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## Unsex Mothering: Toward a New Culture of Parenting

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# UNSEX MOTHERING: TOWARD A NEW CULTURE OF PARENTING

DARREN ROSENBLUM\*

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\* Professor of Law, Pace University School of Law. This Article drew on wonderful conversations with many people about parenting and unsexed, including Noa Ben-Asher, Mary Anne Case, Bridget J. Crawford, Elizabeth F. Emens, Katherine M. Franke, Janet Halley, Berta Esperanza Hernández-Truyol, Holning S. Lau, Melissa E. Murray, Daria Roithmayr, Catherine Smith, Ralph Wilde, and Angela Onwuachi-Willig. I gratefully acknowledge the rich feedback received during presentations of this work at the University of Connecticut School of Law, the New York LGBT Faculty Workgroup, Seattle University School of Law, Syracuse University, the University of Washington School of Law, and Willamette Law School. Matthew Collibee’s research assistance was invaluable as was that of Lauren McIntosh and Alexis Stevens.

## PROLOGUE

I was, until recently, a pregnant man. I explored some of the issues that arose along my path to parenthood in a recent essay titled *Pregnant Man?: A Conversation*.<sup>1</sup> My husband and I began the process of having a child several years ago when we hired a surrogacy agency that works primarily with gay male couples. After a complex process, we are now raising our daughter.

As a parent, I confront a far more sexed area of life than I have ever encountered before. Everyone congratulates my partner and me on being “fathers,” even though within our home we share responsibilities and flip roles, including a mothering role, with some fluidity. The outside world, it seems, needs to box us into the “daddy” category as much as it invests women with the power of motherhood.

Some time ago, I was in a taxi with my daughter, riding to a law school event at Grand Central Terminal. She fussed a bit and the driver said, “Where’s the mother? Only the mother knows how to do this.” Avoiding a complex explanation that I view myself as both mother and father, I said she has two dads. He still seemed perplexed that a man could know how to care for a child. I left the taxi and wiped a saliva-soaked Cheerio from my daughter’s chin, feeling less of a parent because I was perceived as only a father, and not the primary parent—a mother. It is a feeling constantly reinforced for gay male parents I know who report that when in public—at markets, stores, and restaurants—they get asked by women: “Is it mommy’s day off?” It is challenging to come up with a responsible response.

Behind the confusion in faces of people like the taxi driver, whom I tell about our family structure, I can see that they are thinking that a child without a mother is akin to an orphan—taken care of, but not supported and nurtured the way only a “mother” can. Again, “[o]nly the mother knows how to do this.” This is why I wanted to be a mother: because it was about learning and knowing how to parent in the most challenging situations. In reality, to the extent the traditional definitions of “mother” and “father” mean anything, many of us flip and shift among those roles. I have begun to wonder whether society would benefit from unsexing mothering (and fathering) to foster unsexed parenting. This Article explores what that would mean and why it is desirable.

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<sup>1</sup> Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010) [hereinafter Rosenblum, *Pregnant Man?*].

*Come, you spirits  
That tend on mortal thoughts, unsex me here,  
And fill me from the crown to the toe top full  
Of direst cruelty!*

– Lady Macbeth, gathering the strength to commit murder.<sup>2</sup>

#### INTRODUCTION

The fault line between formal, legal sex neutrality and the dichotomous living of sex identity seems to be expanding. It is a conflict that rages furiously in debates over mothering and parenting. This Article argues that legal regimes governing mothering should attempt to unsex it.<sup>3</sup>

In a previous article, *Unsex CEDAW*, I used this same “unsex” term to drive my argument against the exclusive focus on women’s equality in the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW” or “the Convention”).<sup>4</sup> Whereas Lady Macbeth demands unsexing to commit evil, CEDAW requires it to realize its worthwhile goals. Sex and gender inequality is an interrelational phenomenon.<sup>5</sup> Instead of focusing on “women” as part of a male/female binary, CEDAW should minimize the import of the categories “man” and “woman” themselves.<sup>6</sup>

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<sup>2</sup> WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 5. Thanks to Bridget J. Crawford for linking my ideas with this Shakespearean theme.

<sup>3</sup> Thanks to Berta E. Hernández-Truyol for steering me toward the “mothering” focus.

<sup>4</sup> Darren Rosenblum, *Unsex CEDAW, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. (forthcoming 2011) [hereinafter Rosenblum, *Unsex CEDAW*].

<sup>5</sup> As discussed below, the panoply of sex traits creates the potential for many sexes. See *infra* note 19.

<sup>6</sup> Rosenblum, *Unsex CEDAW, supra* note 4, at 8. The Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW Treaty], signed on July 17, 1980 by sixty-four countries, has as its principal goals the protection and promotion of women’s rights and the elimination of discrimination against women. See Fourth World Conference on Women, Beijing, China, September 4–15, 1995, *Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women*, 2–5, U.N. Doc. A/CONF.177/7 (June 21, 1995) [hereinafter Beijing Conference], available at <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>. As of October 24, 2011, 187 countries—more than 90 percent of United Nations’ members—are parties to the Convention. See *Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Oct. 23, 2011). The most notable non-party to the Convention is the United States. See *id.* In addition, as of October 24, 2011, there are 79 signatories and 103 parties to the Optional Protocol, a supplement to CEDAW designed to remedy some of the treaty’s shortcomings. See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=EN](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=EN) (last visited Oct. 29, 2011).

Here, I convert the term “unsex” into a methodology of sorts—a means to attack the linkage between biological sex (“biosex”) and sex roles.<sup>7</sup> In this Article, I observe that “mothering” and “fathering” have been inappropriately tethered to biosex. “Mothering” should be unsexed as the primary parental relationship. “Fathering,” correspondingly, should be unsexed from its breadwinner status. In an ideal world, people now considered “mothers” and “fathers” would be “parents” first, a category that includes all forms of caretaking. One could even imagine an androgynous world in which parenting has no sexed subcategories, whether attached to biosex or not. I doubt our world is anywhere near that; I also wonder whether universal androgyny is a utopian ideal worth pursuing. I instead focus in this Article on unsexing the roles of “mother” and “father,” elevating them from biodeterminist brandings to chosen classifications or roles. Removing biosex from “mothering” and “fathering” may ultimately eliminate some of the meaning of these terms, but its elimination is less important than undoing the biosex link. Liberated from biosex roles, a parent could define herself as “parent,” “mother,” or “father” with some fluidity.

Although the term “unsexed” has not been widely used in this regard, our legal architecture avows support for sex neutrality and equality. As the Supreme Court said in *Mississippi University for Women v. Hogan*, there should be no “fixed notions concerning the roles and abilities of males and females” embodied in the application of the law.<sup>8</sup> This ideal permeates civil society: either sex should be allowed to perform every role in society. As a distributive matter, however, this remains an elusive goal.<sup>9</sup>

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<sup>7</sup> For example, the title of Berta E. Hernández-Truyol’s response to my discussion in *Pregnant Man?* is “Unsexing Pregnancy.” Symposium, *Pregnant Man? A Conversation*, 22 *YALE L.J. FEMINISM* 207 (2010) [hereinafter Symposium, *Pregnant Man?*]. I want to note that I use the term “biosex” with some trepidation. In no way do I seek to reinforce the meaning or import of biological functions. Although certain bodies have certain capacities, “sex” is something that the law and social norms construct. I wish I had a more effective term for articulating the set of functions currently viewed as attached to sex identity, but in the absence of such a term, I continue to use “biosex.” Thanks to Dean Spade for this critical point.

<sup>8</sup> 458 U.S. 718, 724–25 (1982) (holding, in response to a male plaintiff claiming sex discrimination, that the school’s female-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment). *Hogan* stems from the line of sex discrimination cases marked prominently by *Frontiero v. Richardson*. 411 U.S. 677, 678–79 (1973) (holding that a policy that differentiated between benefits for spouses of females and spouses of males in the uniformed services was unconstitutional sex-based discrimination).

<sup>9</sup> It is an elusive goal in particular for women. Although much has changed, given women’s relatively low numbers in political and corporate leadership positions, it is clear that women are still viewed as somehow unfit for such endeavors. Cf. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

The mantra of sex neutrality<sup>10</sup> and equality of opportunity belies social and legal default rules that entrap us in a sexed existence.<sup>11</sup> Parenting is especially rife with defaults that distinguish persons legally deemed as “mothers” from “fathers.” Socioeconomic conventions reflexively reduce parenting to a woman’s job, without compensation, while men are presumed incapable or uninterested in performing these duties. Institutions support the sexed status quo through their insistence on liberal norms without a more active pursuit of the unsexed ideal.

In *Pregnant Man?: A Conversation*, I described my own experience as a differently sexed mother/parent and the impact of my gender on parenting.<sup>12</sup> Here, I promote a conception of parenting that embraces the fluidity of contemporary understandings of gender and the need for balancing roles within the family. Part I elaborates the ways in which legal and social norms configure parenting as a sexed endeavor. Part II argues that the solution to this problem is to unsex mothering, fathering, and parenting. Unwinding parenting from biosex roles creates a construction of family that is liberating for traditionally sexed women and men and holds potential for the equality of LGBT parents. Women’s economic equality efforts have tended to fail in part because of childcare; accordingly, their economic success largely de-

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<sup>10</sup> See generally Martha Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992) [hereinafter Fineman, *The Neutered Mother*] (ardently criticizing liberal legal feminism’s insistence on sex neutrality). “Unsex” has a very different meaning from “neutered,” which Fineman criticizes. Fineman argues:

In their increasingly important role of effecting changes in law and legal institutions, liberal legal feminists have represented women’s issues and concerns as though they are due in part to pathology in the traditional institution of motherhood. The result is that their rhetoric surrounding issues of potential law reform constantly reaffirms the notion that Mother must be overcome—refashioned so that the individual woman is left unencumbered. To a great extent the law and legal language have begun to incorporate the liberal legal feminist notion that Mother is an institution which must be reformed—that is, contained and neutralized. In law, this has been accomplished through the transfiguration of the symbolically positive cultural and social components of parenting typically associated with the institution of motherhood into the degendered components of the neutered institution of “parenthood.”

*Id.* at 655; see also *infra* Part I.B.

<sup>11</sup> My understanding of legal default rules comes from Elizabeth Emens’ authoritative work in this area. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 827–28 (2007). In addressing default rules for marital names, she states:

Majoritarian default rules (for example, Keeping for men) generally reduce transaction costs for private parties by supplying a default that tracks what most people would want. Minoritarian, and particularly penalty, default rules (for example, Keeping for women) force parties to convey information—to reveal their preferences—to each other and to third parties such as courts.

Social defaults, as opposed to the legal default rules that Emens discusses, may not operate with the force of law but function in coercive ways nonetheless. Whether through social stigma or financial pressure, social defaults shape parents’ decision-making.

<sup>12</sup> See Rosenblum, *Pregnant Man?*, *supra* note 1, at 209–17.

pends on shifting men into family responsibilities. Part III shifts the frame to international and comparative law. International law fosters a sexed vision of parenting but also suggests ways to shift toward an unsexed future. After examining the international framework for parenting roles, Part III examines one public policy example of unsexed parenting, parental leave, using a comparative law analysis contrasting the U.S. Family and Medical Leave Act (FMLA) with Sweden's Parental Leave Act. Parental leave is the perfect position from which to examine unsexed parenting because it sits in the middle of the triad of corporate law, family law, and public law. In that sense, it evokes the challenges of intermediating among the normative and regulatory forces of these three legal frames. The Conclusion asserts that parenting is becoming more unsexed and that legal regimes governing parenting should encourage this development to promote fluidity in parenting roles.

### I. SEXED WORLD

Parenting is divided into “mothering” and “fathering,” categories assigned based on biosex presumptions. Although these roles have different forms in different cultures, societies and the laws that govern them divide parents into “mothers” or “fathers.”<sup>13</sup> The law constructs meanings around physical capacities that some people possess and converts these meanings into dichotomized “sexes.” Sex, in this sense, is constructed. The biology underlying sex construction is itself very much contested, as many functions can be altered and are not universally shared among members of a particular “sex.” Although the proponents of sexed legal and social regimes seek to maintain this sexedness, fissures and cracks in sexedness have begun to surface. First, I clarify what I mean by sexed mothering and fathering: mothering and fathering are sexed when mothers and fathers assume roles that have been essentialized into biosex difference. Second, I focus on the biological characteristics that lead to the construction of women as mothers. Third, I attempt to pull apart the links among biology, fathering, and men's economic role. This phenomenon partially persists because of the interaction between two non-state, private entities—the market and the family.<sup>14</sup> Women's association with the family sector is matched by men's link to the economic.<sup>15</sup> Moves to refocus women on economic self-sufficiency have succeeded only to a limited extent, leaving the sex dichotomy as the predominant organizing structure in both market and family. I close this Part by raising the extent to which social and legal structures foster this “sexedness.”

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<sup>13</sup> This is true even in societies that recognize more than two sexes. *See infra* note 22.

<sup>14</sup> *See* Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 68–73 (2009) [hereinafter Rosenblum, *Feminizing Capital*].

<sup>15</sup> *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 383 (1999) (noting that in all societies “women are associated with the private sphere of the home and family”).

A. *Defining “Sexed” Parenting—A Sexed World*

A sexed understanding of parents depends on both a dichotomized understanding of humanity and a very particular religious, psychoanalytic, and aesthetic framework. Behind the understanding of sexed parenting sits sexed humanity. Despite the viral gender bending of Lady Gaga’s “little monsters,”<sup>16</sup> sex, whether biosex or social sex,<sup>17</sup> is still constructed as a category with two choices: “either of the two divisions, designated female and male . . . .”<sup>18</sup> Yet, much of contemporary science rejects this rigid dichotomy in favor of recognizing the multiplicity of sexes composed of a variety of traits.<sup>19</sup> In addition, sex and gender vary across cultural and national boundaries.<sup>20</sup> “Mother” and “father” are also culturally contingent, and shift in tandem with “sex” and “gender.”<sup>21</sup>

Although sexedness exists along a biological continuum composed of permanent and non-permanent biological, cultural, and psychological markers, some thinkers still accept the male-female binarism as “natural” and

<sup>16</sup> Lady Gaga has become a pop culture phenomenon over the past few years. She views her work as akin to that of a performance artist engaged in deconstructing fame and gender. She regularly brings crossdressing into her imagery and language. For example, the refrain of her 2011 song “Born This Way” is “Don’t be a drag, just be a queen.” LADY GAGA, *BORN THIS WAY* (Interscope Records 2011). She has posed on the front cover of *Vogue Hommes Japan* as Jo Calderone, her “male alter ego.” Jocelyn Vena, *Lady Gaga Poses as Her Male Alter Ego*, MTV (Aug. 25, 2010, 1:42 PM), <http://www.mtv.com/news/articles/1646460/lady-gaga-poses-her-male-alter-ego.jhtml>. “Little monsters” is the term used by Lady Gaga for her fans. Nicole Carter, *Lady Gaga Dedicates Her New ‘Little Monsters’ Tattoo to Her Fans*, N.Y. DAILY NEWS, Feb. 3, 2010, [http://www.nydailynews.com/gossip/2010/02/03/2010-02-03\\_lady\\_gaga\\_dedicates\\_her\\_new\\_little\\_monsters\\_tattoo\\_to\\_her\\_fans.html](http://www.nydailynews.com/gossip/2010/02/03/2010-02-03_lady_gaga_dedicates_her_new_little_monsters_tattoo_to_her_fans.html).

<sup>17</sup> By social sex, I mean roles that we self-assign.

<sup>18</sup> AMERICAN HERITAGE DICTIONARY 1595 (4th ed. 2006).

<sup>19</sup> Most people accept the binarism despite the fact that these categories contain a myriad of identities, formed genetically, biologically, and culturally. As Judith Butler argues: “The binary regulation of sexuality suppresses the subversive multiplicity of a sexuality that disrupts heterosexual, reproductive, and medicojuridical hegemonies.” JUDITH BUTLER, *GENDER TROUBLE* 26 (10th anniversary ed. 1999). Butler views “sex” as providing “an artificial unity on an otherwise discontinuous set of attributes.” *Id.* at 146. See also Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, at 21 (“[B]iologically speaking, there are many gradations running from female to male . . . . [O]ne can argue that along that spectrum lie at least five sexes—and perhaps even more.”); Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 503–04 (2000) [hereinafter Rosenblum, *Sing Sing*] (arguing that sexedness exists on a continuum influenced by variables such as chromosomes, genital and gonadal development, reproductive capacities, secondary sexual characteristics, and self-identity); Sharon E. Preves, *Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality*, 27 SIGNS 523, 526 (2002) (discussing sexual identity as a “complex set of linear and causal assumptions”).

<sup>20</sup> Cf. Darren Rosenblum, *Internalizing Gender*, 45 COLUM. J. TRANSNAT’L L. 759, 801 (2007) [hereinafter Rosenblum, *Internalizing Gender*] (arguing that gender varies substantially by country and is culturally-dependent).

<sup>21</sup> Thank you to Holning Lau for this suggestion. See also Rosenblum, *Internalizing Gender*, *supra* note 20, at 807–08.



“real.”<sup>22</sup> Some religious and social authorities depict sharply sexed parenting roles as distinct, complementary, and essential for a child’s well being.<sup>23</sup> For them, heterosexual marriage reinforces sexed parenting: it is “anything but free of ‘fixed notions concerning the roles and abilities of males and females,’ also anything but free of female subordination.”<sup>24</sup>

A wide range of intellectual and social forces, across the ideological spectrum, has reinforced this binarism. On the left, in France, drawing on psychoanalytic theory, philosopher Sylviane Agacinski uses gender binarism in parenting to argue against same-sex marriage. Agacinski’s theory, grounded in Lacanian psychoanalysis, draws on an understanding of the “sexed condition of human existence” to argue that the presence of a man and a woman is necessary for a child’s proper development because the two sexes are so distinct.<sup>25</sup> Agacinski’s vehement opposition to unsexing parenting draws on prior feminist theory, notably that of Luce Irigaray.<sup>26</sup>

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<sup>22</sup> Thanks to Holning Lau for engaging with me on this important point. This is not to say that only two sexes exist in each and every culture: some societies have deep-rooted traditions of recognizing a third sex. As a historical matter, *berdaches* were recognized as a third sex by indigenous peoples in North America. See SYLVAIN LAROCQUE, *GAY MARRIAGE: THE STORY OF A CANADIAN SOCIAL REVOLUTION* 62–63 (Robert Chodos, Louisa Blair & Benjamin Waterhouse trans., 2006). See also Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other”*, 48 *HASTINGS L.J.* 1223, 1242 (1997) (discussing berdaches in the context of Native American culture). Various Asian societies also recognize the legitimacy of other sexes. See Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 97, 137 (2002) (noting that Thailand’s sexual identity system recognized three genders: male, female, and *kathoey*). In recent years, the supreme courts of Pakistan and Nepal have called for recognition of the *hijras* as a third sex. See Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 43 *U.C. DAVIS L. REV.* 773, 780 (2011) (noting that in 2009, the Pakistani Supreme Court held that intersex and transgender *hijras* have the right to be recognized as a third sex by the government).

<sup>23</sup> See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting):

[T]he Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children and that the raising of children by same-sex couples, who by definition . . . cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself . . . to be as optimal as the biologically based marriage norm.

<sup>24</sup> Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 *UCLA L. REV.* 1199, 1202 (2010) [hereinafter Case, *Same-Sex Marriage Litigation*] (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

<sup>25</sup> Sylviane Agacinski, *L’homoparentalité en question*, *LE MONDE*, June 6, 2007, [http://www.lemonde.fr/idees/article/2007/06/21/l-homoparentalite-en-question-par-sylviane-agacinski\\_926550\\_3232.html](http://www.lemonde.fr/idees/article/2007/06/21/l-homoparentalite-en-question-par-sylviane-agacinski_926550_3232.html). The challenging theoretical nature of Agacinski’s work has led to commentary that seeks merely to elucidate the bases for her claims. See, e.g., Gilles Bon-Maury, *Homoparentalité: L’Ignorance ne Peut Conduire qu’à la Violence*, *HOMOSEXUALITÉS ET SOCIALISME*, (July 9, 2007), <http://www.hes-france.org/actions/homoparentalite-l-ignorance-ne> (discussing Agacinski’s concept of “homoparentalité”).

<sup>26</sup> See LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* (Catherine Porter trans., Cornell Univ. Pres 1985). Irigaray argues that men, whose biology involves one sex organ, a penis, are unitary; women, by contrast, have multiple genitalia. See *id.* at 26–28. This

Regardless of whether academics draw on psychoanalytic or feminist theory, their belief in the metaphysics of two opposed sexes matches that of Western society's most conservative institutions. On the right, at least with regard to sexual mores, the Catholic Church rebukes the concept of "gender ideology" and warns against theories that oppose the male/female binary as a threat to the family and its "natural" two-parent structure of mother and father.<sup>27</sup> Within this structure, parenting appears largely as a woman's job. As Mary Anne Case carefully explores, the Vatican pronounced in the 1960s a relatively progressive position regarding the role of men and women in the family, a position from which it has sharply retreated, coming close to saying that even souls have a sex.<sup>28</sup> One prominent Vatican representative recently asserted "the theory of gender is the most worrying sign of the current ideas about man."<sup>29</sup> While espousing the theory that sex roles are distinct and their blurring poses a direct harm to children raised in such homes, he simultaneously believes that a "war of the sexes" cannot be reconciled with Catholic thought.<sup>30</sup>

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multiplicity sits at the origin of the difference between women's language and men's language: while men reference themselves more than interlocutors and speak in subject/object constructions, women incessantly reference the party to whom they speak and reframe the subject/object relationship constantly. See Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1161 (2006) [hereinafter Rosenblum, *Parity/Disparity*] (discussing Irigaray's understanding of male and female sexuality).

<sup>27</sup> *Vatican consultant warns African Church leaders on 'gender ideology'*, CATHOLIC CULTURE (Aug. 11, 2010), <http://www.catholicculture.org/news/headlines/index.cfm?storyid=7179> [hereinafter *Vatican consultant warns African Church leaders on 'gender ideology'*]; see also Joseph Card. Ratzinger, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in The Church and in the World*, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Oct. 24, 2011):

The obscuring of the difference or duality of the sexes has enormous consequences on a variety of levels. This theory of the human person, intended to promote prospects for equality of women through liberation from biological determinism, has in reality inspired ideologies which, for example, call into question the family, in its natural two-parent structure of mother and father, and make homosexuality and heterosexuality virtually equivalent, in a new model of polymorphous sexuality.

*Id.*

<sup>28</sup> Mary Anne Case, *No Male or Female 2* (Chicago Pub. Law & Legal Theory, Working Paper No. 266, 2009) (discussing the evolution of the Church's understanding of sex difference and sex equality).

<sup>29</sup> *Vatican consultant warns African Church leaders on 'gender ideology'*, *supra* note 27.

<sup>30</sup> See *id.* The Catholic Church's war on gender can also be seen in its reaction to same-sex marriage. As Janet Halley has explored: "[Joseph Cardinal] Ratzinger argues that Catholics must actively resist any public policy of recognizing purported marriages between homosexuals. . . . [H]e represents marriage as a firmly formal, absolute legal condition, steeply different from its alternatives, with fixed moral attributes that define it and from which individual marriages must not deviate." Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 HARV. J. LEGAL LEFT 1, 6 (2010). When the Church defends "the specific *heterosexuality* of marriage as a sacred

Beyond the realms of academic theory and religion, social and legal default rules force biosex roles on parents, turning them into “mothers” and “fathers.” For instance, the categories “male” and “female” fluidly translate to “father” and “mother” in parenting. Popular culture embraces these distinctions: while parents in contemporary television are no longer Ward and June Cleaver of *Leave It to Beaver*, the gulf between *Modern Family*’s Phil and Claire Dunphy remains substantial.<sup>31</sup> Social science literature also testifies to the extent to which mothers and fathers see themselves and each other differently.<sup>32</sup>

The market is also sexed: the perception that “mothers” are primarily responsible for children persists in part because of the continued domination of men in the market context.<sup>33</sup> Created by the state and functioning outside its authority, the market reinforces cultural biosex stereotypes.<sup>34</sup> Women’s second-class status at work is coterminous with their principal responsibility

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nexus between the human and the divine,” *id.* (emphasis in original), it implicitly endorses the traditional, gendered notions of the heterosexual couple.

<sup>31</sup> Ward and June Cleaver epitomize a 1950s heteronormative view of the American family. By comparison, *Modern Family*, as its title suggests, depicts a structure distinct from the traditional view on American lifestyles. Whereas June Cleaver was the stereotypical housewife subservient to her working husband, Ward, Claire Dunphy is an independent woman with power over the family structure. Nonetheless, Phil is depicted as the bumbling and aloof working father, while Claire is the anal and overreactive mother, a prototype for Naomi Mezey’s new maternalism. On this new maternalism, *see infra* notes 58–64 and accompanying text.

<sup>32</sup> Catherine Kenney and Ryan Bogle of Bowling Green State University used data from the Fragile Families and Child Wellbeing Study to examine the effect of maternal gatekeeping on father involvement in opposite-sex families. CATHERINE KENNEY & RYAN BOGLE, *MOTHERS’ GATE-KEEPING OF FATHER INVOLVEMENT IN MARRIED- AND COHABITATING-COUPLE FAMILIES* (2009), available at <http://paa2009.princeton.edu/download.aspx?submissionId=91717>. The study examined 1563 couples in the United States and concluded that mothers were protective of caregiving and educational activities because they were important to the women’s identity as caregivers. *Id.* at 8, 16. They conclude “that married mothers’ gatekeeping—and their gender role attitudes more generally—ha[d] a strong negative association with the proportion of parental time in activities that [wa]s spent by fathers.” *Id.* at 16. *See also* Sharon Jayson, *More Parents Share the Workload But First, Mothers have to Learn to Let Go*, USA TODAY, May 5, 2009, at 1D (discussing women’s unwillingness to share the responsibilities of primary caregiving with men).

<sup>33</sup> *See* Stephanie Coontz, *Myth of the Opt-Out Mom*, in *RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 473, 474 (Paula S. Rothenberg ed., 7th ed. 2006) (“Mothers have always been less likely to work full-time than men or childless women.”); *see also* Rosenblum, *Feminizing Capital*, *supra* note 14, at 56 (discussing efforts to promote women’s equal participation in the workforce). Sixty-seven percent of senior-level women working within Fortune 1000 companies surveyed responded that “a commitment to personal or family responsibilities [is] a barrier to women’s advancement.” CATALYST, *WOMEN AND MEN IN U.S. CORPORATE LEADERSHIP* 25 (2004), available at <http://www.catalyst.org/file/74/women%20and%20men%20in%20u.s.%20corporate%20leadership%20same%20workplace,%20different%20realities.pdf>. Furthermore, only 14 percent of women surveyed believed that they would be able to use parental leave without putting their career track in jeopardy. *Id.* at 31.

<sup>34</sup> *See, e.g.*, Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 157, 157–59 (Dorinda G. Dallmeyer ed., 1993) (noting that the public/private distinction is sexed, with women being associated with the private sphere of the home); *see also* Ro-

for children.<sup>35</sup> This split varies along constructions of race, culture, class, and ethnicity—indeed motherhood and fatherhood differ along these axes.<sup>36</sup> Women find themselves impoverished financially, but rich in familial responsibilities. Men benefit enormously from their economic prowess, but pay with a lack of family time, which leads to emotional isolation.<sup>37</sup> The following Subparts delineate how these family/market dichotomies relegate people with vaginas to “motherhood” and people with penises to “fatherhood.”

### B. Disaggregating Mothering

In the 1937 film *Stella Dallas*, Barbara Stanwyck plays a divorced working class woman who pretends to be irresponsible to convince her daughter to choose to live with her patrician father.<sup>38</sup> In the closing scene, Stanwyck, standing outside in the rain, gazes in on her daughter’s perfect upper class wedding, which she made happen through her selfless act of giving up her daughter for the girl’s benefit.<sup>39</sup> Such selflessness is not confined to 1930s melodrama. “Mother” still means “primary parent”—the parent who performs the bulk of childcare, the parent who cares enough to give up herself.<sup>40</sup>

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senblum, *Feminizing Capital*, *supra* note 14, at 68–73 (discussing the sexed characteristics of the public/private distinction).

<sup>35</sup> Carol Sanger played a crucial role in beginning the project of using legal analysis to unpack the meaning of “mother.” Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15 (1992). Sanger states:

My basic argument is this: Motherhood is a central but confusing icon within our social structure. It is at once dominating and dominated, much as mothers are both revered and regulated. The reverence and regulation are not so much in conflict as in league. The rules remind women of how to behave in order to stay revered. This reverence is something more than a fan club for mothers. It matters in such practical and concrete ways as keeping one’s children, having credibility in court, getting promoted at work, and so on.

*Id.* at 17–18. See also Bridget J. Crawford, *Third-Wave Feminism, Motherhood and the Future of Legal Theory*, in GENDER, LAW AND SEXUALITIES 227–28 (Jackie Jones et al. eds., forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1095337](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095337) (elaborating on the meaning of “mother” in light of Third Wave feminist legal theory).

<sup>36</sup> See, e.g., Adrienne Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258–59 (1999) (arguing that the law regards the ideal mother as “self-sacrificing, nurturing, married, white, solvent, stay-at-home, monogamous, heterosexual, [and] female,” and arguing that the definition of mothers should be expanded to include “non-traditional mothers—men, lesbians, poor women, and women of color”).

<sup>37</sup> See generally JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 79–83 (2010) (discussing how workplace practices disadvantage men by keeping them out of the private sphere).

<sup>38</sup> *STELLA DALLAS* (United Artists 1937).

<sup>39</sup> *Id.*

<sup>40</sup> Wing & Weselmann, *supra* note 36, at 258; see also Charity M. Brown, *Women are More Likely than Men to Give up Sleep to Care for Children and Others*, WASH. POST, Feb. 14, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/14/>

This sacrifice of women is not solely relegated to culture, of course. As a matter of legal history, the U.S. Supreme Court stated in *Bradwell v. Illinois*:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.<sup>41</sup>

The legacy of this sharp male/female dichotomy of public/private continues to carry legal and social meaning. Women's primacy in the family allows them to benefit from presumptions that they are the "primary parent," but also serves to subject them to blame for family problems. Art provides a colorful example in "Maman," a work by the unique Louise Bourgeois.<sup>42</sup> "Maman," mother in French, is a nine-meter high sculpture of a spider done in the 1990s that strikes an undeniably frightening posture.<sup>43</sup> The Maman will weave and eat her prey in order to continue to mother.<sup>44</sup>

### 1. *Biology's Outsized Role*

Biology plays a central role in the construction of individuals as "mothers" and "fathers." Regardless of whether one becomes a parent through ordinary heterosexual copulation between fertile individuals or through surrogacy or adoption, biological processes create children. The fact that many women experience pregnancy and lactation serves to define "motherhood" for many.<sup>45</sup> Websites, books, and classes advise "moms" on how to improve their ability to perform these functions.<sup>46</sup> Perceptions of biological functions smooth the path for women to become "primary parent" mothers. Women who carry their own babies build a relationship with the baby *in utero*. Breastfeeding can continue this attachment. Newborns need to be fed during the night to promote health and comfort, which can

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AR2011021405833.html ("Women are 2 1/2 times as likely to interrupt their sleep to care for others"); JUDITH WORELL, *ENCYCLOPEDIA OF WOMEN AND GENDER* 807 (2001) ("[M]others much more than fathers are primary caregivers within the family and have primary responsibility for household work.").

<sup>41</sup> 83 U.S. 130, 141 (1872).

<sup>42</sup> See Press Release, Tate, *Tate Acquires Louise Bourgeois's giant spider, Maman* (Jan. 11, 2008), available at <http://www.tate.org.uk/about/pressoffice/pressreleases/2008/13904.htm>. Bourgeois has said that the sculpture is "an ode to my mother." *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> I should note though that while lactation cannot be "unsexed," the feeding of breast milk can and has been unsexed through breast pump technology. It is even commonplace to use breast milk that is frozen and shipped or stored in milk banks.

<sup>46</sup> See, e.g., PREGNANCY WEEKLY, PARENTING WEEKLY, <http://pregnancy-blog.parentingweekly.com/> (last visited Sept. 21, 2011) (an online blog about pregnancy and parenting, featuring the tagline "for your most important forty weeks").

give a breastfeeding mother more experience in putting the child to sleep and thus make the child feel closer to her.<sup>47</sup> Women's mastery of these crucial life experiences for the baby cements their centrality as "mothers."

To prove that mothering is a social and not a biological phenomenon, let us examine the various elements of women's physiognomy that make them "mothers." Three elements—ovulation, gestation/birth, and lactation—are the core biological elements of women's parenting role, each of which I argue lacks a necessary connection to mothering.

Women ovulate, and the egg not only transmits genetic material, but also provides the conditions to host sperm for fertilization. The egg is life, both symbolically and literally, and yet a woman without ovaries or who produces no eggs may still be a mother both as a matter of custom and of law. For example, if a woman has a child through a surrogate and, after its birth, raises the child and *acts as its mother*, people in general will consider her to be the child's mother. That is, both the legal and social understanding of "mother" does not include ovulation as a necessary criterion. Although only an ovary-bearing person may create an egg, that function and motherhood have no *necessary* link. Indeed, with the increasing prevalence of *in vitro* fertilization, as well as extensive markets in which women provide their eggs, people of all sexes may obtain eggs and have them fertilized for reproduction.<sup>48</sup>

Although the increasing prevalence in egg markets is fairly well established, at least in many parts of the United States, the connection between gestation and motherhood remains central under the law. A woman who carries and gives birth to a child is presumed to be that child's legal mother. Moreover, gestation, according to contemporary science, plays a critical formative role in the creation of a child, a role that in some ways rivals the genetic influence of the egg and the sperm.<sup>49</sup> Colloquial expressions frame women who carry a child for another as "mothers" of a sort—"surrogate mothers" in English, "meres porteuses" in French. Some surrogate mothers may even consider themselves temporary "babysitters" who hold some crucial, but not motherly, role in the life of the baby. However, the general

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<sup>47</sup> See, e.g., *Babies and Sleeping*, BBC HEALTH, [http://www.bbc.co.uk/health/physical\\_health/child\\_development/babies\\_sleeping.shtml](http://www.bbc.co.uk/health/physical_health/child_development/babies_sleeping.shtml) (last visited Nov. 4, 2011).

<sup>48</sup> Nicholas Bakalar, *In Vitro Fertilization, 1974*, N.Y. TIMES, Mar. 21, 2011, [http://www.nytimes.com/2011/03/22/health/22first.html?\\_r=2](http://www.nytimes.com/2011/03/22/health/22first.html?_r=2) (noting that in-vitro fertilization, a new technology in the late 1970s, has now resulted in four million living *in vitro* babies).

<sup>49</sup> See, e.g., AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, FACTS FOR FAMILIES: DRINKING ALCOHOL IN PREGNANCY (FETAL ALCOHOL EFFECTS) 1 (2006), available at [http://www.aacap.org/galleries/FactsForFamilies/93\\_drinking\\_alcohol\\_in\\_pregnancy\\_fetal\\_alcohol\\_effects.pdf](http://www.aacap.org/galleries/FactsForFamilies/93_drinking_alcohol_in_pregnancy_fetal_alcohol_effects.pdf) (discussing the negative effects of alcohol consumption on fetal development); *Gestational Diabetes and its Long Term Effects on Mothers and Their Children*, CLINICAL LAB. INT'L, <http://www.cli-online.com/featured-articles/gestational-diabetes-and-its-long-term-effects-on-mothers-and-their-children/index.html> (last visited Oct. 23, 2011) (discussing a condition known as "gestational diabetes" and its potential effects on the developing fetus).

social understanding of “mother” does not include surrogate mothers; people in general will consider the woman who provides primary caretaking for the child to be its “mother.”<sup>50</sup> Therefore, a woman can be a “mother” without actually carrying a child, and a woman who carries a child need not necessarily be viewed as a mother.

The same argument applies to lactation, though this is the subject of much controversy.<sup>51</sup> Although only people with mammary glands can produce milk, many women, and indeed many mothers, cannot do so or choose not to do so. As with eggs and gestation, human milk is traded for monetary or nonmonetary reasons. Indeed, until nearly the early twentieth century, women of means hired wet nurses to breastfeed their children.<sup>52</sup> The act of feeding an infant itself creates intimacy regardless of the milk’s source. Therefore, it is not obvious that engaging in lactation makes a woman any more or less of a mother. Indeed, much as in the case of ovulation and gestation, people in general would consider a woman who did not breastfeed a child but raised the child and acted as its primary caretaker to be its “mother.”

The various ways in which one can become a mother complicate the usage of the term in ways that expose language’s inadequacy. A child born of gestational surrogacy, under traditional terms, has three people who may be considered mothers: a “genetic mother” (“sm1”), a “surrogate mother” (“sm2”), and a “legal mother” (“sm3”) (if one of the parties contracting for surrogacy is female). Note that there will be still more mothers if the surrogacy involves lesbians. If a lesbian couple uses another woman’s egg/embryo but one of them carries the child, there will be an sm1, but the sm2 is also the sm3. Similarly, an adopted child (if one of the adopting people is female) has two mothers: a “birth mother” (“am1”) and an “adoptive mother” (“am2”).

The social role of the am2 most clearly makes my point: as a legal matter, am2 is the “real” mother—she has the right to parental leave; as a social matter, to view the adoptive mother as anything other than *the* mother

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<sup>50</sup> Note, however, that the social understanding of “mother” is somewhat ambivalent on this point. Babysitters, for example, are, for all intents and purposes, primary caretakers for the duration of the babysitting. However, as I have argued above, caretaking is typically the defining characteristic of motherhood. Therefore, with respect to babysitters, society tends to emphasize the biological relationship (which woman gave birth to the child) rather than the caretaking relationship (which woman takes care of the child) when it identifies the “mother.” Whether a babysitter can “mother” the child is a question that raises fascinating and sometimes ugly class and race questions that other scholars have elegantly explored. See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 104–10 (2006) (noting the challenges minority immigrants face as domestic care workers).

<sup>51</sup> The La Leche League is but one of many organizations that have made the promotion of breastfeeding a central purpose. See LA LECHE LEAGUE INTERNATIONAL, <http://www.llli.org/> (last visited Oct. 29, 2011).

<sup>52</sup> Jeninine Lee-St. John, *Outsourcing Breast Milk*, TIME, Apr. 19, 2007, <http://www.time.com/time/magazine/article/0,9171,1612710,00.html>.

is disrespectful. We do not think of am2 as less of a mother because she has neither birthed nor breastfed the child. Am2's mothering arises from the relationship with the child, and not from a genetic connection. Likewise, we do not think of the am1 or the sm1 or sm2 as the mother because all three individuals chose not to raise the child.

This taxonomical endeavor is a superficial one—it would be fascinating to pursue it in depth, but my principal point draws on the presence of multiple mothers. As people typically understand the term, the “mother” is the person who does the “mothering”—diaper-changing and night feedings matter more than gestation, lactation, or the presence of genetic material. In the context of adoption and surrogacy, biology is at the very least subordinate, if not irrelevant. In this sense, one might say that a pregnant person only becomes a mother if she *cares* for the child born of her womb (am1 or sm2) or of her genes (sm1). Ovulation, gestation, birth, and lactation matter, of course. However, just as their absence does not deprive someone of the status of “mother,” their presence does not *make* someone a mother. Unsexing motherhood will bring the legal and social rules in line with this understanding of “mother.”

## 2. *Mama Grizzlies: Women as Dominant Primary Parent*

Although U.S. law has begun to shift away from a sexed vision of parenting, and the economy continues its slow shift toward greater balance between men and women, social norms of parenting, and, in particular, mothering, continue to assert the primacy of the mother within the family unit. Indeed, with overtones of women's empowerment (but few of feminism's gender politics), mothers have become increasingly engaged in “supermom” discourses about women who can both serve as a primary parent and as a presence in the public sphere.

The element of choice complicates these factors considerably. To the extent legal norms favor women's departure from traditional roles, some women have responded with an “opt-out” revolution, in which well-educated women abandon their career paths in favor of becoming stay-at-home mothers.<sup>53</sup> These opt-out mothers should have the right to do so, but the numbers of highly educated women who make this choice can only slow a

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<sup>53</sup> See LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* 1–3 (2006). Indeed, the debates over the Declaration on the Elimination of All Forms of Discrimination against Women (“DEDAW”) reflect this dilemma early in the debates over women in international law. As the United States' representative stated:

However, that child-bearing role could in no case justify a large complex of distinctions between the rights accorded to men and those accorded to women. Women must be given the right, which had always been recognized for men, to choose freely their life-task and the pattern of life which suited them. Once that choice had been made, they must be given the right to participate as fully as men in the kind of life chosen. It had been found by experience that, when they were given a choice, many women chose freely the traditional role of wife and mother.



shift toward women's equality in the workplace.<sup>54</sup> In a society where the upper echelons of political and corporate power still exclude extremely well-educated and talented women, mothering is one of the only socially-approved contexts in which women can exercise dominance. Indeed, as Katherine Franke has noted, women who resist mothering are actually seen as unnatural: "Reproduction has been so taken for granted that only women who are *not* parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural."<sup>55</sup>

Socioeconomic and legal settings might minimize biology, but with the social construction of mothering it becomes destiny. Not only must women who parent be "mothers," but social norms demand an all-encompassing engagement with this motherhood. There is no room here for a woman to style herself as the Baroness in *The Sound of Music*, who confronts the possibility of raising all those children with the quip: "Darling, haven't you ever heard of a delightful little thing called boarding school?"<sup>56</sup> Women cannot juggle family and work in a way that favors the former, as Anna Wintour's avatar does in *The Devil Wears Prada*.<sup>57</sup>

Naomi Mezey and Cornelia Nina Pillard have identified a "new maternalism" that reflects a growing disconnect between U.S. legal and cultural views on motherhood and parenting.<sup>58</sup> On the one hand, an intimate resurgence of maternalism, seen on popular blogs like MomsRising.org and through Sarah Palin's "Grizzly Mama" rally cry,<sup>59</sup> de-emphasizes the egalitarian notion that men can and should play a nurturing role in parenting. Parenting, in this movement, is squarely within the women's sphere. On the one hand, Mezey and Pillard argue, the past few decades have seen the spread of sex-neutral laws regarding adoption, alimony, child custody, parental leave, and spousal benefits.<sup>60</sup> Law, they argue, no longer assumes motherhood for women and traditional family roles need not have an assigned gender.<sup>61</sup> However, in the face of this legal trend, the "new maternal-

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However, with free choice they accepted that role willingly, without any sense of having been required to accept an inferior position.

U.N. GAOR, 22d Sess., 1471st mtg. at 36, U.N. doc. A/C.3/SR.1471 (Oct. 4, 1967).

<sup>54</sup> See Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, [http://www.nytimes.com/2005/09/20/national/20women.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2005/09/20/national/20women.html?_r=1&pagewanted=print).

<sup>55</sup> Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 185 (2001).

<sup>56</sup> THE SOUND OF MUSIC (20th Century Fox 1965).

<sup>57</sup> THE DEVIL WEARS PRADA (20th Century Fox 2006).

<sup>58</sup> Naomi Mezey & Cornelia Pillard, *Against the New Mechanism*, MICH. J. GENDER & L. (forthcoming 2012) (manuscript at 2–6), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809912).

<sup>59</sup> See *id.* at 16–17.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* Although it is true that law no longer assumes motherhood for women, I emphasize the explicit and default rules (both legal and social) that continue to favor assignment of parental roles based on sex.

ism” undercuts these sex-neutral laws with its implicit return to women as superior parents and caretakers.<sup>62</sup> This “Mama Grizzly” maternalism<sup>63</sup> undermines men’s nurturing parental role. The fact that it is women who *choose* this maternalism purports to empty the category of oppressive meaning, when in reality it only serves to reinforce sexist economic structures.<sup>64</sup> From the perspective of individual women, to relinquish this family primacy for economic potential may seem like folly, but at a societal level it is essential for the realization of equality norms.

### C. *Fathers and Markets; Mothers and Homes*

The sex binary has social and economic effects on men and women that create “father” and “mother” roles. While women become “mothers,” entitling them to both the presumption of legitimate parenthood and the burden of bearing principal responsibility for childcare, men function in the family realm with less legitimacy and commensurately lower burdens, in large part thanks to their economic primacy. This Subpart will first examine the distinct biological role played by men in parenting. Then it will focus on men’s economic role as “fathers” and men’s resulting legal role as “fathers.”

#### 1. *Biological Fathers*

Before addressing the legal and economic framing of fatherhood as male, it is worth noting the way in which male biological participation in parenting differs from that of women. Men provide sperm for the fertilization of eggs—this is their only biological role, in contrast to the multiple biological roles played by women (ovulation, gestation, birth, and lactation). If women who do not carry a child or who do not lactate may be mothers, why not a man? A man can be a “mother” in the same way that an adoptive mother can be.

The impact of this function differs sharply from the strictly biological function of women. A child born of gestational surrogacy has only one father (if the parties contracting for surrogacy are heterosexual) or one genetic father (“sf1”) and one adoptive father (“sf2”) if the couple is homosexual. This contrasts with the presence of one or two potential “mothers” whose role is solely biological.

In adoption, a child may have two or three fathers (if one or both of the adopting people is male), but only one is the genetic father (“af1”)—the other one or two fathers are legally indistinct (“af2”).

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<sup>62</sup> *Id.* at 3.

<sup>63</sup> *See id.* at 16–17.

<sup>64</sup> *See* Mezey & Pillard, *supra* note 58, at 57 (concluding that the “new maternalism” ignores fathers, male partners, relatives, and paid caregivers, whose inclusion would not only ease the burden on mothers but also “transform the lives of children and the men who care for them”).

Even where reproduction results from the purported copulation of the heterosexual parents, there may be two fathers. If, after heterosexual copulation, the father is actually someone other than the presumed father, there will be a genetic father (“cf1”) and a legal father (“cf2”). The law does not inquire whether the presumed father is the actual father unless prompted,<sup>65</sup> which creates the possibility that men may parent as functional fathers even when the genetic connection is lacking. In this context, the male may consider himself to be a cf1 when in fact he is a cf2; or his status as a cf2 may be known to the parents but kept as a closely guarded secret. Regardless, the law does not care—for children born of heterosexual copulation, it seeks to establish paternity regardless of whether this paternity is accurate.<sup>66</sup>

## 2. *Economic Fathers*

The singular biological role men play in parenting facilitates their dominant economic role. Because men’s biological parenting role is limited to providing sperm, men historically have been able to outsource parenting responsibilities to women. With the benefit of this subsidy, men are far more attractive workers for corporate leaders. Men appear more devoted to their work, as women appear to lack the professional ambitions of their male peers.<sup>67</sup> Firms presume either that mothers taking parental leave will cost the firm since other workers must fill in for lost labor, or that mothering will lead to quitting.<sup>68</sup> As a result, men dominate the economic sector in the same way that women are central to the family. Men still outpace women in leadership roles and salary in the private sector,<sup>69</sup> even though women

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<sup>65</sup> For example, children born to parents in a heterosexual marriage are presumed to be the biological child of those parents. See Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70 (2000). In some instances, even if a man can rebut a presumption of paternity against him, the court will not entertain evidence on the ground of paternity by estoppel. See *id.* at 73.

<sup>66</sup> See *id.*

<sup>67</sup> Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1305–10, 1316 (2007). In the authors’ study, volunteers were presented with a pair of equally qualified, same-gendered, same-race applicants only differing on parental status and asked to fill out surveys related to the applicants. *Id.* at 1310–11. The results indicated that mothers were judged as “significantly less competent and committed than women without children.” *Id.* at 1316. The authors suggest that employers perceive mothers as being less committed to work and use that perception to estimate their future effort. *Id.* at 1306.

<sup>68</sup> See *id.* at 1306.

<sup>69</sup> Rajneesh Sharma & Susan Givens-Skeaton, *Ranking the Top 100 Firms According to Gender Diversity*, 30 ADVANCING WOMEN IN LEADERSHIP J. 1, 12 (2010), available at [http://www.advancingwomen.com/awl/2010/RajneeshSharma\\_SusanGivens-Skeaton.pdf](http://www.advancingwomen.com/awl/2010/RajneeshSharma_SusanGivens-Skeaton.pdf). Sharma and Givens-Skeaton analyzed the gender of the officers of the top hundred United States corporations based on revenues and concluded that women are “grossly underrepresented at the top levels of management among the top 100 firms.” *Id.* While women are 46 percent of the workforce, they hold only 13 percent of the top management positions in these firms. Fifty-seven of these one hundred firms have only one or no female officers. *Id.* See also Rosenblum, *Feminizing Capital*, *supra* note 14, at 56.

briefly surpassed men in the working population during the current economic crisis.<sup>70</sup> Efforts to support women's role in the economy sometimes fail because incentives are not matched by a parallel inclusion of men in family responsibilities.<sup>71</sup>

Market forces create social defaults that position men as "fathers"—providers for their families, but not primarily responsible for childcare. Because men's economic role is so predominant, this market reality fosters a presumption that men have a lower caregiving burden to prove their parenthood than women. With less effort, men's actions appear more socially laudable. Expectations for men's caretaking are so low that even occasional diaper-changing or late-night feedings are applauded, despite such efforts falling far short of equally sharing parental responsibilities. "Father" has come to mean at best, wage-earner, and at worst, absentee.<sup>72</sup> Male parents in heterosexual two-parent households typically occupy the secondary parent role;<sup>73</sup> as women are "mothers" and thus "primary parents," men are secondary.<sup>74</sup>

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<sup>70</sup> Floyd Norris, *In This Recession, Men Are Losing Jobs*, N.Y. TIMES, Mar. 13, 2009, [http://www.nytimes.com/2009/03/14/business/economy/14charts.html?\\_r=3](http://www.nytimes.com/2009/03/14/business/economy/14charts.html?_r=3).

<sup>71</sup> See *infra* Part III.B. (discussing the United States Family and Medical Leave Act).

<sup>72</sup> Indeed, the historical relation of a man to his family is one of dominion akin to property. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765 (2004–05). The widespread continued use of men's surnames marks the persistence of this rapport, even if in a much less objectionable form. See Emens, *supra* note 11, at 771 ("[W]omen plainly adopted their husbands' names by custom and not by legal mandate.").

<sup>73</sup> The men's movement mistakenly approaches family law questions as a matter of individual rights. As Martha Fineman writes:

The rhetoric of fathers' rights and fathers' responsibilities reflects the tendency to reduce family policy to mere discussions of individual rights. Three strains of fathers' rights rhetoric appear in contemporary discussions about mothers, children, and families. A perceived loss of paternal power or privilege is the focus of both the middle class and the emerging African-American fathers' rights discourses. Much less vocal (and visible) are the men who call for a transformation of the whole notion of "father," moving toward a redefinition that is neither hierarchical nor patriarchal. Unfortunately, most prevalent is the discourse in which the primary concern seems to be a perceived and generalized loss of male privilege: Many men no longer feel secure within the traditional family.

MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 201–02 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY*].

<sup>74</sup> Some may argue that evolutionary biology provides a biological basis for this distinction, but other studies demonstrate the extent to which sex differences are a social construction. See, e.g., Judith Lorber, "Night to His Day": *The Social Construction of Gender*, in *THE SOCIAL CONSTRUCTION OF DIFFERENCE: RACE, CLASS, GENDER, AND SEXUALITY* 54, 54–57 (2010), available at [www.csus.edu/indiv/s/shawg/courses/033/readings/social\\_constructions.pdf](http://www.csus.edu/indiv/s/shawg/courses/033/readings/social_constructions.pdf). This debate itself, alongside the proliferation of families departing from this sexed norm, gives new urgency to the inquiry into stereotype-determined roles.

### 3. *Legal Fathers*

These social defaults that make men “fathers” and women “mothers” do not arise in a legal vacuum. Men’s role as economic fathers permits them to skirt caretaking requirements. Yet, as a formal matter, the law has shifted toward a sex-neutral position.<sup>75</sup> Take, for example, the Supreme Court’s holding in *Nevada Department of Human Resources v. Hibbs*.<sup>76</sup> Hibbs, a man, filed suit claiming that his right to unpaid time off from work under the Family and Medical Leave Act (FMLA) had been violated.<sup>77</sup> Surprisingly, Chief Justice Rehnquist wrote in favor of Congress’s ability to legislate gender equality: “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify . . . legislation.”<sup>78</sup> The former Chief Justice thus firmly established the sex-neutrality of the law in the United States.

In the face of profound social norms around sex and parenting, thin legal rules mandating sex neutrality may actually serve to reinforce social defaults of difference.<sup>79</sup> Such distinctions may go beyond stereotypes to draw on biological differences between men and women. The legal norms fortify and even exaggerate such differentials. For example, although it operates in a limited context, the burden of proof for paternity and for maternity differs.<sup>80</sup> Men may be declared parents solely by establishing a genetic linkage because courts are eager to assign fatherhood.<sup>81</sup> The default rule for “mother,” however, focuses on the woman who gave birth, which in the case of surrogacy or adoption may not be the “real” mother. For both “mothers” and “fathers,” social parents may attain legal parental recognition. If maternal rights are in doubt, a woman must demonstrate her relationship with the child in question. Under the “de facto” parent test, childcare—not breadwinning—suffices to establish maternal rights.<sup>82</sup> For

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<sup>75</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 640, 653 (1975) (holding that Social Security “mothers benefits” for widows must also be given to widowed fathers).  
<sup>76</sup> 538 U.S. 721 (2003).

<sup>77</sup> *Id.* at 725.

<sup>78</sup> *Id.* at 735.

<sup>79</sup> This is one of the many critiques of sex-neutral liberal legal feminism posited by Martha Fineman and others. See, e.g., FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY*, *supra* note 73, at 88–89 (“The law’s reluctance to recognize and accommodate the uniqueness of Mother’s role in child rearing conforms to the popular gender-neutral fetish at the expense of considerations for Mother’s material and psychological circumstances.”).

<sup>80</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53, 59–60 (2001) (describing the statutory requirements for proving maternity and paternity when a child is born outside the United States and only one of the parents is a U.S. citizen).

<sup>81</sup> See, e.g., N.Y. FAM. CT. ACT § 516-a(b)(i) (McKinney 2011) (“The court shall order genetic marker tests or DNA tests for the determination of the child’s paternity.”).

<sup>82</sup> See *A.H. v. M.P.*, 447 Mass. 828, 839 (2006). To a limited extent, one can argue that men continue to carry a lighter standard in demonstrating ties to a child. The American Law Institute (ALI) Principles note that “[c]aretaking functions are the subset of parenting functions that involve the direct delivery of day-to-day care and supervision to the child.” AM. LAW INST. *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS*

men, however, “holding oneself out” as the “father” carries substantial weight in satisfying this burden.<sup>83</sup> Until recently, this “holding out” standard applied only to men. Thus, until recently a woman had to actually nurture the child, while a man could simply announce that he was the father.<sup>84</sup> Legal rules regarding the rights and responsibilities of parents often strive toward insistent neutrality, even in families where parents exercise childcare to different degrees.<sup>85</sup> This formal neutrality does not override the background social and economic default rules that distinguish the responsibilities for establishing women as “mothers” and men as “fathers.”

The immigration case *Nguyen v. I.N.S.* neatly reflects how the law’s neutrality remains far from universal neutrality; some rules explicitly regulate fathers and mothers differently. In that case, petitioner Tuan Ahn Nguyen challenged the constitutionality of citizenship requirements for children born to U.S. male citizens overseas.<sup>86</sup> Under current federal law, children born overseas out of wedlock to a U.S. *mother* and a noncitizen father automatically acquire the nationality of the mother at birth.<sup>87</sup> However, if the child is born overseas out of wedlock to a U.S. citizen *father* and a noncitizen mother, citizenship only extends to the child if there is evidence of a “clear and convincing” blood relationship between father and child and when the father agrees in writing to provide financial support until the age of majority.<sup>88</sup> A majority of the Supreme Court upheld the statute. One of the compelling government interests cited by Justice Kennedy was the interest in “assuring that a biological parent-child relationship exists.”<sup>89</sup> This case illustrates the extent to which male parenthood is linked to financial support for the child—it forms the basis for a constitutional holding.<sup>90</sup> In this sense,

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AND RECOMMENDATIONS § 2.03 cmt. g (2002) [hereinafter ALI Principles]. One can argue that men, who benefit from a more advantageous position economically, are in a stronger position to demonstrate parental rights because of their financial contributions to the family. However, breadwinning alone will rarely, if ever, suffice. See *A.H. v. M.P.*, 447 Mass. at 839 (citing ALI Principles, *supra*, § 2.03(1)(c)(ii)(B)) (a significant factor the court considers is whether the adult “perform[s] a share of caretaking functions at least as great as that of the parent with whom the child primarily lives.”).

<sup>83</sup> See *LES PARAPLUIES DE CHERBOURG* (Parc Film 1964). In the film *Umbrellas of Cherbourg*, the lead, Catherine Deneuve, becomes pregnant by a soldier who goes off to fight in Algeria. Tormented by the possibility of being an unwed mother, she marries another man who outwardly regards the child as his own. This narrative reinforces the perception that a man who admits to fathering a child must really be the father, because society presumes a man would not otherwise accept such a financial burden. See *supra* notes 65–66 and accompanying text.

<sup>84</sup> Nancy Dowd, *Parentage at Birth: Birth Fathers and Social Parenthood*, 14 WM. & MARY BILL RTS. J. 909, 909–14 (2006).

<sup>85</sup> Thanks to Julie Shapiro for this nuance on the legal default rules.

<sup>86</sup> *Nguyen v. INS*, 533 U.S. 53, 56–57 (2001).

<sup>87</sup> *Id.* at 60. However, the mother must have previously lived in the United States continuously for one year. *Id.*

<sup>88</sup> *Id.* at 59.

<sup>89</sup> *Id.* at 62.

<sup>90</sup> See Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court’s Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 987 (2002) (“the statute appears to rely on, and functions to

it is a higher burden than a woman may face because the presumption of the lineage cannot be taken as a given in this context.

To escape this world of “sexed” mothering (and fathering), we need to envision one characterized by “unsexed parenting,” where biosex and parental roles are not bifurcated. Such “unsexed parenting,” where men and women are parents instead of fathers and mothers, opposes dyads where biosex rules mandate parental roles that arise from fixed biosex identity. Unsexing mothering would have distributional consequences for women by granting greater access to high-level work, while giving men an opportunity to participate more fully in familial duties. Each of the biological phenomena that social and legal norms inject with “mothering” and “fathering” meanings can be peeled apart from their actual biological functions to allow individuals to parent, mother, and father without the constrictive framing of socio-legal predeterminations. Part II will explore the meaning of unsexing this sexed world of parenting.

## II. THE PROLIFERATION OF “UNSEXED” PARENTING

In this Part, Subpart A first defines “unsexed” parenting with greater clarity. Then it elaborates on the proliferation of different kinds of unsexed parenting, among single/multiple/blended families, lesbian and gay families, and transgender families. Subpart B discusses the extent to which unsexed parenting has taken root in same-sex parented families and non-dyad-driven households. Although the increasing prevalence of “alternative” families is well-trod, its meaning in terms of sex roles has only begun to surface. Finally, Subpart C explores a theoretical framework for unsexed parenting.

### A. *A Shift from Sex Neutrality to Unsexed*

By “unsexed parenting,” I mean parenting pulled away from its grounding in biosex. Parenting includes childcare defined as “mothering” and “fathering,” as well as childcare that may be labeled neither, either, or both. The knot of sex and parenting should be unwound entirely, apart from the (admittedly substantial) biological realities of pregnancy and lactation.<sup>91</sup>

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endorse, generalizations regarding the traditional parenting roles of mothers and fathers.”).

<sup>91</sup> I deliberately want to avoid engaging in a debate here over whether these biological functions determine that women are preordained to have a closer relationship with their biological children. Indeed, in some cases, these acts, which can encompass a good part of the beginning of a child’s life, may lead to a far closer bond between mother and child. See Enrico Rossoni et al., *Emergent Synchronous Bursting of Oxytocin Neuronal Network*, 4 PUB. LIBR. OF SCI. COMPUTATIONAL BIOLOGY 1, 9–11 (2008) (concluding that suckling produces oxytocin in the mother’s brain, which creates a positive feedback mechanism that facilitates bonding). This bond is not one that exists in every case. Surrogates give up children to whom they have given birth, women who experience dislike for their newborn as part of postpartum depression, and other circumstances arise, including a wide range of possible bases for a woman’s inability to parent. Lactation is strongly

In the actual act of parenting, biology plays no *necessary* role.<sup>92</sup> Unsexed mothering is relational, not biological, and it is an act, not a fixed identity.<sup>93</sup> While biological elements may undoubtedly further that relationship, one need not engage in these functions in order to mother a child.<sup>94</sup> A male parent could say to others, “I am the child’s mother.”<sup>95</sup>

I focus here on unsexing mothering because mothering has been framed as the primary parent relationship. Because of this primary parent status, I suspect that, as a distributional matter, expanding mothering will effect greater transformation toward unsexing. Unsexing fathering may open room for people of all sexes to “father,” but if the central role of “mothers” in families remains, unsexing fathering would have a relatively smaller transformative impact. As will become apparent in the discussion of the Swedish example in Part III, recasting fathering as a socially fundamental act has involved reifying objectionable tropes of masculinity.<sup>96</sup> Casting fathering as something more than breadwinning constitutes a challenging and compelling parallel project. My focus on “mothering” rather than “fathering” seeks to unsex the explicitly sexed, in the sense that distributive inequalities frame women as having a “sex” while “men” remain “universal” and “neutral.”<sup>97</sup> Many societies frame “mothering” as a critical but private task, unremunerated, and therefore subordinate. Opening up the roles of “mother” to men (and implicitly the role of “father” to women) would liberate men from the confines of high-breadwinning, low-caretaking parenting, and may educate men as to the distributive nature of sex inequality.

Likewise, unsexing parenting is a distinct project. Unsexing “mother” (i.e. the female parent currently assumed to be the primary parent) and “father” (i.e. the male parent currently assumed to be the secondary parent)

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avored as a means to provide children with immune system benefits and bonding with their biological mothers. See e.g., BREASTFEEDING, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/breastfeeding/> (last visited Nov. 4, 2011). Many women, however, experience substantial difficulties with lactation and do not experience it as a means to bond with the child. Bonnie Rochman, *Postpartum Depression and Difficulty Breast-feeding May Go Hand in Hand*, TIME, Aug. 5, 2011, <http://healthland.time.com/2011/08/05/do-depression-and-difficulty-breast-feeding-go-hand-in-hand/>. Over the course of a child’s life, as measured in years, the bulk of parenting occurs after these formative moments, and can be performed by a person of any sex who has or does not have a biological connection to the child.

<sup>92</sup> See *supra* Part I.B.1. With adopted children, parents have no genetic link but are parents in the same way that parents of a biological child are.

<sup>93</sup> See *id.*

<sup>94</sup> See Sanger, *supra* note 35, at 17–20 (critiquing the term “mother” and its transformation from a traditional definition—akin to “housewife”—to broader notions that include working, non-married, lesbian, etc. women).

<sup>95</sup> Although it would achieve a great deal to strip the normative “primary” status from mothering, I doubt whether an appellation solely carried by one sex “women” would truly escape from presumptions of primary parenthood.

<sup>96</sup> See *infra* Part III.C.

<sup>97</sup> Many scholars have made this point and indeed the entire push for CEDAW may be seen as a recognition that women were excluded from understandings of the universal. See e.g., Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women’s Human Rights* 21 HUM. RTS Q. 853, 853–55 (1999).



may lead toward the diminution of the terms' distinctions, and may even serve as a precursor to unsexing parenting. The process of unsexing mothering may ultimately eliminate the presumption that the primary parent is the mother, in which case a parent of any sex could claim to be the primary parent. This unsexed parenting is a possible result of unsexed mothering, but it is not a necessary one. Eventually, untethered from assigned sex, "mother" and "father" may carry less meaning than "parent," but that is a side effect rather than the principal purpose of unsexing mothering and fathering. "Mothering" and "fathering" may take on new meanings as they become untethered from biosex. Indeed, they may be joined by other sex-neutral terms, terms with more appeal than "primary parent" and "secondary parent."

But to unsex parenting entirely would require the precursor of universal androgyny, which I cannot advocate at this point. If we think of binarist heteronormative assumptions of "mother" and "father" on one side of the parenting spectrum and universal androgyny as its opposite, unsexing mothering (and fathering) sits in the middle, allowing fluidity among the sexes as to who is the mother, without making parents park their sex identities at the door.<sup>98</sup> My fear is that androgyny might undermine some of the playfulness and even electricity in sex role differentiation. Unsexing "mothering" (and "fathering") would eliminate the restrictive and subordinating elements of parenting while allowing the adoption (and dismissal) of roles. It means allowing individuals to choose their roles without regard to sex, yet it permits them to experience, even celebrate, if they wish, gender differences in parenting.

Each parent, regardless of biosex, should be able to choose a parenting role, whether gendered or not. It follows that parents, and the law, might then cease conceptualizing childcare as an endeavor that requires adherence to one or the other role. Thus, men can mother, father, or parent; women can mother, father, or parent. Men and women who construct their own gender roles within traditional norms would find that unsexed parenting opens up broader choices.<sup>99</sup> Moreover, the many gender-bending, transgender, and intersex people who fall between the male/female categories would feel freed of pressures to adopt a sex position to become a mother or father.<sup>100</sup> Instead, they could simply categorize themselves as parents.

The implication for families beyond individual parental roles is clear: stripped of the need for a "mother" and a "father," parents may be same-

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<sup>98</sup> Thanks to Matthew Collibee for this suggested framework.

<sup>99</sup> We also know that parents outsource their parenting, thus a nanny or a "manny" may provide caretaking that functions as "mothering." Although I realize that the role of money is no small matter within families, the question of whether mothering and fathering can be performed by careworkers is beyond the scope of this Article.

<sup>100</sup> People who feel their identity is outside the male/female binary, of course, feel pressure in nearly every aspect of their lives to self-define along the binary. Being forced into one of these roles as part of becoming a parent is just one additional form of oppression of the alternately sexed.

sexed, differently-sexed, or multi-sexed.<sup>101</sup> Parents would be expected to provide nurturing, support, structure, and discipline to their children, but they would not need to divide these and other elements of childcare based on parental biosex. A woman might be the “father” and the man a “mother”; a same-sex couple might take on gender roles that are both “father” and “mother” at the same time. Courts and legislatures would move beyond the mother–father presumption to establish family governance for diverse parental family formations. Having escaped from the male/female dyad, family law regimes might even permit adults who have strong bonds with children, but are not primary “parents,” to attain some legal status in recognition of their childcare role.<sup>102</sup>

Two caveats about “unsexing” are in order. First, unsexing is not the same as 1970s formalist sex-neutrality. *Frontiero v. Richardson* and its progeny stand against fixed constructions of male and female roles.<sup>103</sup> These cases posit that women and men should not be presumed to have particular skills that enable or limit them based on biosex. In arguing for “unsexing,” I agree to a limited extent with this line of sex neutrality jurisprudence, but I must account for more recent developments in the understanding of sex, gender, and sexuality, as well as the effects of social realities, such as intersectionality.<sup>104</sup> We now know, based on social science, theory, and practice that the identities of “male” and “female” are not irrevocably attached to biosex. Men can become women and women can become men. Furthermore, gender itself shifts; “women” can be “masculine” and “men” can be

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<sup>101</sup> By multi-sexed, I mean that parents could inhabit different sexes at different times as individuals, but I also mean to open the possibility of multiple individuals, each of one distinct sex (whatever it may be), engaged in parenting a child or children.

<sup>102</sup> Presently, it is difficult for non-parents to acquire such rights in the United States. In 2000, the Supreme Court issued a rare family law opinion in *Troxel v. Granville*, 530 U.S. 57 (2000). In that case, a Washington state court granted visitation rights to paternal grandparents following the death of the child’s father. *Id.* at 61. The Supreme Court held that parents have a constitutional right to raise their children, which includes the right to refuse visitation by other people, including relatives. *Id.* at 75.

<sup>103</sup> *Frontiero v. Richardson*, 411 U.S. 677, 678–79 (1973) (holding that the U.S. military’s unequal treatment of military husbands in contrast to military wives constituted an equal protection violation). This ruling served as a prominent point in the evolution of the Supreme Court’s sex discrimination jurisprudence.

<sup>104</sup> The liberal legal feminist norm of sex neutrality achieves certain theoretical purposes but falls short in its failure to account for the complexity of identity. In addition to Fineman’s critique of this line of legal theory, see Fineman, *The Neutered Mother*, *supra* note 10, I want to note that the construct of sex neutrality surfaced well before much sex and gender theory accounted for the fluidity of identity and the interrelationship among nuanced notions of sex, gender, and sexuality. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of “Sex,” “Gender” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 16 (1995) (“This Project . . . reveals and concludes that, under the conflation [of the terms sex, gender, and sexual orientation], there is no such thing as discrimination ‘based’ solely or exclusively on sexual orientation.”).

“feminine.” Both of these realities move beyond *Frontiero*’s basic framework of formal sex neutrality.<sup>105</sup>

Formal sex neutrality undoubtedly rests on wider social and constitutional support than unsexing. Equality of opportunity is the touchstone of sex and gender jurisprudence, including the resistance to affirmative action efforts. Each individual should be able to hold any role in society without regard to biosex. A woman should be able to be a Chief Executive Officer; a man, a stay-at-home parent. Formal sex neutrality and gender stereotyping jurisprudence reaches toward unsexing, but it does not explicitly undo the biosex presumptions of legal norms.<sup>106</sup> Unsexing not only peels sex from biosex, but it also surpasses investing gender with any reified link to biosex. In this sense, the “unsexed mother” differs sharply from the “neutered mother” that Martha Fineman criticizes. The concept of the “neutered mother” purges women of their gender, reducing them to sex-neutral individuals for legal analysis.<sup>107</sup> Unsexing mothering has nothing to do with

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<sup>105</sup> Critics may argue that the idea of unsexing parenting parallels the ideas of the early 1970s feminist movement—in particular the workings of then-attorney Ruth Bader Ginsburg. Believing that gender equality should “work both ways,” Ginsburg attacked gender role stereotyping through male plaintiffs. See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 91–92 (2010). Thus, in 1972, Ginsburg began work on *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). *Id.* at 132–33. At the time, Social Security benefits from a deceased father were payable, in part, to the widow and couple’s minor children in her case. See *Weinberger*, 420 U.S. at 637. However, a deceased mother’s benefits were payable only to her minor children and not her widowed husband. See *id.* at 637–38. The Supreme Court held the law unconstitutional because it denied benefits to working women that working men received. *Id.* at 638–39. This case highlights the apparent connection between unsexing parenting and the work of Ginsburg—a connection some might view critically. In particular, in the face of a growing conservative movement, rather than defend same-sex relations, Ginsburg stated that equality between the sexes did not implicate that issue. Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 937 (1979). These and other tactical mistakes made Second Wave feminism poorly received by later movements. My argument here builds on Ginsburg’s work, but seeks to go much further. Ginsburg wanted male and female roles, particularly in the family unit, to be interchangeable. However, she still deployed, perhaps as a reasonably practical litigation tactic, the male/female binary—a rigid system I seek to have dissolved.

<sup>106</sup> See, e.g., *Price Waterhouse v. Ann Hopkins*, 490 U.S. 228, 258 (1989) (applying Title VII to a suit alleging sex discrimination in a hiring decision). Although *Price Waterhouse* enforces sex neutrality under Title VII, and extends it to encompass sex stereotyping, Title VII and other laws have not directly sought to undo legal and social defaults that prevent women from attaining equality in the market. See *id.*

<sup>107</sup> Fineman notes:

It is only the legal discourse, not society, that is now formally Mother purged. The very gendered and Mothered lives most women live continue. Equality rhetoric successfully neutered Mother as a unique legal construct, but has failed to erase Mother on the societal level, nor has it removed the material manifestations of the institution of Motherhood. Furthermore, the disparity between the experience of Mother and her neutered legal presentation is potentially threatening to the legal system’s commitment to gender neutrality. If Mother continues to be experienced as “different,” “special” accommodations will be demanded (and delivered) even within a formally neutral family law system.

robbing a woman of her gender, or subjugating her to sex-neutral rules that devalue her gendered realities.<sup>108</sup> It is not about reducing a woman's status as mother, but rather opening that status up to people of all other sexes.

Indeed, Fineman endorsed the position that men can be mothers, although she did not fully explore it.<sup>109</sup> Unsexed mothering positions a mother as a relational entity, holding that position through interaction with her (or his) child. Fineman goes a step further, saying, "I argue [men] *must* be Mothers in the stereotypical nurturing sense of that term—that is, engaged in caretaking."<sup>110</sup> Although unsexed mothering certainly should open the opportunity for men and other sexes to occupy the "mother" role, ideally such unsexing will eventually lead to a conception of "fathering" and "parenting" as legitimate caretaking.

In addition to the distinction between unsexing and 1970s sex neutrality, another caveat is that unsexing does not mean sex-less. In using the term "sex-less," I refer to sex in both its meanings—biosex and sexuality. First, regarding biosex, let me start with an example. Recently, a story surfaced of a young Swedish couple raising their child, "Pop" without any public knowledge of his or her biosex.<sup>111</sup> Pop freely switches between wearing boy and girl clothes.<sup>112</sup> The parents chose to keep Pop's biosex a secret so that Pop would have a self-understanding beyond sex or gender.<sup>113</sup> In advocating for unsexing, I do not mean to advocate for a society in which one's sex or gender becomes a dirty secret. I admire the couple's tenacity in presenting Pop to the world without a sex label, but do not intend for unsexing to impose such a practice on others. In this sense, unsexed parenting would not mandate the elimination of sex or gender roles—as long as those roles do not presume biosex or fixed gender bases. When a woman parent performs a "fatherly" role, it may be masculine, but it reflects unsexed parenting. A person does not need to "lose" all references to her biosex as long as biosex does not by itself define her parental role. A woman can have a child with her own ovaries, carry the child in her womb, and then nurture the child with her breast milk, but it does not make her more of a mother than someone who has done none of those things but nurtures the child in other ways. In my preliminary understanding, parenting would not need to be counter-stereotype to be unsexed; yet, given the predominance of sexed

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FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY*, *supra* note 73, at 89.

<sup>108</sup> *Id.* at 101 ("Corresponding to these movements in legal doctrine has been the devaluation of the concept of Mother as a status worthy of any unique legal significance. The neutering of Mother and the granting of rights disassociated from caretaking or nurturing has important implications for mothers and their children in all contexts.").

<sup>109</sup> *See id.* at 234 ("I believe that men can and should be Mothers.").

<sup>110</sup> *Id.* at 234–35.

<sup>111</sup> Lydia Parafianowicz, *Swedish Parents Keep 2-Year-Old's Gender Secret*, *THE LOCAL*, June 23, 2009, <http://www.thelocal.se/20232/20090623/>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

parenting norms, parenting that matches sex stereotype might still merit examination for echoes of sexed parenting.

Unsexing should not be sex-less either, in the sense of being without sexuality. I would avoid an Andrea Dworkin-esque sexual ethos in which every male-female binary becomes an objectionable form of dominance.<sup>114</sup> Indeed, androgynous utopias pose the risk of heightening the phenomenon that Suzanne Kim refers to as the “neutered parent,” in which well-regarded parental behavior mandates the parent’s foregoing sexual expression.<sup>115</sup> With regard to “sex” as identity, unsexing “mothering” and “fathering” should not obligate parents to a sex-less parenting or constrain individuals from adopting “mother” or “father” roles. Unsexed mothering should not be sexuality-less either. Sexlessness would function as an imposition of conscious ethical commitments on the erotic. Such a willingness to impose norms on sexual pleasure mirrors the control the Roman Catholic Church has sought to exercise over male-female sex, insisting that sexual pleasure should solely be embraced to procreate. Sex, by its nature, functions largely in the subconscious and an effort to unsex sexuality entirely would fail.<sup>116</sup> Equality may result from this unsexed vision, but not necessarily one that would eliminate the sexiness of sex difference.

Unsexed parenting involves a spectrum of parental structures outside the mother-father dyad. For example, it includes much single parenting,

<sup>114</sup> See ANDREA DWORKIN, *INTERCOURSE XXX* (1987) (explaining that “*Intercourse* is a book that moves through the sexed world of dominance and submission”).

<sup>115</sup> In *The Neutered Parent*, Suzanne Kim explores the judicial preference for “sex neutral” parenting through the lenses of custody and visitation law. Suzanne Kim, *The Neutered Parent* 24 YALE J.L. & FEMINISM (forthcoming 2012) (manuscript at 5), available at <http://ssrn.com/abstract=1935945>. She argues that sexually active mothers and same-sex parents are viewed as “sexually salient” and, as a result, suffer harms under family law models for falling outside the “sex neutral” norm. See *id.* In the past, sexual nonconformity has included homosexual parents merely admitting their sexual orientation (and thus not being discreet). *Id.* at 34. This is in stark contrast to custody cases involving heterosexual married couples, where sexual relations are only relevant if literally done in the presence of the child. See *id.* at 39. Other “sexually salient” issues raised in custody and visitation law have included overnight guests, sharing beds with same-sex partners, and hugging and kissing same-sex partners in front of children. *Id.* at 47. Kim finds that “[t]he neutering of sexually salient parents reinforces the marital, gendered norms at the core of the prevailing parental sexuality framework.” *Id.* at 60. She calls for a reexamination of the “sex neutral” framework under the law to facilitate a nuanced conception of parental sexuality. *Id.* at 64. Clifford Rosky has also worked on understanding the ways in which lesbian and gay parents’ sexualities are framed as harmful for their children. Clifford Rosky, *Don’t Kiss, Don’t Tell: Lesbian Mothers, Gay Fathers, and the Regulation of Intimate Conduct* 2–8 (unpublished manuscript) (on file with author) (comparing restrictions against gay fathers and lesbian mothers exposing children to intimate contact in custody and visitation cases).

<sup>116</sup> Here one might think of some of the work of Catharine MacKinnon or Andrea Dworkin in attempting to imagine a sexuality without oppression, indeed without sex roles. This effort, many critics noted, was entirely too utopian. See, e.g., Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* 34 (Henry Abelove & Michele Aina Barale eds., 1993) (“Feminism is no more capable than Marxism of being the ultimate and complete account of all social inequality.”).

which necessarily involves parenting that simultaneously falls under both the “father” and “mother” aegis. Same-sex and transgender parents (many of whom live as part of same-sex couples) often live beyond the male-female dyad. As traditional marriage was and continues to be structured around sex roles, permitting same-sex marriage may undo that sexedness, as some of the language in the recent *Perry v. Schwarzenegger* litigation suggests.<sup>117</sup> As marriage becomes unsexed, so should the relationship between “sex” and the parental role.

### B. *Single, Multiple and Blended Parents*

When considering parenting structures that deviate from the mother/father dyad, same-sex parents immediately come to mind. Before addressing that issue, the broader phenomenon of single, multiple, and blended-parent households should be discussed because it too deviates from sexed parenting privilege. Single-parents, much like same-sex parents, must play roles that are traditionally occupied by both a mother and a father, often simultaneously.<sup>118</sup> This household organization is quite commonplace and comprises homes for over a quarter of all children.<sup>119</sup> Although over four-fifths of single parents are women, men are increasingly serving as single-parents; some even choose to become parents while single.<sup>120</sup> The absence of a “father parent” in such homes has little impact on childhood development—the crucial factor is “good” parenting.<sup>121</sup> To the extent that single parent homes lack stability, it may be traced to the single parent’s inability to specialize in labor—such specialization leads to markedly greater financial

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<sup>117</sup> 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (“The tradition of restricting marriage to opposite-sex couples does not further any state interest. Rather, the evidence shows that Proposition 8 harms the state’s interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender.”). See also *id.* at 958 (“Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. . . . Women were seen as suited to raise children and men were seen as suited to provide for the family.”).

<sup>118</sup> See Marie Richmond-Abbott, *Sex Role Attitudes of Mothers and Children in Divorced, Single-Parent Families*, 8 J. DIVORCE 61, 63–64 (1984) (examining the sex-stereotyped behavior of 134 single mothers).

<sup>119</sup> TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007 1 (2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf> (reporting that in 2007, 26.3 percent of children under 21 years of age lived in a household with one parent and their other parent lived outside of the household).

<sup>120</sup> *Id.* at 2; Mireya Navarro, *The Bachelor Life Includes a Family*, N.Y. TIMES, Sept. 7, 2008, <http://www.nytimes.com/2008/09/07/fashion/07single.html>.

<sup>121</sup> One research note compiled studies that examined the effects on the psychological and social development of children raised by a single woman or a lesbian couple—specifically the effect of an absence of father parenting. Maurice Rickard, *Research Note no. 41 2001–02: Children of Lesbian and Single Women Parents*, PARLIAMENT OF AUSTRALIA: PARLIAMENTARY LIBRARY (June 4, 2002), available at <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn41.htm>.

resources for heterosexual, married households.<sup>122</sup> Issues like paid parental leave, discussed later on, are even more crucial for single parents because they lack the financial advantage of having a working partner in the home.

While the commonplace nature of female-led single parent homes supports the presumption that mothering is the primary mode of parenting, single mothers often engage in fathering and parenting alongside their mothering in ways that women partnered with men may not. The lack of a dyad, in itself, may subvert the sexed nature of mothering. As June Carbone and Naomi Cahn have demonstrated, the impact of these differences varies substantially across jurisdictions: certain states favor traditionally sexed marital and parental relations, while others favor a more unsexed vision of both.<sup>123</sup>

Multiple and blended parents involve sets of more than two individuals who serve as parents. In a multiple parent home, the parents come together to form a larger set of individuals to share childrearing. Some examples include a lesbian couple that finds a sperm donor who will share in some childcare, or a gay couple who shares parenting with the woman who carries the child. It could also be any other formation of friends and lovers who choose to share the responsibilities of childcare. For LGBT individuals, such arrangements may serve as a way to create a family without incurring the expense of paid surrogacy. Blended families result from the formation, separation, and re-formation of couples, creating sets of stepparents. As adult relationships shift, children may benefit from new people engaging in childcare while they maintain their connection to adults who are former partners of a parent. All of these kinds of parents may have a higher proclivity for unsexed parenting in that their functional performance of parental roles could easily diverge from the mother-father dyad.

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<sup>122</sup> See SARAH O. MEADOWS, SARA McLANAHAN & JEAN T. KNAB, ECONOMIC TRAJECTORIES IN NON-TRADITIONAL FAMILIES WITH CHILDREN 3–4 (2009), available at <http://crcw.princeton.edu/workingpapers/WP09-10-FF.pdf>. This report examines data from the Fragile Families and Child Wellbeing Study, which follows 4,898 children born in large U.S. cities, 3,712 of whom come from unmarried parents. *Id.* at 8. The authors refer to the proposition of economists and sociologists that marriage increases family well-being because: (1) “two people can live more cheaply than one;” (2) “marriage encourages gender role specialization between husbands and wives which is expected to increase husbands’ labor market productivity and earnings;” (3) married men may be viewed by employers as more dependable and therefore be paid more; and (4) “marriage provides men with a script or identity . . . which encourages them to work longer hours to support their families.” *Id.* at 3.

<sup>123</sup> See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES 1–6 (2010). June Carbone and Naomi Cahn argue that the United States has seen a proliferation of two kinds of families, “red” and “blue,” which are distinguished largely by their relationship emphasis and closely follow the Democrat/Republican divisions of the 2004 and 2008 elections. *Id.* at 1–2, 5–6. Blue families profess autonomy and support, while red families profess traditional roles for men and women with a strong emphasis on consequences for those who do not follow them. *Id.* at 1–2.

### 1. *Same-sex and Transgender Parents*

This Subpart examines same-sex parenting's role in unsexing parenting. Then it focuses on challenges to the legitimacy of transgender parents. Although the issues facing same-sex couples and couples including one or more transgender partners differ, both groups may find some answer in *Perry v. Schwarzenegger*, the reasoning of which lays the groundwork for dismantling the centrality of sexedness in marriage.<sup>124</sup> Although legal arguments about parental rights and marriage have emphasized how same-sex parents function the same way that different-sexed parents do, in many ways, same-sex parents often become parents and live as parents differently from their heterosexual counterparts. Although many developmental psychology studies emphasize the extent to which children of same-sex parented families "do at least as well as those raised by heterosexuals in cognitive ability, behavior, and mental health, and they may even do somewhat better in some areas,"<sup>125</sup> these studies have only been used to demonstrate that same-sex parents are not *worse* parents than heterosexual parents.<sup>126</sup> These studies have dispatched any claims to legitimacy in anti-same-sex parenting arguments,<sup>127</sup> a fact noted by the court in *Perry*.<sup>128</sup> In-

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<sup>124</sup> 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010).

<sup>125</sup> See CAHN & CARBONE, *supra* note 123, at 131.

<sup>126</sup> Lisa Belkin, *An End to Gay-Adoption Bans?*, N.Y. TIMES, July 28, 2010, <http://parenting.blogs.nytimes.com/2010/07/28/an-end-to-gay-adoption-bans/?scp=1&sq=lisa%20belkin%20gay&st=cse> [hereinafter Belkin, *An End to Gay Adoption Bans?*] (identifying recent studies that demonstrate that there is no basis for a ban on lesbian and gay adoption). Two studies in particular serve to prove this point: "With regard to parenting, Allen and Burrell (1996) and Stacey and Biblarz (2001) concluded that decades of research has consistently shown that sexual orientation is not a relevant factor in terms of a person's ability to parent or in terms of the psychological adjustment of the children." Marcus C. Tye, *Lesbian, Gay, Bisexual, and Transgender Parents: Special Considerations for the Custody and Adoption Evaluator*, 41 FAM. CT. REV. 92, 95 (2003). The testimony in *Perry v. Schwarzenegger* demonstrated this reality: psychologist Michael Lamb testified that "all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents and that the gender of a parent is immaterial to whether an adult is a good parent." 704 F. Supp. 2d at 935.

<sup>127</sup> One prominent study examined child development and parenting in 106 families (fifty heterosexual, twenty-nine gay, and twenty-seven lesbian) by interviewing both the parents and outside caregivers, including the children's teachers. Rachel H. Farr, Stephen L. Forssell & Charlotte J. Patterson, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?* 14 APPLIED DEV. SCI. 164, 164 (2010), available at <http://wipw.law.ucla.edu/wp-content/uploads/Patterson-Farr-Forssell-AppliedDevScience-Jul-2010.pdf>. Parents in all three types of families, as well as the children's teachers, reported that the children generally functioned well and had few behavioral problems, but the children of lesbian and gay parents were described as having fewer behavioral problems than children of heterosexual parents. *Id.* at 171-72. The children's gender role behavior, activities, and characteristics were found to be within the population average Preschoolers' Activities Inventory, which led the authors to conclude that "parental sexual orientation is not as influential in young children's gender development as previously thought." *Id.* at 172, 175. Therefore, the study generally concludes that gay and lesbian parents are capable parents, that their sexual orientation does not



deed, the authoritative understanding of social science in that case permits deliberation beyond defensiveness toward a consideration of differences between same-sex and different-sex parenting. Some of the differences between heterosexual and same-sex families surface from legal and social statuses.

Same-sex parents, for example, often differ from different-sex parents in the extent of planning required to become a parent. Although most lesbian, gay, and bisexual parents become parents through a heterosexual pairing, for other LGB parents, the process requires substantial planning.<sup>129</sup> As Judge Smith of the New York Court of Appeals noted, heterosexual families may happen accidentally, making the planned same-sex families more stable, and thus *less* in need of the security provided by marriage.<sup>130</sup> To be sure, it is not advisable to succumb to the notion that LGBT parents are better and therefore deserve less protection; however, it is important to consider whether same-sex parents' experiences serve as an opportunity for reconsidering the legal regimes of parenting for all.<sup>131</sup> At a time when same-sex parents continue to face discrimination in becoming parents, including laws which make adoption more difficult for them,<sup>132</sup> same-sex parents' methods of adapting to multiple careers and contemporary gender roles may yield productive norms for non-same-sex parenting structures.

Same-sex parents often divide responsibilities more evenly than their heterosexual counterparts.<sup>133</sup> At the very least, in the aggregate this reflects less sexed parenting, if not some unsexed parenting. This balanced practice

relate to their parenting skill or child's adjustment, and that there is no basis for refusing to allow same-sex couples to adopt. *Id.* at 176–77.

<sup>128</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938–44 (finding credible expert testimony that same-sex parents are not worse than heterosexual parents).

<sup>129</sup> For an account of my own experience, see Rosenblum, *Pregnant Man?*, *supra* note 1, at 209–15. For lesbians, at least a sperm provider is required, if not the medical personnel to implant the sperm either in the woman's body or into the ovum. For gay men, the process requires an egg provider and a surrogate to carry the fetus. Most often, as in the gestational surrogacy process, these are two separate women. To coordinate egg providers, surrogates, medical clinics and intended parents, agencies have sprung up to provide matching as well as legal and counseling services.

<sup>130</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 21–22 (N.Y. 2006) (denying plaintiffs' same-sex marriage and holding that the legislature could rationally believe that it is better for a child to grow up with a mother and a father). See also Halley, *supra* note 30, at 6–8 (discussing the origins of the argument that heterosexuals need marriage more than same-sex couples).

<sup>131</sup> For example, at least one commentator has argued that heterosexual families can learn from the parenting styles of same-sex-parented families. Lisa Belkin, *What's Good for the Kids*, N. Y. TIMES MAG., Nov. 5, 2009, available at <http://www.nytimes.com/2009/11/08/magazine/08fob-wwln-t.html>.

<sup>132</sup> *Overview of State Adoption Laws*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting/overview-of-state-adoption.html> (last visited Nov. 7, 2011) (summarizing state same-sex adoption laws).

<sup>133</sup> See Belkin, *What's Good for the Kids*, *supra* note 133 (quoting and citing Abbie E. Goldberg, author of *Lesbian and Gay Parents and Their Children*, as saying: "Same-sex parents tend to be more equal in parenting . . ." [L]esbian mothers . . . tend not to divide chores and responsibilities according to gender-based roles.").

of childcare may inculcate their children with less rigid gender roles.<sup>134</sup> At least one psychologist suggests that this is “‘because you have taken gender out [of] the equation. There’s much more fluidity than in many heterosexual relationships.’”<sup>135</sup>

It may not be that gender is absent from same-sex parenting, but gender role rigidity is. “Same-sex” couples function within highly diverse sex and gender roles, including some “butch-femme” male and female couples. Such roles may frame gender expression as well as shared parenting itself. Although it is unclear whether same-sex parents transmit gender differently based on such butch-femme roles, parents do transmit their understandings of gender to their children.<sup>136</sup> Shared parenting does not necessarily “take[ ] gender out [of] the equation”—gender is still very often omnipresent in the family unit.<sup>137</sup> The legal recognition of same-sex marriage may diminish the sexedness of relationship recognition and parenting, but it will not abolish the entrenched nature of sex and gender identity. Many will continue to think of parenting as “mothering” and “fathering,” constructs that bind only if attached to biosex.

Transgender parents may also engage in “mothering” and “fathering” beyond biosex. It does not always require analogy to connect transgender issues to lesbian and gay ones—by one count, forty percent of transgender people are gay or lesbian.<sup>138</sup> Some transgenders live and function in their target sex, allowing those in heterosexual relationships to live in legally recognized marriages. Transgenders who are in same-sex couples or who live in states that refuse to recognize their changed biosex suffer the same lack of parental legitimacy as parents who are a same-sex couple. Many states have

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<sup>134</sup> See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter*, 66 AM. SOC. REV. 159, 168 (2001). Stacey and Biblarz analyzed twenty-one studies of biological children of lesbian mothers and concluded that children raised in these households are more likely to venture outside of the stereotypical male-female behavior. *Id.* at 167–68. Additionally, while heterosexual mothers were observed encouraging their children to participate in gender stereotypical activities (e.g., daughters to take ballet and sons to play little league) lesbian mothers were more concerned with supporting their child’s gender neutral interest. *Id.* at 172.

<sup>135</sup> See Belkin, *What’s Good for the Kids*, *supra* note 131.

<sup>136</sup> See Stacey & Biblarz, *supra* note 134:

For example, the lesbian mothers in Kweskin and Cook (1982) were no more likely than heterosexual mothers to assign masculine and feminine qualities to an “ideal” boy or girl, respectively, on the well-known Bem Sex Role Inventory. However, mothers did tend to desire gender-traits in children that resembled those they saw in themselves, and the lesbians saw themselves as less feminine-typed than did the heterosexual mothers. This suggests that a mother’s own gender identity may mediate the connection between maternal sexual orientation and maternal gender preferences for her children.

*Id.* at 172. Even where a couple has a butch-femme relationship, the role-playing still may subvert traditional understandings of gender.

<sup>137</sup> Thanks to Noa Ben-Asher for this point.

<sup>138</sup> ZACHARY I. NATAF, LESBIANS TALK TRANSGENDER 32 (1996).

not yet decided what makes an individual “male” or “female,”<sup>139</sup> although they still recognize the distinction,<sup>140</sup> most notably for marriage purposes.<sup>141</sup> Disputes in family law litigation revolve around the recognition of the partner’s chosen sex.<sup>142</sup> Some litigants challenge the validity of their marriages to transgender individuals for legal advantage. For example, in *In re Estate of Gardiner*, the court considered whether a marriage between a transgender individual and someone of that person’s birth sex was legal.<sup>143</sup> Marshall Gardiner, a man, married J’Noel, a woman who had been born in a man’s body.<sup>144</sup> After Marshall died intestate, his son, Joseph, convinced the Supreme Court of Kansas that the marriage was void as against public policy, despite J’Noel having undergone sex reassignment surgery.<sup>145</sup>

Courts have also struggled to decide whether transgender identity should be a factor in determining parental fitness.<sup>146</sup> In *Kantaras v. Kantaras*,<sup>147</sup> Michael Kantaras, born a woman but living as a man after sex-reassignment surgery, legally adopted a son that his wife, Linda, had with another man in a prior relationship.<sup>148</sup> Linda also gave birth to a daughter after she was artificially inseminated with sperm from Michael’s brother.<sup>149</sup> After a nine-year marriage, the two divorced and went to court over child custody.<sup>150</sup> Linda knew that Michael was transgender at the time of their marriage, but nonetheless convinced the Florida Court of Appeals to invalidate their marriage because he was transgender.<sup>151</sup>

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<sup>139</sup> Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 220 (2006).

<sup>140</sup> See Dean Spade, *Documenting Gender: Incoherence and Rulemaking*, 59 HASTINGS L.J. 731, 732–34 (2008).

<sup>141</sup> See Carter, *supra* note 139, at 220 n.83.

<sup>142</sup> *Id.*; see also Case, *Same-Sex Marriage Litigation*, *supra* note 24:

This thin view reduces legal sex—in the sense of legal designation as male or female—to little more than the basis for a claim of discrimination, allowing a plaintiff, whether in a statutory or a constitutional case, to prevail by showing that the plaintiff’s legal sex is a but-for cause of the treatment of which plaintiff complains.

*Id.* at 1205.

<sup>143</sup> 42 P.3d 120, 121–22 (Kan. 2002).

<sup>144</sup> *Id.* at 122.

<sup>145</sup> *Id.* at 137. Similarly, a Texas Court of Appeals held that a marriage between two individuals born as men was invalid, despite one having undergone sex reassignment surgery to become a woman. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999). It is important to note that other states do recognize these marriages. In these cases, some courts have recognized such a reassignment. Notable among these states is New Jersey, whose decision in *M.T. v. J.T.* demonstrates how, even in 1976, some judicial authorities were able to view these questions from an objective standpoint. 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976).

<sup>146</sup> See Carter, *supra* note 139, at 209–17.

<sup>147</sup> 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

<sup>148</sup> Carter, *supra* note 139, at 211–12.

<sup>149</sup> *Id.* at 212.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 214. Likewise, the story of Thomas Beatie is illustrative of the struggles endured by transgender parents. See Thomas Beatie, *Labor of Love*, THE ADVOCATE,

Judicial disrespect for these established couples flips them from legitimate heterosexual status to presumptively illegitimate homosexual status through rigid adherence to the binarism. For example, in *In re Gardiner*, J'Noel could have married only a woman, even though she was a woman after sex reassignment surgery, because Oklahoma refused to recognize the sex change. These deep fissures in legal logic demonstrate the need for unsexing parenting: transgender people are the miner's canary of gender, exposing the extent to which the law's disparate treatment based on sex and gender is arbitrary.<sup>152</sup>

While transgender experience with marital recognition provides one of the strongest arguments for the senselessness of sex restrictions in marriage,<sup>153</sup> *Perry v. Schwarzenegger*,<sup>154</sup> a case involving lesbian and gay couples, confirms the value of unsexed marriage to people of all sexes (including transgender people) who may want to marry another individual. Judge Walker, presiding over *Perry*, found no "historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry. . . . [T]he exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage."<sup>155</sup> Relying on this finding, Judge Walker ultimately held that California's ban on same-sex marriage violated the U.S. Constitution.<sup>156</sup>

Here, *Perry* uses the language of gender, but discusses what I have called "biosex." The decision reflects the extent to which unsexed parenting has become a burgeoning norm, one that the law should encourage. *Perry*'s attention to revisiting gender norms reflects a welcomed departure for same-sex marriage litigation. In other recent cases, such as those in courts in Connecticut, Iowa, and Massachusetts, the sex discrimination argument has more frequently taken a backseat to sexual orientation equal protection arguments.<sup>157</sup> In *Perry*, Judge Walker made it clear that marriage has changed

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Apr. 2008, [http://www.advocate.com/Society/Commentary/Labor\\_of\\_Love/](http://www.advocate.com/Society/Commentary/Labor_of_Love/). When Beatie decided to become a parent, he was rejected by many physicians because he was a transgender man who wanted to carry a child. *Id.* Marriage and parenting of transgender people exposes some of the most core gender biases in these institutions, as the presumption of roles leads to determinations that are patently counterintuitive. See Carter, *supra* note 139, at 211–14.

<sup>152</sup> See Rosenblum, *Sing Sing*, *supra* note 19, at 551.

<sup>153</sup> See, e.g., Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 257 (1998) ("No matter which strand of the opposition's argument against same-sex marriage we consider, transgendered marriages and the subsequent legal response undermine those arguments.").

<sup>154</sup> 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>155</sup> *Id.* at 993.

<sup>156</sup> *Id.* at 995 ("Proposition 8 violates the Due Process Clause of the Fourteenth Amendment.").

<sup>157</sup> See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) ("For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

from a sharply gendered institution to one of equality, and the bases for excluding same-sex couples from marriage have fallen away.<sup>158</sup>

As Mary Anne Case recently put it, “[t]o grant civil marriage licenses to couples regardless of their sex would be to eliminate the last vestige of sex stereotyping from the law of marriage in the United States.”<sup>159</sup> Judge Walker’s decision follows what Nan Hunter predicted almost twenty-years ago in her landmark article on same-sex marriage: she asserted, correctly, that lesbian and gay marriage would “dismantle the legal structure of gender in every marriage.”<sup>160</sup> Although this dismantling has not yet come to fruition, the move toward unsexed parenting points in that direction.

### C. *The Import of Unsexed Parenting*

In the face of so many who typify unsexed parenting or might benefit from it, let us articulate the goal of such an endeavor. Contemporary sex discrimination litigation primarily seeks to prevent individuals from discriminating against others on the basis of sex. But the concept of sex discrimination originally had a broader promise, as the *Hogan* quote in the introduction reflects.<sup>161</sup> Moving beyond fixed notions of the roles and abilities of males and females is an ambitious norm, particularly given the largely post-*Frontiero* developments in understanding the interplay of sex, gender, and sexual identity.<sup>162</sup> Yet it is a norm that is not only encapsulated in United States constitutional law, but is also a key player in international law.<sup>163</sup>

Like most family law rules and norms, law outside the family context drives much of what happens inside the family context. This is one of the crucial lessons of recent moves to examine family law exceptionalism.<sup>164</sup>

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<sup>158</sup> *Perry*, 704 F. Supp. 2d at 993 (“Gender no longer forms an essential part of marriage; marriage under law is a union of equals.”).

<sup>159</sup> Case, *Same Sex-Marriage Litigation*, *supra* note 24, at 1202. Case continued:

It would complete the evolution away from sex-role differentiated, inegalitarian marriage law that began with nineteenth century efforts to ameliorate the effects of coverture and continued in legislative reform and constitutional adjudication through the last third of the twentieth century. As feminist theorists have insisted for decades, this would have benefits, not only for gay and lesbian couples, but for all who value liberty and equality on the basis of sex.

*Id.* at 1202–03. See also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEAL* 97 (2010) (“Privileging only marital heterosexual relationships presents a further danger in that it reinforces a form of association historically marked by gender inequality. As Martha Fineman bluntly puts it, public policy that encourages heterosexual marriage for the sake of children thereby constitutes the state’s willingness to sacrifice women’s interests for children’s.”).

<sup>160</sup> Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES* 9, 19 (1991).

<sup>161</sup> See *supra* note 8 and accompanying text.

<sup>162</sup> See *supra* note 104.

<sup>163</sup> See *infra* Part III.

<sup>164</sup> See generally Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58

Corporate governance law fits squarely in what Janet Halley and Kerry Rittich define as “Family Law 3,” in that without mentioning family law statuses, corporate governance both depends on the status of individuals within the family and affects family law regimes.<sup>165</sup> Men derive substantial material benefits from their advantaged place in the market economy. Even with extensive paid parental leave, some countries still face inequality in the workplace, namely the fact that leadership and its correspondingly larger incomes remain predominantly male.<sup>166</sup> One solution has been the adoption of a quota for corporate board representation to achieve gender balance.<sup>167</sup> For example, to foster a more inclusive corporate sector, Norway created its Corporate Board Quota to force publicly traded corporations to foster gender diversity on their boards, a strategy that several other European nations have

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AM. J. COMP. L. 753 (2010). Halley and Rittich define the range of relevant family law regimes:

Family Law 1—FL1—is what you will find in a modern family law code, course, bar exam, or casebook. It comprises marriage and its alternatives: divorce, parental status, and parental rights and duties; in some countries it includes inheritance and in others, for interesting reasons, it does not. But if you wanted to understand how law contributes to the ways in which actual family and household life is led by actual people, you would never stop there. You would immediately look for the explicit family-targeted provisions peppered throughout substantive legal regimes that seem to have no primary commitment to maintaining the distinctiveness of the family—regimes ranging from tax law to immigration law to bankruptcy law. We can call that Family Law 2, or FL2. In the still-deeper background would then be Family Law 3—FL3—the myriad legal regimes that contribute structurally but silently to the ways in which family life is lived and the household structured, sometimes intentionally, sometimes in ways we could describe as functionally rational, sometimes in the mode of disparate impact or sheer accident or even perversely. For simple examples of FL3, imagine occupancy limits in landlord/tenant law that give more or less protection to incumbents; employment rules that permit dismissal on the part of the employer “at will” or, by contrast, require employers to give notice to employees who are dismissed without cause; rules that exclude household employees from the protective legislation governing workplaces or that craft special regimes governing such employees. Finally, we take it as given that any probing legal analysis of the family or household, and certainly one that attempts to track the effects of legal rules on the bargaining endowments of different household members, needs to attend to a wide range of informal norms, as they may substantially alter the impact of FL1, 2, and 3 and, in some cases, effectively “govern” the household. While their status as *law* is a live question for us—as it has been for comparativists and legal anthropologists at various times—we have no doubt that these norms belong somewhere on the map and, at least for some purposes, we think of them as Family Law 4 (FL4).

*Id.* at 761–62.

<sup>165</sup> *Id.* at 762.

<sup>166</sup> See, e.g., Rosenblum, *Feminizing Capital*, *supra* note 14, at 64–65 (noting inequality in Norwegian corporate boards despite some of the most progressive corporate gender laws in the world). See also REBECCA RAY, JANET C. GORNIK & JOHN SCHMITT, CTR. FOR ECON. AND POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES 9 (2009), available at [http://www.cepr.net/documents/publications/parental\\_2008\\_09.pdf](http://www.cepr.net/documents/publications/parental_2008_09.pdf).

<sup>167</sup> See *Representation of Both Sexes on Company Boards*, MINISTRY OF CHILDREN, EQUAL. AND SOC. INCLUSION, <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864> (last visited Sept. 21, 2011).

emulated.<sup>168</sup> If Norway's effort through the Corporate Board Quota to feminize capital is successful, then it may also succeed in facilitating an unsexing of mothering and parenting.

This effort to integrate corporate boardrooms with women has been mirrored in Scandinavian nations by an effort to bring men into family leadership. Encouraging men to participate more fully in family responsibilities also furthers the goal of unsexing. As Mary Anne Case has commented: "[i]f the question I begin with is, 'Whose responsibility should care for children be?', the answer I begin with is, 'Not simply women's responsibility.'"<sup>169</sup> If childcare is not solely women's responsibility, then unsexing mothering is key to ensure that shift. My goal is precisely not to undermine women's rights within and without the family. Rather, unsexing parenting would further the balancing of family responsibilities. By "unsexed parenting," I mean an assumption of responsibility that is commensurate with decision-making power having no preordained sex.

Two elements of same-sex parenting discussed above, the comparatively egalitarian division of labor and extensive family planning, are both elements of unsexed parenting. To unsex parenting broadly would require a state role in supporting shared parental involvement and responsibility. One such policy could target bringing men more aggressively into the responsibilities of parenting. Effecting such a policy necessarily entails a blurring of sex roles for both heterosexual and homosexual couples: for heterosexuals, it requires consistently refusing to presume that one party will play a particular role because of his or her biosex; for same-sex couples, many of the roles are already blurred, but not all.<sup>170</sup>

The planning element for gay and lesbian parents could extend to heterosexuals as well in the pursuit of unsexed parenting.<sup>171</sup> If both members of a heterosexual couple engaged in this process, it would permit each to voice ideas about how to achieve a more balanced parenting process.

As the above discussion of same-sex parenting suggests, unsexing parenting in the United States currently reflects a shift driven by society more than the law. It is a shift that has largely begun despite the law, as we will see with the discussion of the U.S. Family Medical Leave Act ("FMLA") in Part III. However, unsexing will require both individual par-

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<sup>168</sup> *Id.* Both France and Spain have adopted quotas for women in corporate governance. See Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards 2* (Mar. 3, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1776263](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776263).

<sup>169</sup> Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why and How the Burden of Care for Children Should Be Shifted*, 76 CHI-KENT L. REV. 1753, 1756 (2001).

<sup>170</sup> See Belkin, *What's Good for the Kids*, *supra* note 131.

<sup>171</sup> While Iowa requires parents to have a car seat before leaving the hospital with a baby, it should also require more deliberate parenting, including classes on basic elements of nutrition and caretaking. See IOWA CODE ANN. § 321.446 (West 2011) (requiring children under one year of age being transported in a motor vehicle to be "in a rear-facing child restraint system").

ticipation and state-imparted norms. Both international and domestic legal frames establish those state norms. Although international provisions do not impose direct obligations on families, they do establish expectations for state parties to achieve. To determine what appropriate legal efforts might further the goal of unsexing parenting, the following Part will explicate, respectively, international and comparative legal contexts for unsexing parenting.

### III. INTERNATIONAL LAW AND COMPARATIVE (THIN AND THICK) UNSEXING: THE UNITED STATES AND SWEDEN

This Part assesses several international treaties' framing of parenthood and maternity with respect to their sexedness, and then uses this international background to frame a sharp distinction between the parental leave regimes in the United States and Sweden.

Parental leave is at the core of a broader set of gender equality efforts. Parental leave provisions can substantially shift the leaves taken by parents to care for a new child, which, in turn, fosters or deters bonding with that child. Because of ideas about traditional gender roles, women are presumed to be both responsible for and interested in taking care of a newborn (or newly adopted) child, while (heterosexual) men are presumed to be both incapable and uninterested in the minutiae of childrearing. These men can and should, society tells them, leave such duties largely to their wives and stay in their domain of expertise—the workplace. Thickly unsexed parental leave would remedy this sexed vision of parenting that boxes women into primary childcare and men out of it.

This Part proceeds as follows: Subpart A summarizes the development of international law from before the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) to the Yogyakarta Principles and briefly assesses the relationship among national, international, and comparative legal systems with regard to parenting. Subpart B describes and critiques this critical law for workplace equality. Subpart C assesses Sweden's parental leave policy, arguing that this policy assertively promotes balanced, unsexed parenting. Subpart D explores the differences between the two laws and how a more assertive posture by the United States would foster unsexed parenting.

#### A. *International Law, from Sexed Paternalism to Sexed Liberation to Unsexed Potential*

This Subpart will recount the trajectory of international law from pre-CEDAW framings that address women and children as society's most vulnerable, to CEDAW's picture of women's empowerment, to post-CEDAW considerations that begin to contemplate an unsexed future.



### 1. *Pre-CEDAW Treaties*

The grounding for CEDAW extends back to the Universal Declaration of Human Rights. Article Twenty-Five of the Declaration states “[m]otherhood and childhood are entitled to special care and assistance.”<sup>172</sup> These protections have a deep grounding in cultural traditions of viewing women and children as “favorites of the law,” who deserved the law’s protection from predatory contracts. The Declaration articulates its protection of marriage rights in a sex-neutral (but implicitly heterosexual) frame. Article Sixteen reads: “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”<sup>173</sup> This language reflects a construction of rights around marriage that adhere to “men” and “women” together.

Other important groundwork for CEDAW, as well as for the Convention on the Rights of the Child (“CRC”), appeared in the International Covenant on Civil and Political Rights (“ICCPR”). The international move to close the public/private divide, a critical step in addressing family law questions in international law, began in 1966 with a reference to parents in the ICCPR.<sup>174</sup> However, it is worth noting that the provision merely grants autonomy to parents to determine the religious upbringing of their children “to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>175</sup> Although this provision serves to emphasize parents’ dominion, in it the ICCPR opened the possibility of a link between the public and the private sectors.

### 2. *CEDAW*

International law primarily addresses the relationship among states and, with respect to human rights, the relationship between states and individuals as public entities. CEDAW’s central focus was placing women’s rights at the core of international law, and in pursuit of that goal, the drafters crafted language that blurred the public and the private.<sup>176</sup> A traditional understand-

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<sup>172</sup> Universal Declaration of Human Rights, art. 25, G.A. res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948).

<sup>173</sup> *Id.* at art. 16.

<sup>174</sup> See International Covenant on Civil and Political Rights, art. 18(4), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Note that the analysis of the ICCPR, CEDAW, CRC and the Yogyakarta Principles draws on the texts of these documents and does not explore their interpretation.

<sup>175</sup> *Id.*

<sup>176</sup> CEDAW blurs these lines by addressing family life and sex roles in the context of international law. For example, the preamble states that signatories adopt its provisions:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for

ing of international law prior to CEDAW included no reference to parenting. International law, as a field, only focused on public functions, such as the direct interaction with the state and the ways that states respected or ignored individual rights. This focus on the “public” reinforced the extent to which heads of households, customarily men, received almost total discretion over how they ran their household: the public state’s refusal to regulate the “private” family<sup>177</sup> permitted domestic violence, rape, and other abuses to occur within the home.<sup>178</sup> For that reason, international law’s move to bridge the public/private divide was a radical shift. Having arrived relatively recently into the area of regulating family life, international law may have avoided some of the baggage carried by more entrenched national family law regimes.

CEDAW marked the first true move in international law to breach the public and private barriers. This change remains one of CEDAW’s lasting contributions to international legal discourse. Women throughout the world

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discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

CEDAW Treaty, *supra* note 6, at preamble; *see also* Rosenblum, *Unsex CEDAW*, *supra* note 4, at 1. In *Unsex CEDAW*, I argued that CEDAW struggles to achieve its goal of improving women’s lives because it identifies the wrong reason for inequality. *Id.* Women are not subjugated solely because of the power relationship that establishes men as superior. Instead, women suffer from inequality in part because of the maintenance of the male/female binary itself. Binarisms, whether by design or not, necessarily frame individuals in a top/bottom hierarchy. Focusing only on “improving women’s lives” serves to reify the sex binary. I do not mean to say that women’s lives do not merit improving—rather, I take issue with the central and exclusive framing of the problem in this biosex light. “Women’s lives” cannot be improved until being a “woman,” “man,” or any sex means less in terms of social, legal, and political standing. This is the challenge posed to women-centered feminism by transgender movements (in the United States and elsewhere) and by Scandinavian feminism, which expressly seeks the reduction of gender differences. *See generally* SCANDINAVIAN CRITIQUE OF ANGLO-AMERICAN FEMINIST THEOLOGY (Hanna Stenstrom et al. eds., 2007) (collection of articles engaging in a critical dialogue with American feminist theology). It is a challenge that has led to the Yogyakarta Principles, a non-binding agreement by international law experts on sexuality and gender-related rights. THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) [hereinafter YOGYAKARTA PRINCIPLES]. In concluding that CEDAW should be more inclusive, I do not mean to exclude the need for remedies that focus on the inequality that women face based on their identity. Rather, I argue that the sole treaty in the international landscape on sex discrimination must attempt to protect more than just “women’s rights.”

<sup>177</sup> Frances Olsen’s landmark work articulates a parallel between the two public/private dichotomies most relevant to feminist analyses: the state/civil society division and the market/family division. Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 157 (Dorinda G. Dallmeyer et al. eds., 1993). The former “distinguishes ‘the state’ from the rest of society—public, state action from the private action of individuals and nongovernmental groups,” while the latter separates the public world of the market, work, and commerce from the private world of the family and home. *Id.* at 157, 160.

<sup>178</sup> JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 5–6 (2009).

confronted sexist “private” institutions; the drafters sought to bring international law to bear on those harms.<sup>179</sup> Despite CEDAW’s limited enforcement, one major success of CEDAW is the extent to which some States Parties have internalized its norms within their national legal systems.<sup>180</sup> As Hilary Charlesworth and Christine Chinkin have noted, CEDAW “acknowledges that, for women, protection of civil and political rights is meaningless without attention to the economic, social, and cultural context in which they operate . . . . The Women’s Convention also attempts to overcome the public/private dichotomy observed in international law.”<sup>181</sup>

Although CEDAW focuses almost exclusively on “women’s rights,” it does not solely talk about empowering mothers. Rather, the Convention seems to articulate an understanding of the value in shared parenting. It strikes a compelling balance between the recognition of the role women play in childbirth and the shared roles of parents: the Preamble starts by recognizing women’s role in society, but quickly moves toward embracing “the role of both parents in the family and in the upbringing of children.”<sup>182</sup> Although the Preamble does not use the terms “mother” and “father,” it clearly implies both a dyad (both parents) and the presumption that this dyad consists of a member of each of the two sexes (men and women).<sup>183</sup>

Other provisions support this dyadic heterosexual model. Article Eleven, Section Two, like the Preamble, first references specific women’s issues and then expands to broader references to equality in the dyadic model and, implicitly, sexed parental rights.<sup>184</sup> Section Two frames this dis-

<sup>179</sup> CEDAW Treaty, *supra* note 6, at preamble.

<sup>180</sup> See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638–56 (2004) (drawing on the meaning of the term “acculturation,” the process through which groups adopt the behaviors and beliefs of a surrounding culture. They argue that this process can be “harnessed” by institutions in order to “socialize recalcitrant states” into complying with international norms.).

<sup>181</sup> HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 217 (2000).

<sup>182</sup> CEDAW Treaty, *supra* note 6, at preamble. While the Preamble further emphasizes the “social significance of maternity,” it also supports a shared responsibility of men and women in the family. *Id.*

<sup>183</sup> It is worth noting that in the Spanish version, the term for “parents” is “padres,” which is the plural of “father.”

<sup>184</sup> Section Two of CEDAW states:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

discussion in the context of preventing discrimination against women with regard to maternity and pregnancy.<sup>185</sup> For that reason, it focuses on maternity leave as a guarantee. The first and last provisions of Section Two focus on pregnancy—banning discrimination on the basis of pregnancy and protecting pregnant women from harmful work.<sup>186</sup> This focus, like that of the Preamble, engages an issue specific to women’s biology; only individuals with female reproductive organs may become biologically pregnant. In Section Two, CEDAW also protects women from discrimination based on maternity, presuming that either: (1) it would not be possible for men to be victims of discrimination based on paternity; or (2) even if it were possible, it is beyond the scope of the Convention.<sup>187</sup> Concerning the third requirement, Article Eleven, Section Two, orders maternity leave with pay. Maternity leave provisions proved a radical innovation when CEDAW was drafted, but such provisions may ultimately discourage employers from hiring women in the first place. As Part Three discusses, contemporary “parental leave” laws move beyond a focus on women and adopt some form of sex neutrality, in part to reduce leave-based discrimination against women.<sup>188</sup>

The Convention’s last provision that expressly addresses parenting is less explicitly sexed, opening space for broader interpretation. Several sets of language here support the potential for a sex-neutral interpretation. Article Sixteen, Section One focuses on eliminating discrimination within marriage by promoting the abandonment of the traditional patriarchal order.<sup>189</sup> Subsections (d) and (f) emphasize that States Parties should foster parenting “on a basis of equality of men and women.”<sup>190</sup> Here, both provisions, like Article Eleven Section Two, Subsection (c), aim for rights to be allocated on a basis of equality between men and women. These provisions address equality in power over, as well as, responsibilities to the children. Here,

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(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

CEDAW Treaty, *supra* note 6, at art. 11 § 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See CEDAW Treaty, *supra* note 6, at art 11 § 2.

<sup>188</sup> See *infra* Part III. The fourth requirement of Article Eleven, Section Two, Subsection (c) urges States to “encourage . . . social services,” including “child-care facilities,” “to enable parents to combine family obligations with work responsibilities and participation in public life.” This provision does not reference “parents” as necessarily dyadic nor sexed, although in context those meanings may be inferred. *Id.* At the time of its drafting, CEDAW’s sex neutrality regarding parenting may follow from the presumption that parenting was another word for caretaking, which presumed only women performed.

<sup>189</sup> CEDAW Treaty, *supra* note 6, at art. 16 § 1.

<sup>190</sup> *Id.* Subsection (d) provides for States Parties to ensure to both men and women “[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.” *Id.* at art. 16 § 2(d). Subsection (f) provides for States Parties to ensure to both men and women “[t]he same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.” *Id.* at art. 16 § 2(f).

again, no explicit language says “both parents,” opening the possibility of multiple parents.<sup>191</sup>

Interestingly, the Convention’s provisions regarding parenting strike a different tone from the rest of the treaty, referencing not only the expected elements of “maternity” but also the “equality of men and women.”<sup>192</sup> CEDAW achieves a great deal by breaching the public/private divide, but its focus on women, in particular the provision for *maternity* leave, reflects an underlying social reality that women dominate (and are dominated by) parenting—a norm that both provides women with substantial social power and deprives them of economic power.

### 3. *Post-CEDAW International Law*

International legal thought had shifted considerably toward a sex-neutral and even perhaps an unsexed vision of parenting by 1990, when the CRC entered into force.<sup>193</sup> In this detailed treaty on the rights of children, only one section focuses on women specifically. Article Twenty-Four includes a provision for pre- and post-natal healthcare for mothers.<sup>194</sup> All other references are to “parents.”<sup>195</sup> No reference is made to “women” or “men,” establishing that this is not a sexed treaty in any explicit fashion. However, the CRC does refer to “both parents” five times,<sup>196</sup> limiting in that sense which family compositions may benefit from its protections.

In addition, the Yogyakarta Principles<sup>197</sup> was published, filling a void in international law on the intersection of human rights and sex, gender, and sexuality. This document is not legally binding in any jurisdiction and only constitutes an agreement by experts on a set of norms. Nonetheless, the principles provide a glimpse into how international law appears after four decades of developments in gender and sexuality rights. Principle Three states that “[n]o status, such as marriage or parenthood, may be invoked as

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<sup>191</sup> Moreover, no explicit language states that the parents must be of different sexes. Rather, the dyadic sexedness, to the extent present, draws on the implication that “parents” with rights “on a basis of equality of men and women” would include both a man and a woman parent. This implication conveys a presumption of heterosexual coupling as the basis for parenting.

<sup>192</sup> See, e.g., CEDAW Treaty, *supra* note 6, at art. 12 (discussing medical care for women during pregnancy and confinement, but also asserting that access to health care should be provided “on as basis of equality of men and women”).

<sup>193</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC Treaty].

<sup>194</sup> *Id.* at art. 24 § 2(d).

<sup>195</sup> By way of example, Article 2, Section 2 of the CRC Treaty states that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.” (emphasis added). *Id.* at art. 2 § 2.

<sup>196</sup> See *id.* at arts. 9, 10, 18.

<sup>197</sup> YOGYAKARTA PRINCIPLES, *supra* note 176.

such to prevent the legal recognition of a person's gender identity."<sup>198</sup> Likewise, Principle Thirteen references parenthood only to require that states provide equal access to parental status "without discrimination on the basis of sexual orientation or gender identity."<sup>199</sup> Significantly, the Principles avoid sexedness and references to dyadic couples or parental units.

In sum, international law references parenting in compelling ways with regard to protecting women from pregnancy and maternity discrimination. Surprisingly, CEDAW contains several provisions that do not solely protect women's rights, but also emphasize the equality of parents. Both CEDAW and CRC rely not only on implicit presumptions of male-female parents but also on the heterosexual dyadic nature of parenting. The Yogyakarta Principles move far beyond this; there is no sexedness, except to refer to prohibited forms of stereotyping, and no presumptions of dyadic parenting.

#### 4. *Internalization of International Parenting Norms*

International law, especially human rights law, has been subject to strong critiques surrounding a lack of compliance. The norms, critics contend, are aspirational at best. Countries do, to some extent, internalize these international norms, leading to some legitimization and institutionalization of human rights.<sup>200</sup> However, they internalize norms in different ways. In addition to encouraging states to adopt international norms, international law can encourage internalization through transnational networks of activists and individuals,<sup>201</sup> as well as through acculturation and selective adaptation.<sup>202</sup> Semi-formal and informal networks of women's rights advocates can foster change in several national contexts with specific connections to CEDAW's provisions. In these contexts, CEDAW has served to both inspire action and further legitimize national women's advocacy movements.<sup>203</sup> Cultural differ-

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<sup>198</sup> *Id.* at 12.

<sup>199</sup> *Id.* at 19.

<sup>200</sup> CEDAW's norms inspire a range of reactions from fully compliant internalization to disdainful evasion. Only when States internalize international law do they establish domestic legal obligations. Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2659 (1997) (noting that an "obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into [a State's] domestic legal system."). Without internalization, CEDAW lacks substantial impact. Along with Koh, other scholars have theorized how States internalize international law. See, e.g., Rex Glensy, *Quasi-Global Social Norms*, 38 *CONN. L. REV.* 79, 86–87 (2005) (describing how "transnational norm entrepreneurs" facilitate internalization in both their home countries and abroad); Goodman & Jinks, *supra* note 180, at 638–56 (explaining how institutions can harness acculturation, the process in which individuals and groups adopt beliefs and behaviors of a surrounding culture, to drive internalization).

<sup>201</sup> See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1–10 (1998).

<sup>202</sup> See, e.g., Goodman & Jinks, *supra* note 180, at 638–56; Rosenblum, *Internalizing Gender*, *supra* note 20, at 824.

<sup>203</sup> See generally Rosenblum, *Internalizing Gender*, *supra* note 20 (examining the utility of comparative methodologies in analyzing the process by which nations internal-

ences surface within and across national boundaries, and State and non-State actors engage in political behavior based on multiple rationalities. Although some international scholars may worry that cultural relativism challenges the viability of universal international human rights norms,<sup>204</sup> such norms have found their way into domestic legal systems, often colored with local cultural realities.<sup>205</sup> While these cultural differences may distract observers from the influence of international norms, internalization of these norms does occur.

In a previous article, I argue that CEDAW faces particular challenges during the process of internalization.<sup>206</sup> This phenomenon applies to all human rights instruments; especially those that traverse the public-private

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ize international norms, specifically considering how quotas for women's representation in France and Brazil illustrate the power of international legal instruments in different State contexts). CEDAW's Article 7 requires parties "to eliminate discrimination against women in the political and public life of the country." CEDAW Treaty, *supra* note 6, at art. 7. In the early 1990s, Brazilian feminists drew on the international women's rights movement to address the fact that women accounted for only a small percentage of the country's representation in government. See CLARA ARAÚJO, QUOTAS FOR WOMEN IN THE BRAZILIAN LEGISLATIVE SYSTEM I (2003), available at [http://www.quotaproject.org/CS/CS\\_Araujo\\_Brazil\\_25-11-2003.pdf](http://www.quotaproject.org/CS/CS_Araujo_Brazil_25-11-2003.pdf). Feminists persuaded the legislature to pass a statute requiring each political party to set aside at least 30 percent of its nominations for candidates of each sex. Comm. on the Elimination of Discrimination Against Women, Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women: Combined initial, second, third, fourth, and fifth periodic reports of States Parties: Brazil, at 21, U.N. Doc. CEDAW/C/BRA/1-5, (Nov. 7, 2002), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/29fa368c23666011c12572b20038b10a/\\$FILE/N0268725.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/29fa368c23666011c12572b20038b10a/$FILE/N0268725.pdf). Like Brazil, France took little action to fulfill its responsibilities under Article 7 until it passed the Parity Law in 2000. Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 to facilitate equal access for men and women to electoral mandates and elective functions], available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=INTX9900134L>. France's Parity Law imposes a 50 percent requirement with two kinds of enforcement mechanisms, which vary depending on the election in question. *Id.* at arts. 14–15. Overall, France's Parity Law has proven more effective than Brazil's Quota Law—a difference that can be attributed to more powerful, though imperfect, enforcement mechanisms. I argue that key differences in implementation derive, in part, from the variation in the construction of gender in these two different countries. Rosenblum, *Internalizing Gender*, *supra* note 20, at 800. Regarding Parity's efficacy, see generally, ELÉONORE LÉPINARD, L'ÉGALITÉ INTROUVABLE. LA PARITÉ, LES FÉMINISTES ET LA RÉPUBLIQUE (2007).

<sup>204</sup> For a discussion on the influence of cultural relativism, see CHARLESWORTH & CHINKIN, *supra* note 181, at 222–29. They note that some scholars reject cultural relativism because it retards the development of universal standards. See *id.* at 222–23 (citing Fernando Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985)).

<sup>205</sup> See Rosenblum, *Internalizing Gender*, *supra* note 20, at 759, 821–25. For example, French and Brazilian internalization of international norms, like women's suffrage, appear distinct, yet international law has still impacted both countries domestic laws. See *id.* at 788–99. Variations between countries may be the result of different modes of internalization, including transnational networks of activists and individuals, acculturation, and selective adaptation; however, this does not diminish the impact of internalization. See *id.* at 821–25.

<sup>206</sup> See *id.* at 807.

divide: “[d]ifferentiation among legal cultures may lead to divergent internalizations of the same international norm.”<sup>207</sup> In that article, I show how the differences between Brazilian and French cultural gender constructions play out in remedies adopted pursuant to CEDAW.<sup>208</sup> I argue that cultural difference creates possibilities for new norms that do not simply project one cultural framework onto the world political stage.<sup>209</sup> This is an example of the centrality of comparative knowledge—we see that different countries implement international treaties in vastly different ways. Although unsexed parenting may constitute a norm with some universalist aspirations, I want to be explicit that I recognize that implementation of this norm will necessarily vary across national borders.<sup>210</sup>

The relationship between international norms and domestic internalization of those norms cannot easily be described as causal. International norms regarding parenting, however, may play a meaningful role in state adoption of legislation that correlates to international standards. Of course, such norms have no formal influence if a state is not a party to a convention, as is the case with the United States and both CEDAW and CRC. Nonetheless, the example of the United States, when contrasted with that of Sweden, demonstrates the challenge of assessing whether a facially sex-neutral law promotes “unsexing.”

#### B. *Thin Unsexing—the United States’ Family and Medical Leave Act*

The Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. §§ 2601 et seq., was signed into law on February 5, 1993. Congress sought to aid in “the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions.”<sup>211</sup> The FMLA requires employers to allow employees to take up to twelve weeks of time off.<sup>212</sup> Be-

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 809.

<sup>209</sup> *Id.* at 801.

<sup>210</sup> Fernanda Nicola makes this point in a particularly eloquent fashion in her recent piece. Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2011). In this article, she criticizes modern international human rights lawyers and their comparative family law projects that aim to create harmonious reform on issues like abortion, same-sex marriage, transsexual, and adoption rights. *See id.* Nicola resists these universalist projects, suggesting that comparative family law should favor legal pluralism “not because of a single social purpose, but rather through a multiplicity of local and global factors, both internal and external to family law.” *Id.* at 809–10. Nicola shows that “family law reforms should not be about only moral values and universal rights but, just like reforms of the market, about their economic and distributive consequences as well.” *Id.* at 810. I recognize the unsexing project’s universalist tone, and indeed it draws on the Yogyakarta Principles. However, nation states internalize international law using nationally and culturally variant forms to reflect these differences. *See* Rosenblum, *Internalizing Gender*, *supra* note 20, at 787–88.

<sup>211</sup> Family and Medical Leave Act, 29 U.S.C. § 2601(a)(2) (2006).

<sup>212</sup> *Id.* at § 2612(a)(1).



cause employees must satisfy a number of criteria to be eligible for parental leave under the FMLA, including employment at a company with fifty or more employees, only “roughly 50 percent of the workforce is covered.”<sup>213</sup> Moreover, the FLMA only required *unpaid* leave.<sup>214</sup> As a result, some estimate that as many as seventy-eight percent of eligible employees cannot afford to take advantage of the FMLA.<sup>215</sup> Moreover, the United States is the only nation in the developed world without paid parental leave.<sup>216</sup> And unfortunately, the fact that the leave is unpaid has a sexed impact: families with a male breadwinner view men taking leave as a luxury beyond their means.<sup>217</sup>

Although its language is entirely sex-neutral, one purpose behind the FMLA was to advance women’s role in the workplace.<sup>218</sup> The House Report for the statute recognized that the typical family is no longer made up of a working father and stay-at-home mother; rather, single mothers make up a substantial portion of the workforce.<sup>219</sup> Congressional findings state that, “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>220</sup>

The FMLA’s structure explicitly sought to avoid allegations of discrimination.<sup>221</sup> Congressional debate focused not on sex differentials, but rather on the desirability of creating parental leave protections as a social guaran-

<sup>213</sup> EICHNER, *supra* note 159, at 36.

<sup>214</sup> 29 U.S.C. § 2612(c) (“[L]eave granted under [this section] may consist of unpaid leave.”); *see also* Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 258 (2003).

<sup>215</sup> EICHNER, *supra* note 159, at 36.

<sup>216</sup> Jennifer Ludden, *U.S. Only Industrialized Nation With No Paid Leave for New Parents*, NPR (June 17, 2010), <http://www.npr.org/blogs/thetwo-way/2010/06/17/127904924/u-s-now-only-industrialized-nation-without-paid-leave-for-new-parents>.

<sup>217</sup> Halverson, *supra* note 214, at 258 (identifying “financial obstacles” as one of the reasons why men do not take leave under the FMLA).

<sup>218</sup> *Id.*

<sup>219</sup> H.R. REP. NO. 103–8(I), at 20 (1993). The report predicted that women would make up forty-seven percent of the American work force by 2005, and that “two-thirds of women with preschool-aged children and three quarters of women with school-age children” would be in the work force in 1995. *Id.* The FMLA aimed to address these changes that shifted the cultural makeup of families in the 1990s. *See id.*

<sup>220</sup> 29 U.S.C. § 2601(a)(5).

<sup>221</sup> Significantly, the House Report itself argues that the FMLA does not discriminate on the basis of sex. H.R. REP. NO. 103–8(I), *supra* note 219, at 32. It states that “[the FMLA] covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.” *Id.* The Report notes at least one reason why men are included under the FMLA: “[a] law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. [The FMLA], by addressing the needs of all workers, avoids such a risk.” *Id.*

tee.<sup>222</sup> One example of the limits of this neutrality is that while the FMLA allows an employee to take unpaid leave to care for children of his or her same-sex partner, regardless of how the child comes to the family, the relationship status of the couple, or the legal relationship between the person taking leave and the child, it does not permit same-sex partners to take leave to care for each other.<sup>223</sup>

The FMLA is thinly unsexed. It has no provisions that discriminate or prefer one sex over another—it merely requires employers to provide leave. However, the FMLA’s nominal sex neutrality becomes a sexed reality due to overpowering default rules that govern its implementation. As Elizabeth Emens argues:

[D]efault rules affect the choices that parties make across widely varying domains, from organ donations to pension plans to corporate antitakeover measures. For instance, across these varied domains, defaults are often “sticky.” That is, parties often choose whatever option is set as the default. Thus, even when private parties choose, the law shapes behavior by the way it frames those choices.<sup>224</sup>

Social defaults, like legal defaults, affect the choices of private parties by framing those choices in a particular way. Although money and stigma are not enforceable rules, they influence one’s decisions just the same: when a male parent decides whether to take leave under the FMLA, his decision is framed by the sexual norms inherent in these social defaults. The FMLA’s sex neutrality thus leaves the sexedness or unsexedness entirely in the hands of individuals and their employers,<sup>225</sup> allowing social defaults to determine that women will be the primary beneficiaries of the Act. Because of social defaults that encourage men not to take leave, the thin unsexedness of the FMLA’s language has not translated into a sex-neutral family-leave sys-

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<sup>222</sup> Debate on the House and Senate floors were largely devoid of any discussion over the inclusion of men in this bill. *See, e.g.*, 139 CONG. REC. H557–03 (Feb. 4, 1993). Instead, Senators and Representatives argued over the need for the federal government to intervene and the economic effects of the bill. *Id.*

<sup>223</sup> M.V. LEE BADGETT, THE WILLIAMS INST., THE IMPACT OF EXPANDING LEAVE RIGHTS TO CARE FOR CHILDREN OF SAME-SEX PARTNERS 1 (2010), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Badgett-FMLA-Jun-2010.pdf> (noting that while the FMLA requires leave to care for the children of a same-sex partner, it does not allow leave to care for a same-sex partner).

<sup>224</sup> Emens, *supra* note 11, at 763.

<sup>225</sup> *See id.* Default rules may be counteracted by proactive state policy. Such efforts do not necessarily intrude on the family. Maxine Eichner argues the contrary, that state policy limiting coercion by the marketplace on a family increases privacy and family autonomy. EICHNER, *supra* note 159, at 65. Limiting mandatory working hours, paid time off for childcare, and prohibiting employers from firing parents who refuse to work overtime allow families the institutional space to make important family decisions without being held captive by the market. *See id.*

tem.<sup>226</sup> Of the many reasons for men's failure to take parental leave,<sup>227</sup> two stand out—money and stigma. Not surprisingly, data reveals that more women take advantage of parental leave.<sup>228</sup>

These social defaults have prevented new parents from invoking the FMLA: men continue to rely on vacation time for parental leave, taking an average of only ten days off.<sup>229</sup> Although private corporate initiatives tout their attempts to raise male paternity leave, recent data suggests only lukewarm success.<sup>230</sup> The thin neutrality of the FMLA simply serves to reinforce social divisions between men and women.<sup>231</sup> In a heterosexual two-parent household, financial incentives heavily favor the man working and the woman caretaking. In adopting a neutral stance with regard to the division of labor, the FMLA reinforces pressure on men to continue working, leaving only women to take leave. This is because men earn more money and the family cannot afford to lose this income through unpaid leave, so pressures leave men working and women at home—the same as before the FMLA.<sup>232</sup>

In addition to the fact that unpaid leave is a luxury many families cannot afford, men who take leave to care for children face substantial stigma—masculinity stereotypes construct men as breadwinners.<sup>233</sup> Through bearing the responsibility of family finances, many men spend less time with their

<sup>226</sup> The primary goal of the law was not to change the societal demands on men as caregivers, but “to promote the goal of equal employment opportunity for women and men.” 29 U.S.C. § 2601. In other words, the FMLA did not attempt to correct the discrepancy between those taking maternity and those taking paternity leave, but to protect employees, irrespective of their gender, from risking employment in order to care for children, sick family members, or the elderly.

<sup>227</sup> There are many theories as to why men fail to take leave under the FMLA. One commentator argues that five obstacles impede men's use of parental leave: (1) the stigma of taking leave; (2) financial reasons for not taking unpaid leave; (3) ignorance of the law; (4) administrative burdens on employers that serve as obstacles for men taking leave; and (5) the lack of any legislative intent to encourage fathers to bond with their newborns. Halverson, *supra* note 214, at 261.

<sup>228</sup> *Id.* at 259–61.

<sup>229</sup> The 2000 U.S. Department of Labor statistics showed that only 13.5% of male and 19.8% of female employees took family leave. *Id.* at 260. It also showed that women comprised 58.1% of leave takers in general. *Id.* The survey was conducted over five years and the trend showed that overall the percentage of male leave takers in general declined by almost two percent (43.8% to 41.9%) while women leave takers increased by the same increment (56.2% to 58.1%). *Id.* at 260. The stigma of taking parental leave may lead men to count such leave as vacation time.

<sup>230</sup> For example, Ernst & Young created an internal campaign in 2006, featuring senior manager Rob McLeod, age 32, speaking enthusiastically about his experience when he took four weeks of paternity leave. The purpose of this campaign was to help men feel more comfortable with taking advantage of family-friendly benefits. Karen Holt, *Good for the Gander*, WORKING MOTHER, Oct. 2008, at 92. *But see FMLA: Facts and Statistics*, AAUW, <http://www.aauw.org/act/laf/library/fmlastatistics.cfm> (last visited Oct. 23, 2011) (58% of employees who took leave in 2007 were women; 42% were men).

<sup>231</sup> Lindsay R. B. Dickerson, “Your Wife Should Handle It”: *The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 435 (2005) (arguing that the provisions of the FMLA “do not challenge the discriminatory structures of family and work that were in place prior to its enactment”).

<sup>232</sup> *See id.* at 440–41.

<sup>233</sup> *Id.* at 429–31.

children and may be perceived as “less attached.”<sup>234</sup> Under these circumstances, it is unsurprising that parenthood remains a highly gendered institution in Western culture. With respect to childcare for newborns, “men receive subtle messages from employers that their place is at the office and their wives’ responsibility is child care.”<sup>235</sup> A double standard thrives as successful men face pressure to work even immediately after a child’s birth, while women face pressure to take as much time off as possible. Mothers who succeed at work are perceived as bad mothers, while fathers are only viewed as successful if they achieve at work.<sup>236</sup> In addition, all of these roles become exacerbated given the relatively high number of hours United States citizens work weekly.<sup>237</sup>

The FMLA’s neutral language fails to translate into a neutral-functioning policy precisely because of these market realities and concomitant sex stereotypes. One study argues that the technological progress that has taken place in the second half of the twentieth century should have eliminated the wage gap by 1970, but that gender stereotypes have prevented this shift.<sup>238</sup> Central among these stereotypes is the presumption that women must be responsible for parenting. Based on complicated gender structures in the United States, women generally step down from work to care for children in two-income households.<sup>239</sup> In the aggregate, even short withdrawals from the workforce have substantial effects on women’s economic equality.<sup>240</sup>

These stereotypes create a self-perpetuating inequality—if employers believe that women are mostly responsible for household work, then they expect women to put less time and effort into their jobs and therefore offer them lower paying jobs and earnings.<sup>241</sup> For this reason, more generous ma-

<sup>234</sup> Halverson, *supra* note 214, at 262.

<sup>235</sup> *Id.* In fact, “many law firms . . . require male employees to show that they are the primary caregiver [of a child] before allowing them to take paternity leave.” *Id.*

<sup>236</sup> *Id.* at 263; see also Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STAN. L. REV. 967, 973 (2001) (arguing that male lawyers will not adopt alternative work schedules that allow them to engage in family responsibilities if upper management does not “honor a man’s simultaneous commitments as lawyer and father”).

<sup>237</sup> U.S. workers log far more hours, an average of 1,966 per year, than other industrialized nations. EICHNER, *supra* note 159, at 39. By way of example, Swedish workers spend an average of 1,552 hours working annually, while French (1,656), German (1,560), and Canadian (1,732) workers also spend significantly less time working than Americans. *Id.* American parents spend a combined average of eighty hours per week at their jobs, while Swedish couples only spend sixty-nine hours per week. *Id.* at 40.

<sup>238</sup> Stefania Albanesi & Claudia Olivetti, *Gender Roles and Technological Progress*, VOX (July 20, 2007), <http://voxeu.org/index.php?q=node/402>.

<sup>239</sup> EICHNER, *supra* note 159, at 41.

<sup>240</sup> *Id.*

<sup>241</sup> More women than men take time off from work, work part time, cannot go into work early, or cannot stay later at work. David Leonhardt, *A Labor Market Punishing to Mothers*, N.Y. TIMES, Aug. 3, 2010, <http://www.nytimes.com/2010/08/04/business/economy/04leonhardt.html>. Taking time off from work is penalized with reductions in pay, promotions, or loss of specific career paths. *Id.* Jane Waldfogel, a professor at Columbia University who specializes in families and work, said, “[w]omen do almost as well as men today . . . as long as they don’t have children.” *Id.* While the career price assessed

ternal leave policies may prove counterproductive as they reinforce the division of labor that places women in the home.<sup>242</sup> Several scholars argue that a policy of paid parental leave alone would substantially improve the ability of men and alternative families to take parental leave.<sup>243</sup>

In short, the FMLA's guarantee of equal access to family leave without regard to sex provides the thinnest of protections. This guarantee exists at the level of formal law, but is handily undermined by a set of social default rules that predominate in the "free market" context of the United States. This thinness subjects the sex neutral provisions of the Act to the vagaries of different employers and substantial market differentials between sexes, classes, and races. In practice, it achieves little in assuring access to leave at a universal level, particularly when compared with the more assertive Swedish parental leave regime.

### C. *Thick Unsexing—the Swedish Context*

Sweden's parental leave policy is generally considered to be both comprehensive and creative.<sup>244</sup> Its goal is "getting mom a job and making dad

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for taking time off in a career is similar between men and women, women are more likely to take time off. *See id.* Women who had no children and never took time off had careers that resembled those of men. *Id.* The effect on women who do have children is their exit from the workplace toward full-time parenting because they cannot find a part-time job. *See id.* Some policy propositions to remedy this situation are universal preschool programs, paid parental leave policies, or a policy that gives workers the right to request a switch to part-time or to have a flexible schedule. *See id.*

<sup>242</sup> *See* Rosenblum, *Unsex CEDAW*, *supra* note 4, at 1. For example, June Carbone argues that paid parental leave is critical for parental relationships. CAHN & CARBONE, *supra* note 123, at 84. She argues for "incentives such as paid family leave that might encourage fathers to join mothers in newborn care" and establishing "paternity and child support obligations, with less of the onus of initiating action placed on the mother." *Id.* at 84. *See also* Dickerson, *supra* note 231, at 447 (arguing that California's Paid Family Leave Program has succeeded as a "viable first step" towards equality in the workplace because it tears down the economic barrier for men).

<sup>243</sup> *See* Rosenblum, *Unsex CEDAW*, *supra* note 4, at 6. For example, June Carbone argues that paid parental leave is critical for parental relationships. CAHN & CARBONE, *supra* note 123, at 84. She argues for "incentives such as paid family leave that might encourage fathers to join mothers in newborn care" and establishing "paternity and child support obligations, with less of the onus of initiating action placed on the mother." *Id.* at 84. *See also* Dickerson, *supra* note 231, at 447 (arguing that California's Paid Family Leave Program has succeeded as a "viable first step" towards equality in the workplace because it tears down the economic barrier for men).

<sup>244</sup> *See* Michelle Ashamalla, *A Swedish Lesson in Parental Leave Policy*, 10 B.U. INT'L L.J. 241, 243 (1993); *see also* FÖRÄLDRALEDIGHETSLAG (Svensk författningssamling [SFS] 1995:584) (Swed.), English translation of Parental Leave Act (*available at* <http://www.sweden.gov.se/content/1/c6/10/49/85/f16b785a.pdf>). Several countries have begun to consider adopting versions of Sweden's law to extend parental leave with gender restrictions. *See* JOHN EKBERG, RICKARD ERIKSSON & GUIDO FRIEBEL, PARENTAL LEAVE—A POLICY EVALUATION OF THE SWEDISH "DADDY-MONTH" REFORM 2 (2005), *available at* <http://ftp.iza.org/dp1617.pdf>. Denmark, Italy, and Norway require "at least one month of the extension is a 'use it or lose it' option for fathers." *Id.* In Austria, parents get two years of extended leave, but only if the father uses at least six months. *Id.* Iceland allocates three months each to fathers and mothers and three months to share. *Id.*

pregnant”—a deliberate use of public policy to unsex work and caretaking.<sup>245</sup> Under this policy, two employed parents are entitled to a combined sixteen months of parental leave.<sup>246</sup> Either parent may use this benefit or apportion it.<sup>247</sup> To encourage paternal involvement in child rearing, Sweden requires that each parent take two months of the time allowance, with the remainder available to either parent.<sup>248</sup> The first three hundred and ninety days are paid at eighty percent of a normal salary, while the remaining ninety days are paid at a flat fixed rate.<sup>249</sup> Each parent’s parental leave may be taken simultaneously or consecutively.<sup>250</sup> As such, this provision allows parents to decide if they want to enjoy the luxury of both parents taking care of the baby or conserve resources and have the parents care for the child in a consecutive manner. In addition, both parents have the option to return to work on part-time basis until the child reaches the age of eight.<sup>251</sup> The state also maintains a highly developed system of daycare facilities, which ease the transition back to the workforce.<sup>252</sup> Parents even benefit from a guaranteed departure time from their work.<sup>253</sup>

Rather than focusing on gender as the primary basis for receiving benefits, the Swedish system emphasizes a child’s ability to spend equal time with both parents. The Swedish gender-neutral system “alleviates feminist concerns about disparate treatments involved with ‘maternity’ leave” because it does not penalize women who desire both a career and children.<sup>254</sup> Prior to the enactment of the current provisions, men were mostly reluctant to take parental leave because of traditional sex roles.<sup>255</sup> To address the lack of social acceptability for fathers taking paternity leave, the “feminists proposed that the Swedish government mandate paternity leave.”<sup>256</sup>

Sweden’s parental leave policy is a thick unsexing provision—it recognizes the extent to which social defaults (here against men taking parental

<sup>245</sup> Roger Klinth, *The Best of Both Worlds? Fatherhood and Gender Equality in Swedish Parental Leave Campaigns, 1976-2006*, 6 *FATHERING* 20, 20 (2008).

<sup>246</sup> *Id.* at 22; see also 4–5 § FÖRÄLDRALEDIGHETSLAG (SFS 1995:584) (Swed.), English translation available at <http://www.sweden.gov.se/content/1/c6/10/49/85/f16b785a.pdf>; *Gender Equality: the Swedish Approach to Fairness*, SWEDEN.SE, <http://www.sweden.se/eng/Home/Society/Equality/Facts/Gender-equality-in-Sweden/> (last visited, Nov. 6, 2011).

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

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> Ashamalla, *supra* note 244, at 243.

<sup>252</sup> U.S. DEP’T OF STATE, BACKGROUND NOTE: SWEDEN, (July 19, 2011) <http://www.state.gov/r/pa/ei/bgn/2880.htm> (“Sweden has an extensive child-care system that guarantees a place for all young children ages two through six in a public day-care facility.”)

<sup>253</sup> See *Gender Equality: the Swedish Approach to Fairness*, *supra* note 246.

<sup>254</sup> Ashamalla, *supra* note 244, at 243–44.

<sup>255</sup> See *id.* at 244.

<sup>256</sup> *Id.* There is some debate over the extent to which the Swedish law actually incentivizes men to acquire the “human capital needed for child care.” EKBERG, ERIKSSON & FRIEBEL, *supra* note 244, at 2–3.

leave) determine outcomes, and directly incentivizes behavior to counter the drag-down effect of these defaults. At the same time, it is worth noting that while this is a thick provision, it is also noncoercive: parents may prefer to maintain the leave as taken solely by one parent, but they would lose the right to some of their leave. The other interesting element in the Swedish law is that it requires some balance: for both parents to get the full eighteen months, the parent taking less leave must take at least two months. Because of this, in heterosexual families where the man takes more leave, the woman must take at least two months. In this sense, the provision consistently pursues unsexing. And yet, even with the state's assertive posture, male employees are still more likely to take leave only if another father took leave within the previous two years.<sup>257</sup>

Public campaigns attempted to subvert traditional gendered notions of men's and women's responsibilities: "[m]en's identity, as well as citizenship, was redefined; men were supposed to be fathers, not just breadwinners."<sup>258</sup> However, it has also been argued that the public campaigns to sell men on parenting involve constructions of masculinity<sup>259</sup> and an emphasis on heteronormativity.<sup>260</sup> Nevertheless, Sweden's promotion of caregiving as a masculine endeavor may serve to unsex parenting by creating space for men to be fathers.

The policy does not presume the sex of the parents, nor does it differentiate between them—in a different-sex couple, the man could take more leave than the woman, all of it paid. As such, Sweden's system is fully neutral, even though it presumes only two parents.<sup>261</sup> This is distinct from other systems in Europe that favor maternity leave over a sex-neutral parental leave.<sup>262</sup>

Yet the Sweden parental leave policy is not merely sex neutral, but unsexed. By incentivizing some balance between parents in assuming responsibilities, Sweden's law succeeded in initiating a more egalitarian division of home labor by strongly encouraging men to stay at home with the baby for two months. Sweden does not merely permit balanced childcare

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<sup>257</sup> Linda Haas & C. Philip Hwang, *Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden*, 7 *FATHERING* 303, 305 (2009).

<sup>258</sup> Klinth, *supra* note 245, at 26.

<sup>259</sup> *Id.* at 27 (discussing how campaign makers used "masculine figures like weight lifters and male-coded implements" in an effort to "create a social position acceptable to men").

<sup>260</sup> *Id.* ("In campaigns, the new father was firmly placed within the context of the heterosexual nuclear family. Alternative family forms such as single parenthood, gay or lesbian families, were excluded.")

<sup>261</sup> Such laws that favor couples inevitably put families with single parents or multiple parents at a disadvantage.

<sup>262</sup> Sweden and a few other countries provide parental leave that is sex neutral, but most European countries continue to provide maternity leave that is separate from parental leave. *La famille en Europe*, UNION DES FAMILLES, <http://www.uniondesfamilles.org/conge-maternite.htm> (last visited Nov. 6, 2011).

but encourages it. By the early 1990s, almost fifty percent of men with children took paternity leave.<sup>263</sup> As more men took paternity leave, it became more socially acceptable and created a virtuous cycle where men increasingly began to take the leave.<sup>264</sup> This model promotes social advancement and results in less hiring discrimination because parental leave no longer strongly favors women's caretaking responsibilities. When men are encouraged to take leave, employers no longer presume that female employees are more costly than male employees.

The generosity of its provisions has proven to be highly effective in diminishing workplace discrimination based on gender and traditional parenting roles. Sweden's parental leave policy has many salubrious effects. For men, the effects involve discovery of the joys of parenting, more equitable participation in family responsibilities, and more time with children.<sup>265</sup> Employers expect employees to take leave without regard to gender and refrain from penalizing parents in promotions.<sup>266</sup> Because women are no longer the only parents taking leave, their paychecks have improved.<sup>267</sup> Some even perceive that participation by men has led to lower divorce rates and increased joint custody of children after divorce.<sup>268</sup>

The introduction of required leave for fathers in 1995 marked a huge shift. There was no mandate that fathers had to stay home, but if fathers did not, the family would lose a month (now two months) of parental leave subsidies.<sup>269</sup> The rate of fathers taking leave went from six percent to eighty-five percent.<sup>270</sup> Fostering choice for men, a central element in public relations campaigns prior to 2001, reinforced the notion of "active fatherhood as something out of the ordinary."<sup>271</sup> Only after particular choices were encouraged did the law achieve its greater success. Thanks to women's newfound ability to flourish in the workplace while parenting, "housewife"

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<sup>263</sup> Klinth, *supra* note 245, at 22 (46% of new fathers took leave during period immediately before 1995 reform); *but see* Haas & Hwang, *supra* note 257, at 304 (noting that although 90% of fathers took leave in 2007, mothers still took 79% of the total leave days).

<sup>264</sup> Klinth, *supra* note 245, at 33–34 (noting that cultural depictions of men as fathers was a necessary precondition to mainstream acceptance by men of paternal leave).

<sup>265</sup> Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html?scp=1&sq=sweden%20fathers&st=cse> [hereinafter Bennhold, *Men Can Have It All*].

<sup>266</sup> *See id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See id.*

<sup>269</sup> Anna-Lena Almqvist, *Why Most Swedish Fathers and Few French Fathers Use Paid Parental Leave: An Exploratory Qualitative Study of Parents*, 6 FATHERING 192, 194 (2008).

<sup>270</sup> *See* Bennhold, *Men Can Have It All*, *supra* note 265.

<sup>271</sup> Klinth, *supra* note 245, at 30.



became a largely socially unacceptable position.<sup>272</sup> Even so, work still remains to shift attitudes in the corporate sector.<sup>273</sup>

*D. Thin Versus Thick Unsexing: Contrasting U.S. and Swedish Models*

Both the FMLA in the United States and the Swedish parental leave law attempt to achieve some form of sex neutrality. They each do, to a certain extent. Formally, the FMLA's text provides the guarantees that would permit a person, regardless of biosex, to obtain the benefits of the statute. However, the FMLA stands out against a world in which all other developed nations guarantee paid parental leave. Because most families are unwilling to choose to forego pay, whether an employee will be able to take leave may depend solely on his or her relationship with the employer. The FMLA leaves the provision of paid leave to the market and employer's discretion, with obvious consequences. Women, whose employment often pays less, can least afford to take leave. Because the FMLA permits paid leave, but does not force employers to provide it or employees to take it, financial concerns prevent men from taking parental leave. Many economists point out that maternity leave policies, or even sex-neutral policies that favor women, lead to hiring fewer women, as well as the reinforcement of sexist norms of work and income.<sup>274</sup> To the extent that women are more likely to take maternity leave, employers view them as more expensive and therefore expendable employees.<sup>275</sup> A sex- and gender-neutral model can reflect women's biological realities in parenting, but still provide for men's equal participation in parenting. Default rules draw on stereotypes that portray men

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<sup>272</sup> Katrin Bennhold, *The Stigma of Being a Housewife*, N.Y. TIMES, July 20, 2010, <http://www.nytimes.com/2010/07/21/world/europe/21iht-LETTER.html?scp=2&sq=sweden%20fathers&st=cse>.

<sup>273</sup> Haas and Hwang, *supra* note 257, state:

Our surveys also make it clear that the majority of large Swedish companies are still not supportive of fathers taking parental leave. The majority have not made a formal decision to support fathers taking leave, implemented special programs to encourage fathers to take leave, kept records about fathers' leave use or designated someone to encourage fathers to take leave. . . . The majority of companies in 2006 still reported that co-workers and managers typically did not react positively to fathers who wanted to take leave and that most fathers did not yet take much leave. . . . Will the worsening economy stall progress even more? During the last recession, our 1993 study found that companies concerned with productivity and cost-cutting provided less formal and informal support to fathers who wanted to take parental leave.

*Id.* at 318–19.

<sup>274</sup> See, e.g., Catherine Hakim, *The mother of all paradoxes*, PROSPECT MAG., Nov. 18, 2009, <http://www.prospectmagazine.co.uk/2009/11/the-mother-of-all-paradoxes/> (noting Swedish economists see maternity leave as a glass ceiling for women in the labor workplace).

<sup>275</sup> In this sense, the stereotypes reinforce men's financial advantage over women. The benefit from this stereotype does not, however, ameliorate the cost of not having time with their families.

as unsuited to familial and caretaking roles, thus causing women to take parental leave more readily than men. The power of default rules leaves the FMLA's neutrality thin and not thick, formal rather than substantive. In the end, the protections of the FMLA fail to advance unsexing with any consistency.

Scandinavian models reflect the importance of shared parenting for greater economic equality, as well as for equality in the home. The Swedish policy attempts to remove sex from employers' equations precisely by addressing sex. The requirement that both parents take at least two months off to get the maximum benefit under the statute encourages men to take parental leave. This provision has led to widespread engagement by fathers in their children's daily caretaking. By emphasizing the connection between masculinity and childcare, Sweden's policy helps ensure that traditionally gendered men can engage in childcare without fearing social disapproval. In short, Sweden has engineered a shift in family structures, one that has a direct impact on the viability of attempts to promote women's equality in the workplace.

The Swedish law also demonstrates the interrelatedness of regulation of the family and the market. Although the private sector continues to pursue affirmative action for women, it has not transformed women's home lives—women obtain work, but continue to bear the responsibility of home management and childrearing.<sup>276</sup> The Swedish policy demonstrates the extent to which remedying inequality in the family can reduce market inequalities. Sweden set a goal to balance parental responsibility and foster the effective childcare necessary for a newborn. Incentivizing leave for both parents minimizes gender asymmetries in the allocation of parental responsibilities and “decreases the potential for statistical discrimination that leads to gender inequalities in wages.”<sup>277</sup>

Indeed, a truly thick understanding of unsexed parenting would include not only an awareness of the default rules regarding parenting, but the related legal systems implicated in family life—notably those of economic life and the corporation. Scholars attribute Swedish women's reduced financial dependence on men to parental leave policies that equalize treatment.<sup>278</sup> For that reason, it is worth noting the example of Norway, which instituted a quota of forty percent of the minority sex's representation on corporate boards.<sup>279</sup> The quota applied to all publicly traded corporations, and was to

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<sup>276</sup> *A Guide to Womenomics*, ECONOMIST, Apr. 12, 2006, <http://www.economist.com/node/6802551> (noting that women do most work at home in addition to their “public” work).

<sup>277</sup> Albanesi & Olivetti, *supra* note 238.

<sup>278</sup> Klinth, *supra* note 245, at 23.

<sup>279</sup> See *The Act Relating to Gender Equality*, GOVERNMENT.NO: INFORMATION FROM THE GOVERNMENT AND THE MINISTRIES, <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-relating-to-Gender-Equality-the-.html?id=454568> (last visited Nov. 13, 2011) [hereinafter *Act Relating to Gender Equality*] (Norwegian statute containing corporate board quota provision). See also Rosenblum, *Feminizing Capital*, *supra* note 14.

be enforced with the draconian punishment of dissolution for noncompliance.<sup>280</sup> Its success has inspired other countries to follow suit.<sup>281</sup> Where women take parental leave far more frequently than men, it exacerbates their absence in management, leaving corporate hierarchies sexed male. By accelerating the integration of women in corporate hierarchies, corporate board quotas and other gender diversity efforts pursue the basic goal of balancing gender in society. Along the same lines, Sweden's thickly unsexed parental leave policy creates the conditions necessary for further sex integration in the corporate sector. As a corporate board quota seeks to feminize capital from the boardroom down, Sweden's parental leave policy feminizes capital from the bassinet up. By incentivizing parenting for men, it may serve to unsex family leadership, thus fostering overall gender balance in society.

The Swedish parental leave policy serves as an example of how much women actually benefit from paternal leave: an unsexed parental leave policy erodes the hold that men have over the workplace and serves to undercut the economic incentive for hiring men over women. An unsexed vision of mothering, and indeed of parenting, can reflect women's biological realities in parenting while still providing for men's equal participation in parenting, thus furthering the overall goal of creating a society with a broader gender balance.

#### CONCLUSION

The recent trend of courts, states, and countries around the world taking steps to recognize same-sex couples' rights gives new urgency to thinking about unsexing mothering. In 2010, Argentina and Mexico City legalized marriage for same-sex couples,<sup>282</sup> marking a major departure for two countries whose social norms were defined largely by the Catholic Church. The United States, now the only country in North America without marriage equality, has been thrust into a nationwide debate thanks to the prominence

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<sup>280</sup> *Act Relating to Gender Equality*, *supra* note 279.

<sup>281</sup> France, for example, has recently adopted a similar quota system. Daniel Schäfer & Peggy Hollinger, *Managers Hit Back at Female Board Quotas*, *FIN. TIMES*, Feb. 20, 2011, <http://www.ft.com/cms/s/0/915bac1e-3d15-11e0-bbff-00144feabdc0.html#axzz1EdTBRsfY>. Spain and the Netherlands have also followed suit. See Bruce Crumley, *Boardroom Revolution*, *TIME*, Apr. 26, 2010, available at <http://www.time.com/time/magazine/article/0,9171,1982304,00.html>.

<sup>282</sup> Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, *N.Y. TIMES*, July 15, 2010, [http://www.nytimes.com/2010/07/16/world/americas/16argentina.html?\\_r=1&ref=argentina](http://www.nytimes.com/2010/07/16/world/americas/16argentina.html?_r=1&ref=argentina); David Agren, *Mexican States Ordered to Honor Gay Marriages*, *N.Y. TIMES*, Aug. 10, 2010, <http://www.nytimes.com/2010/08/11/world/americas/11mexico.html?scp=1&sq=mexico%20gay%20marriage&st=cse>.

of *Perry v. Schwarzenegger*,<sup>283</sup> as well as recent federal decisions concerning the constitutionality of the Defense of Marriage Act.<sup>284</sup>

Sexed mothering persists, the many social forces that support the stereotype that parenting is a woman's job.<sup>285</sup> International law's provisions regarding parenting provide some support for conceptualizing unsexed parenting. Comparative examinations of the construction of sex and parenting offer contours of alternative legal norms and structures. Crossing borders yields insight beyond national blinders. Other countries' public policy choices serve to question the FMLA's sex-neutrality and its purported deference to parents. In the United States, we have assumed both that men do not want to parent and that women prefer parenting—without asking either their choice. The Swedish example exposes how the state can nourish or minimize purportedly fundamental sex differences.

Indeed, this is perhaps the Swedish example's most important lesson—the state's choices, both explicit and default, play a central role in constructing sex and gender, elements of our identity presumed to be intractable. Inequality is not a state of nature that must be accepted; state regulation of corporations and families can foster or undermine equality. A prime example surfaces in Sweden's Pre-School Curriculum, which states:

The ways in which adults respond to boys and girls, as well as the demands and requirements imposed on children contribute to their appreciation of gender differences. The pre-school should work to counteract traditional gender patterns and gender roles. Girls and boys in the pre-school should have the same opportunities to develop and explore their abilities and interest without having limitations imposed by stereotyped gender roles.<sup>286</sup>

This text is clear: adults who interact with children are responsible for their understanding of gender. The state, responsible for pre-school, has a clear interest: "to counteract traditional gender patterns and gender roles." This goes well beyond the anti-stereotyping purpose furthered in the United States by interpretations of Titles VII and IX.<sup>287</sup> Instead, it goes to the heart of the promulgation of gender itself. This is thick unsexing—of mothering, and indeed of all childcare—perhaps at its most ambitious.

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<sup>283</sup> 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>284</sup> Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, Feb. 23, 2011, <http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all>.

<sup>285</sup> The continuation of sexed parenting is also supported by continued restrictions on non-traditional forms of parenting, such as restrictions on same-sex adoption.

<sup>286</sup> SKOLVERKET, CURRICULUM FOR THE PRE-SCHOOL LPFÖ 98 4 (2006), available at [http://www.boden.se/db/web/external.nsf/0/53A2A404E02B52A4C1257623006FC06D/\\$file/L%E4roplan%20f%F6r%20f%F6rskolan%20p%E5%20engelska.pdf](http://www.boden.se/db/web/external.nsf/0/53A2A404E02B52A4C1257623006FC06D/$file/L%E4roplan%20f%F6r%20f%F6rskolan%20p%E5%20engelska.pdf).

<sup>287</sup> See, e.g., *Price Waterhouse v. Ann Hopkins*, 490 U.S. 228, 258 (1989) (holding that an employer cannot take an employee's gender into account when making promotion decisions).

Unwinding parenting from biosex roles fosters family structures that liberate traditionally sexed men and women. Public debate over the wisdom of gender neutral, but ineffective legislation, such as the FMLA, may shift toward a distribution of resources that encourages families of all stripes to fulfill their intergenerational responsibilities. We cannot hope, like Dorothy in Oz, that if we close our eyes and click our sequined heels while repeating “no fixed notions of males and females”<sup>288</sup> three times, that we will arrive, miraculously, in an unsexed home. Instead, we must assess and criticize legal rules—explicit and default—to understand the way forward.

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<sup>288</sup> See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).