation of equal protection if the distinction was rational and not a pretext for sex discrimination.⁸³ In an earlier case, *Cleveland Board of Education v. La Fleur*,⁸⁴ the Supreme Court ignored the petitioners' sex discrimi-

disability leaves. Proponents of this theory point out that failure to provide special rights to a group whose members are disadvantaged because they deviate from the established norm has effectively denied them equal rights. For a complete discussion of the special treatment or positive action rationale, see generally, Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U.L. Rev. 513 (1983). See also The Hon. Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 Law & Inequality 143 (1986).

The converse to the special treatment rationale, the equal treatment rationale, imposes an intermediate standard of review on all gender-based classifications, including pregnancy. Under this standard, the government or employer must demonstrate that the pregnancy classification bears a substantial relation to an important government state interest. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Using this rationale the court would need to determine if there were an important government objective furthered by distinguishing pregnancy disability from other types of disability.

81. 417 U.S. 484 (1974) (California disability insurance system which covered most medical disabilities *other than* pregnancy ruled *not* a violation of equal protection).

82. *Id.* at 496-97. The California statute at issue in *Geduldig* provided temporary wage replacement to workers who became physically unable to work. It covered a broad variety of physical disabilities, including those specific to males, but it failed to cover disability connected with pregnancy. *Id.* at 501 (Brennan, J., dissenting). Cal. Unemp. Ins. Code § 2626 (West 1972).

Justice Stewart's majority opinion argued that the plan did not distinguish persons on the basis of sex, but rather on the basis of pregnancy. *Geduldig*, 417 U.S. at 496 n.20. While one group included only members of one sex, the other comprised members of both sexes. Because the plaintiff in *Geduldig* did not satisfactorily demonstrate to the court that distinctions were made solely on the basis of sex, the court applied the more lenient "rational basis" test rather than a higher level of scrutiny. The Court allowed the pregnancy exclusion without attempting to explain why excluding pregnancy and not other more costly sex-specific disabilities was rational. *Id.* at 493-94. Justices Marshall and Douglas joined Brennan's dissent, adopting the plaintiff's argument that pregnant women were similar to victims of other disabilities and should therefore be treated similarly to other disabled workers. *Id.* at 500-01 (Brennan, J., dissenting).

83. *Id.* at 496 n.20. As Justice Brennan argued in his dissent in *Geduldig*, the Court made man the standard and measured women against that standard. Justice Brennan was troubled by the Court's reasoning that as long as women were compensated for everything a man was compensated for they received equal treatment. He believed that limiting the number of disabilities experienced by women while including all disabilities experienced by men was a double standard and amounted to sex discrimination. *Id.* at 501 (Brennan, J., dissenting).

84. 465 F.2d 1184 (6th Cir. 1972), *rev'd*, 414 U.S. 632 (1974).

nation claims.⁸⁵ Instead, the Court relied on the due process clause, acknowledging that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected."⁸⁶ The Court then held that the mandatory maternity leave unconstitutionally infringed on the teachers' enjoyment of this freedom.⁸⁷

The Court, however, was careful not to rule out all mandatory maternity leaves—only those which were arbitrary and unduly burdensome to pregnant women.⁸⁸ Thus in 1974, after *Geduldig*, employers still were allowed to discriminate against pregnant women in the benefits provided by insurance programs and the leaves employers granted for disability. The employer or state could withstand a constitutional challenge to its maternity leave policy by showing that the leave furthered a valid state interest and that the policy related to that interest.⁸⁹

The Court first addressed pregnancy-based discrimination under Title VII in *General Electric Co. v. Gilbert*.⁹⁰ In *Gilbert*, female employees brought an action against a private company, General Electric, for excluding pregnancy-related disability benefits from its disability programs.⁹¹ The Supreme Court held that dis-

85. In this case the Cleveland Board of Education adopted a policy requiring pregnant teachers to quit their jobs five months before the expected childbirth. Return to work was not allowed until the child was three months old. 414 U.S. at 634-35. In assessing the constitutionality of the policy, the Court ignored the opinion of the Sixth Circuit which held that the school board's requirement discriminated against plaintiffs on the basis of sex. *LaFleur*, 465 F.2d at 1188 (1972).

86. *LaFleur*, 414 U.S. at 639.

87. *Id.* at 648.

88. *Id.* at 650. Justice Stewart explained the school district's policy in his opinion violated due process not because required maternity leaves in general violated women's freedom of reproductive choice, but because an eight month required leave in this instance amounted to a "conclusive presumption" that pregnant women were unfit after the fourth month of pregnancy. This was "neither necessary nor universally true," nor a constitutionally adequate justification for the rule. *Id.* at 646. Justice Stewart, however, hinted that a shorter leave "requiring a termination of employment at some firm date during the last few weeks of pregnancy" might pass constitutional muster. *Id.* at 647 n.13. In a concurring opinion, Justice Powell also indicated that a shorter leave might be justifiable. *Id.* at 656 n.5 (Powell, J., concurring). Justice Rehnquist, in a dissenting opinion joined by Chief Justice Burger, criticized the majority for its reliance on the irrebuttable presumption rationale, arguing that any line drawn short of the delivery room would be valid and a legislative matter. *Id.* at 660 (Rehnquist, J., dissenting).

89. *Id.* at 653 n.2 (Powell, J., concurring).

90. 429 U.S. 125 (1976).

91. Here the employer's insurance plan was almost identical to the California plan in *Geduldig*. *Id.* at 133. It excluded pregnancy-related temporary disabilities while it included almost every other temporary disability. *Id.* at 127. General Electric's plan was held constitutional because, as the Court reasoned, "[T]he disability insurance plan only failed to allow pregnant women greater benefits rather than imposing upon women a burden which men did not suffer." *Id.* at 138. Rehnquist

crimination by a private employer on the basis of pregnancy was not sex discrimination under Title VII.⁹² In *Nashville Gas Co. v. Satty*,⁹³ however, which involved a plaintiff's challenge to her employer's policy of denying pre-leave seniority status to women returning from maternity leave, the Court held that pregnancy distinctions constituted sex discrimination under Title VII.⁹⁴ The Court distinguished *Satty* from *Geduldig* and *Gilbert*, stating that the employer in *Satty* "not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer."⁹⁵ Under the Court's interpretation of Title VII, then, an employer could allocate benefits differently between pregnant and non-pregnant persons, but could not allocate burdens differently.

In 1978, Congress passed the Pregnancy Discrimination Act (PDA),⁹⁶ directly overruling the Court's holdings in *Geduldig* and *Gilbert*, that discrimination on the basis of pregnancy is not sex discrimination. The PDA amended section 701 of Title VII, thereby changing the definition of sex discrimination.⁹⁷ By passing the PDA, Congress adopted the 1972 EEOC Guidelines advising employers to treat pregnancy like any other temporary disability "under any health or temporary disability insurance or sick leave plan available in connection with employment."⁹⁸ As a result, if an employer offers any benefits for temporary disabilities, the employer must offer the same to women disabled by pregnancy. This does not, however, compel employers who do not offer temporary disability benefits to begin offering them to pregnant women. The PDA simply guarantees that pregnant women be treated no better

explained in the majority opinion that Title VII does not mean "that greater economic benefit[s], must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *Id.* at 139 n.17 (quoting *General Electric Co. v. Gilbert*, 375 F. Supp. 367, 383 (E.D. Va. 1974)). The Court relied heavily on *Geduldig*, reasoning that pregnancy classifications were not in and of themselves gender-based. *Id.* at 138-40. See *supra* note 82 and accompanying text.

92. *Gilbert*, 429 U.S. at 145-46.

93. 434 U.S. 136 (1977).

94. *Id.* at 139-41. The Court found that denying such seniority to women who take maternity leave was sex discrimination. This decision finally came five years after the EEOC issued its guidelines following the 1972 congressional debates on pregnancy classifications. The EEOC stated that to deny pregnant women benefits available to other employees violated Title VII. The Supreme Court in *Geduldig* and *Gilbert* refused to comply with EEOC guidelines. See, e.g., *Geduldig*, 417 U.S. 484 (1974); *Gilbert*, 429 U.S. 125 (1974).

95. *Satty*, 434 U.S. at 142 (1977).

96. 42 U.S.C. § 2000e (Supp. V. 1981).

97. In relevant part the PDA stated that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, 'because of or on the basis of pregnancy, childbirth, or related medical conditions.'" 42 U.S.C. § 2000e(k) (Supp. V. 1981).

98. 29 C.F.R. § 1604.10(b)(1975).

or worse than other "similar" workers suffering from temporary disabilities.⁹⁹

The PDA has survived judicial scrutiny,¹⁰⁰ including review by the United States Supreme Court.¹⁰¹ In *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission*,¹⁰² the Court ruled that a *Geduldig*-type employer medical insurance program providing less coverage for spousal pregnancies than for other medical procedures of dependents violated Title VII.¹⁰³ In that case, the employer violated Title VII because he failed to justify the pregnancy distinction.¹⁰⁴ The Court determined that Congress, in passing the PDA, overruled *General Electric Co. v. Gilbert* and "the test of discrimination employed by the Court in that case."¹⁰⁵ As a result, the Court adopted the dissenter's argument in *Gilbert* that the appropriate distinction was not between pregnant and non-pregnant persons, but "between persons who face a risk of pregnancy and those who do not."¹⁰⁶ In so ruling, the Court clearly established that pregnancy discrimination can be directed against men and pregnant and non-pregnant women alike.

99. The Act states that "[w]omen affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k)(1982).

100. For a complete discussion of the lower court's three interpretations of the PDA: (1) identical treatment, (2) differential treatment, and (3) hybrid treatment, see Ellen Little, *Motherload or Overload: The Need for a National Maternity Policy*, 17 J. Int'l L. & Pol. 717, 717-33 (1985).

101. See *infra* notes 111-114 and accompanying text.

102. 462 U.S. 669 (1983).

103. In this case the PDA was used to invalidate an employee benefit program offering full medical coverage for employees and their spouses, but limiting benefits available to wives of male employees. The plan limited the amount of hospital benefits an employee's wife could receive to \$500, while offering unlimited hospital maternity expenses to employees. Employees and non-employees received identical benefits for all other disabilities. The plan violated Title VII by discriminating against male employees whose wives became pregnant. Congress, noted the Court in the opinion, equivocally rejected the reasoning that such an exclusion is non-discriminatory on its face. *Id.* at 676.

104. In order to justify a differentiation in treatment of pregnant women under Title VII, the employer must prove that the essence of the business operation would be undermined, *Diaz v. Pan Am Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), or that a physical characteristic unique to one sex was crucial to successful job performance, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971).

105. 462 U.S. at 676.

106. *Id.* at 678 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 161-62 n.5 (1976) (Stevens, J., dissenting)).

C. *Post PDA: The Inadequacy of Existing Protections*

Today, even with legal protections for pregnancy-related disabilities, child nurturing leaves are not the norm.¹⁰⁷ The PDA, although a major step in insuring equal treatment for pregnant women, is not a national child care program.¹⁰⁸ In fact, as respondents in *Wimberly v. Labor & Industrial Relations Commission of Missouri*¹⁰⁹ argued, the PDA, interpreted strictly, discourages and might even forbid the government from allowing unemployment insurance payments to pregnant workers when other temporarily disabled workers are not covered.¹¹⁰ In a similar case, *California Federal Savings & Loan Association v. Guerva*,¹¹¹ respondents argued that guaranteeing leave for pregnancy and not for other disabilities was a violation of Title VII, because it allowed pregnant women benefits not provided to persons with other temporary disabilities.¹¹² The Court, however, ruled narrowly that states may

107. Only 40% of today's working women receive any type of unpaid child care leave. Steve Max, *The Need for Parental Leaves*, N.Y. Times, Aug. 27, 1986, at 23A, col. 1.

108. The U.S. is the only industrialized nation without a national parental leave policy. *Id.* Wendy Williams points out four major problems with the PDA amendment of Title VII: (1) it does not affect the military, (2) it may encourage employers to offer no disability program or to severely restrict the leave period, (3) maternity leave beyond what is medically necessary may be discriminatory towards men and non-pregnant women and thereby might stir up animosity, and (4) only 40 percent of the population is covered for disability. See Williams, *supra* note 71, at 350-51.

109. 688 S.W.2d 344 (Mo. 1985), *aff'd*, 107 S. Ct. 821 (1987).

110. In this case, argued before the Supreme Court on December 9, 1987, a female worker denied reinstatement by her employer after returning from maternity leave asked the Court to rule that the State of Missouri violated federal law when it refused to pay her Unemployment Compensation benefits. The petitioner relied upon the 1976 amendment to FUTA (Federal Unemployment Tax Act), 26 U.S.C. § 3304(a)(12), which provides that "no person shall be denied compensation under such state law solely on the basis of pregnancy or termination of pregnancy." The Missouri Supreme Court ruled that FUTA does not require a state to pay jobless benefits to employees like Wimberly who leave work because of a "voluntary condition." See *Wimberly*, 688 S.W.2d at 344. The Supreme Court affirmed the Missouri Supreme Court in an opinion by Justice O'Connor indicating that "Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment." *Wimberly*, 107 S. Ct. 821, 825 (1987). Because the law distinguishes workers for reasons not related to work or the employer, the Court ruled, it is not inconsistent with FUTA. *Id.* at 827.

111. 758 F.2d 390 (9th Cir. 1985), *aff'd*, 107 S. Ct. 683 (1987).

112. In this suit, a California statute providing pregnant women with a guaranteed leave of absence was challenged as discriminatory against men because it guaranteed pregnant women benefits above and beyond benefits received by employees suffering from other temporary disabilities. This, argued respondents, created a disproportionate and discriminating impact upon men. The Federal District Court ruled against the state and in favor of California Federal Savings and Loan, but was subsequently overturned by the Ninth Circuit Court of Appeals. See *Guerva*, 758 F.2d at 390. The Court of Appeals concluded that Congress intended the PDA to be

order private firms to implement unpaid maternity benefits to new mothers, even if other temporary disabilities are not covered.¹¹³ In so holding, the Court adopted the same special treatment rationale it relied upon in its pre-PDA decisions.¹¹⁴ In other words, the Court found no inconsistency in allowing states to mandate that pregnant women be reinstated after maternity leave while victims of temporary disabilities are refused reinstatement after they take disability leave. Of course this case and the California statute did not address whether a woman or man taking time off for *child care* would be mandatorily reinstated.

The PDA is insufficient with regard to strict physically-necessitated birth leave because it ignores the fact that most employers provide grossly inadequate temporary disability benefits.¹¹⁵ Only 40 percent of the workforce are currently covered for disability.¹¹⁶ Women make up over one-half of the remaining 60 percent.¹¹⁷ As a result, even though 85 percent of women will have children at some time during their working lives, most will not be covered for pregnancy-related disability.¹¹⁸ Even more disturbing, the indus-

"a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.* at 396. Respondents argued contrarily that the PDA neither imposed a ceiling nor a floor, but rather worked as a guarantee that victims of pregnancy disability be treated the same as victims of other temporary disabilities. Hence, statutes requiring mandated benefits for temporary disabilities must offer the same benefits for pregnancy-related temporary disabilities and vice versa. The National Organization of Women (NOW), the American Civil Liberties Union (ACLU) and many feminist and pro-labor groups supported respondents' arguments.

The Montana Supreme Court upheld a similar statute on the basis that women's actual needs during pregnancy exceeded those of men. *See Miller-Wohl Co. v. Comm'rs of Labor & Indus.*, 685 F.2d 1088 (9th Cir. 1982). The court reasoned that isolating pregnancy-related disabilities for special treatment equalized the benefits men and women received in the work force without burdening women for their unique biological ability to bear children. The court found the Montana legislation consistent with the intentions of the PDA because it eliminated the disparate effect leave of absence policies have on women employees. *Id.*

113. Although the PDA required that pregnant workers be treated the same as other workers, Justice Marshall, writing for the 6-3 majority, argued that Congress had not intended to prohibit such special preferential treatment. *Guerra*, 107 S. Ct. 683, 693. Instead, he concluded, the California statute afforded mothers extra protection and promoted "equal employment opportunity [because] . . . it allows women, as well as men, to have families without losing their jobs." *Id.* at 694. White, in a dissenting opinion chastised the majority view stating that the language of the PDA "leaves no room for preferential treatment." *Id.* at 698.

114. *See supra* note 80 and accompanying text.

115. Small companies are least likely to provide any type of temporary disability leave. Unfortunately, small companies make up one of the greatest sources of new jobs in the nation annually. As a result, many women reentering the workforce will not be covered. *See Briefing Paper, supra* note 5, at 4.

116. *Id.*

117. *Id.*

118. At least 60% of women employed by large companies have no maternity-re-

tries which provide no temporary leave are predominantly those which employ women in the highest concentrations.¹¹⁹ As a result, because women get pregnant and because most will become pregnant during their lifetimes, women are affected to a far greater extent by an employer's failure to provide disability leaves than are men.

The failure of the present legal system in handling pregnancy and childrearing issues partly stems from the American courts' and legislatures' insistence on addressing childcare as a "maternity" issue. Acknowledging this inconsistency, Elizabeth Koontz suggests that the term "maternity leave" be abandoned for two separate terms: "childbirth leave" and "childrearing leave."¹²⁰ While only females bear children, both sexes raise them.¹²¹ Thus, advocates argue, childrearing and childbearing should be separate issues with different programs and benefits designed to meet the specific needs of each.

Childrearing leaves, as opposed to maternity leaves, would help to promote equality between the sexes and eliminate the stereotype of "woman as nurturer." It would also provide relief for fathers and adoptive parents. Optional time off for fathers and adoptive parents is virtually non-existent under strict maternity leave programs.¹²²

Besides adversely affecting fathers, adoptive parents, and perceptions of working mothers in the marketplace, maternity leaves limit a woman's choice. Too often a woman must stay at home with the child because the father is not allowed a leave.¹²³ Employers, therefore, need to institute parental leaves available to members of both sexes to discourage the work place and society from perpetuating inaccurate gender stereotypes and from discriminating against adoptive parents. Such a move by conscientious employers or legislators would make the necessary distinction between childbearing and childrearing, thereby eliminating the assumption that women will take time off to care for

lated benefits which provide a six-week leave—the minimum recommended by obstetricians. *Id.*

119. *Id.* at 6-7.

120. Elizabeth Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480, 481 (1971).

121. See *supra* note 43 and accompanying text.

122. See Briefing Paper, *supra* note 5, at 12.

123. This situation may support a cause of action under the equal protection rationale. In *Danielson v. Bd. of Higher Educ.*, 358 F. Supp. 22 (S.D.N.Y. 1972), a father attacked the college's practice of allowing women an extended maternity leave, but denying men a similar paternity leave. The court denied a motion to dismiss his claim, stating that he possessed at least "a colorable claim." *Id.* at 28.

children while men will not.¹²⁴

D. Parental Insurance in Sweden: A Comparison, a Model

Parental leave is considered the norm in most Western nations. Over 100 countries offer some type of leave.¹²⁵ "Seventy-five countries, including every industrialized nation except the U.S., provide a guaranteed job protected leave with cash benefits to replace wages."¹²⁶ The average paid minimum leave in Europe is twelve weeks, while the vast majority of countries favor at least a fourteen-week minimum.¹²⁷ Five months is the most common length of leave.¹²⁸

Canada, too, offers a generous leave. Canadian workers are guaranteed up to 41 weeks with job security and 60 percent pay.¹²⁹ Italians may take up to five months leave with 80 percent pay.¹³⁰ Norwegians get eighteen weeks at full pay.¹³¹ The United States, on the other hand, has no federal statutory guarantees. While the governments and employers in most countries share the cost of benefits for parental leave,¹³² the United States government feels no such commitment. In the United States, only those parents working for employers which grant such leaves are covered.

The most generous leave benefits are found in Scandinavia.¹³³

124. A 1981 Stanford Law School Employment Survey disproves the assumption that men do not want to take time off to raise a family. Given the opportunity, men expect to and are increasingly willing to take time off to raise children. Of the firms and government agencies interviewed, one-fifth had paternity policies, but only 43% offered paid leaves. *Project: Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 Stan. L. Rev. 1263, 1272 (1982) [hereinafter *Lawyers with Children*]. Fifty percent of these policies had been used by men and the use increased each year. The study concluded that while "[t]here are powerful pressures within law firms toward social and political conformity which may discourage men from asking for or taking a leave when they observe their peers do not." *Id.* at 1273. Where offered, however, paternity leaves were used regularly. *Id.* Of the law students surveyed, 79% of the women and 67% of the men responded. *Id.* at 1277. When asked if they would like the opportunity to take more than three months off to care for their children, 87% of the females and 23% of the males indicated they desired the option. When asked if they would like to work part-time while caring for their children, 85% of the women and 58% of the men responded favorably. Only 36% of the women and 9% of the men, however, expected their employers would grant them a leave. *Id.* at 1284-85.

125. See *supra* note 3 and accompanying text.

126. Catalyst, Preliminary Report on a Nationwide Survey of Maternity/Paternity Leaves 145 (June, 1984) [hereinafter *Maternity/Paternity Leaves*].

127. *Maternity Policies*, *supra* note 28, at 15.

128. *Maternity/Paternity Leaves*, *supra* note 126, at 145.

129. *Maternity Policies*, *supra* note 28, at 16.

130. *Id.* at 21.

131. *Id.*

132. *Maternity/Paternity Leaves*, *supra* note 126, at 145.

133. While this article focuses on Sweden, the programs offered by Norway,

In Sweden, parental insurance has been offered since 1974.¹³⁴ Amended in 1977 and 1979, the Swedish program offers 60 weeks of wage-related paid benefits to natural mothers and fathers in connection with childbirth and childrearing.¹³⁵ During the first six months of the leave, the stay-at-home parent receives 90 percent of his or her wage.¹³⁶ If the parent is a student or otherwise not gainfully employed, however, a standard benefit rate of pay is provided.¹³⁷ In this manner, worth is assigned to child care performed by persons not previously members of the work force. Adoptive and foster parents, too, receive six months of leave at 90 percent of their wage.¹³⁸ As a result, Swedish parents are allowed to stay home with the child regardless of the parents' gender or biological relation to the child.

In Sweden, parental leave continues past the child's infancy. Every parent is entitled to paid parental leave for a maximum of 60 days a year.¹³⁹ The leave may be used:

- When a child is ill or a child's caretaker is ill.
- When more children are born into the family and the mother is in the hospital, the father may stay at home to take care of the children in the home.
- When the child needs to be taken to a health facility.¹⁴⁰

In addition to the benefits of infancy leave, parents of children under eight are entitled to a six-hour work day, if they so desire, without compensation for the time not spent at work.¹⁴¹ Parents of children sixteen and under also receive a special child allowance.¹⁴² This allowance is a flat-rate, non-taxable cash benefit of 4,800 SEK (approximately \$800) per year¹⁴³ and is offered universally to all parents regardless of income.¹⁴⁴ Another benefit, the

Denmark, and Finland are among the best in the world. For a complete description of benefits in each country as of 1982, see Table 1, *infra* at 264.

134. Child Care, *supra* note 2, at 49. See also Side by Side: A Report on Equality Between Men and Women in Sweden 51 (1985) [hereinafter Side by Side].

135. Child Care, *supra* note 2, at 99.

136. *Id.* A minimum of 48 SEK (Swedish Kroner) or \$8.00 a day is also established. Swedish Institute, Social Insurance in Sweden 2 (March, 1986) [hereinafter Social Insurance In Sweden]. The money received is taxed. *Id.*

137. Child Care, *supra* note 2, at 48.

138. *Id.* at 47. The six month limit is set because adoptive parents do not require the pre-natal and post-natal temporary disability that natural mothers require. *Id.* The adopted or foster child must be ten years or under for the parents to qualify for the benefit. Social Insurance in Sweden, *supra* note 136, at 2.

139. Child Care, *supra* note 2, at 49.

140. Social Insurance in Sweden, *supra* note 136, at 2.

141. Child Care, *supra* note 2, at 47.

142. *Id.* at 50.

143. Social Insurance in Sweden, *supra* note 136, at 3.

144. Child Care, *supra* note 2, at 50.

Swedish housing allowance, is income tested.¹⁴⁵ In addition to the child allowance, it offers financial assistance to lower income families with children under seventeen.¹⁴⁶ Fifty percent of Swedish families were covered by this program in 1975.¹⁴⁷ The average housing allowance per family figures at or near 6,000 SEK or \$1,000 a year per child.¹⁴⁸

Parents with chronically ill or handicapped children also receive benefits. A parent required to stay home for an extended time to nurse a child sixteen or under receives an allowance of up to 45,000 SEK (approximately \$7,500).¹⁴⁹ This benefit allows parents a choice between institutional care for a sick child and personal care in the home without imposing a severe economic penalty on the nurturing parent.

Comparing Swedish parental leaves with Sweden's other social programs places them in perspective. Importantly, parent entitlements are not gender or status related, but are instead family based—designed to facilitate parents' roles in the home and marketplace.¹⁵⁰

Swedish society, through legislative action, has committed itself to preserving the family. Concerns of the overall family policy in Sweden include:

- 1) supplementing the family income of families with children.
- 2) redistributing resources and income from those with more to those with less.
- 3) assuring equality between the sexes and economic groups.¹⁵¹

In this context, one can see that parental insurance, child allowances, housing allowances, disability benefits, and the right to part-time employment are designed to meet social needs and cause social change.

The Swedish scheme has many implications. First, parents have a real choice in deciding whether one or both parents will take a leave. Because the parent receives 90 percent of his or her wage, the lower-wage earner is not forced to stay at home while the higher wage earner remains in the workforce. Second, the economic impact upon the family, should the higher wage earner stay at home, is not so debilitating. This encourages both parents to participate in childrearing. It also assures that children of two-par-

145. *Id.* at 51.

146. *Id.*

147. *Id.*

148. *Id.*

149. Social Insurance in Sweden, *supra* note 136, at 3.

150. *Id.*

151. Child Care, *supra* note 2, at 46.

ent families receive no greater benefits than children of single parent families. Third, the leave assigns worth to child care by recognizing it and paying for it.¹⁵² Swedish society also protects families against temporary loss of income following the birth of a child and aims to increase the health and well-being of both parents and children.¹⁵³

Among other enlightened social policies in Scandinavia, the progressive parental insurance programs result from and have played an instrumental role in elevating the status and perceptions of men and women in Nordic society. Perhaps the art and literature of the Scandinavian countries best reflect this.

As far back as 1891, in *A Doll's House*,¹⁵⁴ Henrik Ibsen presented his turn-of-the-century audience with Nora—a "squirrel-wife," living contentedly as an appendage of her father, husband, and children.¹⁵⁵ During the course of the drama, however, Nora realized that the foundation of their love came not from her worth, honor, and abilities, but from their vision of her helplessness and insignificance. Upon realizing this, Nora leaves the doll's house for an education her father, husband, and minister could not give her. Only then, she intimates to her husband, Torvald, could she be fit to educate her own children; only then could they achieve an equal and meaningful relationship.¹⁵⁶ In early twentieth-century Scandinavia, "people," in particular women, "[didn't] do such things."¹⁵⁷ For many, Nora's slamming of the door awoke an awareness in Scandinavia of women's issues and increased scrutiny in the roles assigned to each gender.

During the next fifty to sixty years Scandinavian women, perhaps sooner than women in the United States, began to assert themselves in government and in the marketplace. In Sweden, the number of married, employed women increased from less than 10 percent in the 1930s to over 15 percent in the 1950s, to almost 70 percent today.¹⁵⁸ At the same time, Swedish women are having fewer children.¹⁵⁹ Most mothers work right up until the birth of

152. See *supra* notes 23-25 and accompanying text.

153. Child Care, *supra* note 2, at 46.

154. Henrik Ibsen, *A Doll's House* (William Archer trans. 1900).

155. *Id.*

156. *Id.* at 162-65.

157. Henrik Ibsen, *Hedda Gabler* 246 (Michael Meyer trans. 1961).

158. Child Care, *supra* note 2, at 17. In 1970, about 26% of Swedish women were full-time housewives. That figure decreased to 14% by 1984. Side by Side, *supra* note 134, at 55.

159. Although over 90% have children, the average Swedish woman has only 1.6 children. More than one-half of Swedish families with children have only 1 child. Child Care, *supra* note 2, at 19.

their first child and return within one year of giving birth.¹⁶⁰ The parental insurance programs therefore encourage Swedish women to have children, but do not force them to make a career out of caring for children. Recent factors such as women's ability to earn their own living, higher education, higher wages, a declining marriage rate, the older age at which Scandinavian women marry and bear children, the increased availability of child care services, the differentials in ages between children and a declining birth rate have facilitated Swedish women's participation in the work force.¹⁶¹ Scandinavian society, it seems, perceives women's employment to be as natural and permanent as men's.

Scandinavian social policy has also addressed the negative input of gender stereotypes upon men. Even though women were becoming more active in the labor force, in the 1920s, men remained strangers to their children and to nurturing roles.¹⁶² In Ingmar Bergman's film *Wild Strawberries*,¹⁶³ audiences are confronted with Isak Borg, a crotchety doctor in the twilight of life who realizes his failings with familial relationships. Too busy with his career and obsessed with being excused from all intimacies he drives his wife to infidelity by his inability to express his love. His lack of communication and strictness with his son Evald in turn causes Evald to demand for no children in his own marriage. This desire elevates to the point where Evald forces his wife, Marianne, to choose between an abortion and their marriage. When Marianne comes to her father-in-law, Isak, impelled by "some idiotic ideal" that the doctor would minister to the wounds of his son's marriage, Isak responds that he "doesn't give a damn" about their problems.¹⁶⁴ Marianne relates to Isak that while Evald and his father are very much alike, Evald hates him.¹⁶⁵

Through Isak's relationship with his son, and the reaffirmation in Evald's own actions mirroring his father's conduct, Bergman illustrates the plight faced by a father who fails to nurture, and of Scandinavian society in the 1950s which did not encourage him to nurture. *Wild Strawberries* seems to warn men and women alike that there is more to life than career success, and that filial relationships require that both parents nurture and play a significant part in their children's upbringing.

160. *Id.* at 17.

161. *Id.* at 17-19.

162. *Id.*

163. Ingmar Bergman, *Wild Strawberries* (Svensk Filmindustri 1957).

164. Ingmar Bergman, *Wild Strawberries*, in *Four Screenplays of Ingmar Bergman* 226 (1960).

165. *Id.* at 225.

Parental insurance in Sweden has increased men's participation in child care responsibilities. Sweden, through legislation and other means, makes it extremely attractive for fathers to take advantage of benefits and to assume responsibility for children. The new Swedish Marriage Act of 1987 stipulates that "[s]pouses shall jointly care for the home and the children. . . [and] shall share the expens[e] and the discharge of household duties."¹⁶⁶ Aside from the gender-neutral policy of providing 60 days for parental care to either or both parents, Swedish law entitles men to ten additional days of parental benefit when a child is born¹⁶⁷ even if the mother is currently receiving the benefit.¹⁶⁸ This encourages men to take parental leave.

The Swedish government's efforts have met with increasing success. Since 1974, the percentage of fathers taking a leave has increased ten-fold.¹⁶⁹ On the average, fathers stayed at home for 47 days during the first 18 months of a child's life in 1981.¹⁷⁰ The impact is felt as the children grow older. For example, fathers in Sweden are just as likely as mothers to take off from work in order to care for a sick child.¹⁷¹

As trends continue in favor of fathers' increased participation in child-rearing in Sweden, government officials hope for a turnaround in the relatively minor role divorced men play in the upbringing of their children. Studies in Sweden indicate that divorced women are disproportionately more likely to care for children than are divorced men.¹⁷² Men availing themselves of pa-

166. Labour Party, Sweden, *The Changing Role of the Male: Summary of a Report by the Working Party for the Role of the Male 10* (1986).

167. In 1983, 85% of Swedish men so entitled took all or part of this ten-day leave. Labour Party, Sweden, *Men and Women in Sweden: Facts and Figures 20* (1985) [hereinafter *Men and Women in Sweden*].

168. *Id.*

169. In 1974, two percent of fathers took a significant time block for parental leave. In 1975, the number jumped to six percent, and then by two percentage points in each of the following years, up to 1978. Child Care, *supra* note 2, at 48. In 1985, one father in five took off a significant amount of time to care for his child while 85% took at least some time off in connection with child birth. Side by Side, *supra* note 134, at 52.

170. The equivalent figure for women was 265 days. *Men and Women in Sweden*, *supra* note 167, at 20.

171. Side by Side, *supra* note 134, at 53. Both mothers and fathers in Sweden took on the average of seven days per annum to care for sick children. *Id.*

172. A survey in Sweden shows that 28% of children living in single-parent families never had contact with the other parent (usually the father). Ministry of Labour, Sweden, *The Changing Role of the Male 16* (1986) [hereinafter *Ministry of Labour*]. The study also notes that "Sunday fathers" tend to grow away from their children as their children age. *Id.* Even though Swedish legal action regarding child custody awards is sex neutral, fathers are awarded sole custody only ten to fifteen percent of the time. Usually these children are teenagers. Jan E. Trost &

rental benefits, however, were much more likely to actively participate in a nurturing role following divorce.¹⁷³ They were also awarded custody more often.¹⁷⁴

Amazingly, Sweden has implemented its parental-leave policies without unduly burdening the taxpayer. The program's consequences have made it quite popular. Benefiting the families of 1.6 million children,¹⁷⁵ Sweden's parental insurance program costs the country an estimated 6,350 million SEK in 1986-87 (approximately 1.6 million dollars).¹⁷⁶ This number increased from 1.350 million SEK in 1975 and 2.54 million SEK in 1979,¹⁷⁷ but still amounts to approximately seven percent of the total 20 billion SEK budget for social services.¹⁷⁸

The central government (15%) and employer contributions (85%) finance the benefit.¹⁷⁹ It is supervised by the National Social Insurance Board and administered by local social insurance officers.¹⁸⁰ Promoters of the policy note with pride the following highlights of parental insurance:

- 1) No measurable dislocation in the job market has occurred as a result of the program.
- 2) More than 3/4 of the women return to work within a year.
- 3) Male eligibility tends to lessen possible discrimination against young women in the work force.
- 4) Men are more likely to share in the rearing and upbringing of young children.¹⁸¹

While parental insurance remains one of Sweden's most popularly supported social measures, many government and elected officials see room for improvement. The suggested improvements include a compulsory minimum leave for men and a legislated shortened work day for parents of toddlers.¹⁸²

Swedish legislation concerning the workplace and the family, particularly the parental leave benefit program, offers a fair and realistic attitude toward the problems of raising a family and establishing a career. It provides economic, psychological, and physi-

Orjan Hultaker, *Legal Changes and the Role of Fathers: Swedish Experiences 87 (1986)*. Parents are generally awarded joint custody. *Id.* at 91.

173. Ministry of Labour, *supra* note 172, at 15.

174. *Id.*

175. Ministry of Finance, Sweden, *The Swedish Budget 1986-1987*, at 75 (1986) [hereinafter *The Swedish Budget*].

176. *Id.*

177. Child Care, *supra* note 2, at 49.

178. *The Swedish Budget*, *supra* note 175, at 74.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

ological security to parents while assigning worth to parental child care on a non-sexist basis. It is a model program for governments throughout the world and furthers the goals of equality in the workplace and the family. Other nations, specifically the U.S., clearly could benefit from such an enlightened policy.

III. A Proposed National Policy in the U.S.

One common misperception in the U.S. parental-leave debate is that employers will protect their workers without the need for legislation.¹⁸³ Some employers do offer maternity/parental leaves to their employees, but the overall coverage is dramatically low.¹⁸⁴ Catalyst, a nationwide survey firm, conducted a study of maternity/parental leaves in 1986.¹⁸⁵ Of the employers responding, only 51.8 percent offered unpaid child care leave to women with some job benefit guarantees,¹⁸⁶ while over 90 percent offered the same or comparable job upon return to the workforce.¹⁸⁷ Most of the leaves, however, were included in a maternity leave package without comparable benefits for fathers.¹⁸⁸

Paternal leave benefits were even stingier. Only 37 percent of Catalyst's survey firms provided unpaid guaranteed leave to men.¹⁸⁹ Those provided usually lasted 3 months or less.¹⁹⁰ Ninety percent of companies, however, designated the leaves as "personal leaves" and made no effort to publicize their availability to new fathers.¹⁹¹ Those employers not offering a leave did not "consider it appropriate for men to take any kind of parental leave."¹⁹²

A. *The Parental and Medical Leave Act of 1987*

As a result of the inequities in maternity/paternity leaves and employers' lack of enthusiasm in offering such benefits, many

183. See, e.g., Williams, *supra* note 71, at 373.

184. Currently it is estimated that only 50% of employers offer maternity benefits to their employees. See Briefing Paper, *supra* note 5, at 4.

185. The survey was based on 384 responses to questionnaires sent to the Fortune 500 companies. Just over one-fifth returned the questionnaires. Catalyst, Report on a National Study of Parental Leaves 3 (1986) [hereinafter Parental Leaves].

186. Fifty-one percent of companies continued payment of benefits through part or all of the leave. Forty-two percent required employees to pay all or a good deal of the benefits, while the rest either stopped or reduced benefits altogether. *Id.* at 33.

187. *Id.* at 31.

188. *Id.*

189. *Id.* at 37.

190. Sixty-four percent offered a leave for three months or less. *Id.* at 38.

191. Maternity/Paternity Leaves, *supra* note 126, at 131.

192. *Id.* at 132. Of the 37% offering a leave, 17.4% suggested a maximum of two weeks. *Id.*

experts have realized that change will not come from the courts or through private enterprise. Instead, change must come through legislation.¹⁹³

The Family and Medical Leave Act of 1987¹⁹⁴ in the House and the Parental and Temporary Medical Leave Act of 1987¹⁹⁵ in the Senate, propose a national program designed to provide job protected leaves for parental child care.¹⁹⁶ In part, the bills guarantee workers eighteen weeks of unpaid parental leave for care of newborn, newly adopted, or seriously ill children.¹⁹⁷ These are major pieces of legislation because they provide parents with job security benefits while guaranteeing their right to a family leave. Parents taking a leave under either bill are assured the same or equivalent job upon returning to work.¹⁹⁸

193. As the Supreme Court ruled in *Dandridge v. Williams*, 397 U.S. 471 (1970), each state or Congress, and not the Supreme Court, retains responsibility for legislating in the social welfare area. "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Id.* at 486-87. Additional support can be found in employer reactions to the PDA, often cited as the primary motivation behind Catalyst firms' restructuring of disability benefits. Eighty-seven percent of companies named Congress' passage of the PDA as the impetus behind their policy changes as opposed to twenty percent citing competition for employees from others in the industry and 12.9% citing employee demand. *Maternity/Paternity Leaves*, *supra* note 126, at 135.

194. H.R. 925, 100th Cong., 1st Sess. (1987).

195. S. 249, 100th Cong., 1st Sess. (1987).

196. The purpose of the bill, as stated by its authors, is threefold: (1) to balance the demands of the workforce with the needs of families, and to provide stability and economic security in families; (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child or dependent parent who has a serious health condition; and (3) to accommodate the legitimate interest of employers. See Briefing Paper, *supra* note 5, at 2. Coupled with this bill is a temporary medical leave guarantee and a national leave policy for care of a sick child or an elderly family member. *Id.* This article will focus on the parental leave aspects of the bill.

197. H.R. 925, 100th Cong., 2d Sess. at 8-9 (1987). S. 249, 100th Cong., 2d Sess. § 103 (1987). Under Representatives Clay and Schroeder's plan in the House, the leave must be commenced within one year of birth or placement of the child in newborn/newly adopted cases and can be taken only once during any twenty-four month period. Briefing Paper, *supra* note 5, at 8-9. Under Senators Dodd and Spector's bill the same provisions apply. S. 249 § 103(a). Parents may also take the leaves on a reduced-hour basis, not exceeding thirty-six weeks and must schedule them so as not to unduly disrupt an employer's operations. *Id.* at 9. Of course, what "unduly disrupts employers' operations" may foster various interpretations and ensuing litigation. The leave-taker has a responsibility or duty to provide reasonable notice prior to foreseeable leaves. *Id.* at 10.

198. In pertinent part, these bills state that "the employee shall be entitled A) to be restored by the employer to the position of employment held by the employee when the leave commenced, or B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." Briefing Paper, *supra* note 5, at 13. The employer must also continue health insurance coverage and other benefits on the same basis as before the leave. *Id.* at 13-14. Under the proposal, seniority benefits accrued before the leave would also be maintained. *Id.* Under the Clay and Dodd proposals then, parents opting to

B. Impacts of the Proposed Bill: Pro and Con

Perhaps the most attractive feature of parental leave legislation is gender neutrality. It offers men and women the same benefits, providing they actually use the leave to care for a child.¹⁹⁹ In this manner Congress precludes men from claiming that the Act discriminates in favor of women.²⁰⁰ The leave also avoids the perpetuation of gender stereotypes plaguing men and women and perceptions of their roles in the home, workplace, and family. It encourages men to play an active part in infant and child care.²⁰¹ This fosters the bonding relationship considered so crucial by child psychologists.²⁰² The bill also encourages employers to view mothers, as well as fathers, as dedicated employees.²⁰³

Secured benefits form another important aspect of the leave. Employees will be more likely to take a leave if they are confident they will not lose out on seniority, insurance, and other benefits.²⁰⁴ Taking the leave, therefore, will not seem as great a risk as it would if a national policy were not involved. Parental leave also protects interests important to young job-seekers, who may be too inhibited to inquire about benefits while seeking employment.²⁰⁵

Adoption of a parental leave bill would force society and the workplace to value child-caretakers.²⁰⁶ The nation as well as employers must appreciate the endeavors of nurturers who will raise

take the leave would be guaranteed benefits and job security. While H.R. 925 and S. 249 leaves are unpaid, they do not prohibit any period of paid family leave offered by the employer, and allow the employer to include the paid leave as part of the total eighteen-week leave. *Id.* at 9. This provision also authorizes the use of any vacation leave or personal leave to be included at the election of the employer or employee. *Id.* Enforcement of the leave will be handled both by civil and administrative agencies. *Id.* The agencies will also have an investigative authority. *Id.* at 20-26. Remedies for violation of the Act include reinstatement, back-pay, benefits, and general damages as determined by the court or agency. *Id.* The program would cover all federal agencies and private employers with more than fifteen employees. *Id.* at 6.

199. *Id.*

200. See *supra* note 106 and accompanying text. See also *supra* note 110 and accompanying text.

201. See *supra* notes 32-36 and accompanying text.

202. See *supra* note 66 and accompanying text.

203. See *supra* notes 44-52 and accompanying text. Women want to work and are effective employees. "Work has a profound effect on a woman's sense of self worth, her feelings of being in charge of her life, and her chances of avoiding depression and anxiety." Rosalind Barnett, Grace Baruch & Carol Rivers, *Lifeprints: New Patterns of Work for Today's Women* 63 (1983).

204. See, e.g., *Lawyers with Children*, *supra* note 124.

205. *Id.*

206. For an argument on society's failure to compensate for and acknowledge the services of mothers and caretakers, see Frug, *supra* note 6, at 55. Quality child care is extremely important in the development of healthy confident human beings. Studies evaluating under-staffed institutions show that inadequate personal interac-

the next generation of workforce participants. Just as pre-natal care decreases the cost and complications of pregnancy, and preventive medicine dramatically improves the health of many persons and therefore their work performance, so too may parental leave prevent some of the problems associated with family stress and its effects at the office.²⁰⁷

The government will benefit from a gender-neutral policy that promotes equality between the sexes. Providing mandatory work leave and benefits is not alien to substantial government interests. On the contrary, workers are guaranteed time off for jury duty,²⁰⁸ military duty²⁰⁹ and in some cases to vote.²¹⁰ Like the above examples, children and their quality care are a substantial interest which the government should foster. The government already recognizes this interest in the form of tax benefits to families with dependent children.²¹¹ Such a policy would definitely be in line with judicial decisions regarding the family as a protected interest.

The parental leave bill will have an especially profound effect on the development of the child and family. As indicated earlier, the value of parental care for a child is immeasurable.²¹² A statement by the Organization for Obstetric, Gynecological and Neonatal Nurses stresses the importance of guaranteeing a leave for new parents. It discloses that new parenting involves the development and readjustment of individual and couple skills which require time and can create stress.²¹³ The new parents will need to negotiate a reassignment of tasks, such as who will be the primary breadwinner.²¹⁴ New parents will also need to determine how to fit intimacy as a couple into this family configuration.²¹⁵

tion towards infants produces mild depression, symptoms of withdrawal, apathy, and in extreme cases, even death. See Chodorow, *supra* note 29, at 32-33.

207. According to Catalyst, "[a] program that brings employees back to work before they are rested and ready may actually be more deleterious to productivity than allowing an extended leave. The odds are good that leave-takers who return too soon will not be fully productive or will make costly and needless mistakes...." Maternity/Paternity Leaves, *supra* note 126, at 25.

208. 29 C.F.R. § 103.100 (1972).

209. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

210. See *Dean v. Gadsden Times Publishing Corp.*, 412 U.S. 543 (1973).

211. U.S. Tax Code provisions authorize tax credits for employment related dependent care expenses for parents with dependent children. See 26 U.S.C. § 21 (1982 & Supp. V. 1985).

212. See *supra* note 57 and accompanying text.

213. 1 *Joint Hearing on Parental and Medical Leave Act of 1986 Before the House Comm. on Post Office and Civil Service*, H.R. Doc. No. 99-56, 99th Cong., 2d Sess. 78 (1986) [hereinafter *Joint Hearing*].

214. *Id.*

215. *Id.*

The parental leave bill's eighteen week figure was based on suggestions by child development experts like Dr. Terry Brazelton and the Yale Bush Center²¹⁶ and by the adoption requirements set up by many agencies around the country requiring that potential parents guarantee home care by one of the parents for three months to three years in order to be considered worthy candidates.²¹⁷ Also considered in the figure were studies indicating that time spent with children in infancy directly relates to greater self-assurance, less drug abuse, and better general development among children receiving such care.²¹⁸

The bill's most attractive features are its national coverage and uniformity. As the Catalyst survey of maternity and paternity leaves points out — not all employers offer the same benefits.²¹⁹ Benefits vary geographically.²²⁰ For instance, employers in the south are much less likely to offer a leave than their counterparts in the northeast, midwest, and west.²²¹ The type of industry²²² and the annual sales of the enterprise also impact the amount of benefits offered.²²³ Even the federal government differs according to region and department when it comes to maternity/paternity leave benefits.²²⁴ As a result, keeping up with the status of benefits can be a nightmare for prospective employees and employers. As states move toward adopting their own versions of the bill,²²⁵

216. 1 House Committee on Post Office and Civil Service, Parental and Medical Leave Act of 1986, at 6 (July 21, 1986) [hereinafter Leave Act of 1986]. Factors figuring into the eighteen-week total include: (1) time needed for full physical recovery of the mother, (2) an emotional and physical transition time to adjust to parenthood, (3) time necessary for the health and temperament of the baby, and (4) availability of child care. Maternity/Paternity Leaves, *supra* note 126, at 133.

217. *Joint Hearing, supra* note 213, at 6.

218. *See* Parental Absence, *supra* note 35, at 11.

219. Maternity/Paternity Leaves, *supra* note 126, at 30-49. Companies vary as to length of leave, pay, disability, when the leave is offered, and the requirements of seniority. *Id.*

220. *See* Parental Leaves, *supra* note 185, at 40.

221. *Id.*

222. *Id.* at 41. Catalyst reports that 68% of transportation, communications, and public utilities companies were likely to offer a leave, while the corresponding figures for the manufacturing/construction and financial/service industries hovered around 50%. *Id.*

223. *Id.*

224. *See Joint Hearing, supra* note 213, at 14.

225. There are currently four types of leave mandated by states regarding maternity disability: (1) those reiterating the PDA, thereby offering women another avenue of relief (California, Colorado, Iowa, Kansas, Missouri, New Hampshire, Oklahoma, Rhode Island, and Washington); (2) states requiring disability benefits for all employees (New York, New Jersey, Rhode Island, California, Hawaii, and Puerto Rico); (3) states recently passing laws requiring employers to provide pregnancy disability even if it is not offered to employees with other disabilities (California, Colorado, Connecticut, Kansas, Montana, New Hampshire, and Washington); and (4) states which offer remuneration for disability (New York at

pressure from interstate businesses will push for a national policy.²²⁶ Colorado Congresswoman and co-sponsor of H.R. 925, Patricia Schroeder, states, "[I]'m not sure I would want 50 different state policies when I am operating a company across state lines."²²⁷ Because the leave is not based on a position within an organization or office, but on status as a new parent, the bill would eliminate disparities in existing leaves between companies, workers and management, and between geographic lines. A uniform policy would also communicate to workers that the option is available.²²⁸ It would help to eliminate the economic hardships and disparities faced by women and men who do not yet receive a parental leave as part of their job benefit package.²²⁹

The strongest opponents of a national parental leave policy are employers who fear it will be too costly to implement.²³⁰ The

2/3 of the weekly salary up to \$145 per week, and California with a similar program up to \$224 per week). See *Maternity Policies*, *supra* note 28, at 77-94. Some states even require job-protected leave for adoptive parents if it is offered to biological parents (Kentucky, Maine, and Minnesota). *Id.*

Because states individually enact laws regarding pregnancy and child care, employers need national guidelines so that they may more easily comply with the law. Employers need to know if it is illegal to deny men unpaid child care leaves if leaves are offered to women. They need to know if it is legal to offer leaves to biological parents, but not to adoptive parents. The list goes on. The headaches for an interstate corporation in keeping abreast of changes in law in an area of such piecemeal legislation can prove quite dramatic.

226. Currently six states (Minnesota, New York, New Jersey, Hawaii, California, and Rhode Island) have parental leave provisions. See Barbara Bradley, *Is Maternity Leave Too Costly for Employers?* *Chr. Sci. Mon.*, Feb. 2, 1987, at 36, col. 1. Minnesota's legislation is the most generous. It offers six weeks of unpaid leave for the birth or adoption of a child with guarantees for the same pay and comparable job upon return. Minn. Stat. §§ 181.940-944 (West 1987).

227. Leslie Wayne, *Talking Business with Rep. Schroeder of Colorado*, N.Y. Times, Jan. 20, 1987, § D, at 2, col. 2.

228. Simple lack of information is perhaps the biggest obstacle facing men who already enjoy the parental leave option as part of their employment contracts. Janet Elder, *Parental Leave Bill: Its Effects on Men*, N.Y. Times, Aug. 27, 1986, § A, at 10, col. 4. The major problem noted by Catalyst in its survey was "[n]ot the lack of a comprehensive policy [by a given employer], but the fact that few employees or supervisors had knowledge of or access to it." *Maternity/Paternity Leaves*, *supra* note 126, at 45.

229. As indicated earlier, the costs of childbirth without leave extend beyond medical costs. They include costs relating to unemployment and hours away from work. According to a 1985 survey comparing employed women offered unpaid leaves to similarly employed women without any type of leave, each woman not offered a parental leave lost approximately \$450 in the three years following the birth of a child. Among all women having children in 1985 the loss amounts to nearly \$255 million. Costs to Women, *supra* note 50, at 8-9.

230. Before the first hearing of the Parental and Medical Leave Act in February, 1987, the U.S. Chamber of Commerce announced that the proposed legislation would cost employers \$23.8 billion. It then amended its estimate to \$16.2 billion. Several weeks later the Chamber again amended its estimate to \$2.6 billion citing the \$16.2 billion figure as a "worst case scenario." Hearing, *supra* note 18, at 2. Of

program, however, is limited in the scope of employers it covers. Companies with fewer than fifteen employees are not affected.²³¹ Hence, the bill exempts employers who would be economically harmed the most because of their inability to hire part-time employees or to implement other programs. Larger companies, those with more resources, money, and personnel, will be better able to carry out the program. According to Catalyst's survey of the Fortune 500 companies, 86.4 percent of these companies who offered a program found that it was "relatively easy" to set up a leave period and arrange to continue benefits.²³² According to the United States General Accounting Office, the parental leave portion of S. 249 will cast the nation's employers just \$340 million annually for continuation of health benefits,²³³ and "little if any measurable net cost to companies resulting from a firm's method of adjusting to the absence of a worker on temporary leave."²³⁴

A National Parental Leave Program would also save companies money in the form of returning workers.²³⁵ Jeanne Kardos, Director of Employee Benefits for Southern New England Telecommunications, which has offered parental leave for a decade and enjoys an extremely high employee return ratio²³⁶ stresses, "In

course the \$2.6 billion figure includes costs for *temporary disabilities and parental leaves*. According to estimates by the United States General Accounting Office, however, all of the Chamber's figures prove exaggerated. The Office estimates the annual costs to employers associated with leave to care for newborn or newly adopted children to be *less than \$340 million*. This figure was based on its findings that only approximately 155 million men and women were likely to use the leave for an average of 12 weeks or less. United States General Accounting Office, Summary of GAO Testimony by William DeGaines on GAO's Estimate of S. 249, the Parental and Medical Leave Act of 1987, at 1 (1987) [hereinafter GAO Estimate]. See also *Should Business Be Forced To Bring Up Baby?* Bus. W., Apr. 6, 1987, at 39.

231. See Briefing Paper, *supra* note 5, at 2. Representative Marge Rokkema's alternative bill cuts the leave from eighteen weeks to thirteen weeks for medical leave and eight weeks for family leave, and exempts companies with fewer than 50 employees. Supporters of the original bill argue that the watered down Rokkema proposal would exempt 42% of the workforce, a number they find unacceptable. With the fifteen employee limit, the original bill already exempts 22% of the workforce. Linda Greenhouse, *Member and Family Leave*, N.Y. Times, Feb. 3, 1987, § A, at 13, col. 3.

232. See Parental Leaves, *supra* note 185, at 46. The number who felt the leave "difficult" was 13% while the number who felt it "very difficult" was only .6%. *Id.*

233. GAO Estimate, *supra* note 230, at 2.

234. *Id.* at 5.

235. Lyle M. Spencer advises employers to adopt child care leaves because of the extreme economic consequences surrounding employee resignation or termination. He argues that employee turnover can cost as much as 93% of a first-year salary. This figure is based on costs incurred while interviewing, hiring, and training a new employee as well as productivity loss. Maternity/Paternity Leaves, *supra* note 126, at 25. "[W]hen insufficient leave time results in an employee's attrition, the cost of replacing the employee can be substantial." 1 H.R. Rep. No. 99-699, at 8 (1986).

236. Bradley, *supra* note 226, at 36, col. 1.

the long run, we save money.”²³⁷ She attributes their success to the fact that it is much less expensive to offer an unpaid leave and to adjust schedules or hire a temporary than it is to train a lot of inexperienced people.²³⁸ Another argument focuses on the increased productivity of workers who are not burdened by family pressures.²³⁹ Keeping these arguments in mind, employers’ assertions that the program would prove too costly are easily rebutted.

Another harsh critic of parental leave is the Reagan Administration. Advocating that terms and conditions of private employment should be decided in the private marketplace without government interference, the Justice Department in 1987 issued a statement opposing the bill.²⁴⁰ As Stephen J. Shapiro, Associate Professor of Law, points out, however, “[t]he federal government has consistently taken the lead in establishing protections for the nation’s employees.”²⁴¹ Using the administration’s rationale, measures such as the federal minimum wage, anti-discrimination laws, the Fair Labor Standards Act, and federal safety and health standards are matters for the private sector.

The Justice Department also asserts that the Act may violate several constitutional amendments including: the tenth amendment, because its protections extend to local and government employees;²⁴² the eleventh amendment, because it authorizes federal court action against the states;²⁴³ and the first amendment, because it provides no exemption for religious employers.²⁴⁴ Again, as Shapiro points out, “Supreme Court precedents make clear, [that] the Act violates neither constitutional amendment, whether it is construed as an exercise of the commerce power or as an exer-

237. *Id.*

238. Kardos reports that of the 235 employees who took a parental leaves in 1985, “only a handful” did not come back. *Id.* As the Catalyst survey points out, if the leave is too restrictive, many employees choose not to return or may leave again soon after they return. Maternity/Paternity Leaves, *supra* note 126, at 25. “Ultimately, the costs of turnover may far outweigh the costs of a generous, flexible leave policy.” *Id.*

239. As Dr. Yogman points out, employers such as AT&T are already noting that unmet family concerns may decrease employee productivity. *Joint Hearing, supra* note 213, at 6.

240. Department of Justice, Statement of Stephen J. Markman, Assistant Attorney General Office of Legal Policy Before the Subcommittee on Children, Families, Drugs and Alcoholism: Committee on the Parental and Temporary Disability Act of 1987 (1987) [hereinafter Justice Department] (on file with Law & Inequality).

241. Testimony of Stephen J. Shapiro in Support of the Parental and Temporary Disability Leave Act of 1987, at 1 (1987) (on file with Law & Inequality).

242. Justice Department, *supra* note 240, at 14.

243. *Id.* at 15.

244. *Id.*

cise of Congress's power to enforce the fourteenth amendment."²⁴⁵ As a result it appears neither the federalism nor constitutional arguments asserted by the Justice Department warrant the bill's defeat.²⁴⁶

Employers can develop sound policies to provide the most economic implementation of the parental-leave law. Sheila Kamerman offers the following advice whereby employers may reduce costs of providing parental-leave benefits. She recommends that:

- (1) [S]mall employers may purchase certain coverage together to achieve some of the economy of scale available to bigger employers;
- (2) [Companies may adopt] policies that permit women who do not intend to return after childbirth to report this early to ensure adequate replacement, yet not suffer adverse benefit consequences;
- (3) [Companies may choose] extensive use of part-time, half-time, [flex-time] and phased-in return to work employees after childbirth;
- (4) [Companies may also concentrate on] efforts to increase the scope and size of the pool of part-time personnel who could provide coverage for leave-takers.²⁴⁷

Feminists and non-feminists alike argue that gender stereotypes will not be affected because women will still be more likely to take a leave than men. While this argument is true and persuasive, offering men a leave will make it more acceptable to take a leave.²⁴⁸ Again, many men do not take leaves, even if offered by the company, because they do not know about them.²⁴⁹ Stereotypes, unfortunately, cannot be erased overnight. Hopefully, parental-leave legislation will bring us closer to eliminating these detrimental gender notions.

245. Shapiro, *supra* note 241, at 2.

246. *Id.* at 7.

247. See Maternity Policies, *supra* note 28, at 148. For recommendations on how employers may offer a cost-effective plan, see also Maternity/Paternity Leaves, *supra* note 126, at 87-98.

248. See *supra* note 124 and accompanying text. As Catalyst points out, "A new generation of fathers may well display more positive attitudes toward parental leave. It is also possible that companies which discourage such leaves will begin to discover three of their advantages:

- 1) Entitling men to parental leaves may mean that women's leaves can be reduced and women can return to work with fewer worries about child care;
- 2) The spouse with the higher level of responsibility at work can return to the job promptly while the other remains at home with the baby; and,
- 3) Companies will be more willing to invest time and training in women employees."

Maternity/Paternity Leaves, *supra* note 126, at 98.

249. See Elder, *supra* note 228 and accompanying text.

C. Conclusion

The courts' and legislatures' handling of maternity/parental issues in the United States is fatally flawed.²⁵⁰ By focusing on rationales and programs which promote gender stereotypes, and by failing to recognize and implement a nationwide gender neutral nurturing leave policy, the United States remains behind all other major industrialized nations in this area.²⁵¹ Women will continue to suffer economically. Children will not receive adequate care. Men will continue to be discouraged from participating in child-rearing activities. Only with major legislative efforts will problems in this area be alleviated. A national parental leave such as the Parental and Medical Leave Act of 1987 could be the first in a series of steps for insuring a just and realistic work atmosphere for all employees. The Act is certainly supported by the American public.²⁵² If implemented²⁵³ and successful, more programs will likely follow.

250. Treating pregnancy different from other temporary disabilities and therefore deserving of special treatment hinders pregnant and non-pregnant persons alike. It makes women of childbearing age less desirable as employees because employers will assume these women will take the leave. The policy also shifts attention away from employers' inadequate temporary disability programs and encourages animosity against women who take maternity leave. Special treatment perpetuates the classic falsehood that women are unique and should be treated "specially." Providing for childbirth leave and not childrearing leave virtually guarantees that women will continue to raise children to the exclusion of men.

251. See *supra* note 3 and accompanying text.

252. Opinion Research Corporation Public Opinion Index, Issue Watch: A Majority of the Public—Regardless of Sex, Age, or Employment Status—Support Parental Leave Legislation (1987) (on file with Law & Inequality).

253. In 1986, H.R. 4300 was introduced by Representatives William L. Clay (D-MO) and Patricia Schroeder (D-CO) before the Committee on Education and Labor and the Committee on Post Office and Civil Service. The Subcommittee on Civil Service and Compensation and Employee Benefits and the Post Office and Civil Service Committee ordered the bill favorably reported. The Committee on Education and Labor adopted the bill by a vote of 22-10. The Rules Committee granted a rule for floor debate in September, but the House adjourned before H.R. 4300 could be considered. A similar bill (S. 2278) before the Senate was introduced on April 9, 1986 but was not acted upon in the Republican-controlled Committee on Labor and Human Resources. Briefing Paper, *supra* note 5, at 1. The 1987 House version of the Family and Medical Leave Act, H.R. 925, was introduced by Rep. Clay on Tuesday, Feb. 3, 1987. The Senate bill, The Parental and Temporary Disability Leave Act, S. 249, was introduced by Senator Dodd (D-CT) on Feb. 16, 1987. Both bills are currently being considered by the 100th Congress.

TABLE 1*
PARENTAL INSURANCE IN THE SCANDINAVIAN COUNTRIES

| Country | Eligibility or Qualifying Conditions | Duration of Leave | Benefit Level or Rate |
|---------|---|--|--|
| Denmark | Natural and adoptive mothers. Employees and self-employed. Others may insure voluntarily. | 18 wks. 4 wks can be taken before expected birth; 14 wks after birth, or adoption (4 wks postchildbirth for nonearners). | 90% of weekly earnings up to maximum insured wage. |
| Finland | Natural mothers and fathers. 3 mos in covered employment or in receipt of unemployment | 43 wks (10 mos), can be supplemented by annual vacation (at least 4 more wks). | 80% of average weekly earnings up to maximum insured wage. |
| Norway | Natural mothers and fathers. 6 mos insured employment during last 10 mos before expected delivery. Only mothers can use prenatal benefit. | 18 wks, including 6 wks before birth. 6 wks post-childbirth mandated for mother. Father can use up to 12 wks of total benefit. | 100% of average weekly wage up to maximum insured wage. |
| Sweden | Natural adoptive parent Insured for 180 days for minimum cash benefit; worked in covered employment for 6 mos, for leave. Only mother can use prenatal leave. | 9 mos; up to 60 days before childbirth. Benefit can be prorated as portion of days. 3 mos more at minimum flat-rate daily benefit. | 90% of wage up to maximum insured wage. |

* Reprinted with permission from Maternity Policies, *supra* note 28, at 18-22.

TABLE 1
(CONTINUED)

| Country | Financing | Job Security | Additional Benefits |
|---------|---|---|--|
| Denmark | National government, 75%; local government, 25%. | Same or comparable job guaranteed; seniority, fringe benefits and pension rights protected. | For white-collar workers, benefit duration up to 5 mos including 2 mos before birth (if delay up to 3 mos) and a maximum of 3 mos after birth at a benefit level equal to 50% wages. |
| Finland | Contributory: employer, 2% of wages; employee, 1.5%. | Same or comparable job guaranteed; seniority benefits and pension entitlements. | Supplementary 1 yr unpaid leave; can be used by either parent or both. |
| Norway | Contributory: employer; employee; national and local government. | Same or comparable job guaranteed, including seniority and pension rights. | Right to unpaid but job-protected leave for up to 1 yr; can be used by either parent or both. |
| Sweden | Employer, 7% of wage up to maximum. Government pays 25% of costs. | Same or comparable job guaranteed, including seniority and pension rights. | Right to unpaid leave until child is 18 mos of age. Right to work 6 hr day (without extra compensation) until child is 8. |

