

# HELPING OUT SUPERMOM: GENDER-AWARE POLICYMAKING & MOTHERING IN THE TWENTY-FIRST CENTURY AMERICAN WORKFORCE

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## ABSTRACT

*Feminists have long debated whether the path to gender equality requires treating men and women the same or differently. Answering this question is fundamental to the formulation of policies that address women’s disproportionate contribution to unpaid caretaking labor. Should feminists promote gender-neutral policies to avoid cementing the notion that women should perform this labor? Or should advocates pursue policies aimed directly at women to better meet their unique needs? This Note argues that feminists should instead adopt a third strategy: gender-aware policymaking. Gender-aware policies are acutely alert and responsive to gendered realities but do not explicitly distinguish on the basis of sex. By endorsing gender-aware policies, feminists can simultaneously satisfy women’s pressing, short-term needs and affirm a vision where parents of all genders can and should contribute to the rearing of children.*

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## I. INTRODUCTION

A fundamental issue in feminist advocacy is this: Should feminists champion policies compatible with the future they want to build? Or policies mindful of present-day shortcomings?

Many feminists envision a world where parents of all genders have the freedom to actively participate in the rearing of children.<sup>1</sup> But that is not the world we live in today. Instead, we live in a world where state pressures and societal norms channel women toward unpaid caretaking labor and men toward paid market work.<sup>2</sup> We live in a world where the performance of unpaid caretaking labor is stigmatized and undervalued—and where women are more likely than men to step up and do the work that must be done.<sup>3</sup> The gap between the world feminists hope to build and the world they find themselves in today presents a complex dilemma for advocates: How should they formulate policies for the transitional period?

Feminists could design and advocate for forward-looking policies compatible with a world in which gender does not predetermine contribution to unpaid caretaking labor. Gender-neutral policies that do not distinguish on the basis of sex—for example, a parental leave entitlement available to men and women on an equal basis—serve an expressive function: They endorse a vision where parents of all genders can and should contribute equally to the rearing of children.<sup>4</sup> Such policies also ensure that men who actively participate in unpaid caretaking labor have the same resources as women.<sup>5</sup>

But aspirational gender-neutral policies can also be naïve—men today do not shoulder an equal portion of unpaid caretaking labor.<sup>6</sup> Gender-neutral policies often fail to address women’s present needs. They inhibit the drafting of targeted

1. See Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 303 (1998) (“Surely no feminist wants to add to the social forces that penalize people for nontraditional gender performance.”).

2. See discussion *infra* Part II.B (describing the channeling effects of the ideal parent and ideal worker standards).

3. Julie Vogtman, *Undervalued: A Brief History of Women’s Care Work and Child Care Policy in the United States*, NAT’L WOMEN’S LAW CTR. 3 (2017), [https://nwlc.org/wp-content/uploads/2017/12/final\\_nwlc\\_Undervalued2017.pdf](https://nwlc.org/wp-content/uploads/2017/12/final_nwlc_Undervalued2017.pdf).

4. See Williams, *supra* note 1, at 305–06.

5. See *id.* at 313.

6. See Vogtman, *supra* note 3.

policies tailored to women's unique realities. And they shuttle limited resources away from the women who need them toward men who do not.<sup>7</sup> Gender-neutral plans actually increase gender inequality: Because men and women are differently situated, providing them with the same entitlements snowballs men's advantage.<sup>8</sup> By pretending men and women have the same needs, gender-neutral policies obscure women's distinct and extraordinary contribution to society and conceal men's failure to step up. The inefficacy of these policies represents a state endorsement of the status quo and an absolution of men's failure to do more to raise the next generation.

Instead of pursuing aspirational gender-neutral policies, feminists could draft and advocate for realistic policies that acknowledge women's disproportionate contribution to unpaid caretaking labor. Gender-specific policies that distinguish on the basis of gender or that are aimed specifically at women—for example, a maternity leave entitlement available only to women—do a better job of meeting women's present needs and recognizing women's remarkable contribution to society.<sup>9</sup> However, a gender-specific strategy impedes the progress feminists hope to make by cementing the assumption that women should be responsible for unpaid caretaking labor.<sup>10</sup> They also harm men who actively contribute to rearing children.<sup>11</sup> Neither gender-neutral nor gender-specific policies, therefore, allow feminists to advocate for women's pressing, short-term needs—a goal that must be at the center of any feminist agenda—without reaffirming archaic gender norms.

In this Note, I argue that the bridge between the present day and the idealistic future can instead be built with gender-aware policymaking. Gender-aware policies are acutely attuned and responsive to gendered realities, but do not afford different entitlements on the basis of sex. By drafting and advocating for policies that are gender-neutral but not gender-blind, feminists can affirm the values essential to a future of gender equality while simultaneously meeting women's present needs.

Part II of this Note explores the unequal division of unpaid caretaking labor in the United States today, highlights its social and economic consequences, and explains why the current legal regime is incapable of addressing the problem. Part III juxtaposes arguments for gender-neutral and gender-specific solutions and identifies gender-aware policymaking as an alternative strategy for feminist advocates. Finally, Part IV describes how policymakers could apply gender-aware principles in the drafting of a parental leave policy.

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7. See, e.g., Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 18–19, 33–35 (1991).

8. See, e.g., Heather Antecol, Kelly Bedard, & Jenna Stearns, *Equal but Inequitable: Who Benefits from Gender-Neutral Tenure Clock Stopping Policies?*, 108(9) AM. ECON. REV. 2420, 2422 (2018).

9. See discussion *infra* Part III.B.1 (describing the advantages of a gender-specific approach).

10. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 354–55 n.117 (1984).

11. See Williams, *supra* note 1, at 305–06.

## II. THE GENDER GAP IN UNPAID CARE

In the United States and globally, women perform the majority of unpaid care-taking labor despite their active participation in the paid labor force.<sup>12</sup> This Note will refer to this prevailing phenomenon as the gender gap in unpaid care. The gender gap in unpaid care has proven to be an intractable obstacle to gender equality.<sup>13</sup> The costs it imposes on women, men, children, society, and the economy are severe.<sup>14</sup> And the current American legal regime is incapable of confronting the problem.<sup>15</sup>

### A. THE UNEQUAL DISTRIBUTION OF UNPAID CARETAKING LABOR

Women have steadily entered the paid labor force since the nineteenth century, but their rate of entry accelerated dramatically beginning in the 1950s.<sup>16</sup> In 1950, women made up 29.6% of the paid labor force; by 2016, 46.8% of paid workers were women.<sup>17</sup> This trend was most striking among mothers and particularly mothers of young children.<sup>18</sup> Between 1975 and 2016, the percentage of women with children under the age of six who worked outside the home rose from 39% to 65.3%.<sup>19</sup> During that same period, the percentage of women with children under the age of three who worked in the paid labor force increased from 34.3% to 63.1%.<sup>20</sup> In 2017, 41% of mothers were the sole or primary breadwinner for their family, and an additional 23.2% of mothers were co-breadwinners with their partners.<sup>21</sup> Women's rapid entry into the paid labor force over the last seven

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12. See INT'L LABOUR ORG., *A Quantum Leap for Gender Equality: For a Better Future of Work For All* 36–37 (2019) [hereinafter "ILO Report"], [https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_674831.pdf](https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_674831.pdf); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *American Time Use Survey Summary* (June 28, 2018, 10:00 AM) [hereinafter *Time Use Survey*], <https://www.bls.gov/news.release/atus.nr0.htm>.

13. ILO Report, *supra* note 12, at 36.

14. See *infra* Part II.C.

15. See *infra* Part II.D.

16. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME 2* (Penguin Books 2d. ed. 2012) (1989); see also Jocelyn Frye, *The Missing Conversation About Work and Family: Unique Challenges Facing Women of Color*, CTR. FOR AM. PROGRESS 4 (Oct. 3, 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/09/30124619/WorkAndFamily-WomenOfColor-Oct.pdf> (emphasizing that women of color have always been more likely than white women to work outside the home).

17. U.S. DEP'T OF LABOR, *FACTS OVER TIME – WOMEN IN THE LABOR FORCE – TEXT VERSION* [hereinafter *FACTS OVER TIME*], <https://www.dol.gov/wb/stats/NEWSTATS/facts/women-lf-text.htm#CivilianLFSex>.

18. See HOCHSCHILD, *supra* note 16.

19. *FACTS OVER TIME*, *supra* note 17.

20. *Id.*

21. Sarah Jane Glynn, *Breadwinning Mothers Continue to Be the U.S. Norm*, CTR. FOR AM. PROGRESS (May 10, 2019, 5:17 PM), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm> (reporting that 41% of mothers earn at least half of their total household incomes and an additional 23.2% earn at least 25% of their total household incomes).

decades has transformed the United States economy.<sup>22</sup>

A parallel transformation has not occurred in the division of unpaid domestic labor. Women still complete the majority of this labor, particularly caretaking, as compared with men.<sup>23</sup> In her seminal book, *The Second Shift*, Arlie Hochschild found that women work an extra month of twenty-four-hour days over the course of a year because of their disproportionate share of unpaid caretaking labor.<sup>24</sup>

Hochschild's findings are reinforced by the 2017 American Time Use Survey published by the Bureau of Labor Statistics (BLS), which provides telling data on how mothers and fathers divided daily caretaking work between 2013 and 2017.<sup>25</sup> In households with children under the age of six, mothers spent on average 2.71 hours caring for children as a primary activity each day, while fathers completed only 1.38 hours of the same work.<sup>26</sup> In those same households, mothers spent on average 1.12 hours providing physical childcare, such as bathing or feeding a child, while men spent only twenty-six minutes each day providing such care.<sup>27</sup> In households with older children, women spent on average sixty-four minutes every day providing childcare as a primary activity, while men spent only thirty-four minutes doing so.<sup>28</sup>

Women also shoulder responsibility for the most demanding and time-sensitive aspects of unpaid caretaking labor. In most households, women are responsible for managing their children's care, even when they delegate tasks to fathers.<sup>29</sup> Unlike most men, women are often forced to multitask.<sup>30</sup> Women complete two-thirds of daily tasks, like cooking dinner.<sup>31</sup> This forces women into a rigid routine while men are allowed the flexibility to contribute at home when it is most convenient.<sup>32</sup> And women, more often than men, are forced to drop everything and respond immediately to unexpected emergencies, such as a sick child who must be picked up from school.<sup>33</sup>

22. See INST. FOR WOMEN'S POL'Y RES., *Women's Labor Force Participation*, <https://statusofwomendata.org/earnings-and-the-gender-wage-gap/womens-labor-force-participation>.

23. See HOCHSCHILD, *supra* note 16, at 3; see also *Time Use Survey*, *supra* note 12.

24. HOCHSCHILD, *supra* note 16, at 3–4 (“Most women work one shift at the office or factory and a ‘second shift’ at home.”). Hochschild reasons that women's entry into the paid labor force caused a “‘speed-up’ of work and family life” where there is “no more time in the day than there was when wives stayed at home, but there is twice as much to do.” *Id.* at 8. She concludes that “[i]t is mainly women who absorb this ‘speed-up.’” *Id.*

25. See *Time Use Survey*, *supra* note 12.

26. *Id.* at tbl. 9.

27. *Id.*

28. *Id.* (measuring activities in households with children between the ages of six and seventeen).

29. See Suzanne M. Bianchi & Melissa A. Milkie, *Work and Family Research in the First Decade of the 21st Century*, 72 J. MARRIAGE & FAM. 705, 708 (2010).

30. HOCHSCHILD, *supra* note 16, at 9.

31. *Id.* at 8–9 (explaining that “[m]ost women cook dinner and most men change the oil in the family car”).

32. *Id.*

33. Darcy Lockman, *Don't Be Grateful That Dad Does His Share*, ATLANTIC (May 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/mothers-shouldnt-be-grateful-their-husbands-help/588787>

Both in the United States and worldwide, the gender gap in unpaid care is “one of the most resilient features of gender inequality.”<sup>34</sup> In the United States, it has remained stagnant for two decades.<sup>35</sup> Globally, the gender gap in unpaid care will not be eliminated until the year 2228 at the current rate of progress.<sup>36</sup>

#### B. UNDERSTANDING THE GENDER GAP IN UNPAID CARE

The performance of caretaking labor is not free—it imposes significant costs. The American legal regime, with its lack of paid parental leave, subsidized child-care, and adequate workplace flexibility, refuses to bear these costs. Men, with their efforts to conform to the ideal worker standard and pervasive entitlement to women’s labor, refuse to shoulder these costs. That leaves women, who every day step up and pay the costs of raising the next generation. For many women, that price is their own subordination.

In the United States today, the construction of the “ideal parent” remains unequivocally female.<sup>37</sup> The ideal parent standard depicts women as more instinctive, compassionate, and competent caretakers: “[T]he first assumption of the [i]deal [p]arent norm is that mothers provide childcare that is inherently superior and therefore preferable to childcare by any other provider, including fathers.”<sup>38</sup> Even when biological mothers do not parent, the ideal parent standard assumes that other women are better suited than men to take their place.<sup>39</sup> The ideal parent standard, therefore, channels women toward unpaid caretaking labor and men away from it.

The ideal parent standard works in concert with the ideal worker standard to entrench the gender gap in unpaid care. The paid labor force is designed to reward the worker without unpaid caretaking labor obligations and punish the worker with such responsibilities.<sup>40</sup> It channels higher earners toward paid market work and lower earners toward unpaid caretaking labor. This channeling effect is evidenced by the division of unpaid caretaking labor in same-sex households.

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(citing David J. Maume, *Gender Differences in Providing Urgent Childcare Among Dual-Earner Parents*, 87 SOC. FORCES 273 (2008)).

34. ILO Report, *supra* note 12, at 36.

35. Lockman, *supra* note 33 (citing *Time Use Survey*, *supra* note 12, tbl.A-7A) (highlighting BLS findings that women employed outside the home have consistently performed 65% of unpaid caretaking labor for the last twenty years).

36. ILO Report, *supra* note 12 (reporting that women’s daily contribution to unpaid caretaking labor decreased by only fifteen minutes and men’s daily contribution increased by only eight minutes between 1997 and 2012).

37. See Jennifer H. Sperling, *Reframing the Work-Family Conflict Debate by Rejecting the Ideal Parent Norm*, 22 AM. U. J. GENDER SOC. POL’Y & L. 47, 69 (2013) (describing the “maternal bias in normative assumptions about parenting”).

38. *Id.*

39. *See id.* at 70.

40. The socially constructed “ideal worker” is “embodied by a [w]hite, middle-class family man with [a] stay-at-home spouse” who has the “ability to say yes to any full-time/face-time schedule.” Andrea Rees Davies & Brenda D. Frink, *The Origins of the Ideal Worker: The Separation of Work and Home in the United States from the Market Revolution to 1950*, 41 WORK & OCCUPATIONS 18, 19, 35 (2014).

Lesbian and gay couples divide unpaid domestic labor more equitably than opposite-sex couples do prior to having children.<sup>41</sup> After they become parents, however, the higher earner will typically specialize in the paid labor force, and the lower earner will shoulder an increased share of unpaid domestic labor.<sup>42</sup> This research demonstrates how the market imposes costs on the performance of unpaid caretaking labor.

Men's ubiquitous entitlement to women's labor makes them expect women to pay these costs.<sup>43</sup> Men's entitlement to women's labor is pervasive in both the domestic and public spheres.<sup>44</sup> Researchers have found, for example, that women in the workplace are significantly more likely than men to be asked to volunteer to complete tasks that do not lead to promotion.<sup>45</sup> In all-male groups, men volunteer readily for such tasks.<sup>46</sup> But when women enter the workspace, male employees sit back and expect them to do the work that no one really wants to do.<sup>47</sup>

Male entitlement is especially damaging in light of women's proclivity for selflessness. In both the public and private sectors, women are significantly more likely than men to perform tasks that benefit the collective but place themselves at a relative disadvantage.<sup>48</sup> The American legal regime exploits their selflessness by relying on the privatization of caretaking costs, whereby individual families, rather than society as a whole, pay the costs of raising the next generation. And women, more than men, bear these costs; they are more likely to "choose marginalization" in order to meet the needs of their spouses, children, and society.<sup>49</sup>

Women's role in unpaid caretaking labor is nuanced and important. Feminist theorists have spent decades working to create a "rich, complex, problematized account of women's nurturing experiences."<sup>50</sup> Liberal feminists have critiqued women's caretaking role as "stultifying and oppressive," "dream deferring and socially isolating."<sup>51</sup> Cultural feminists have emphasized the "fundamental morality" of caregiving, arguing that women "possess a unique ethic of care."<sup>52</sup> And

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41. Claire Cain Miller, *How Same-Sex Couples Divide Chores, and What It Reveals About Modern Parenting*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/upshot/same-sex-couples-divide-chores-much-more-evenly-until-they-become-parents.html?module=inline>.

42. *Id.*

43. See Darcy Lockman, Opinion, *What 'Good' Dads Get Away With*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/men-parenting.html>.

44. *See id.*

45. See Lina Babcock et al., *Gender Differences in Accepting and Receiving Requests for Tasks with Low Promotability*, 107 AM. ECON. REV. 714, 743 (March 2017).

46. *See id.* at 726.

47. *See id.* at 714.

48. *See id.* at 714, 743 (reporting that in co-ed groups, women are 50% more likely than men to volunteer to perform tasks that do not lead to promotion).

49. *See Williams, supra* note 1, at 306–07.

50. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 379–80 (2001).

51. *Id.* at 380 (citing BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 19 (1963)).

52. *Id.* at 381 (citing CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982)).

critical race feminists have made significant strides to emphasize the “social, political, and spiritual importance of family caregiving work for women of color.”<sup>53</sup>

However women’s domesticity and caretaking are conceptualized, the substantial labor required of women in America today imposes significant costs. Arlie Hochschild coined women’s disproportionate share of unpaid caretaking labor “the second shift.”<sup>54</sup> Barbara Hobson labels the phenomenon a “care deficit.”<sup>55</sup> Laura Kessler calls the effect a “labor force attachment gap.”<sup>56</sup> Regardless of nomenclature, the gender gap in unpaid care produces significant consequences for women, men, children, the economy, and society as a whole.

### C. THE CONSEQUENCES OF THE GENDER GAP IN UNPAID CARE

The gender gap in unpaid care exacts a significant toll on women’s economic outcomes. In the United States, women earn seventy-seven cents for every dollar men earn.<sup>57</sup> The gender wage gap is even worse for mothers and women of color.<sup>58</sup> While women without children earn ninety-three cents for every dollar men without children earn, mothers earn only seventy-six cents for every dollar fathers earn.<sup>59</sup> This discrepancy is part of a phenomenon known as the “fatherhood bonus” and “motherhood penalty”: Having a child is correlated with higher earnings for men and lower earnings for women.<sup>60</sup> While white, high-income men receive the highest fatherhood bonus, low-income women suffer the greatest motherhood penalty.<sup>61</sup>

The root causes of the gender wage gap intersect with the gender gap in unpaid care. First, almost half of the gender wage gap is driven by occupational

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53. *Id.* (citing Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997)).

54. HOCHSCHILD, *supra* note 16, at 4.

55. Barbara Hobson & David Morgan, *Introduction*, in *MAKING MEN INTO FATHERS: MEN, MASCULINITIES AND THE SOCIAL POLITICS OF FATHERHOOD* 1, 3 (Barbara Hobson ed., 2002).

56. Kessler, *supra* note 50, at 385 (“[W]omen’s disproportionate share of family caregiving and housework has resulted in a persistent labor force attachment gap between men and women.”).

57. Sarah Jane Glynn, *Explaining the Gender Wage Gap*, CTR. FOR AM. PROGRESS 1 (May 19, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/05/WageGapBrief1.pdf> (“The ‘77 cents’ formulation is a colloquialism—shorthand for expressing a complex economic truth. Simply put, what it conveys is the fact that, if you average out what all women, working full time, year round, earn and compare that number to what all men working full time, year round, earn, you find that women take home seventy-seven percent of what men do.”).

58. See Michele J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay>; see also Milia Fisher, *Women of Color and the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 14, 2015), <https://www.americanprogress.org/issues/women/reports/2015/04/14/110962/women-of-color-and-the-gender-wage-gap> (emphasizing that “on average, women of color experience a much greater wage deficit than white women”).

59. Budig, *supra* note 58 (reporting the gender wage gap for mothers and fathers with at least one child under the age of eighteen).

60. *Id.*

61. *Id.*



segregation by gender.<sup>62</sup> This segregation exists in large part because women are more likely than men “to accept voluntarily or to be funneled into lower paying ‘mommy-track’ professional jobs and noncommissioned retail work.”<sup>63</sup> Second, women working full-time still work fewer hours in the paid labor force than men.<sup>64</sup> This is unsurprising given that women, more than men, must cut back their hours to accommodate their unpaid caretaking responsibilities.<sup>65</sup> Third, women are often subject to discrimination on the basis of gendered stereotypes about mothers and their value in the workplace.<sup>66</sup>

The gender wage gap actually underestimates gender inequality because it only considers full-time workers, and women are much more likely than men to work part-time.<sup>67</sup> In March of 2018, the BLS published a report on “voluntary” part-time workers, whom they define as individuals working less than thirty-five hours per week for “noneconomic” reasons, such as “childcare problems” and “other family and/or personal obligations.”<sup>68</sup> According to the report, approximately 20% of working women worked part-time voluntarily in 2016.<sup>69</sup> Women were twice as likely as men to work part-time on a voluntary basis.<sup>70</sup> Among workers between the ages of twenty-five and fifty-four, this gap widens: Women were three to five times more likely than men to work part-time voluntarily.<sup>71</sup> Men and women’s reasons also differed.<sup>72</sup> Only 8% of men cited “childcare problems” or “other family and/or personal obligations” as their reason.<sup>73</sup> In contrast, 35% of women cited one of these two justifications as the reason they worked part-time.<sup>74</sup>

The gender gap in unpaid care affects women’s economic wellbeing in other ways as well. The United Nations’ International Labour Organization, for example, emphasizes that the gender gap in unpaid care exacts a leadership penalty: Worldwide, mothers of young children have the lowest participation rates in

62. Glynn, *supra* note 57, at 2.

63. Kessler, *supra* note 50, at 385 (citing Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 89–90 (1989)).

64. Glynn, *supra* note 57, at 4 (emphasizing that women work more hours than men when both paid and unpaid labor are considered).

65. *Id.* (“When women earn less to begin with . . . it may make economic sense for them to be the ones to scale back to provide family care for children or aging relatives.”)

66. *Id.* at 4–5 (“The unfortunate truth is that mothers are perceived as less dedicated employees after having children because many employers think mothers will be distracted by their home lives.”).

67. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *Who Chooses Part-Time Work and Why* (Mar. 2018), <https://www.bls.gov/opub/mlr/2018/article/who-chooses-part-time-work-and-why.htm>.

68. *Id.*

69. *Id.*

70. *Id.* at fig.2.

71. *Id.*

72. *Id.*

73. *Id.* Thirty-seven percent of men cited “school and/or training.” *Id.*

74. *Id.*

managerial and leadership positions.<sup>75</sup> Women are also more likely than men to work at jobs that do not offer health insurance, childcare benefits, pension benefits, or significant opportunities for advancement.<sup>76</sup> And women who engage in unpaid caretaking labor have less in savings when they reach retirement.<sup>77</sup> These unfortunate realities contribute to the “feminization of poverty,” a well-documented phenomenon that leads to the widespread marginalization of women and the children for whom they care.<sup>78</sup> If women were paid the same as men, 2.5 million children would be lifted from poverty.<sup>79</sup>

The gender gap in unpaid care also exacts personal costs on women themselves. The United States is a “nation of mothers engulfed in stress.”<sup>80</sup> American women repeatedly report greater work-family conflict than fathers and “generally blame themselves for how hard their lives are.”<sup>81</sup> The consequences of this can be severe: “The ‘feminization of poverty’ weakens women’s bargaining power within marriage, leaves women vulnerable to sexual abuse and domestic violence, and can decrease the likelihood of women gaining or keeping the custody of their children upon divorce.”<sup>82</sup> Working mothers “are more tired and get sick more often” than working fathers.<sup>83</sup> And women who view their unpaid caretaking labor obligations as unjust or inequitable are more likely to suffer from depression than those who do not.<sup>84</sup>

The gender gap in unpaid care also harms men. Most men wish they had more time to spend with their children.<sup>85</sup> But the same system that channels women into shouldering a disproportionate share of unpaid caretaking labor also penalizes men who attempt to deviate from their traditional breadwinner role: “Men who request workplace flexibility for family reasons receive lower wages, poorer

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75. See ILO Report, *supra* note 12, at 41–42.

76. See Kessler, *supra* note 50, at 386–87.

77. See Christian Weller, *Caring for a Loved One Hurts Women’s Retirement Prospects*, FORBES (Nov. 20, 2018, 6:00 AM), <https://www.forbes.com/sites/christianweller/2018/11/20/family-caregiving-worsens-gender-wealth-inequality/#5c50b879529c>.

78. See Kessler, *supra* note 50, at 387–88 (citing Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 28 (1978)). About 12.8 million American children were living in poverty in 2017. CHILDREN’S DEFENSE FUND, *Child Poverty in America 2017: National Analysis* (Sept. 12, 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-National-Fact-Sheet.pdf>.

79. Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy*, INST. FOR WOMEN’S POL’Y RES. (Apr. 5, 2017), <https://iwpr.org/publications/impact-equal-pay-poverty-economy>.

80. Caitlyn Collins, *The Real Mommy War Is Against the State*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/09/opinion/sunday/the-real-mommy-war-is-against-the-state.html>.

81. *Id.*; see also HOCHSCHILD, *supra* note 16, at 6.

82. Kessler, *supra* note 50, at 387–88.

83. HOCHSCHILD, *supra* note 16, at 3.

84. See Lockman, *supra* note 43 (citing Kathryn J. Lively, Lala Carr Steelman, & Brian Powell, *Equity, Emotion, and Household Division of Labor Response*, 73 SOC. PSYCHOL. Q. 358 (2010)).

85. See generally Gretchen Livingston, *Most Dads Say they Spend Too Little Time with Their Children; About a Quarter Live Apart from Them*, PEW RESEARCH CTR. (Jan. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/01/08/most-dads-say-they-spend-too-little-time-with-their-children-about-a-quarter-live-apart-from-them>.

performance evaluations, and fewer promotions than their counterparts who maintain regular work schedules.”<sup>86</sup> This inhibits men’s ability to foster meaningful and fulfilling relationships with their children.<sup>87</sup>

Finally, the gender gap in unpaid care exacts a toll on the United States economy. Gender equality in the workplace would contribute an additional \$512.6 billion per year to the United States’ gross domestic product (GDP).<sup>88</sup> Even businesses benefit when women stay in the paid labor force.<sup>89</sup> Businesses that invest in policies that support working parents report lower turnover costs, increased productivity, and better bottom lines.<sup>90</sup> The gender gap in unpaid care has produced a nationwide crisis, and American laws are ill-equipped to address it.

#### D. THE INABILITY OF EXISTING LAWS TO CONFRONT WOMEN’S CULTURAL CAREGIVING

The American legal system can only recognize immutable, biological differences between men and women.<sup>91</sup> It allows accommodation for the unpaid caretaking labor women perform as a result of their reproductive capacity, such as pregnancy, childbirth, or breastfeeding.<sup>92</sup> But it has failed to confront the significant unpaid caretaking labor women complete that is unrelated to their biological differences from men, from changing an infant’s diaper to driving a child to school.<sup>93</sup> Women perform the majority of this labor even though men are

86. Erin Rehel & Emily Baxter, *Men, Fathers, and Work-Family Balance*, CTR. FOR AM. PROGRESS 6 (Feb. 4, 2015) <https://cdn.americanprogress.org/wp-content/uploads/2015/02/MenWorkFamily-brief.pdf>. While mere status as a father improves economic outcomes, *see* Budig, *supra* note 58, actual contribution to unpaid caretaking labor traditionally left to mothers diminishes fathers’ economic outcomes.

87. *See* Berit Brandth & Elin Kvande, *Masculinity and Fathering Alone During Parental Leave*, 21 MEN & MASCULINITIES 72, 82 (2018) (discussing the self-esteem and confidence men build from caretaking); *see also* THE FATHERHOOD PROJECT, *10 Facts About Father Engagement* (June 18, 2015), <http://www.thefatherhoodproject.org/10-facts-about-father-engagement> (describing the “positive, lifelong impact fathers can have by being positively engaged early in their children’s lives”).

88. Milli et al., *supra* note 79.

89. NAT’L. PARTNERSHIP FOR WOMEN & FAMILIES, *Paid Family and Medical Leave: Good for Business* (Sept. 2018), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/paid-leave-good-for-business.pdf>.

90. *Id.*

91. *See* Kessler, *supra* note 50, at 375, 436.

92. *See, e.g.*, EEOC ENFORCEMENT GUIDANCE NO. 915.003, PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015) [hereinafter EEOC PREGNANCY DISCRIMINATION GUIDANCE], [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#IC3](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IC3).

93. Kessler, *supra* note 50, at 371. It is also important to note that many believe that women’s disproportionate contribution to unpaid caretaking labor is rooted in immutable, biological differences. *See, e.g.*, Tara Parker-Pope, *Do Women Like Child Care More Than Men?*, N.Y. TIMES (Mar. 22, 2012 12:01 AM), <https://well.blogs.nytimes.com/2012/03/22/do-women-like-child-care-more-than-men> (“[S]ome research suggests that a woman’s parenting skills are deeply rooted in biology. Women with high levels of testosterone, for instance, often show less interest in babies, while a father’s testosterone levels are known to drop when a new baby arrives, ostensibly a biological mechanism to encourage bonding with the infant.”).

theoretically just as capable of doing so. Laura Kessler therefore calls this type of labor women's "cultural caregiving."<sup>94</sup>

The American legal system cannot cope with women's cultural caregiving because it is "understood by judicial decision makers and society more broadly to be a product of women's choices or gender socialization, but certainly not immutable biological difference."<sup>95</sup> American values of autonomy, equality, and rationality prohibit accommodation when inequality is the result of an individual's own choices.<sup>96</sup> Title VII of the Civil Rights Act of 1964 (Title VII), therefore, fails to protect women from discrimination on the basis of their cultural caregiving. And the Family and Medical Leave Act (FMLA) has been unable to confront the gender gap in unpaid care.

### 1. Title VII of the Civil Rights Act of 1964

Title VII proscribes discrimination in the workplace "with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex."<sup>97</sup> In 1978, Congress enacted the Pregnancy Discrimination Act (PDA), amending Title VII to clarify that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" constitutes discrimination because of sex.<sup>98</sup> In 1989, the Supreme Court explained that Title VII also prohibits discrimination on the basis of sex stereotypes concerning the way men and women should behave.<sup>99</sup>

Title VII therefore protects against discrimination on the basis of stereotypes about women's diminished value in the workplace as a result of their disproportionate unpaid caretaking labor obligations.<sup>100</sup> The Equal Employment Opportunity Commission (EEOC) Enforcement Guidance explains:

[W]omen with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work. Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts. . . . Employment decisions based on such

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94. Kessler, *supra* note 50, at 371.

95. *Id.* at 418.

96. *See id.* at 436.

97. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 116-56).

98. 42 U.S.C.A. § 2000e(K) (Westlaw through Pub. L. No. 116-56). The PDA was passed in direct response to the Supreme Court's holding in *Gen. Elec. Co. v. Gilbert* that pregnancy discrimination did not constitute sex discrimination under Title VII. 429 U.S. 125 (1976).

99. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (holding that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

100. EEOC ENFORCEMENT GUIDANCE NO. 915.002, UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <https://www.eeoc.gov/policy/docs/caregiving.html>.

stereotypes violate [Title VII], even when an employer acts upon such stereotypes unconsciously or reflexively.<sup>101</sup>

Under this theory, female plaintiffs have been relatively successful at challenging discrimination based on negative stereotypes about women with children.<sup>102</sup>

The catch is this: Title VII only protects women when negative stereotypes are unfounded. The statute fails to protect women whose disproportionate unpaid caretaking labor burden has actually affected their performance at work.<sup>103</sup> The countless women who experience a decrease in workplace productivity after having children fall outside Title VII's protections. As a result of the gender gap in unpaid care, this lack of coverage harms women more than men.

## 2. The Family and Medical Leave Act

The FMLA provides a gender-neutral entitlement to eligible employees of up to twelve weeks of unpaid, job-protected leave for specified family and medical reasons, including the birth or adoption of a child.<sup>104</sup> In an opinion by Justice Rehnquist, the Supreme Court described Congress' goal in passing the statute as undoing "the pervasive sex-role stereotype that caring for family members is women's work."<sup>105</sup> This purpose was codified by Congress in the findings section of the FMLA, which stated that "primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the lives of men."<sup>106</sup>

Despite its transformational goals, the FMLA failed to confront the gender gap in unpaid care. The statute falsely assumed that "equal leave *availability* would translate to equal leave *taking*, equal parenting, and equal valuation of male and female workers."<sup>107</sup> But that has not proven to be the case. The mere availability of leave does not effectively incentivize men to take it, and women still take leave

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101. *Id.*

102. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 125 (2003).

103. See Kessler, *supra* note 50, at 418.

104. WAGE & HOUR DIVISION, U.S. DEP'T OF LABOR, *Family and Medical Leave Act Overview*, <https://www.dol.gov/whd/fmla>.

105. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (upholding the FMLA as a constitutional exercise of Congress' prophylactic Section 5 power under the Fourteenth Amendment). Justice Rehnquist elaborated: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees." *Id.* at 736.

106. 29 U.S.C.A. § 2601(a)(5) (Westlaw through Pub. L. No. 116-56).

107. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 60 (2004) (emphasis added).

more frequently and for longer periods than men do.<sup>108</sup> The law's gender-neutrality was not enough to undo the stereotype that women should shoulder the bulk of unpaid caretaking labor.<sup>109</sup> Instead, because more women than men take leave, the statute *reinforces* that stereotype, "preserv[ing] employers' incentive to prefer male employees."<sup>110</sup>

The FMLA has additional shortcomings. The policy legally and practically excludes most women. Because it only applies to employers with fifty or more employees,<sup>111</sup> only fifty-nine percent of employees in the United States are covered.<sup>112</sup> And many more people are effectively excluded because they simply cannot afford to take leave that is unpaid.<sup>113</sup> By prioritizing the inclusion of men, feminists who advocated for the FMLA sacrificed the inclusion of the most marginalized women.<sup>114</sup> The gender-neutral bill also perpetuates the myth that men and women distribute unpaid caretaking labor equally, obscuring women's extraordinary contribution to society and concealing men's failure to do more at home.<sup>115</sup>

The gender gap in unpaid care is a crisis that the American legal system is unable to address. The commitment of American laws to gender-neutrality and a vision of equality that treats men and women the same "presents an insurmountable epistemological obstacle to gaining accommodations for women's cultural experiences."<sup>116</sup> Under these circumstances, what is the best path forward? Should feminist policy advocates pursue gender-neutral policies to acknowledge that women are not biologically predisposed to perform the majority of caretaking labor and that fathers can, should, and often do have a substantial role to play

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108. See Barbara Gault, Heidi Hartmann et al., *Paid Parental Leave in the United States: What the Data Tell Us About Access, Usage, and Economic and Health Benefits*, INST. FOR WOMEN'S POL'Y RES. 21, 24 (Mar. 2014), [https://www.dol.gov/wb/resources/paid\\_parental\\_leave\\_in\\_the\\_united\\_states.pdf](https://www.dol.gov/wb/resources/paid_parental_leave_in_the_united_states.pdf) (reporting that mothers take considerably longer leave than fathers, with 70% of men taking parental leave for 10 days or less, compared with 23% of women, and only 6% of men taking parental leave for 60 days or more, compared with 38% of women); NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *A Look at the U.S. Department of Labor's 2012 Family and Medical Leave Act Employee and Worksite Surveys* 1 (Feb. 2013) [hereinafter *A Look at FMLA Surveys*], <http://www.nationalpartnership.org/our-work/resources/workplace/fmla/dol-fmla-survey-key-findings-2012.pdf> (reporting that women who took leave to care for a new child took an average of 58 days of leave and men who took leave to care for a new child took an average of 22 days of leave).

109. Grossman, *supra* note 107, at 58 ("Gender neutrality does not guarantee equality. Although the mandate of gender-neutral leave does not explicitly reinforce stereotypes that only women do or should take leave to fulfill caregiving obligations, the FMLA does nothing to change those beliefs or the caretaking and leave-taking patterns that flow from them."). Grossman also posits that "being able to have a baby without being fired is only part of the bundle of rights men have always enjoyed." *Id.*

110. *Id.* at 18.

111. 29 U.S.C.A. § 2611(4)(A)(i) (Westlaw, current through P.L. 116–56).

112. *A Look at FMLA Surveys*, *supra* note 108, at 3.

113. Littleton, *supra* note 7, at 35.

114. *Id.* at 18–19, 33–34 (noting that feminist advocates sacrificed the inclusion of lesbians, women of color, and low-income women in the drafting of the FMLA—essentially "leaving women out by bringing men in").

115. See Kessler, *supra* note 50, at 420.

116. *Id.* at 440.

as parents? Or should they pursue gender-specific policies in order to meet women's pressing, current needs—but risk essentializing gender roles in the process?

### III. THE NEED FOR GENDER-AWARE POLICYMAKING

Feminists have long debated whether the path to equality requires treating men and women the same or differently. Answering this question is fundamental to the formulation of policies that address the gender gap in unpaid care. Gender-specific plans are effective at meeting women's pressing, short-term needs but can cement gender norms that cause the gender gap in unpaid care in the first place. Gender-neutral plans affirm a vision of society in which parents of all genders can actively contribute to unpaid caretaking labor but often fail to meet women's present needs. Instead of pursuing either of these options, feminists should instead advocate for gender-aware policies. Gender-aware policies are acutely alert and responsive to gendered realities but do not explicitly distinguish on the basis of sex. By pursuing gender-aware policies, feminists can simultaneously meet women's current, unique needs and affirm the values essential to a future of gender equality.

#### A. THE SAMENESS OR DIFFERENCE DEBATE

Since the 1980s, feminists have fiercely debated whether policies should treat men and women the same or differently.<sup>117</sup> Special treatment feminists argue that true equality can only be achieved with policies that acknowledge women's differences from men.<sup>118</sup> Equal treatment feminists caution that such policies reinforce archaic gender roles, instead endorsing policies that treat men and women the same.<sup>119</sup> The American legal system has largely adopted the equal treatment approach, requiring men and women to be treated the same except when gender differences are biologically rooted.<sup>120</sup>

The disagreement between special treatment and equal treatment feminists is ultimately one of strategy rather than vision—most feminists want to build a world where people of all genders can participate in unpaid caretaking labor, unhindered by state and social pressures. The question is how to build that world.

#### 1. The Cal Fed Litigation

Lillian Garland had worked for several years as a receptionist at California Federal Savings and Loan Association (Cal Fed) in Los Angeles when she took

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117. See Williams, *supra* note 1, at 280.

118. See generally Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 517 (1983).

119. See generally Williams, *supra* note 10, at 331.

120. Williams, *supra* note 1, at 279.

four months of unpaid pregnancy leave in 1982.<sup>121</sup> When she notified Cal Fed that she was ready to return to work, the company informed her that they no longer had a position available for her.<sup>122</sup> Cal Fed's decision violated Section 12945(b)(2) of California's Fair Employment and Housing Act, which required employers to provide female employees with up to four months of unpaid pregnancy disability leave and to reinstate employees upon their return from leave.<sup>123</sup> As a result, the California Department of Fair Employment and Housing issued an administrative accusation against Cal Fed on Garland's behalf.<sup>124</sup>

In response, Cal Fed sought a declaration in federal court that Section 12945(b)(2) was preempted by Title VII.<sup>125</sup> As amended by the PDA, Title VII prohibits discrimination on the basis of sex, including "pregnancy, childbirth, or related medical conditions."<sup>126</sup> Cal Fed argued that Section 12945(b)(2) discriminated on the basis of sex by singling out pregnancy and treating it differently from all other disabilities.<sup>127</sup>

The Court disagreed, finding that Title VII did not preempt Section 12945(b)(2).<sup>128</sup> The Court affirmed that the purpose of Title VII is "'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'"<sup>129</sup> The Court found that Congress enacted the PDA to "extend" these objectives to cover pregnancy.<sup>130</sup> It agreed with the Ninth Circuit that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"<sup>131</sup> Title VII and Section 12945(b)(2) "share a common goal" of "equal employment opportunity" for women.<sup>132</sup>

The Cal Fed case incited a fierce debate among American feminists.<sup>133</sup> Christine Littleton and Judith Resnik submitted an amicus brief in support of the Department of Fair Employment and Housing on behalf of the Coalition for Reproductive Equality in the Workplace (CREW), a coalition assembled by

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121. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 278 (1987); see also Bill Farr, *Pregnancy Rights Law Reinstated*, L.A. TIMES (Apr. 16, 1985), <https://www.latimes.com/archives/la-xpm-1985-04-16-mn-23234-story.html>.

122. *Guerra*, 479 U.S. at 278.

123. *Id.* at 276.

124. *Id.* at 278.

125. See *id.* at 279.

126. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 116-56); 42 U.S.C.A. § 2000e(K) (Westlaw through Pub. L. No. 116-56).

127. *Guerra*, 479 U.S. at 284 (arguing that "California's 'special treatment' approach to pregnancy discrimination" was in conflict with the plain language of Title VII, as amended by the PDA).

128. *Id.* at 292.

129. *Id.* at 288 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

130. *Id.* at 288-89.

131. *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

132. *Id.* at 285, 290.

133. See *Williams*, *supra* note 1, at 280.



Littleton and others.<sup>134</sup> Littleton and Resnik argued that the California statute should be upheld.<sup>135</sup> Like the Court, they believed Section 12945(b)(2) did not conflict with the PDA because it furthered Title VII's overall goal of equal employment opportunity.<sup>136</sup>

Wendy Williams also submitted an amicus brief, but in support of neither party and on behalf of the National Organization for Women, the National Women's Law Center, and others.<sup>137</sup> Like Littleton, Williams argued that the California statute should be upheld.<sup>138</sup> However, she reasoned that Section 12945(b)(2) did not conflict with the PDA because the two statutes could be read together as requiring California employers to provide up to four months of unpaid leave to disabled employees of both genders.<sup>139</sup> Williams was clear that Title VII required employers to treat men and women the same: The PDA would, she argued, preempt Section 12945(b)(2) if the Court interpreted the California statute as extending disability benefits only to pregnant women.<sup>140</sup> However, she insisted that the proper remedy, in that case, would be the extension of benefits to men rather than removal of benefits from women.<sup>141</sup>

The disagreement between the Littleton coalition and the Williams coalition embodies the longstanding sameness or difference debate that dominated feminist scholarship in the 1980s and 1990s.<sup>142</sup> Equal treatment feminists and special treatment feminists were divided: Does the path to gender equality require treating men and women the same or differently?

Joan Williams has argued that there are actually "two branches" of the sameness or difference debate.<sup>143</sup> The first branch, or "the special treatment debate," asks whether feminists should draft policies that treat men and women the same or differently.<sup>144</sup> The second branch, or "the different voice debate," asks "whether men and women are 'really' the same or different."<sup>145</sup> Because these two debates unfolded simultaneously, they are often "lumped together" under the sameness or difference label despite their logically independent inquiries.<sup>146</sup>

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134. See Brief for Coalition for Reproductive Equality in the Workplace et al. as Amici Curiae Supporting Respondents, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494) [hereinafter CREW Brief]; see also Williams, *supra* note 1, at 281.

135. CREW Brief, *supra* note 134, at 23-24.

136. *Id.*

137. See Brief for the National Organization for Women et al. as Amici Curiae Supporting Neither Party, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494) [hereinafter NOW Brief]; see also Williams, *supra* note 1, at 281.

138. NOW Brief, *supra* note 137, at 4.

139. *Id.*

140. *Id.* at 11.

141. *Id.* at 20.

142. See Williams, *supra* note 1, at 283; see also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1286-87 (1987).

143. Williams, *supra* note 1, at 284.

144. *Id.* at 283.

145. *Id.*

146. *Id.* at 283-85.

Teasing them apart reveals that the disagreement between equal treatment feminists and special treatment feminists is not one of vision, but of strategy.

## 2. The Special Treatment Debate

The special treatment debate, embodied by the Cal Fed litigation, began in 1983 with an article published by Linda Krieger and Patricia Cooney.<sup>147</sup> Krieger and Cooney argued that the liberal model of equality underpinning the equal treatment approach “focuses excessively on an attempt to ‘nullify’ sex differences” and is “structurally inadequate to effectuate equality between the sexes.”<sup>148</sup> Instead, they argued, many situations call for “positive action” or “special treatment” to “change the institutions in which women work”—institutions that are “designed with a male prototype in mind.”<sup>149</sup>

Wendy Williams’ response in 1984 defended the equal treatment model and argued that its goal “is not and never was the integration of women into a male world.”<sup>150</sup> Instead, equal treatment feminists aspire to “break down the legal barriers that restrict[] each sex to its predefined role and create[] a hierarchy based on gender.”<sup>151</sup> Williams identified several potential traps in the special treatment model.<sup>152</sup> First, the same logic that allows the creation of special benefits for pregnant women also permits the state to treat pregnancy worse than other disabilities.<sup>153</sup> Second, singling out pregnancy as unique is politically and culturally divisive and undermines a more unifying, humanitarian vision.<sup>154</sup> Third, the special treatment approach could reopen the door to the paternalistic, protective legislation that enforced women’s subordination in the first half of the twentieth century and that equality feminists dismantled.<sup>155</sup> Finally, a state’s claimed interest “in women’s special procreational capacity” is directly correlated with their ability to restrict women’s “freedom of choice.”<sup>156</sup> Williams explained that the equal treatment approach “necessarily creates not only the desired floor under the pregnant woman’s rights but also the ceiling.”<sup>157</sup> She famously urged pragmatism: “If we can’t have it both ways, we need to think carefully about which way we want to have it.”<sup>158</sup>

Christine Littleton reframed the debate in 1987, relabeling “equal treatment” and “special treatment” as “symmetrical” and “asymmetrical” models of equality,

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147. See Krieger & Cooney, *supra* note 118; see also Williams, *supra* note 1, at 283.

148. Krieger & Cooney, *supra* note 118, at 517, 545.

149. *Id.* at 515, 571.

150. Williams, *supra* note 10, at 331.

151. *Id.*

152. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196 (1982).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

respectively.<sup>159</sup> She identified two models within the symmetrical framework and four models within the asymmetrical framework.<sup>160</sup> Within the first framework, she argued that the American legal system has adopted the “assimilation” model, which assumes that “women, given the chance, really are or could be just like men” and that therefore “the law should require social institutions to treat women as they already treat men.”<sup>161</sup> The other symmetrical model of equality is “androgyny,” which would “require[] institutions to pick some golden mean between [men and women] and treat both sexes as androgynous persons would be treated.”<sup>162</sup>

Littleton further identified “special rights,” “accommodation,” “empowerment,” and “acceptance” within the asymmetrical framework.<sup>163</sup> The special rights model seeks to account for biological and cultural differences between men and women, pursues justice rather than equality, and claims “special rights for women based on their special needs.”<sup>164</sup> The accommodation model concedes the necessity of differential treatment for biological differences between men and women but endorses an equal treatment approach for cultural differences.<sup>165</sup> The empowerment model “rejects difference altogether as a relevant subject of inquiry” and posits that “the subordination of women to men has itself constructed the sexes, and their differences.”<sup>166</sup>

Littleton herself endorsed the fourth asymmetrical model, labeling it “the model of ‘equality as acceptance.’”<sup>167</sup> She argued that “[t]he difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons.”<sup>168</sup> Equality as acceptance does not distinguish between biological and cultural differences; rather than asking whether, and which, gender differences are “real,” it demands that gender differences be “costless.”<sup>169</sup>

While the special treatment view is more widely accepted among academics today, the equal treatment approach has triumphed in the legal arena.<sup>170</sup> Other than the small allowance of differential treatment for biological differences endorsed by the PDA and the Cal Fed litigation, the American legal system has

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159. Littleton, *supra* note 142, at 1291–92.

160. *Id.* at 1292, 1295.

161. *Id.* at 1292.

162. *Id.*

163. *Id.* at 1295.

164. *Id.* (citing ELIZABETH H. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 61–63, 122 (1980)) (identifying Wolgast as a significant proponent of the special rights model).

165. *Id.*

166. *Id.* at 1299–1300.

167. *Id.* at 1285.

168. *Id.* 1284–85.

169. *Id.* at 1285, 1296.

170. Williams, *supra* note 1, at 279.

overwhelmingly endorsed an equal treatment standard that requires men and women to be treated alike.<sup>171</sup>

### 3. The Different Voice Debate

Underlying, but distinct from, the special treatment debate is the different voice debate.<sup>172</sup> The different voice debate began in 1982 with the publication of Carol Gilligan's seminal book, *In a Different Voice*.<sup>173</sup> Its fundamental premise is that men and women are different in significant and real ways, and, more importantly, that these differences are women's strengths.<sup>174</sup> Cultural feminists, the primary advocates of this view, have identified the most significant difference between men and women as the moral difference: They argue that "women are more nurturant, caring, loving and responsible to others than are men."<sup>175</sup> This idea is central to Robin West's "connection thesis," which posits that "[w]omen are actually or potentially materially connected to other human beings" and "[m]en aren't."<sup>176</sup> While the special treatment debate asks how to "redesign the practice of domesticity," the different voice debate "involves not the practice but the *ideology* of domesticity," specifically the connection of "women with an ethic of care."<sup>177</sup>

### 4. Distinguishing Strategy from Objective

The sameness or difference label conflates the logically independent inquiries advanced by the special treatment and different voice debates.<sup>178</sup> The different voice debate asks "how, in the long run, we want to define women[] and men's places and roles in society."<sup>179</sup> While "maternalists" want to "empower women within the role domesticity assigns to them," "equal parenting advocates" want to "deconstruct both of domesticity's traditional gender roles."<sup>180</sup> In contrast, the special treatment debate is a dispute over policy design.<sup>181</sup> Special treatment feminists and equal treatment feminists often agree on vision: Both hope to build a world where people of all genders have the freedom to participate in the rearing of children, unhindered by state and social pressures. At the very least, "[s]urely no feminist wants to add to the social forces that penalize people for nontraditional gender performance."<sup>182</sup> The question, therefore, is not the objective to

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171. *See id.* ("[T]he public policy of the U.S. eschews special treatment for women."); *see also* Littleton, *supra* note 142, at 1304 ("[T]he Supreme Court's decision in [Reed v. Reed, 404 U.S. 71 (1971)] marked its acceptance of the 'assimilationist' model of sexual equality.")

172. Williams, *supra* note 1, at 283.

173. *Id.*; *see generally* GILLIGAN, *supra* note 52.

174. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988).

175. *Id.* at 17.

176. *Id.* at 14.

177. Williams, *supra* note 1, at 283 (emphasis added).

178. *See id.*

179. Williams, *supra* note 152, at 197.

180. Williams, *supra* note 1, at 280, 297.

181. *See id.* at 285.

182. *Id.* at 303.

strive for, but the strategy necessary to get there. Should feminists acknowledge and accommodate gender differences, or ignore them in the hope that they go away on their own?

## B. GENDER-SPECIFIC AND GENDER-NEUTRAL ENTITLEMENTS

Gender-specific policies can meet women's needs today but impede further progress by bolstering the gender norms that push women toward unpaid caretaking labor and police men away from it. Gender-neutral plans, in contrast, lay the foundation for a world where parents of all genders can contribute to the rearing of children but fail to meet women's current needs. Feminists must find a middle path that allows them to simultaneously meet women's present needs and affirm the values essential to a future of gender equality.

### 1. Gender-Specific Policies

Feminists could advocate for gender-specific policies that distinguish on the basis of sex or that provide entitlements directly to women. Often, the preference for gender-specific policies is pragmatic: Many feminists prioritize helping women today over the expression of an aspirational but out-of-touch vision of the future. Littleton, for example, describes her strategy of equality as acceptance in this way:

[I]f women currently tend to assume primary responsibility for child-rearing, we should not ignore that fact in an attempt to prefigure the rosy day when parenting is fully shared. We should instead figure out how to assure that equal resources, status, and access to social decisionmaking flow to those women (and few men) who engage in this socially female behavior.<sup>183</sup>

Or as Winnie Chan eloquently states, “[s]ometimes, raising the floor is more important than smashing the ceiling.”<sup>184</sup>

This logic holds water—improving women's lives today must be the centerpiece of any feminist agenda, and gender-specific policies satisfy this standard more than gender-neutral ones. Unlike gender-neutral entitlements, gender-specific policies shuttle the state's limited resources straight to the women who need them.<sup>185</sup> And gender-specific policies, drafted with only women in mind, can be tailored to their unique realities. Gender-specific plans serve a symbolic

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183. Littleton, *supra* note 142, at 1297.

184. Winnie Chan, *Mothers, Equality and Labour Market Opportunities*, 42 *INDUS. L.J.* 224, 235 (2013).

185. See, e.g., Littleton, *supra* note 7, at 33–34 (discussing how feminists sacrificed the inclusion of marginalized women in order to secure the gender-neutral FMLA, which includes men within its coverage).

function as well: Unlike gender-neutral entitlements, they highlight, rather than obscure, women's extraordinary contribution to society.<sup>186</sup>

But gender-specific policies impede the progress feminists hope to make. By providing resources for women as caretakers, they reinforce gendered assumptions about who should be responsible for unpaid caretaking labor in the first place: "If the workplace accommodates only mothers' parental responsibilities, fathers will be discouraged from deviating from traditional roles. The traditional arrangement will reproduce itself."<sup>187</sup> They also fail to support men who actively participate in unpaid caretaking labor. As Joan Williams has argued, "[t]rue equality requires the deconstruction of masculine norms" and demands that "men and women have equal access to both work and family life."<sup>188</sup>

## 2. Gender-Neutral Policies

Instead of gender-specific policies, feminists could advocate for gender-neutral plans that do not distinguish on the basis of sex. Unlike the more pragmatic gender-specific policies, gender-neutral entitlements are aspirational, endorsing a vision of the world where parents of all genders can and should actively contribute to the rearing of children. They therefore serve an expressive function, affirming the norms that will become the foundation of an egalitarian future. In family law, for example, Katharine Bartlett and Carol Stack have advocated for a gender-neutral presumption of joint custody instead of a primary care presumption.<sup>189</sup> They have "defend[ed] their proposal by reference to law's expressive function: its ability to express and change social expectations and norms."<sup>190</sup> They have argued that "'an end to the law's complicity in inequalitarian norms may be a precondition of reform and even a catalyst for it."<sup>191</sup> Even if gender-neutral policies fall short of disassembling the gender norms that channel women toward unpaid caretaking labor and men toward paid market work, at least they do not reinforce those norms the way that gender-specific policies do. Gender-neutral policies also ensure that men who actively contribute to unpaid caretaking labor receive the resources they need to continue doing so.

But gender-neutral policies are often naïve, prioritizing a far-off vision of gender equality over women's current needs. They shift limited state resources away from women who need them toward men who do not. Littleton described this phenomenon—"leaving women out by bringing men in"—as one of the "two

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186. Kessler, *supra* note 50, at 420 (arguing that "the gender neutrality of the [FMLA] perpetuates the myth that women and men share equally in the burdens of caregiving"). Gender-neutral entitlements are disingenuous about the distribution of care burdens. *Id.* A gender-specific policy, in contrast, highlights women's disproportionate share of unpaid caretaking labor by providing women, and not men, with the support to continue performing this labor. *Id.*

187. Williams, *supra* note 10.

188. Williams, *supra* note 1, at 318–19.

189. *Id.* (citing Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 37 (1986)).

190. *Id.* (quoting Bartlett & Stack, *supra* note 189, at 30).

191. *Id.*

traps that await the unwary proponent of sexual equality.”<sup>192</sup> She argued that feminists advocating for the FMLA fell into this trap, sacrificing the inclusion of the most marginalized women in order to include the most privileged men.<sup>193</sup> And gender-neutral policies necessarily demand a one-size-fits-all approach; they attempt to accommodate the distinct needs of men and women with broad gender-neutral language. Improving women’s lives today must be the cornerstone of any feminist agenda. Gender-neutrality does not meet this standard.

Even worse, gender-neutral policies are almost never actually “neutral,” using a male baseline as a default instead. Take Bartlett and Stack’s gender-neutral joint custody standard as an example: Courts’ preferences for consistent and lengthy residences or greater wealth in the custody analysis both favor fathers over mothers, despite their alleged gender neutrality.<sup>194</sup> It is crucial for feminist advocates “to go ‘behind’ the asserted neutrality of any legal doctrine in order to find the gendered reality that prevents true equality.”<sup>195</sup>

Gender-neutral policies can even increase gender inequality by snowballing men’s advantage. A study of tenure clock stopping policies in the economics departments at top American universities found just this. By extending the family-friendly policy to men and transforming a traditionally gender-specific policy into a gender-neutral one, universities caused a “substantial[] *increase* [in] the gender gap in tenure rates.”<sup>196</sup> Clock stopping policies allow assistant professors, who are evaluated for tenure after a seven-year period, to stop their tenure clock for one year after the birth or adoption of a child.<sup>197</sup> Although “the objective of these policies [is] to . . . level the playing field for women, . . . they accomplished the opposite.”<sup>198</sup> The gender-neutral policies decreased women’s tenure rates by 19% and increased men’s tenure rates by 17%.<sup>199</sup> “[T]he primary mechanism driving the tenure results appears to be that men publish[ed] more in top-5 journals after the policies [were] implemented, but women [did] not.”<sup>200</sup> In other words, while female professors needed the clock stopping policies to help juggle their careers with the unpaid labor that comes with having a child, male professors “used the extra year to publish their research, amassing impressive publication

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192. See Littleton, *supra* note 7, at 18–19.

193. See *id.* at 33–36. The FMLA excludes low-income women and men, who cannot afford to take unpaid leave. *Id.* at 35. It excludes women of color, who are more likely than white women to live with extended family members not covered by the statute. *Id.* at 34. And it excludes lesbians, who are less likely than straight women to be the legal parents of their children and who, at the time of the FMLA’s passage, could not be “spouses” within the meaning of the statute. *Id.* at 33–34.

194. See *id.* at 51.

195. *Id.*

196. Antecol et al., *supra* note 8 (emphasis added).

197. *Id.* at 2423.

198. *Id.* at 2439.

199. *Id.*

200. *Id.*

records.”<sup>201</sup> Gender-neutral clock stopping policies are blind to the reality that women shoulder the bulk of unpaid caretaking labor. They “assume[] both a commonality of interest not now demonstrated and an equality of situation not yet achieved.”<sup>202</sup>

The clock stopping study demonstrates that “[n]eutral treatment in a gendered world . . . does not operate in a neutral manner.”<sup>203</sup> As long as the gender gap in unpaid care persists, providing the same entitlements to men and women will only increase men’s advantage: “[F]athers . . . receive the same benefits without bearing anything close to the same burden. . . . [I]t’s little wonder some recently instituted benefits have given men an advantage.”<sup>204</sup>

Finally, gender-neutral policies fail to dismantle the gender norms that channel women toward unpaid caretaking labor and men toward paid market work. As the clock stopping study demonstrates, gender-neutral policies fail to increase fathers’ contribution to unpaid caretaking labor and shrink the gender gap in unpaid care.<sup>205</sup> Their inefficacy represents a state endorsement of the status quo, absolving men of their failure to step up. And their gender-neutral language obscures women’s extraordinary contribution to society under the veil of alleged equality.

### 3. Redefining Neutrality

Gender-specific policies that distinguish on the basis of sex or that provide specific entitlements to women would generally be preempted by Title VII, which requires employers to treat men and women the same, except for pregnancy, childbirth, or related medical conditions.<sup>206</sup> A maternity leave policy that only provides leave for mothers, for example, would therefore be preempted under the current legal regime.<sup>207</sup> But it is important for advocates to understand the

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201. Justin Wolfers, *A Family-Friendly Policy That’s Friendliest to Male Professors*, N.Y. TIMES (June 24, 2016), [https://www.nytimes.com/2016/06/26/business/tenure-extension-policies-that-put-women-at-a-disadvantage.html?\\_r=0](https://www.nytimes.com/2016/06/26/business/tenure-extension-policies-that-put-women-at-a-disadvantage.html?_r=0).

202. Littleton, *supra* note 7, at 19.

203. Martha A. Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 10 (1992).

204. Wolfers, *supra* note 201.

205. *See also* Williams *supra* note 1, at 290 (describing how Sweden’s original, gender-neutral parental leave policy was disproportionately utilized by women).

206. *See* 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 116-56); 42 U.S.C.A. § 2000e(K) (Westlaw through Pub. L. No. 116-56); *see also supra* Part III.A.1 (discussing the Cal Fed litigation and its allowance of differential treatment of pregnancy).

207. *See* EEOC PREGNANCY DISCRIMINATION GUIDANCE, *supra* note 92 (“[P]arental leave must be provided to similarly situated men and women on the same terms.”); *see also* Press Release, EEOC, *EEOC Sues Estée Lauder for Sex Discrimination* (Aug. 30, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/8-30-17.cfm> (reporting that the EEOC sued Estée Lauder for sex discrimination, alleging that the company “violated federal law when it implemented and administered a paid parental leave program that automatically provides male employees who are new fathers lesser parental leave benefits than are provided to female employees who are new mothers . . .”).



strengths and drawbacks of both gender-specific and gender-neutral approaches so that they recognize the full array of strategic choices available to them.

The American legal system has eschewed accommodation of gender differences and, as a result, adopted a definition of gender-neutrality that requires complete blindness to gendered realities. A gender-aware strategy reconceptualizes the meaning of neutrality: Rather than blindness, neutrality requires equality, which in turn demands awareness of gender differences. Gender-aware policies are ultimately gender-neutral ones, but they consider men's and women's biological and cultural differences in order to enhance gender equality.

Neither strict gender-neutral nor gender-specific policies allow feminists to meet women's pressing, short-term needs and affirm the values of gender equality. A gender-aware strategy allows feminists to formulate policies that do both.

### C. A PATH FORWARD: GENDER-AWARE POLICYMAKING

The bridge between the imperfect present day and the egalitarian future feminists are working toward can be built with gender-aware policymaking. Gender-aware policies are acutely alert and responsive to gendered realities but do not explicitly afford different entitlements on the basis of sex. They are technically gender-neutral, but they are not gender-blind. By advocating for gender-aware policies, feminists can simultaneously affirm the values essential to a future of gender equality and meet women's current, unique needs.

Gender-aware policies have the advantages of both gender-specific and gender-neutral approaches while avoiding many of their shortcomings. Because gender-aware plans do not explicitly distinguish on the basis of sex, they do not reinforce the gender norms that channel women toward unpaid caretaking labor and men toward paid market work. But because they are attuned to gendered realities, they accomplish what a purely gender-neutral plan cannot. They can be tailored to meet women's unique needs. And they can be designed to actually increase men's contribution to unpaid caretaking labor. That efficacy changes the equation. Unlike gender-neutral policies, gender-aware plans do not endorse the status quo or absolve men of their failure to do more at home. And they will not snowball men's advantage, because they provide men with entitlements they will actually use—distributing the costs of unpaid caretaking labor more equitably between men and women, rather than merely providing men with a benefit they do not need.<sup>208</sup> Gender-aware policies further ensure that men who contribute to

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208. By effectively incentivizing fathers to contribute more to unpaid caretaking labor, gender-aware policies narrow the gender gap in unpaid care and decrease gender inequality. In contrast, strict gender-neutral strategies fail to engage fathers. The gender-neutral FMLA, for example, theoretically provides an entitlement to both men and women, but in reality, only women take advantage of the benefit. See Gault, Hartmann et al., *supra* note 108. The FMLA therefore preserves, or even enhances, employers' incentive to prefer men as employees. See Grossman, *supra* note 107, at 58. Likewise, the gender-neutral clock stopping policy was utilized by women to complete unpaid caretaking labor, but by men to work on their research and advance their careers. See Wolfers, *supra* note 201. It therefore increased gender inequality. *Id.*

unpaid caretaking labor receive the resources they need to continue doing so. Finally, a gender-aware strategy endorses a vision of the world where parents of all genders can actively participate in raising the next generation—a vision foundational to the world feminists hope to build.

There are three rules in formulating gender-aware policies. First, policymakers must consider gender. Second, they should prioritize closing the gender gap in unpaid care by redistributing the labor currently shouldered by women. And finally, drafters should focus on validating the inherent value and importance of unpaid caretaking labor to society.

There are several ways the stigmatization of unpaid caretaking labor can be conceptualized. Is the labor undervalued because women have traditionally performed it? If this is the case, increasing men's contribution to unpaid caretaking labor will degender it and thereby destigmatize it, making it less costly to perform. Or do women perform the labor because it is stigmatized? If this view is accepted, increasing men's contribution to unpaid caretaking labor will at least distribute the costs of stigmatization more equitably between men and women. Either way, the redistribution of unpaid caretaking labor increases gender equality. Closing the gender gap in unpaid care is therefore an important goal of gender-aware policies.<sup>209</sup>

It cannot, however, be the only line of attack. Allowing men to infiltrate the domestic sphere, appropriate it, and thereby destigmatize it, as if their presence adds automatic "value," is not an appropriate feminist goal. Instead, the drafters of gender-aware policies must ensure that their plans affirm the fundamental importance of caretaking labor.<sup>210</sup> The performance of this labor confers a moral value by raising the next generation of human beings. It also bolsters the American economy.<sup>211</sup> Laura Kessler explains this idea as follows:

If women assert that they deserve rights because they are 'equal' to men, they are likely to be afforded rights only when they are in fact equal. If women assert that they deserve rights because gender socialization or biological forces dictate their caregiving, they will receive

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209. Williams, *supra* note 1, at 285 (identifying the redistribution of unpaid caretaking labor between men and women as one of her "three axes" to degender domestic and market labor).

210. See Kessler, *supra* note 50, at 453. Kessler explains that the current American legal system supports two justifications for accommodating dependency: innocence and immutability. *Id.* at 452–53. As a result, feminist legal advocates have "depict[ed] women's caregiving as a manifestation of constrained agency . . . so that it fits into the dominant framework's justifications for accommodation." *Id.* She argues that feminists should instead "assert the fundamental morality of caregiving, and the importance of such work to the sustenance of society." *Id.* at 453. She advocates for a substantive equality model similar to that found in the Americans with Disabilities Act and Title VII's religious accommodation provisions: Title VII's religious accommodation is "based upon the notion that a person's religious practices are a fundamental right, even if voluntarily adopted," and are therefore deserving of workplace accommodation. *Id.* at 457–58.

211. See FAM. CAREGIVER ALLIANCE, *Caregiver Statistics: Demographics* (Apr. 17, 2019), <https://www.caregiver.org/caregiver-statistics-demographics> (explaining that unpaid caregivers provided an estimated \$470 billion of value to the United States economy in 2013).

rights only during the limited circumstances when society considers their agency to be bounded. But if women assert that they deserve rights because caregiving work is fundamental to the functioning of society, the continuation of the human race, and the living of a full life, then women—and men for that matter—will be afforded rights when they engage in that caregiving.<sup>212</sup>

Men should be incentivized to take on more unpaid caretaking labor not because they are “rescuing” women from the costs of stigmatization but because they too want to contribute to the vocation of rearing children.

By considering gender, shrinking the gender gap in unpaid care, and affirming the importance of unpaid caretaking labor, gender-aware policies simultaneously prioritize the needs of women today and the values fundamental to gender equality.

#### IV. A CASE STUDY IN PARENTAL LEAVE

The Swedish experiment with parental leave demonstrates the power of gender-aware policymaking. Feminists know that parental leave can be an important tool for increasing gender equality.<sup>213</sup> The first few weeks after a child is born are crucial to solidifying patterns that last long into the future. Fathers who take parental leave contribute more to unpaid caretaking labor long after they return to work.<sup>214</sup> This not only shrinks the gender gap in unpaid care—it can also improve women’s wages and employment outcomes.<sup>215</sup>

More than four decades ago, Sweden introduced a gender-neutral paid parental leave program—the first of its kind in the world.<sup>216</sup> Under the program, parents received 180 days of leave for every child they had and could divide that time between them however they liked.<sup>217</sup> But nothing changed—in the program’s first year, fathers took only half of one percent of all leave.<sup>218</sup>

So the Swedish government went back to the drawing board. They learned that fathers do not take leave nearly as often when they can transfer leave to their

212. Kessler, *supra* note 50, at 456–57.

213. See U.S. DEP’T OF LABOR, *DOL Policy Brief – Paternity Leave – Why Parental Leave for Fathers Is So Important for Working Families* 3, <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/PaternityBrief.pdf>.

214. *Id.* at 2–3.

215. *Id.* at 3.

216. S.H., *Why Swedish Men Take So Much Paternity Leave*, *ECONOMIST* (Jul. 23, 2014), <https://www.economist.com/the-economist-explains/2014/07/22/why-swedish-men-take-so-much-paternity-leave>.

217. *Id.*

218. *Id.*; see also Katrin Bennhold, *In Sweden, Men Can Have It All*, *N.Y. TIMES* (June 9, 2010), <https://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html> (“Women continued to take parental leave not just for tradition’s sake but because their pay was often lower, thus perpetuating pay differences.”); see also Gault, Hartmann et al., *supra* note 108 (explaining that gender-neutral entitlements are ineffective at sufficiently incentivizing fathers to take leave after the birth or adoption of a child).

spouses.<sup>219</sup> So in 1995, Sweden introduced the first father's quota—a portion of leave that Swedish fathers could either use or lose, but could not transfer to their spouses.<sup>220</sup> First, the government offered one month, then two.<sup>221</sup> Now fathers in Sweden receive three months of nontransferable leave.<sup>222</sup>

They also learned that fathers are less likely to take leave if a program does not offer a high wage replacement rate.<sup>223</sup> So the Swedish government offered paid leave at a competitive reimbursement rate.<sup>224</sup>

Finally, the Swedish government learned about the importance of fathers taking leave alone.<sup>225</sup> One-on-one time with children allows fathers to gain confidence and competence in their caretaking.<sup>226</sup> One Norwegian study even found that fathers who care for children alone develop “caring masculinities” by “assess[ing] the values and practices of care and integrat[ing] them into masculine identities and practices.”<sup>227</sup> So the Swedish government structured leave in a way that incentivizes parents to stagger their leave back-to-back rather than take it simultaneously.

As a result of these changes, fathers in Sweden now take leave more often and for longer periods than ever before.<sup>228</sup> In 2016, 45% of people who took parental leave were men.<sup>229</sup> In that same year, fathers took an average of forty days of leave and mothers took an average of eighty-six days.<sup>230</sup> The percentage of couples that share parental leave equally continues to increase: For children born in 2013, 14.1% of couples shared leave equally.<sup>231</sup>

The Swedish parental leave program is technically gender-neutral. But it was developed in response to gendered realities. The policy has shrunk the gender gap in unpaid care and affirmed the fundamental value of caretaking labor.<sup>232</sup> And while the policy was not a cure-all solution to gender inequality, the Swedish

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219. See, e.g., Rehel & Baxter, *supra* note 86, at 10 (explaining that, while 89% of fathers in Norway currently take parental leave, only 15% of fathers take any of the available leave that can be transferred to their spouses).

220. Sonja Blum, Alison Koslowski, & Peter Moss, *14th International Review of Leave Policies and Related Research 2018*, INT'L NETWORK ON LEAVE POLICIES & RES. 407 (Sept. 2018), [https://www.leavenetwork.org/fileadmin/user\\_upload/k\\_leavenetwork/annual\\_reviews/Leave\\_Review\\_2018.pdf](https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/Leave_Review_2018.pdf).

221. *Id.*

222. *Id.* at 402. It is important to note that the Swedish policy is still technically gender-neutral. Men and women each receive a ninety-day parental leave entitlement that is nontransferable to their partner. *Id.* They then receive an additional 210 days to divide as they please. *Id.*

223. See *id.* at 17; see also Rehel & Baxter, *supra* note 86, at 9.

224. See Blum et al., *supra* note 220, at 403.

225. Brandth & Kyande, *supra* note 87, at 73 (explaining that time fathers spend caring for children alone “is qualitatively different from time when the mother is also present”).

226. See *id.* at 82.

227. *Id.* at 86 (citation omitted).

228. See Rehel & Baxter, *supra* note 86, at 10; S.H., *supra* note 216.

229. Blum et al., *supra* note 220.

230. *Id.*

231. *Id.* (the study defined equal leave sharing as leave divided within a 40% to 60% ratio).

232. See *Norwegian, Swedish Men Do More Housework*, NPR (Aug. 10, 2009, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=111721639>.

government has made strides in improving the lives of women in Sweden.<sup>233</sup> Their action laid the foundation for future progress by undoing the gender norms that push women toward unpaid caretaking labor and police men away from it.

Policies like the one in Sweden would be legal in the United States because they do not actually distinguish on the basis of sex.<sup>234</sup> The Swedish program demonstrates the immense potential of gender-aware policymaking.

## V. CONCLUSION

Mothers in the twenty-first century American workforce are expected to pick up the slack for men and the United States government, paying the costs of labor fundamental to society. The best strategy for feminist advocates is to formulate gender-aware policies that are alert and responsive to gendered realities while retaining gender-neutral language. By adopting a gender-aware strategy, feminists will meet women's pressing, short-term needs and refrain from cementing archaic notions about the proper roles of mothers and fathers. In doing so, they will improve the lives of women today and lay the foundation for gender equality tomorrow.

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233. See Bennhold, *supra* note 218 (reporting that “a mother’s future earnings increase on average seven percent for every month the father takes leave”); see also S.H., *supra* note 216 (noting that Sweden is near the top of most international gender-equality rankings).

234. See EEOC PREGNANCY DISCRIMINATION GUIDANCE, *supra* note 92 (“[P]arental leave must be provided to similarly situated men and women on the same terms.”).