

THE CHANGING RELATIONS OF FAMILY AND THE WORKPLACE: EXTENDING ANTIDISCRIMINATION LAWS TO PARENTS AND NONPARENTS ALIKE

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The infusion of women into the workforce in the 1960s brought great freedom but also great difficulty. Without women at home to tend to the sick, raise children, care for the elderly, and manage households, workers of both sexes (but particularly women) struggle to balance this “care work” with outside wage work. Laws which prohibit discrimination against employees because of their status as parents purport to solve this problem by allowing parents to perform child care without workplace conflict. In this Note, P.K. Runkles-Pearson argues that these laws are an incomplete and potentially dangerous solution to the tension between work and family, because they ignore the diverse care work needs of employees who do not parent. Ignoring nonparents leads to inefficient labor markets, leaves all groups—including children—with less than optimal care, discourages reproductive choice, and provides an unbalanced discrimination remedy that contravenes the very nature of American antidiscrimination laws. Instead of the current system, Runkles-Pearson proposes antidiscrimination laws that protect both parents and nonparents from discrimination on the basis of their parental status.

INTRODUCTION

The structure of American families has changed dramatically since the Industrial Revolution. This change began with a decrease in the birth rate when the switch from an agrarian to an industrial economy made reproduction largely unnecessary on an individual economic level, as parents no longer relied on children to perform manual labor.¹ The transformation continued during the 1960s and 1970s, when the development of the birth control pill and changes in attitudes about female autonomy enabled women to choose not to

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¹ See Jennifer Glass, *Envisioning the Integration of Family and Work: Toward a Kinder, Gentler Workplace*, 29 *Contemp. Sociology* 129, 129-30 (2000) (describing historical developments that led to current workplace).

reproduce.² At the same time, women entered the workforce in record numbers.³ However, husbands generally still expected their wives to perform an undiminished load of housework and child care.⁴ This “second shift” of work performed by women was the catalyst for mothers (and later fathers) in the workplace to demand state- and employer-sponsored day care and other support.⁵

We are now at a critical juncture. The sexual/gender revolution has been reflected in laws reconceptualizing equality in the workplace⁶ and in the family.⁷ Law, however, has yet to respond to the

² See Sharon Snider, *The Pill: 30 Years of Safety Concerns*, <http://www.fda.gov/bbs/topics/CONSUMER/CON00027.html> (last visited Feb. 20, 2002) (“When the birth control pill was introduced in 1960, it was a major medical achievement that rewrote the future of women and family life. For the first time in history, it became possible for a woman to safely and effectively control childbearing . . .”); see also Elinor Burkett, *The Baby Boon: How Family-Friendly America Cheats the Childless* 12 (2000).

³ See U.S. Dep’t of Labor, *Report on the American Workforce 60* (2001), <http://www.bls.gov/opub/rtaw/rtawhome.htm> (“Between 1960 and 1995, the number of married working mothers grew from 6.6 million to 18 million.”); see also John P. Fernandez, *The Politics and Reality of Family Care in Corporate America* 10-11 (1990) (describing near doubling of percentage of dual-income families from 1960 to 1985).

⁴ See Joan Williams, *Unbending Gender: Why Work and Family Conflict and What To Do About It* 41 (2000).

⁵ See generally Arlie Hochschild, *The Second Shift* (1989) (describing women’s dual load of workplace and home-based labor); see also Williams, *supra* note 4, at 48-51 (describing second shift and its effect on mothers, demands for day care).

Whether the problems of work/life balance that this Note discusses are solely “women’s problems” or problems that affect men and women alike is a matter of debate. Compare, e.g., Williams, *supra* note 4, at 6 (“[This] is a system with ‘built-in headwinds’ that discriminate against women . . .”), with *Talk of the Nation* (National Public Radio broadcast, Feb. 16, 2000), 2000 WL 21458843 (“Ms. [Elinor] BURKETT: . . . I don’t write about this or think about this as a particularly male or female issue because I know that men in the workplace who are childless have the same issues I do.”). Cf. Joan Wallach Scott, *Gender and the Politics of History* 167-77 (1988) (discussing debate over whether laws should conceptualize women as equal to or different from men in context of expert testimony in sex-discrimination trial). Even if this problem primarily affects women, classifying it as “women’s problem” simply may entrench self-perpetuating stereotypes of women. *Id.* at 2 (stating that ways of ordering world, rather than physical sexual differences, create gender discrimination). In addition, courts interpreting Title VII seem to favor rubrics of equality rather than difference. See, e.g., *Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 248 (3d Cir. 1990) (holding that collective-bargaining agreement allowing child-rearing leave for women but not for men violated gender-discrimination provision of Title VII). Such interpretations could render useless any proposals for work/life assistance solely targeting women.

Regardless of this debate, the purpose of this Note is to isolate the tension between parents and nonparents or childfree people without respect to gender. For a definition of these terms and how they are used for the purposes of this Note, see *infra* note 18.

⁶ See, e.g., the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

⁷ For example, Martha Albertson Fineman writes:

Changes in the family are visible and undeniable. The law has responded to these changes on one level by altering the set of expectations, obligations, and entitlements governing the intra-family relationship between the spouses—

new conceptions and secondary effects brought on by the “second shift.”⁸ Although American law encourages⁹ (and sometimes our economy forces)¹⁰ women to work outside the home, American law has not adequately addressed what to do with what was formerly “women’s work”—care work.¹¹ The market cannot commodify all of this work completely,¹² so it is either juggled precariously with job responsibilities or, tragically, left undone.

The passage of laws forbidding discrimination against parents in the workplace was an initial step toward integrating care work into employment law.¹³ This Note argues that this step is misguided, and it proposes laws forbidding employment discrimination based instead on parental status—the status of being a parent or not being a parent.¹⁴ These proposed laws would require employers to evaluate and reward employees by their actual work performance and individual needs, not by stereotyped group characteristics that employers use as a proxy for individualized evaluation.

Part I describes the problem of parental-status discrimination from the perspective of parents, nonparents, and employers, and it reviews the lopsided patchwork of current laws that have been early attempts to fix the problem. Part II explains that these laws are inadequate because entrenched societal norms of the “ideal worker” and “ideal parent” create market problems that can be solved only by a

family law. What we have not done, however, is to consider the required restructuring of extra-family relationships given the changes in the family

Martha Albertson Fineman, *Contract and Care*, 76 Chi.-Kent L. Rev. 1403, 1427 (2001).

⁸ See *id.* at 1431 (“We must look at the reality of the contemporary family and consider the implications of its transformation from the historic model. We must explicitly reconsider our institutional arrangements.”); Shelley M. MacDermid et al., *Work and Families: Looking Forward by Looking Back*, 3 Work-Fam. Res. Newsl. 6, 7 (Spring 2001), at http://www.bc.edu/bc_org/avp/csom/cwf/newsletter/spring_2001.pdf [hereinafter *Work-Fam.*] (“Employment has improved women’s status in society, but there has been no good replacement for the caregiving labor that women are no longer doing to the extent that they used to.”).

⁹ See *supra* note 6 (giving examples of laws).

¹⁰ See Fineman, *supra* note 7, at 1430 (“Most middle-class families now require at least a wage and a half to maintain the same standard of living possible on a ‘family wage’ of decades ago.”).

¹¹ For a complete definition of “care work,” see *infra* note 51 and accompanying text.

¹² See *infra* note 126 and accompanying text.

¹³ See Part I.D for an enumeration of these laws.

¹⁴ Although most state antidiscrimination laws use the term “parental status” to mean the status of being a parent, see *infra* note 90, this Note will use the term more broadly to refer to the condition of having, or of not having, children.

Although some of this Note’s arguments relate to the controversial question of whether a discrimination rubric is the best tactic for addressing work/life issues, it is not the purpose of this Note to answer that question. This Note simply makes the case that when such laws exist, they should protect both parents and nonparents.

multilateral law.¹⁵ Unilateral laws,¹⁶ this Part argues, ignore important societal values such as broad definitions of care and reproductive choice, and they lose the benefit of multilateral protection, which characterizes most American antidiscrimination law. Part III proposes and argues for statutory schemes that prohibit basing hiring, promotion, or benefits decisions on parental status, but that allow employment decisions that only have disproportionate impacts on parents or nonparents. The Note concludes by exploring the possible real-world effects of a multilateral law through a series of examples.

I

THE PROBLEM OF PARENTAL-STATUS DISCRIMINATION

As American society pays an increasing amount of attention to the balance between work and family, parents, nonparents, and employers are approaching the work/life problem from markedly different points of view. Many parents believe that nonparents are favored in hiring and promotion decisions,¹⁷ while many childfree¹⁸ and nonparent employees believe that parents receive unduly favorable employment benefits and more flexible schedules.¹⁹ Employers, trying to satisfy employees in both groups, are caught in the middle.²⁰

This Part explores the current problem of work/life balance and the measures taken to deal with it so far. It describes parents', nonparents', and employers' distinct concerns with regard to workplace policies, and it lays out existing laws that address parental status.

A. *Parents*

Parents in the workplace constantly strive to maintain the delicate balance between being responsible employees and nurturing parents, and they worry that employers may refuse to hire, retain, or promote them because of their family responsibilities.²¹ Some em-

¹⁵ This Note uses the term "multilateral" to describe laws that protect more than one group.

¹⁶ This Note uses the term "unilateral" to describe laws that protect only one group.

¹⁷ See *infra* Part I.A.

¹⁸ This Note will use "childfree" to describe employees who are childless by choice. "Parent" will refer to employees who have biological or adoptive children. "Nonparent" will describe employees who have no children, whether because of choice, postponement, or infertility.

¹⁹ See *infra* Part I.B.

²⁰ See *infra* Part I.C.

²¹ See, e.g., Judith G. Gonyea & Bradley K. Googins, *The Restructuring of Work and Family in the United States: A New Challenge for American Corporations*, in *The Work-Family Challenge* 63, 70 (Suzan Lewis & Jeremy Lewis eds., 1996) (describing parents' fears); Melinda Ligos, *Women Welcomed Back to Career Path*, *N.Y. Times*, Aug. 30, 2000, at G1 (describing experience of stay-at-home mom who reentered workplace after six

employers have attempted to address these concerns by instituting a variety of programs (including day care subsidies, flex time, and child health-care benefits) to help parents manage their personal and professional lives.²²

Many advocates of workplace support for parents believe that these programs are the only way to relieve mothers from the gender inequity of the "second shift."²³ They hold that inequity occurs because many employers fully expect employees to sacrifice time at home for more time on the job.²⁴ This "ideal worker" model relies on a traditional assumption that each employee is supported by the full-time unpaid labor of a spouse, usually female, who attends to children, housework, and other aspects of the employee's personal life.²⁵ Since part-time employees normally do not get proportional benefits,²⁶ both

years). Such concern is not without foundation. A recent study by *Management Today* magazine revealed that one-third of the two thousand managers surveyed admitted discriminating against parents. Maureen Rice, *Age of the Flex Exec*, *Mgmt. Today*, Aug. 2000, at 48, 50.

²² For examples of specific company strategies, see Christian C. Kjeldsen, *Partnering Work and Family*, in *Work-Family: Redefining the Business Case*, at 15, 15-16 (Conf. Bd., Report No. 1050, 1993) [hereinafter *Conf. Bd.*] (describing program of Johnson & Johnson); Sue Osborn, *The Three D's: Demographics, Decentralization and Downsizing*, in *Conf. Bd.*, supra, at 29, 29-30 (describing program of Chevron Corporation); Ruthann Prange, *The Return on Investment*, in *Conf. Bd.*, supra, at 13, 13-14 (describing program of AT&T); David F. Russo, *Do You Employ Women? How About Common Sense?* in *Conf. Bd.*, supra, at 23, 23-24 (describing program of SAS Institute, Inc.); and Delores B. Vellinga, *Crossing the Line*, in *Conf. Bd.*, supra, at 27, 27-28 (describing program of US West, Inc.).

²³ See, e.g., Williams, supra note 4, at 4-5 (describing inadequacy of current work-family programs and need for better ones); Marcie Pitt-Catsouphes, *Why Take Gender Out of Work/Life?, Work-Fam.*, supra note 8, at 9, 9 (asserting that work/family issues have disproportionate impact on women). Williams cites the Contingent Workforce Equity Act, S. 2504, 103d Cong. (1994), which required equal pay for the equal work of full- and part-time employees, as a measure that would have enhanced gender equity. Williams, supra note 4, at 274; see also Joan Williams, *Exploring the Economic Meanings of Gender*, 49 *Am. U. L. Rev.* 987, 992 (2000) ("A track that offered quality part-time work, thereby reducing the number of hours required for paid and family work combined, would increase women's economic equality by increasing the number of women able to participate in the labor force."). The bill died in the Senate Committee on Labor and Human Resources, to which it was referred on October 5, 1994. Bill Summary and Status for the 103d Congress, <http://thomas.loc.gov/bss/d103query.html> (last visited Apr. 15, 2002).

²⁴ See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *N.Y.U. L. Rev.* 1559, 1597-1600 (1991) (describing ideal worker model and its disproportionate adverse effect on women).

²⁵ See *id.*; see also Sylvia Ann Hewlett & Cornel West, *The War Against Parents* 38 (1998) (referring to economy's past reliance on "a deep and largely invisible reservoir of free female labor").

²⁶ James T. Bond et al., *The 1997 National Study of the Changing Workforce 10* (Families & Work Inst., Pub. No. W98-01, 1997), <https://www.igc.apc.org/fwi/pubs/nscw.pdf> ("Part-time workers . . . have less access than other workers to traditional fringe benefits.").

parents cannot work part time and bring home the same amount as one parent working full time. Thus, the demands of the workplace often force one spouse in each marriage to subordinate his or her career so that the other spouse can be an ideal worker and achieve the full benefits and promotions that the family finances require.²⁷ Women often make less money than men,²⁸ so their careers may seem the logical choice for subordination.²⁹ In addition, widely held social expectations pressure women to feel guilty if they are not active mothers, so women often are willing to subordinate their careers themselves.³⁰ Eliminating the ideal worker model helps to eliminate gender inequity in the workplace by supporting women in their endeavors to be both mothers and employees.³¹

Other advocates of benefits tailored to parents focus on the aggregate social benefit of parenting and claim that parenting is a community service.³² Citing a drastic decrease in real government dollars committed to American families,³³ they claim that society will sustain irreparable social harm if government and employers do not continue to increase work-family benefits to parents.³⁴ In addition, they advocate a qualitative value shift that would restore honor and respect to

²⁷ See Williams, *supra* note 24.

²⁸ Women's Bureau, U.S. Dep't of Labor, *Women's Earnings as Percent of Men's, 1979-2000* (stating that in 2000, women's weekly earnings averaged only seventy-six cents for every dollar earned by men) (on file with the *New York University Law Review*).

²⁹ See Samuel Estreicher & Michael C. Harper, *Cases and Materials on Employment Discrimination and Employment Law 324* (2000) ("[T]he division of home and marketplace responsibilities . . . may compound any external discrimination that women confront in the job market. . . . [I]f a discriminatory job market makes a wom[a]n's potential earnings somewhat less than her husband's, it may be economically rational for them to subordinate her career to his.").

³⁰ See Williams, *supra* note 4, at 30-31, 48-49 (describing pressure society exerts on women to be perfect mothers); Megan Rutherford, *When Mother Stays Home*, *Time*, Oct. 16, 2000, at F9, 2000 WL 25227458 (quoting Peggy Orenstein, author of book of interviews with women, as saying "you can never be a good enough mother"). For an overview of working mothers' guilt and their subsequent decisions to subordinate their careers, see generally Teresa Arendell, *Hegemonic Motherhood: Deviancy Discourses and Employed Mothers' Accounts of Out-of-School Time Issues* (Ctr. for Working Families, Working Paper No. 9, 1999), <http://workingfamilies.berkeley.edu/papers/9.pdf>.

³¹ See Williams, *supra* note 24, at 1562 ("The [ideal worker] system blocks mothers from the traditional avenues of power and responsibility and is a key element of women's disempowerment both inside and outside the household.").

³² See Hewlett & West, *supra* note 25, at 49-51 (asserting that good parenting leads to stable society that benefits all).

³³ See *id.* at 33-34, 98-99 (claiming that golden family era of 1950s was created by yearly per-child tax deductions and credits worth \$6500 in 1996 dollars).

³⁴ See *id.* at 42 (citing possible "civic collapse" and violence).

the occupation of parenting,³⁵ “[g]iv[ing] top billing to families with children.”³⁶

Understandably, this is a very personal issue for parents, who do not respond positively to nonparents’ claims that benefits helping employees reconcile their work and family lives should cover more than just parents with children.³⁷ Many parents believe that nonparents fail to see the long-term view because eventually nonparents will decide to have children and thus will derive future benefits from the extra help and attention accorded parents.³⁸ Some believe that nonparents are just envious of parents’ good fortune in having children.³⁹ Other parents believe that raising children is a responsibility of adulthood; they reason that those who choose not to raise children—especially the devotedly childfree—have not “grown up” and assumed the obligations of mature involvement in society.⁴⁰ Lastly, many overwhelmed parents envy the freedom and disposable income they perceive that their nonparent counterparts enjoy,⁴¹ and they find it hard to believe that nonparents truly need the same level of benefits that parents receive.

B. Nonparents

The number of nonparent employees is increasing rapidly and soon may overtake the number of employees who parent.⁴² Some em-

³⁵ *Id.* at 35-36. Hewlett & West give little insight into how such a shift would be achieved, but the fact that they advocate it is significant because it highlights their belief that parents currently do not receive respect.

³⁶ Sylvia Ann Hewlett, *When the Bough Breaks: The Cost of Neglecting Our Children* 234 (1991).

³⁷ For some of these nonparents’ claims, see *infra* notes 62-68 and accompanying text.

³⁸ See Jennifer Kahn, *The Nurture Assumption*, at <http://www.salon.com/mwt/feature/1999/03/19feature.html> (last visited Mar. 22, 2002) (relating parents’ assumptions that decision not to have children is “just a phase”). Of course, parents may not be seeing the long-term view when the nonparent is childfree. See *infra* Part I.B.

³⁹ See Marnell Jameson, *Do Childless Workers Get the Short End of the Stick?*, *L.A. Times*, Mar. 13, 2000, at E1 (quoting parent’s opinion that childless women have “sour grapes”).

⁴⁰ See J.E. Veevers, *Childless by Choice* 110-11 (1980) (describing beliefs of dominant religious groups in North America that childbearing is essential part of marriage); Cathy Young, *The Anti-Child Revolt*, at http://www.salon.com/mwt/feature/2000/07/31/anti_child/index.htm (last visited Mar. 22, 2002) (stating ways in which parents are more responsible than nonparents).

⁴¹ See Cathy Young, *Parents Have It Much Tougher Than Child-Free*, *Detroit News*, July 28, 2000, at 13A (citing sacrifices made by parents).

⁴² See Amara Bachu, *Is Childlessness Among American Women on the Rise* (U.S. Census Bureau, Population Division Working Paper No. 37, 1999), <http://www.census.gov/population/www/documentation/twps0037/twps0037.html> (“In general, employed women showed substantial increases in childlessness since 1980 regardless of their occupational status.”); Amara Bachu & Martin O’Connell, *Fertility of American Women* 3 (U.S. Census

ployees are nonparents because they are unable to reproduce,⁴³ some because they simply are postponing the decision to have children, and growing numbers are childfree, or “childless by choice.”⁴⁴ Being childfree or a nonparent, however, does not mean failing to contribute to the community in general or to care work in particular. Although some nonparents give up having children (temporarily or permanently) for reasons unrelated to care work,⁴⁵ the field of care work that makes up the second shift is hardly limited to those who have chosen to procreate or adopt. Nonparents spend nonworkplace time caring for their partners,⁴⁶ mentoring children in their extended fami-

Bureau, Current Population Reports No. P20-526, 1998) (finding that percent of women reaching end of childbearing years without bearing children doubled between 1976 and 1998). Studies focusing on nonparent rates among men yielded similar results. See Amara Bachu, *Fertility of American Men* 31 (U.S. Census Bureau, Population Division Working Paper No. 14, 1996) (noting that, in 1992, 33.8% of men were childless, compared to 26% of women); see also Susan Dodge, *Employers Catch Flak for Pro-Family Policies*, *Chi. Sun-Times*, July 23, 2000, at 32, 2000 WL 6686895 (“[T]here are more non-parents (80 million) than parents (50 million) in the workplace, according to the Employment Policy Foundation, a Washington think tank. By 2005, single and married couples without kids are expected to become the most common type of household in the country, the Census Bureau reports.”).

⁴³ Many of these couples choose to adopt. For the purposes of this Note, there is no significant distinction between biological and adoptive parents, since both groups have the same childcare needs and since both also require significant time away from the job when a new child joins the family. However, it should be noted that federal law does not require adoption benefits to keep pace with maternity benefits—and in many cases adoption benefits lag behind. See National Adoption Information Clearinghouse, *Adoption Benefits: Employers as Partners in Family Building*, <http://www.adopting.org/employer.org> (last visited Mar. 25, 2002) (including section entitled, “How Do Adoption Benefits and Maternity Benefits Compare?”); see also Omnibus Adoption Act of 1999, H.R. 2540, 106th Cong. § 201 (1999) (unenacted bill which would have provided for leave equity between adoptive and biological parents).

⁴⁴ Groups such as Child-Free Network, <http://www.childfree.net> (last visited Mar. 22, 2002) (providing resources for childfree adults), Childless by Choice, <http://now2000.com/cbc> (last visited Mar. 22, 2002) (same), and No Kidding!, <http://www.nokidding.net/> (last visited Mar. 22, 2002) (same) serve childfree people who desire social activities that do not center on parenting or children. The original chapter of No Kidding!, for example, sponsors three to eight social activities a month, including participatory and spectator sports events, dinners, cultural activities, and even a forum for members to discuss investments. See No Kidding!, *supra*. They are also pivotal in assisting childfree people in forming an identity as a cohesive group with common concerns.

⁴⁵ Some use the extra time to pursue a career or leisure, see Diana Burgwyn, *Marriage Without Children* 28-31 (1981) (citing additional freedom of nonparents to pursue activities of their choice). Some believe in limiting population growth for environmental reasons. See Veevers, *supra* note 40, at 151-52 (“Childlessness comes to be defined as in society’s best interest, in that each couple who do[es] not produce a child do[es] not contribute to existing ‘people pollution.’”).

⁴⁶ See Veevers, *supra* note 40, at 94-95, 102-05 (describing relationships of childfree couples).

lies,⁴⁷ and doing the arduous and time-consuming work of elder care,⁴⁸ among other activities.⁴⁹ The second shift also includes the often-unappreciated work of homemaking.⁵⁰ Care work is pervasive, necessary, and affects all employees, whether they are parents or not. It includes at least seven types of care: (1) growth work (childbirth and breastfeeding); (2) housework and yardwork; (3) household management (organizing and scheduling work); (4) social capital development (maintaining kinship ties, initiating and maintaining friendship networks, and developing status); (5) emotion work (comforting and listening); (6) care for the sick (partners, parents, and children); and (7) day care (of children and the elderly).⁵¹ Of these seven kinds of care work, only one, growth work, requires procreation or adoption.

As this exhausting litany should make clear, the time crunch that leads to the second shift is not limited to parents. The lack of time away from work impacts both parents and nonparents, degrading the

⁴⁷ Cheryl Wetzstein, *More American Women Pull Plugs on Biological Clocks*, Wash. Times, Nov. 22, 2000, at A2 (quoting married nonparent describing roles of nonparent women in network of adults supporting and mentoring children).

⁴⁸ Providing benefits to parents alone overlooks the skyrocketing numbers of the elderly in family care. See Fernandez, *supra* note 3, at 12-13 (describing scope of problem); MacDermid et al., *supra* note 8, at 6-7 (stating that in 1900, there were ten people of working age for each older person, but that “by the end of the current century,” there will be only two working-age people to support each older person); see also Bond et al., *supra* note 26, at 15 (stating that twenty-five percent of employees surveyed had provided elder care during preceding year; those employees spent nearly eleven hours per week). Some writers even suggest that elder care work is more difficult and frustrating than child care. E.g., Mary Anne Case, *Commentary: 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, 1754 n.5 (2001). Of course, some parents also have elder care responsibilities. Margaret Neal & Leslie Hammer, *A Study of Dual-Earner Couples in the Sandwich Generation*, *Work-Fam.*, *supra* note 8, at 8, 8 (stating that parents who also provide elder care “ha[ve] received relatively little research attention”).

⁴⁹ It is beyond the scope of this Note to delineate every possible familial or community obligation that an individual could hold. The basic point to be made here, however, is that only one of this myriad of obligations requires procreation or adoption first.

⁵⁰ See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 Chi.-Kent L. Rev. 1441, 1462-63 (2001) (arguing against terminology that classifies housework and yardwork as “care”). It is worth noting that part-time and full-time stay-at-home parents also perform this work. *Id.* at 1450 (“[W]omen who stay home today almost invariably say it is ‘to take care of the children’—they just happen to pick up the dry cleaning and clean the toilets as well.”).

⁵¹ *Id.* at 1462-65.

quality of mental health as well as civic and family life.⁵² The crunch also harms couples' relationships.⁵³

Although nonparents also face difficulties in balancing work and family, many employers do not give them the attention and support that their parenting coworkers receive. First, nonparents believe that employers ask them to work longer hours than parents, but that employers do not acknowledge these extra hours when compensating or promoting employees.⁵⁴ Employers often schedule nonparents for undesirable shifts (such as weekends, evenings, and holidays) because "they have no children to go home to," while nonparents also often receive off-season vacation time so that parents can take advantage of school vacations.⁵⁵ They catch up on work that parents leave behind to attend their children's extracurricular activities and school functions.⁵⁶

Second, nonparents often receive less valuable fringe benefits than employees who parent. Although the Family and Medical Leave Act (FMLA) requires employers to make available twelve weeks of unpaid leave per year for a variety of family and personal events (only some of which are child related),⁵⁷ some employers allow parents paid

⁵² See Bond et al., *supra* note 26, at 7 (describing jobs' negative effects on "the personal well-being of workers"); Robert D. Putnam & Kristin A. Goss, *It's About Time*, S.F. Chron., Sept. 24, 2000, at Zone 1 ("[Americans today] have become more productive workers, but . . . feel like lousy parents and even worse citizens.").

⁵³ See, e.g., Lisa Belkin, *A Husband and Wife's Daydream: To Meet Occasionally for Lunch*, N.Y. Times, Nov. 8, 2000, at G1 (describing struggle to find time for relationships).

⁵⁴ See Burkett, *supra* note 2, at 16-20 (suggesting that such differential workloads could violate Equal Pay Act).

⁵⁵ Jerry Steinberg, Letter to the Editor, at http://www.salon.com/letters/daily/2000/08/02/anti_child/index.html (last visited Apr. 1, 2002) (describing ways in which childfree employees' schedules are discriminatory). Jerry Steinberg is the "founding non-father" of No Kidding!. See No Kidding!, *supra* note 44. One survey found that although parents and nonparents worked equal numbers of hours, parents were three times as likely as nonparents to describe their work time as "flexible." Anne Marie Owens, *SINKS and DINKS of the World, Unite*, Nat'l Post (Can.), May 20, 2000, 2000 WL 21834056 (describing study).

⁵⁶ Burkett, *supra* note 2, at 38-40. Although this informal burden may be more difficult to track, it may be more pervasive than the formal scheduling burden. The amount of work that is shifted to nonparents also may vary greatly depending on the type of job to be performed. Although some jobs consist of work that employees can perform on a flexible schedule in virtually any location, others require reliable employee presence at the work site during specified hours. In the latter category, unscheduled or frequent absences can create a significant burden for the remaining employees. Consider the difference between the situation of an accountant or architect on one hand, and a fast-food worker or an emergency-room doctor on the other.

⁵⁷ The Family and Medical Leave Act (FMLA) includes leave (1) for the birth or adoption of a child, (2) for the care of a spouse, child, or parent, or (3) when the employee's health makes it impossible for him or her to do a job. 29 U.S.C. §§ 2601-2654 (1994). Employers must maintain health benefits during the leave period. *Id.*; see also Case, *supra* note 48, at 1766 n.38 (applauding FMLA's egalitarian approach).

leave, leave time in excess of the statutory requirement, or both.⁵⁸ Some employers allow parents to add their children to health-insurance plans for little or no cost.⁵⁹ Other employers subsidize day care or provide day care on the premises.⁶⁰ In most cases, nonparents receive no equivalent benefit; some reason that providing many of these benefits to parents also increases the cost or reduces the level of benefits to nonparents.⁶¹

Some nonparents believe that these benefits to parents cannot be justified by conceptualizing parenting as a unique community benefit.⁶² Although some believe that parenting is simply a personal choice that confers both significant benefits and attendant drawbacks upon parents,⁶³ many concede that properly caring for children gener-

⁵⁸ Thirty-three percent of employers surveyed by the Families and Work Institute in 1998 allowed more than the required twelve weeks for maternity leave, 16% allowed more leave for paternity and adoption/foster care, and 15% for the care of seriously ill children. Ellen Galinsky & James T. Bond, *The 1998 Business Work-Life Study: A Sourcebook*, at IV tbl.B (Families & Work Inst., Pub. No. W98-03, 1998) (1998) [hereinafter *Business Study*]. Forty-nine percent of companies with one hundred or more employees allowed time off for the care of mildly ill children, even though the FMLA does not require this. *Id.* at IV. Fifty-three percent of companies provided at least some paid time off for maternity, 13% for paternity, and 12.5% for adoption/foster care. *Id.* at IV tbl.C.

⁵⁹ See *id.* at X tbl.J (stating that 87% of companies surveyed provided "full or part payment of [health insurance] premium[s] for family members").

⁶⁰ *Id.* at V tbl.D (describing various forms of child-care assistance provided by companies surveyed).

⁶¹ Keith H. Hammonds, *Women with Children First?*, at http://www.fastcompany.com/change/change_feature/babyboon.html (last visited Mar. 24, 2002) ("When you give benefits to one group and not to another, it's always at someone's expense." (quoting Elinor Burkett)); see Case, *supra* note 48, at 1782 ("[W]e should not only consider the extent of available subsidy for childbearing and rearing in comparison to subsidies for other activities, but also the comparative costs imposed on those who do or do not have children.").

⁶² See Burkett, *supra* note 2, at 197-98 (arguing that in some circumstances, having children is irresponsible); Case, *supra* note 48, at 1775 ("Some children may not produce positive externalities . . . ; indeed, some will produce net negative externalities."); see also *id.* at 1774 ("[I]f all we are looking for is a new generation of workers to pay my generation's social security, it may be cheaper to import them as adults than to raise them at home." (internal citation omitted)).

⁶³ The relevant literature compares parenting to a number of optional joys, such as raising a horse, Kahn, *supra* note 38; owning a Porsche, Fineman, *supra* note 7, at 1403 n.2; and owning an expensive Armani suit, Burkett, *supra* note 2, at 75. As a childfree person wrote to a National Public Radio show:

Today's parents seem to feel an enormous misplaced sense of entitlement just because they chose to have children and bring stress and financial strain to their lives. . . . Now they want the rest of us to relieve them of the consequences of their actions.

Steven Stark, *Weekend Edition Sunday* (National Public Radio broadcast, June 4, 2000), 2000 WL 21454115 (quoting comments anonymous listeners posted on World Wide Web).

ally provides certain advantages to society.⁶⁴ However, even these nonparents do not concede the rationality of privileging parenting above other forms of care.⁶⁵ Some nonparents assert that this differential treatment is simply the result of high-pressure lobbying by parents, who use their political power to transfer some of the costs of childrearing to nonparents.⁶⁶ The childfree often state that parents' quest for child care assistance and other benefits is a raw power play for personal financial gain phrased as a plea for the welfare of helpless children.⁶⁷ Neither do many nonparents believe that their coworkers chose to be parents out of an excess of community feeling; they think that many parents choose to have children for personal emotional satisfaction, not for societal welfare.⁶⁸

For nonparents, as for parents, this is a very personal issue. Many nonparents are startled and overwhelmed by the current child-centered nature of life,⁶⁹ and many nonparent women are worried that these "family-friendly" policies are again "collaps[ing] women's identity into motherhood."⁷⁰ Some nonparents, in response to what they

⁶⁴ See, e.g., Case, *supra* note 48, at 1785 (approving of "some collective responsibility" for childcare in order to stop future losses borne of improper socialization or medical care (quoting Fineman, *supra* note 7, at 1403)).

⁶⁵ See, e.g., *id.* at 1767 ("[P]roviding benefits on the basis of certain 'family' relationships and not others privileges certain relationships in ways we ought not be blind to.").

⁶⁶ Burkett, *supra* note 2, at 118-46 (describing laws benefiting parents as directed primarily to middle- and upper-class parents who lobby intensively for their adoption). Politicians of both parties have responded to this exercise of political power. See Talk of the Nation, *supra* note 5 ("It has become an expected part of the political speech that one should be pro-family.").

⁶⁷ Talk of the Nation, *supra* note 5 ("It's the old 'Give us money or the kid gets it' argument. . . . [I]t's basically a hostage-taking. . . . [Parents are] hiding behind the kids."); see also Case, *supra* note 48, at 1765 (stating that "having a child should on no account be simply a ticket to a benefit").

⁶⁸ See, e.g., Case *supra* note 48, at 1779 (asserting that parents get emotional satisfaction from having children, but may or may not produce positive social externalities). Some parents admit that their choice to have children was not a purely selfless decision. See Sharon Hays, *The Cultural Contradictions of Motherhood* 109-10 (1996) (quoting mother as saying that raising children "brings us a sense of love we couldn't get from sex, or pleasures from, you know, going out, or doing something we like to do, dancing, or watching a movie. Kids give us this inner pleasure that [we are] unable to get from anything, anyone"); Kahn, *supra* note 38 (describing emotional benefits of parenthood).

⁶⁹ See Williams, *supra* note 50, at 1448 ("Households are now child-centered in a way that seems foreign to non-Americans, and even to Americans in their seventies and eighties."); see also Nancy Gibbs, *Who's in Charge Here?*, *Time*, Aug. 6, 2001, at 40 (citing lengthening work hours, divorce, and unsafe streets as some reasons why eighty percent of those polled by *Time* believed kids were more indulged than kids ten to fifteen years ago).

⁷⁰ Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 183 (2001).

perceive as condescending rhetoric from parents,⁷¹ have responded with a particularly offensive vocabulary of their own.⁷²

Even expressing their dissent becomes difficult for some nonparents, as Mary Anne Case describes: "If we remain silent, we risk being told that these policies are justified . . . because everyone supports them; if we speak out about our concerns or our exclusion, we risk being accused of selfishness, pettiness, indifference to the plight of hardworking parents and innocent children, or worse."⁷³ Expressed or not, the sentiment among nonparents is not likely to diminish soon. Half of the managers surveyed by *Management Today* believed that their nonparent employees were resentful of benefits provided to parents.⁷⁴

C. Employers

Employers who provide work-family benefits for their employees usually have self-interest at heart,⁷⁵ as offering such benefits may be more efficient than the alternative.⁷⁶ Most employers reason that if they do not offer leave time, employees will take it unexpectedly by calling in sick or will continue to work unproductively because they are concerned about problems at home.⁷⁷ Similarly, health-care benefits ensure that employees are well and thus able to work. Extending health-care benefits to employees, families reduces the amount of

⁷¹ Leslie Lafayette, *Mothers Who Don't Think About Anything but Their Kids*, at http://www.salon.com/mwt/feature/2000/04/06/no_kids/index.html (last visited Apr. 1, 2002) (describing ways in which parents are condescending and selfish).

⁷² Some of the more militant childfrees, in particular, may have hurt the cause of nonparents through the development of offensive slang used to describe children and parents. Some of the more publishable terms that Internet childfree community members use to refer to children include "anklebiter," "bratzilla," "crib lizard," "crotch cricket," "fartling," "floormonster," "hellspawn," "kinderwhore," "nipplecruncher," "shriekling," "sperm 'n' egg omelette," "sprog," and "spawn"; these communities refer to parents as "breeders" and to the process of giving birth as "sprog[ging]" or "spawn[ing]." E.g., A Lexicon of Spawn, <http://www.geocities.com/BourbonStreet/Quarter/7404/> (last visited Mar. 20, 2002).

⁷³ Case, *supra* note 48, at 1755 n.8.

⁷⁴ See Rice, *supra* note 21, at 50.

⁷⁵ See Gonyea & Googins, *supra* note 21, at 71-72.

⁷⁶ The Families and Work Institute found that "when employees' personal and family well-being is compromised by work, they experience more negative spillover from home to work, which diminishes their job performance." Business Study, *supra* note 58, at I. Most employers surveyed believed that the benefits of their various work-family programs outweighed or equaled the cost. For instance, only seventeen of employers thought that the costs of leave programs outweighed the benefits, while eighty-four percent thought that the benefits equaled or outweighed the costs. *Id.* at IV. Employers perceived that the cost-benefit analyses of child-care and elder-care assistance were roughly equal. See *id.* at VI.

⁷⁷ See, e.g., Prange, *supra* note 22 (discussing AT&T's savings when it implemented generous leave program); *supra* note 76 (describing results of employer survey).

time that employees are away from work to care for sick family members and reduces unproductive time employees spend worrying about their families. In short, both leave time and other benefits make employees more effective. Perhaps because of these reasons, the recent trend has been for employers who provide benefits to tailor the benefits to their employees' needs—particularly by using “cafeteria” or “flexible benefit” plans, which give employees a defined benefits budget with which to select benefits most relevant to them from a range of options.⁷⁸

Although all of the rationales for generous employee benefits plans apply equally to parents and nonparents, many employers choose to provide benefits that allow parents to juggle work and child-care obligations, while not providing benefits that allow all employees to juggle work and other family or community obligations.⁷⁹ The reason for such lopsided provision of benefits remains unclear.⁸⁰

D. The Lack of Legal Remedy

Although no single viewpoint has emerged to govern work/life issues completely, parents' groups have made the most headway, and their interests have dominated discussion so far. All of the laws addressing parental status appear to help parents, while ignoring nonparents.

In the federal system, an Executive Order forbids discrimination against parents in federal employment,⁸¹ and a Department of Labor regulation encourages states to allow new parents paid leave courtesy of the unemployment system.⁸² Tax credits supported by both parties

⁷⁸ See U.S. Dep't of Labor, *supra* note 3, at 60 (“Although flexible benefit plans still are quite limited, they are growing in popularity. In 1986, only 2% of workers employed in medium and large private establishments were eligible to participate in a flexible benefit plan; but, by 1997, it had grown to 13%.”).

⁷⁹ See Gonyea & Googins, *supra* note 21, at 69. This is not to say that all employers provide generous benefit plans. In fact, many employers provide next to nothing above the minimum required by the FMLA. See *supra* note 58. This Note simply observes that of the discretionary employer-provided benefit plans which do exist, a significant portion provide work-family assistance that solely or disproportionately eases the work-family burden of parents, to the exclusion or detriment of nonparents.

⁸⁰ Perhaps parents are more vocal than nonparents about the need for benefits. Cf. Burkett, *supra* note 2, at 62-65 (describing enormous lobbying power of parents that turned House hearing on giving tax credits to parents into “a bipartisan love-in”). However, even if an employer's business interest is better served by giving the grease to the squeakier wheel, this may not make for the best public policy.

⁸¹ Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000) (amending Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969)).

⁸² 20 C.F.R. pt. 604 (2001); see also Joyce Howard Price, Clinton Would Tap Unemployment Insurance for Paid Leave, *Wash. Times*, June 11, 2000, at C3 (quoting President

apply to children, but not to other dependents.⁸³ The Fair Housing Act forbids discrimination against parents in renting or selling homes.⁸⁴ The Pregnancy Discrimination Act (PDA) makes the physical condition of pregnancy subject to the same protections as other employer-covered disabilities in order to further Title VII's prohibitions on gender discrimination.⁸⁵ Only the FMLA is even-handed, allowing unpaid leave for parents and nonparents alike.⁸⁶ Although this list of legislation is limited, it is unlikely to remain so—the 107th Congress saw at least four bills that would have provided unilateral benefits to parents.⁸⁷

Outside the federal system, five states and the District of Columbia prohibit discrimination against parents in the workplace.⁸⁸ One state—Alaska—includes parents as a protected class under its general civil rights law,⁸⁹ although there is some indication that Alaska's law also may protect nonparents.⁹⁰ Twelve states prohibit discrimination against parents in various nonworkplace situations.⁹¹

Clinton that rule was necessary because many families could not afford unpaid leave under FMLA).

⁸³ See Virginia Postrel, *Politicizing Parenthood*, Reason, Oct. 2000, at 17 (arguing that both parties gear tax policy to reward parents).

⁸⁴ 42 U.S.C. § 3604 (1994) (making it unlawful to refuse to sell or rent because of “familial status”).

⁸⁵ § 2000e-(k). However, there is some indication that the courts are reinterpreting the Pregnancy Discrimination Act (PDA) to protect both women who are pregnant and women who desire to avoid pregnancy. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1273-74, 1277 (W.D. Wash. 2001) (holding that Title VII as amended by PDA prohibited employment-based health insurance from refusing to pay for women's' prescription contraceptives and citing *Law*, *infra*); see generally Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363 (1998) (providing rationale for coverage of women's' prescription contraception under PDA).

⁸⁶ See *supra* note 57.

⁸⁷ Employment Policy Found., *Parental Discrimination in the Workplace: Truth or Fiction?*, Fact & Fallacy, Mar. 29, 2001, at 1, 4 n.1, <http://www.epf.org/research/newsletters/2001/ff20010329.pdf> (listing bills).

⁸⁸ They are California, Michigan, New Jersey, Pennsylvania, and South Dakota. *Id.* at 1.

⁸⁹ Alaska Stat. §§ 18.80.200-18.80.295 (Michie 2000) (preventing discrimination against parents, *inter alia*).

⁹⁰ Although there is no case directly on point, a recent decision of the Alaska Supreme Court suggests that Alaska's law may protect both parents and nonparents. In *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997), the court construed the provision of the Human Rights Act that protects “marital status” and “parenthood.” Although the case did not require the court to interpret the meaning of “parenthood,” it held that the statute should be interpreted in light of broad principles of “eradication of discrimination.” It therefore held that “marital status” included the unmarried plaintiffs. If the court applied similar logic to a future interpretation of the statutorily parallel term “parenthood,” it would conclude that the Human Rights Act protects both parents and nonparents.

⁹¹ Ariz. Rev. Stat. Ann. § 20-448 (2001) (stopping insurance companies from discriminating between parents and nonparents in terms of benefits); Cal. Educ. Code §§ 54743(g),

The decision to include or exclude nonparents from antidiscrimination statutes is particularly important because there appears to be no cause of action under other, more generic laws. There is no legal recourse against parental-status discrimination under the rubrics of equal protection,⁹² gender stereotyping,⁹³ substantive due process,⁹⁴ or the Americans with Disabilities Act (ADA).⁹⁵ To date, no

54745(c)(1) (West 2000) (preventing discrimination in CAL-SAFE educational program because student is parent, pursuant to state interpretation of 34 C.F.R. 106.1, implementing Title IX); Cal. Gov't Code § 12955.2 (West 2002) (preventing housing discrimination against parents); Haw. Rev. Stat. § 515-5 (2000) (disallowing discrimination against parents in real estate contracts); 775 Ill. Comp. Stat. § 5/3-101 (2000) (same); Ind. Code Ann. § 22-9.5-1-2(2) (West 1991) (same); Iowa Code § 216.9(4) (1999) (including parental status, *inter alia*, in prohibition against education discrimination because of sex); Ky. Rev. Stat. Ann. § 344.010(15) (Michie 1997) (defining "familial status"), § 344.300(1) (authorizing cities and counties to pass any laws that protect parents from discrimination), § 344.360 (protecting parents against housing discrimination); Okla. Stat. tit. 25, § 1451(17) (1991) (prohibiting housing discrimination against parents); 43 Pa. Cons. Stat. Ann. § 954(t) (West 2001) (same); S.C. Code Ann. § 31-21-30(6) (1991) (same); S.D. Codified Laws § 20-13-20.1 (Michie 1995) (same); Wis. Stat. §§ 36.12(1), 38.23(1), 118.40(4)(b)(2) (1999-2000) (outlawing discrimination against parents in various state educational institutions).

⁹² An equal protection claim would state that either parents or nonparents should be considered a "protected class" within the meaning of the Fourteenth Amendment's Equal Protection Clause. U.S. Const. amend. XIV, § 1. The chances of success here are slim, given the courts' reluctance to create new classes of protected persons. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-83 (2000) (refusing to consider elderly protected class under the Equal Protection Clause); *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988) (refusing to consider homosexuals as protected class under Equal Protection Clause), *vacated and aff'd* on other grounds, 875 F.2d 699 (1989) (*en banc*).

⁹³ Joan Williams suggests that the sexual-stereotyping rubric of *Price Waterhouse v. Hopkins* should be used to challenge "ideal worker" policies. See Williams, *supra* note 4, at 104-10; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (allowing woman recovery under Title VII's gender provision because her employer penalized her for not conforming to stereotype of femininity). A man who was discriminated against because he placed a priority on his children rather than his work could attempt to recover using this template; a woman who was denied opportunities because she chose not to have children (perhaps by being excluded from a decisionmaking social group of mothers) could also use this principle. However, this strategy is far from perfect. It protects neither all parents nor all nonparents. Besides, the Supreme Court has yet to endorse an extension of the "gender stereotyping" language of *Price Waterhouse*.

⁹⁴ Litigants could use the *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) substantive due process precedents to argue that employers who discriminated on the basis of parental status were interfering with employees' right to choose whether or not to reproduce. However, this line of cases has prohibited only government actors from interfering with the right of privacy; the claim would therefore be limited to government employers. Additionally, litigants likely would have to prove that the interference amounted to a virtual prohibition on their autonomy. Since most litigants would likely leave a job before the interference reached this extreme point, finding plaintiffs would be difficult.

⁹⁵ Parents could claim that having children is a disability, since it substantially limits the "major life activity" of working. See Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2) (1994). However, this argument is undermined by the Supreme Court's holding that "procreating" is a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). If

claim has alleged discrimination based on parental-status discrimination alone.⁹⁶ In sum, the current laws only address a few facets of the greater problem. Nothing protects parents from discrimination in hiring unless they are federal government employees or live in selected states; nothing protects them from discriminatory benefits or workload policies. Similarly, nothing protects nonparents from discrimination in hiring, benefits, or workload.

II

A REMEDY TO PROTECT PARENTS AND NONPARENTS ALIKE

Having sketched out the problem of work/life conflict and the proposed remedies, Part II explains why laws prohibiting discrimination against parents but not nonparents are inadequate. The argument has three major points. First, protecting parents but not nonparents in an environment of competing norms creates a poorly functioning labor market. Second, even if the labor market functions efficiently, these laws contravene the two important societal values of care and reproductive choice. Third, in protecting parents only, these laws forsake the principle of multilaterality that undergirds other American antidiscrimination laws.

A. *An Intractable Problem: Ideal Worker vs. Ideal Parent*

Regulation of any market, including labor markets, often is deemed appropriate when no market solution is available to solve a problem. Antidiscrimination laws are one way to bridge the gap that prejudices and ingrained norms cause between the malfunctioning

procreating is a normal part of everyday life, such that its impairment is a disability, claiming that procreating is itself a disability could be difficult to sustain. Since infertility is a disability that substantially limits the "major life activity" of procreating, providing leave to parents but not to nonparents could impact the infertile disparately. Cf. *McWright v. Alexander*, 982 F.2d 222, 229 (7th Cir. 1992) (holding that plaintiff alleged good claim that her sterility was handicap under pre-ADA disability discrimination statute). This remedy would be of limited application, since it would not benefit fertile plaintiffs who chose not to have children. Also, since most benefit plans apply to adopted children as well as biological children of employees, infertile employees could not bring this claim unless their disability also affected their ability to adopt children. Cf. *id.* at 223-24 (ruling that employer's lack of adoption leave discriminated against sterile woman).

⁹⁶ However, some successful claims have alleged parental-status discrimination in conjunction with sex discrimination. These "sex-plus" cases, which may combine sex with any other factor, are premised on an employer's differential treatment of women who have a certain characteristic (such as parenthood) and men who have the same characteristic. For a discussion of the legal rationale at work in these cases, see *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205(MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998) (upholding "sex-plus" claim on 12(b)(6) motion).

real market and the well-functioning ideal market. Some economists, of course, will argue that in any market, there will be a variety of preferences: some discriminatory, some nondiscriminatory.⁹⁷ Profit-seeking employers, so the theory goes, should jump at the chance to hire the well-qualified yet discriminated-against employee; before long, profit will overcome prejudice, and the formerly rejected class will achieve wage parity.⁹⁸ If, however, a preference is intractable, all or most employers will hold the same discriminatory preference, the market will malfunction, and regulation in the form of antidiscrimination law should step in to remove the obstructive prejudice or norm.⁹⁹

The market is malfunctioning in the case of work and family benefits. This occurs because modern society embraces two radically conflicting norms: the "ideal worker" norm that serious, respected employees should sacrifice time with families in order to perform well at work,¹⁰⁰ and the "ideal family member" norm that responsible citizens should always have families and put their families first.¹⁰¹ Some employees (both parent and nonparent) violate the former, while other employees (both parent and nonparent) violate the latter. In all cases, employees who violate a norm may be subject to prejudice: Employees who violate the ideal worker norm may be seen as irresponsible, and employees who violate the ideal family member norm may be seen as "bad parents," "bad partners," or "bad children." Such derision naturally has adverse consequences in either the workplace or the family.¹⁰²

⁹⁷ See Estreicher & Harper, *supra* note 29, at 3.

⁹⁸ William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, *J. Econ. Persp.*, Spring 1998, at 63, 82 (1998) (describing neoclassical theory that "[i]f two groups share similar productivity profiles under competitive conditions where at least some employers prefer profits to prejudice, eventually all workers must be paid the same wage").

⁹⁹ For instance, Darity and Mason argue that racial and gender discrimination could not have been abridged through market forces and instead needed Title VII. *Id.* "The strong evidence of the persistence of discrimination in labor markets calls into question any theoretical apparatus that implies that the discrimination must inevitably diminish or disappear." *Id.* at 87.

¹⁰⁰ See *supra* notes 24-31 and accompanying text (describing ideal worker).

¹⁰¹ See Williams, *supra* note 4, at 20, 30; *supra* note 30 (describing conflict between motherhood and work).

¹⁰² Even if all employers do not have the same prejudices, the transaction costs often will be too high for each employee to search for the workplace that is her perfect match. See Estreicher & Harper, *supra* note 29, at 4 ("[M]obility in labor markets may be questionable. . . . Moreover, a variety of forces . . . may bind the employee to the job."). For the particular employee, the market will operate as if the employer held a monopoly or monopsony. The fact that the market has not produced a variety of flexible working arrangements despite high demand may suggest that such a malfunction is occurring. See Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 *Chi.-Kent L. Rev.* 1557, 1566 (2001) ("[O]ne of the mysteries of the labor market is why

However, when a employee receives special benefits that enable her to balance work and family, she, in effect, receives a “pass” from the ill effects of prejudice. She is not being irresponsible, because her absence from work, for instance, is legitimized by the presence of the benefit. Employees who do not receive these special benefits do not receive a “pass.”

Therefore, in workplaces that embrace the ideal-worker norm, where work-family benefits are available to parents, but not to nonparents, nonparents are laboring under the employer’s prejudice against ideal family members, but parents are not.¹⁰³ There will be a poorly functioning market for nonparent labor, since employers are making hiring, benefits, and promotion decisions irrationally between and among employees who can add equal productivity to the workplace. Changing the antidiscrimination laws to require employers to provide the same “pass” to nonparents will fix the market.¹⁰⁴

B. *Protection of Societal Values*

Even in a well-functioning, productive labor market,¹⁰⁵ regulation still may be necessary or desirable to accomplish broader societal agendas.¹⁰⁶ In other words, even if employees with some characteristics are less productive than others, we may wish to prohibit employers from basing hiring or benefits decisions upon this fact. For example, the ADA¹⁰⁷ requires employers to provide reasonable accommodation for employees with disabilities,¹⁰⁸ even though such accommodation may not maximize profitability, because it is a societal

it has not produced a greater variety of jobs, since there seems to be a desire for such jobs . . . , and it is difficult to identify something inherently magical about a forty-hour week that occurs in an office five days a week.”).

¹⁰³ If the employer correctly assumes that the employee violating the “ideal worker” norm is actually being less productive than the employee who is not violating the norm, the employer’s prejudice causes no market problem. The employer simply is choosing a more productive employee over a less productive one. In this case, however, other reasons for prohibiting such discrimination should attach—such as the centrality of care work to society as a whole. See *infra* Part II.B.1.

¹⁰⁴ When there is no “pass” for parents, all ideal family members (both parents and nonparents) feel the ill effects of prejudice in a workplace subscribing to the ideal worker norm. Although both parents and nonparents receive equal treatment, the ill treatment they receive is clearly undesirable. The argument for universal care in Part II.B describes why universally poor treatment for parent and nonparent ideal family members is undesirable. See *infra* Part II.B.1.

¹⁰⁵ See *supra* note 102 and accompanying text for a description of what such a market would mean in the parent/nonparent sense.

¹⁰⁶ See Estreicher & Harper, *supra* note 29, at 5 (“We may, for instance, wish to exclude the satisfaction of human ‘tastes’ for at least some forms of discrimination from the welfare calculus.”).

¹⁰⁷ 42 U.S.C. §§ 12101-12212 (1994).

¹⁰⁸ § 12112(b)(5).

value to avoid adverse economic impacts on employees with disabilities.¹⁰⁹ The Age Discrimination in Employment Act (ADEA)¹¹⁰ requires employers to refrain from discriminating against employees forty years old or over,¹¹¹ even though firing older employees saves more money, because it helps society to watch out for the welfare of older employees.¹¹² Title VII¹¹³ forbids employers to discriminate against women, even though women statistically are more likely than men to leave employment before the employer has recouped the full value of their training.¹¹⁴ None of these policies are “profit maximizing,” yet they are justifiable because they benefit society as a whole in important ways.

This Note suggests two such beneficial societal policies that an even-handed application of antidiscrimination laws to parents and nonparents would foster: the ethic of universal care and the importance of reproductive choice to personal identity.

1. *Universal Care*

As advocates for parental benefits rightly remind us, care for others produces benefits for society as a whole.¹¹⁵ Care—not as an expression of concern, but as a practical activity¹¹⁶—is essential to a properly functioning society.¹¹⁷ As Mona Harrington puts it:

[We must] add care to the pantheon of national social values. That is, to assure good care to all members of the society should become a primary principle of our common life, along with the assurance of liberty, equality, and justice.

We need to elevate care to this level of importance for the basic reason that it is essential to human health and balanced development. It is also crucial to developing human moral potential, to instilling and reinforcing in an individual a sense of positive connection to others. And it is this sense of connection that makes

¹⁰⁹ See § 12101 (expressing societal value of ending discrimination against people with disabilities); Estreicher & Harper, *supra* note 29, at 516 (describing economic incentives for employers to discriminate against people with disabilities).

¹¹⁰ 29 U.S.C. §§ 621-634 (1994).

¹¹¹ § 631(a).

¹¹² Estreicher & Harper, *supra* note 29, at 6 (“[I]t may be quite rational to discharge older workers who, because of seniority-based compensation policies, are paid at a level higher than the value they currently contribute. . . . [S]ociety may, however, wish to bolster the economic position of older workers because of the difficulties they confront in securing alternative employment.”).

¹¹³ 42 U.S.C. §§ 2000e to 2000e-17 (1994).

¹¹⁴ See *supra* notes 27-29 and accompanying text.

¹¹⁵ See *supra* notes 32-34 and accompanying text.

¹¹⁶ See *supra* note 51 and accompanying text.

¹¹⁷ *Id.*

possible the whole range of mutual responsibilities that allow the people of a society to respect and work toward common goals.¹¹⁸

Such rhetoric is likely to elicit dismissive snorts from many serious policy thinkers because it conjures up images of pale-faced Victorian women imploring us all to give a little kindness and make the world a bright, happy, sunshiny place. Unfortunately, such reactions are an inevitable result of years of “formal veneration of the separate, domestic sphere” where such ideas were “systematically feminized and . . . devalued.”¹¹⁹

Care is hardly without public value, however; even in hard numbers, the public cost of care is shocking. In 2000, the federal budget included \$615 billion for various elder-care programs¹²⁰ and \$134 billion for various child-care programs.¹²¹ The fact that the federal government pays for vast amounts of care underscores the enormous gap between the care work that families of all types are able to provide and what they actually need.

The public value of care only can be maximized if it is broadly inclusive of all kinds of care. Failure to do so risks inefficiencies and ruinous setbacks to those groups lobbying for public attention to the cause of care.¹²² Just as important, failure to be inclusive also passes up enormous resources. Restricting acceptable caretakers to the nuclear family unit, alone, for instance, risks losing the valuable innova-

¹¹⁸ Mona Harrington, *Care and Equality: Inventing a New Family Politics* 48-49 (1999); see also Deborah Stone, *Why We Need a Care Movement*, *Nation*, Mar. 13, 2000, at 13, 15 (“Caring is the essential democratic act, the prerequisite to voting, joining associations, attending meetings, holding office and all the other ways we sustain democracy.”). Although this Note does not reach the question of whether a right to care might take on constitutional proportions, it is enough to mention that the value of care to a well-functioning society is staggering.

¹¹⁹ Kathryn Abrams, *The Second Coming of Care*, 76 *Chi.-Kent L. Rev.* 1605, 1609 (2001).

¹²⁰ Cong. Budget Office, *Federal Spending on the Elderly and Children* 3 tbl.1, <ftp://ftp.cbo.gov/23xx/doc2300/fsec.pdf> (last visited Apr. 2, 2002).

¹²¹ *Id.* at 5-6 tbl.2 (including all federal spending on children except Earned Income Tax Credit).

¹²² This may be beginning already. See Williams, *supra* note 50, at 1451 (

Much of the spleen surrounding *The Baby Boon* reflects a gender war in which women hurt by domesticity’s sacralization of motherhood as the only path to “true” womanhood turn their anger on women hurt by domesticity’s marginalization of mothers. There must be a better way: this kind of gender war derailed the last feminist effort on the work-family axis, and threatens to derail this one as well.)

See also *supra* notes 37-41 and 62-68 and accompanying text (describing animosity between parents and nonparents over care issues).

tions of community-based care.¹²³ Restricting the objects of care to children alone risks forgetting the value of care to adults¹²⁴—a value that is becoming more important as people are living longer and the population is getting older.¹²⁵

The importance of using all care resources available becomes even more clear in situations where additional help cannot be obtained in the market. This often happens in family care, where a market substitute could not perform the same task. Joan Williams has explained, “[M]ost . . . forms of care cannot [be commodified]: you cannot simply hire someone to strategize with your teenager, or to comfort your mother, or to build up a reservoir of goodwill so that you have a friend or neighbor available for emergency backup childcare.”¹²⁶

2. *Personal Identity and Reproductive Choice*

Good antidiscrimination legislation should protect “those aspects of identity that are socially understood as important”¹²⁷ Although American antidiscrimination law protects against discrimination on the basis of many “aspects of identity” that are immutable,¹²⁸

¹²³ Williams, *supra* note 50, at 1467 (describing Lucie White’s proposal for “a wide variety of neighborhood-based caretakers’ circles, drop-in centers, and network-based approaches to childcare in place of rigid bureaucratic models”).

¹²⁴ See Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 *Chi.-Kent L. Rev.* 1673, 1682-83 (2001) (“Human development literature finds that the role of care in the formation of human capabilities and in human development is fundamental not only for children, but also for adults.” (internal quotations omitted)).

¹²⁵ See Fernandez, *supra* note 3, at 12-13 (describing problems of caring for skyrocketing elderly population); MacDermid et al., *supra* note 8, at 6-7 (showing how ratio of working-age to elderly people has decreased drastically in last hundred years).

¹²⁶ Williams, *supra* note 50, at 1466. One extreme example of a need for broad-based care which can not be obtained in the market is the Freedom Corps program established by George W. Bush. See George W. Bush, *The President’s State of the Union Address* (Jan. 29, 2002) (announcing establishment of Freedom Corps) (transcript available at <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>). Not only will Freedom Corps rally citizens to the cause of “homeland security,” but it also encourages citizens in a variety of community service activities, such as volunteering at hospitals and schools, working in youth mentoring programs, teaching parenting skills, helping in day care, and serving as companions to homebound seniors. George W. Bush, *USA Freedom Corps Policy Book* 4, 10, 23 (2002), <http://www.whitehouse.gov/news/releases/2002/01/freedom-corps-policy-book.pdf>. The kind of large-scale volunteerism proposed in Freedom Corps may not have a market parallel.

¹²⁷ Denise G. Réaume, *Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination*, 2 *Theoretical Inquiries L.* (Jan. 2001), <http://www.bepress.com/til/default/vol2/iss1/art13>.

¹²⁸ Examples include Title VII’s protection of race, color, sex, and national origin, see *infra* note 151, and the protection of age in the Age Discrimination in Employment Act (ADEA), see 29 U.S.C. §§ 621-634.

protection is not, and need not be, limited to immutable characteristics. For example, “religion” under Title VII covers religious belief, observance, and practice¹²⁹—all of which are matters of conviction and not merely or necessarily birth.¹³⁰ Sex, race, and ethnic origin may all be “immutable” in one sense, but, like religion, the *expression* of all of these traits can be muted or suppressed by hostile work environments.¹³¹ Thus discrimination also occurs when a woman is forced to conform her behavior to stereotypes of “femininity” held by upper management.¹³² An employee should not be forced to act “more white,” “more American,” or “less gay.”¹³³ Antidiscrimination is not about categorically protecting identity created by birth; it is about protecting people’s liberty of conscience over matters central to developing personal identity and autonomy.¹³⁴

The Supreme Court’s emphasis on the “fundamental” nature of the right to make choices regarding family and reproduction is one

¹²⁹ 42 U.S.C. § 2000e(j) (defining discrimination on account of religion to include “all aspects of religious observance and practice, as well as belief”).

¹³⁰ See *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (describing cognizable claim for employment discrimination under Title VII when employer discriminated against employee because employee did not share employer’s religious beliefs); *Young v. S.W. Sav. & Loan Ass’n*, 509 F.2d 140, 142-43 (5th Cir. 1975) (holding that atheist presented cognizable action for discrimination under Title VII when her employer forced her to participate in prayer activities); cf. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002) (arguing that liberty of conscience was central historical and philosophical basis behind freedom of religion and Establishment Clause).

¹³¹ Race, for instance, may be an immutable trait, but consider the case of a light-skinned African American who feels compelled to “pass” as white in order to avoid discrimination. Cf. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Pa. L. Rev. 149, 200 (1992) (describing, analogously, sex as semi-immutable characteristic). Similarly, one’s alienage is a matter of birth, but keeping one’s foreign citizenship is a matter of choice. Nonetheless, the choice is constitutionally and statutorily protected. 42 U.S.C. § 2000e-2(a)(1) (forbidding employers from discriminating against employees on basis of national origin); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (holding that Equal Protection Clause protects classifications of alienage and right to maintain citizenship in chosen country).

¹³² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹³³ Cf. Alexander, *supra* note 131, at 163-65 (arguing that discrimination in workplace reflects people’s preferences for dealing with those who conform to “role ideals”).

¹³⁴ Réaume, *supra* note 127; see also Alexander, *supra* note 131, at 200. Professor Alexander argues that “immutable” traits should be understood as those that require extreme “psychic costs and basic opportunity costs” to change. *Id.* People rarely identify themselves and others with traits that are easily altered. Thus, traits that are most difficult to conceal and are most constant through life—race, sex, alienage, religion—become most associated with personal identity. *Id.* In turn, because a person, in part, defines herself or is defined through certain salient and “immutable” traits, those traits entail even more psychic and opportunity costs to change. See *id.*; cf. *infra* notes 135-47 and accompanying text (discussing expansion of equal protection rights to fundamental choices regarding family and reproduction).

indication that the ability to make this choice is one of these essential characteristics.¹³⁵ The Court has repeatedly emphasized the sanctity of this personal decision. In *Skinner v. Oklahoma*,¹³⁶ the Court stated that procreation was a “basic civil right[.]”¹³⁷ Earlier, the Court discussed the importance of parents’ rights to make choices about their children’s education in *Meyer v. Nebraska*¹³⁸ and *Pierce v. Society of Sisters*.¹³⁹ In *Griswold v. Connecticut*,¹⁴⁰ the Court defended the right of a married couple to use contraception;¹⁴¹ in *Eisenstadt v. Baird*,¹⁴² it expanded this right to unmarried couples.¹⁴³ In *Roe v. Wade*,¹⁴⁴ the Court recognized the extremely important interest in determining whether to have a child.¹⁴⁵ In the cases following *Roe*,¹⁴⁶ the Court continued to recognize the fundamental personal importance of the choice.¹⁴⁷

The women’s rights movement also supported, and continues to support, the right of reproductive choice.¹⁴⁸ Indeed, support for

¹³⁵ Although these constitutionally motivated decisions only prohibit state actions that impinge upon this right, see *supra* note 94, the fact that the Court considers these rights fundamental informs the case for analogous legislative protection from private discrimination.

¹³⁶ 316 U.S. 535 (1942).

¹³⁷ *Id.* at 541.

¹³⁸ 262 U.S. 390 (1923) (invalidating state statute which prohibited the teaching of any non-English language in public or private grammar schools). *Meyer* emphasized the liberty to “establish a home and bring up children.” *Id.* at 399.

¹³⁹ 268 U.S. 510 (1925) (invalidating state statute requiring children to attend public school).

¹⁴⁰ 381 U.S. 479 (1965).

¹⁴¹ In *Griswold*, the Court wrote:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life[,] . . . a harmony in living[,] . . . [and] a bilateral loyalty . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

¹⁴² 405 U.S. 438 (1972).

¹⁴³ *Id.* at 453 (championing right of couples to determine “matters so fundamentally affecting a person as the decision whether to bear or beget a child”).

¹⁴⁴ 410 U.S. 113 (1973).

¹⁴⁵ *Id.* at 153. The Court specifically noted the practical concerns, such as the possibility of a “distressful life and future,” and physical or emotional harm, that could arise if the woman could not exercise her right. *Id.*

¹⁴⁶ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁴⁷ See, e.g., *id.* at 846.

¹⁴⁸ Although it would be impossible to present a survey of the broad variety of views in the women’s rights movement in one footnote, one indication of the movement’s wide-ranging commitment to reproductive choice is in the diverse literature of city-specific women’s liberation organizations. See generally, e.g., *Boston Women’s Health Book Collective, Our Bodies, Ourselves for the New Century* (1998) (advocating variety of reproductive choices); *Chicago Women’s Liberation Union, CWLU Historical Archive*, <http://www.cwluherstory.com/CWLUArchive/archive.html> (last visited Feb. 20, 2002) (containing

women's autonomy created the changes in the family that led to this critical moment in workplace history.¹⁴⁹ It would be ironic if support for the autonomous right to contraception promoted only the choice of "when," and not "whether," to have children.¹⁵⁰ For these reasons, the societal value of reproductive choice, and the fact that it makes up a large component of personal identity, may justify extending workplace protections to nonparents as well as parents.

C. *Multilaterality in Discrimination Law*

Title VII¹⁵¹ protects "all sides" of every protected class—that is to say, it protects both men and women;¹⁵² it protects all racial and ethnic categories;¹⁵³ and it protects all religious believers,¹⁵⁴ nonbe-

historical documents in which Chicago Women's Liberation Union opposes forced sterilization of women and advocates abortion rights and home births).

¹⁴⁹ See *supra* notes 1-8 and accompanying text (describing social forces that were catalysts for changes in workplace structure).

¹⁵⁰ See Franke, *supra* note 70, at 184 (urging more attention to "complex ways in which reproduction is incentivized and subsidized in ways that may bear upon the life choices women face").

It bears noting that feminism has had to address these issues before. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994), which famously required the payment of equal wages for equal work, was premised on the notion that it was unfair to pay men a "family wage" while giving women less because they were either single or (presumably) supported by their husbands. See Case, *supra* note 48, at 1763 (quoting Secretary of Labor's 1945 testimony that "[p]ay is for work done, rather than for the number of dependents of the worker").

¹⁵¹ Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating with respect to the "terms and conditions of employment" against five separate classes: race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. Employees may prove a *prima facie* case of discrimination in three ways:

- (1) Showing that an employer used a facially discriminatory classification, *id.*;
- (2) Showing that an employer had an illegal motive (known as "disparate treatment"), *id.*; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (clarifying burden-shifting rules in disparate-treatment cases); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (laying down procedural framework for disparate treatment); or
- (3) By showing that an employer's policy had an adverse effect upon a protected group (known as "disparate impact"). See *Griggs v. Duke Power*, 401 U.S. 424 (1971) (announcing rule); *cf.* § 2000e-2(k)(1)(A)(i).

When employees bring claims of religion, sex, or national origin discrimination, employers have a defense; they may prove that the preferred status was a "bona fide occupational qualification" for the job. § 2000e-2(e).

¹⁵² See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women . . ."); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) ("Male as well as female employees are protected against discrimination [under Title VII].").

¹⁵³ See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) ("[The] terms [of Title VII] are not limited to discrimination against members of any particular race.").

lievers,¹⁵⁵ and atheists.¹⁵⁶ In so doing, the statute creates an implicit assurance of even-handedness to all groups (“multilaterality”). A Muslim employee knows that her employer must accommodate her Protestant coworker’s need to attend church on Sunday, but she also knows that her need to pray several times during the work day will be respected.¹⁵⁷ Multilaterality thus lends legitimacy to the statutory scheme—since people in all groups know that their needs are respected, they have no fear that the system is being manipulated for the benefit of a single group. This legitimacy is critical to a well-functioning system of laws because it prevents lawsuits based on insecurity rather than facts. It also creates the good faith that allows parties to settle their differences without litigation; if every claim had to proceed through the lengthy, complex litigation process to achieve results, the system would break down very quickly. Therefore, any efficient statutory mechanism or workplace agreement that protects against parental status discrimination should protect the interests of both parents and nonparents multilaterally.¹⁵⁸

Astute observers may object that the ADEA does not protect both the old and the young multilaterally; it only protects employees over age forty.¹⁵⁹ While this policy is different from the multilateral protection of Title VII, the two rationales can be reconciled. The young, who are not protected under the ADEA, almost certainly will be compensated¹⁶⁰ by the protection they will receive when they reach age forty. Some argue for the parallel position that nonparents someday will have children and then will enjoy the benefits they now lack.¹⁶¹ However, recent historical developments, including the ad-

¹⁵⁴ § 2000e(j) (defining discrimination on account of religion to include “all aspects of religious observance and practice, as well as belief”).

¹⁵⁵ See, e.g., *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (describing cognizable claim for employment discrimination under Title VII when employer discriminated against employee because employee did not share employer’s religious beliefs).

¹⁵⁶ *Young v. S.W. Sav. & Loan Ass’n*, 509 F.2d 140, 142-43 (5th Cir. 1975) (holding that atheist presented cognizable action for discrimination under Title VII when her employer forced her to participate in prayer activities).

¹⁵⁷ 29 C.F.R. § 1605 app.A. (interpreting, as part of Equal Employment Opportunity Commission regulations, Title VII’s prohibition against discrimination on basis of religion as requiring reasonable accommodation of prayer breaks and nonworking Sabbaths).

¹⁵⁸ The term “multilateral” (rather than “bilateral”) describes parents and nonparents because there are many different categories of parents and nonparents. See *supra* note 18.

¹⁵⁹ 29 U.S.C. § 631(a) (1994).

¹⁶⁰ The young would not be compensated only if they tragically do not reach age forty or if the statutory scheme changes before they reach it. The inequity of these eventualities may not be preventable.

¹⁶¹ See *supra* note 38 and accompanying text; see Talk of the Nation, *supra* note 5 (“Ms. BURKETT: . . . So much of this debate is presupposing that women and mothers are the

vent of reliable birth control,¹⁶² have made parenthood a choice, not an inevitability. Therefore, parental status is more analogous to matters of conviction and personal identity, like religion, rather than progressively cycling categories like age. Restricting protections to parents alone will not create an even-handed solution in the long run, because not all nonparents will choose to become parents.

III.

THE LEGAL STRUCTURE OF A MULTILATERAL REMEDY

Part II argued that antidiscrimination laws should protect parents and nonparents multilaterally. This Part offers some suggestions for structuring such a legal regime and concludes with a brief discussion of the effects of this law on the overall problem of work/family that was outlined in Part I.

Federal antidiscrimination laws contain two main types of claims: disparate treatment and disparate impact.¹⁶³ These claims may be combined in a variety of ways. For instance, Title VII allows plaintiffs to bring disparate-impact and disparate-treatment claims for discrimination "on the basis of race, color, religion, sex, or national origin,"¹⁶⁴ but ADEA appears to allow only disparate-treatment claims for discrimination against employees at least forty years old.¹⁶⁵

Disparate-impact claims allow plaintiffs to recover upon a showing that an employer's policies had a differential and adverse impact upon members of their class, even though the employer's intent was neutral and nonmalicious.¹⁶⁶ Such a remedy would not be workable in a multilateral statute protecting parents and nonparents because it would invalidate too many valuable neutral policies.

Consider, for example, the problem facing drafters of the ADEA: Many policies having disproportionate and adverse impacts on older employees may not be the products of invidious discrimination. For example, older employees may need more medical benefits than

same person." Of course, this assumption is likely to be wrong when the nonparent is avowedly childfree—and even if it is right, it may be profoundly insulting to the childfree employee. See Lisa Belkin, *Your Kids Are Their Problem*, N.Y. Times, July 23, 2000, § 6 (Magazine), at 30 (describing case of childfree woman who refused to take psychiatric exam before her tubal ligation "because the suggestion that she was crazy to want a life without children was 'absurd and insulting'").

¹⁶² See *supra* notes 1-2 and accompanying text.

¹⁶³ See *supra* note 151 for an explanation of these terms.

¹⁶⁴ 42 U.S.C. § 2000e-2(a)(1) (1994) (disparate-treatment remedy); § 2000e-2(k)(1) (disparate-impact remedy).

¹⁶⁵ See 29 U.S.C. § 631(a) (1994) (prohibiting discrimination against individuals at least forty years old); *infra* note 168 and accompanying text (discussing application of disparate-treatment versus disparate-impact standards to ADEA).

¹⁶⁶ *Id.*

younger employees. Older employees are by definition closer to retirement than younger employees; changes or reductions in health plans or pensions thus impact older employees most heavily, but employers nevertheless may have legitimate nondiscriminatory reasons to change or reduce these benefits. The ADEA resolves this conflict by allowing employers to make age distinctions within a benefit plan so long as equal contributions are made to employees of all ages: It allows distinctions “[w]here, for each benefit, or benefit package, the actual amount of payment made or cost incurred on behalf of an older employee is no less than that made or incurred on behalf of a younger employee.”¹⁶⁷ Probably for these reasons, the Supreme Court has hinted broadly that the ADEA permits only claims of disparate treatment, not claims of disparate impact.¹⁶⁸

Allowing a disparate-treatment remedy without disparate impact may present a solution to situations, such as those created when employers provide dependent-care benefits, where an employer’s neutral policies enacted without discriminatory motive nevertheless disparately impact a particular group. To illustrate, consider an employer who provides a neutral, all-purpose sick-leave plan that, like FMLA leave, can be used to care for a variety of family members. Employee A, who has a partner and three children, uses seven days of this leave in a year, while Employee B, who has no partner and cares for an elderly parent, uses only two days’ leave in a year.¹⁶⁹ Under a disparate-impact remedy, Employee B would be able to sue the employer for providing benefits that favor parents and disadvantage her. Such a suit may prevent some instances of intentional discrimination in favor of parents, but only at the expense of the many more numerous cases where parents’ disproportionate use of leave can be attributed to

¹⁶⁷ § 623(f)(2)(B)(i) (1994).

¹⁶⁸ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. . . . Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”). The federal courts of appeals are split on whether the ADEA allows disparate-impact claims. Circuits that ruled prior to the Court’s *Hazen Paper* decision maintain that the claims are permitted, see, e.g., *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), while many circuits that ruled after *Hazen Paper* have not allowed the claims, see, e.g., *Smith v. City of Des Moines*, 99 F.3d 1466, 1469 (8th Cir. 1996) (noting that after *Hazen Paper* many courts reconsidered whether disparate-impact theory should be recognized under ADEA).

The ADEA also allows employers the affirmative defense that they were motivated by “factors other than age.” § 623(f)(1). Since very few (if any) disparate-impact claims could survive this defense, it is likely that the ADEA does not contemplate disparate-impact claims.

¹⁶⁹ This disparate impact of the FMLA is likely to occur frequently since “childcare typically takes far more time over a lifetime than other types of care work.” Williams, *supra* note 50, at 1466.

greater need.¹⁷⁰ In fact, it may overturn policies that are far more likely to be helpful than to be harmful.

At the crux of the problem that an antidiscrimination remedy could solve is the concern that employers will make false assumptions about an employee's work/life commitments based on her membership in a particular category of parental status,¹⁷¹ and that employers will discourage certain kinds of care by assigning benefits based on societally unacceptable categories.¹⁷² A disparate-treatment remedy can address both of these concerns. Returning to Employees A and B for a moment, assume that Employee A, the parent, actually uses ten hours a year of sick time to care for her family under the employer's all-purpose sick-leave plan. Employee B, the nonparent, actually uses twelve hours a year. An employer hires Employee B, erroneously reasoning that she will not need as much time off because she does not have children.¹⁷³ Such a decision is inefficient because it fails to provide a market for Employee B's true mix of preferences and needs. It also ignores the ethics of universal care, because it assumes that children are the only members of society worth caring for. A disparate-treatment remedy would solve these problems by allowing Employee A to sue for discrimination, since the employer made the hiring decision because of parental status.

Next, consider another common scenario where an employer offers paid leave time to new adoptive or biological parents but not to adult children newly caring for elderly parents. Such a policy is undesirable because it neglects to maximize care because of a reproductive choice decision. A disparate-treatment remedy would allow Employee B to sue for discrimination because the employer's policy is based on parental status.¹⁷⁴

Lastly, consider a scenario where Employee A, the new parent, and Employee B, the nonparent, are vying for a promotion. The em-

¹⁷⁰ In other words, it is more likely that the statistical anomaly (parents' use of seven days' leave rather than nonparents' use of two days' leave) is due to actual need rather than discriminatory tailoring of benefits in favor of parents. In such cases, where "countless ordinary preferences" rather than irrational discrimination create disproportionate impacts, it seems costly to pursue the few instances of discrimination at the expense of the many innocent uses of the benefit. See Alexander, *supra* note 131, at 216.

¹⁷¹ See *supra* Part II.A.

¹⁷² See *supra* Parts II.B & II.C.

¹⁷³ The employer may reason this way either because she knows of Employee B's elder-care responsibilities and falsely assumes that these responsibilities will not take as much time as child care, or because she does not know about Employee B's elder-care responsibilities. For the purposes of this Note, it is irrelevant which of these assumptions the employer holds; both assumptions are inefficient and contravene the ethic of universal care.

¹⁷⁴ One possible simplified wording of such a statute, drawing heavily from the ADEA, would read as follows:

ployer chooses to promote Employee B, reasoning that Employee A will have a great deal of child-care responsibilities at home and will be unable to fulfill the demands of the new job. The employer's decision is based solely on this assumption, and not on any actual record of absenteeism or lack of productivity. This decision is undesirable for the same reasons as in the previous two hypotheticals. Under a disparate-treatment remedy, as under the current laws forbidding discrimination on the basis of parenthood, Employee A has a cause of action against the employer.

Employers as well as employees would prefer a disparate-treatment remedy to a disparate-impact remedy. Disparate-treatment remedies protect employers from suit if they simply refrain from inquiring about employees' familial obligations when hiring or promoting and provide facially neutral benefits policies. This would allow employers either to word benefits inclusively (such as by offering a general "personal" leave rather than parental leave, sick leave, vacation, etc.),¹⁷⁵ or to create a cafeteria plan,¹⁷⁶ awarding each employee

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- (1) The Congress hereby finds and declares that:
 - (a) Because of the increase in dual-income households and longer hours on the job, employees of all family types are struggling to balance work and family responsibilities.
 - (b) Some employers have implemented measures intended to remedy this problem, but that assist employees with children at the expense or to the exclusion of employees without children.
 - (c) Some employers have assumed that employees with children are more likely to prioritize family at the expense of job performance, and have based hiring and advancement decisions on this assumption, to the detriment of employees with children.
 - (d) Because of the fundamental nature of reproductive decisions, and because arbitrary discrimination in employment because of parental status is unfair and burdens commerce and the free flow of goods in commerce,
 - (2) It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's parental status;
 - (3) Nothing in Section 2 shall be construed to prevent an employer from offering any benefit where, for each benefit, or benefit package, the actual amount of payment made or cost incurred on behalf of employees with children is no less than that made or incurred on behalf of employees without children.
 - (4) For the purposes of this statute, "parental status" connotes either the condition of being a parent or of not being a parent. The condition of being a parent is satisfied when an employee has substantial financial responsibility for a child. This condition includes, but is not limited to, the condition of being a foster parent, adoptive parent, or natural parent, and may include both partial- and full-custody parents.

¹⁷⁵ For example, a collectively bargained solution between Catholic Healthcare West and a local union provided for Paid Time Off (PTO), which "combines sick and personal leave and is separate from other vacation time employees may have. It can be used for any personal reason, . . . [including] vacations, religious observances, medical visits, [and] per-

a certain number of “points” to be spent on the benefits of her choice. This system would allow employers to spend equal amounts on benefits for parents and nonparents, just as ADEA requires employers to equalize payments for older and younger employees’ benefits.¹⁷⁷

CONCLUSION

An antidiscrimination remedy preventing disparate treatment of both parents and nonparents is the best way to help employees of all types navigate the intractable conflict between work and family, to preserve the values of universal care and reproductive freedom, and to maintain the multilateral nature of American antidiscrimination law.

Parents have good reason to ask for help as they balance the demands of child care and the workplace, and employers should not be hampered unnecessarily in their efforts to assist parents. Parents are correct in asserting that good parenting is net beneficial, because it properly socializes the next generation of responsible citizens.¹⁷⁸ The choice to parent is also worthy of protection on a personal level: Everyone should have the right to make reproductive choices without fear of discrimination.¹⁷⁹ Thus, parents should not be discriminated against by employers who refuse to hire or promote them simply because of their status as parents.

A multilateral remedy would satisfy parents’ legitimate concerns. Employers could not consider them unfit to hire, retain, or promote simply because of their parental status; employers defending discrimination lawsuits brought by parents would be required to show that their decisions were not made “because of parental status.” Parents still could enjoy employer-subsidized day care, child health care, and other child-centered benefits because parents would be able to choose those options from a menu offered by the employer. This scheme does not solve the problems associated with the “second shift,” because it does not require employers to provide work/life benefits to

sonal or family needs.” AFL-CIO Working Women’s Dep’t, *Bargaining Fact Sheet: Family Leave and Expanding the Family and Medical Leave Act*, <http://www.aflcio.org/women/family.pdf> (last visited Feb. 20, 2002).

¹⁷⁶ See *supra* note 78 and accompanying text.

¹⁷⁷ See *supra* note 167 and accompanying text.

¹⁷⁸ See Arendell, *supra* note 30, at 7 (“[M]others are held accountable for such things as children’s behavior, mental and physical health, school performance, character, and developmental outcomes.”).

¹⁷⁹ See *supra* Part II.B.2.

parents. Yet it does not hinder the solutions either, since benefits addressing the “second shift” remain available.¹⁸⁰

Although the care of children by parents is an inestimable societal good, the method of supporting it need not discriminate on the basis of reproductive choice or accident. Nonparents make a good case that childrearing is not the only socially valuable activity worth public notice and protection; nonparents’ activities benefit society in many ways, from community service work, to mentoring children, to caring for aging parents. At least in the eyes of the law, each of these activities, and others like them, deserves equal regard with parenting.¹⁸¹ Nonparents’ decision to remain childless (or childfree) should not allow employers to exclude them from benefits calculated to assist caregivers.

However, nonparents go astray when they assume that all activities are equal.¹⁸² Claiming that taking a weekend to go skiing, for example, provides the same societal benefit as taking that weekend to care for a sick relative (child or not) is not justifiable. Employers should distinguish between privileging activities that benefit society and privileging activities that have purely personal benefits, without

¹⁸⁰ It is possible that employers will reduce expenditures on parents’ benefits to accommodate the increases in nonparents’ benefits necessary to comply with this scheme. This Note considers some reduction in benefits to be an unfortunate but necessary sacrifice to advance the values discussed in Part II. In addition, this Note considers it likely that such reductions in benefits for parents will be offset by the increase in child care from other sources, such as extended kinship and friendship networks, that may result from providing benefits to more workers. Cf. McClain, *supra* note 124, at 1715 (describing state designed around universal care, where some care is provided “in households by relatives and friends, but such households would not necessarily be heterosexual nuclear families. . . . [C]hildless adults, older people, and others without kin-based responsibilities would join parents and others in democratic, self-managed carework activities” (quoting Nancy Fraser, *After the Family Wage: A Postindustrial Thought Experiment*, in *Justice Interruptus* 41, 61 (1997))).

¹⁸¹ Critics of this claim may argue that nonparents are likely to abuse care leave benefits. However, fears of abuse are not unique to nonparent leave; parents also may abuse this leave. As Mary Anne Case points out, trust is a necessary element of the current system:

Are we going to do quality control, and, if so, should we check up to see how people are using their leave time? Should we make them put in a daily log, the way we do when they get paid for [other] activities? . . . What if they use their leave as a paid vacation, spending very little time with their child? What if they . . . spend their own time writing more law review articles?

Case, *supra* note 48, at 1773. Case’s examples are equally applicable to parent and nonparent leaves, suggesting that nonparents may be no more susceptible to leave abuses than parents.

¹⁸² For examples of this assumption, see, e.g., Burkett, *supra* note 2, at 38 (citing “writ[ing] a book, [and] travel[ing]”); Kahn, *supra* note 38 (comparing decision to have child to decision to buy horse).

burdening important reproductive decisions that should be autonomous.

A multilateral remedy would satisfy nonparents' legitimate concerns, because it would require employers to make hiring and promotion decisions on the merits, thus ensuring that extra work would be recognized through enhanced reward. Nonparents also would receive benefits equal in value to benefits enjoyed by parents. Although nonparents sometimes would have to "fill in" for absent parents, they would be compensated by equal benefits—they will know that parents also will fill in when nonparents have family obligations.

Finally, this remedy should satisfy employers because they would gain the benefits of high employee morale (and thus fewer losses in productivity),¹⁸³ and they would have a simple statutory scheme that would protect them from unexpected lawsuits. The remedy proposed here allows employers to base hiring, firing, benefits, and promotion decisions on neutral, easily demonstrated factors, such as education, experience, and hours worked; they thus could promote the objectives of their business freely without fear of reprisal.¹⁸⁴ The requirement that employers make expenditures of equal value for parents and nonparents would allow employers easily to demonstrate their compliance with the statutory scheme. Employers would not be burdened with extra expenses, because the system outlined here does not require a minimum level of benefits.¹⁸⁵

In summary, a multilateral remedy advances the goals of parents, nonparents, and employers and serves the interest of society with very few drawbacks. At this crucial time in the development of the workplace, it is critical that mechanisms enabling employees to balance work and family be as inclusive and even-handed as possible. Reversing the trend toward antidiscrimination laws that favor parents is an important first step.

¹⁸³ See *supra* Part I.C for a discussion of how providing benefits increases employee productivity.

¹⁸⁴ Some meritorious cases of malicious discrimination will no doubt go unpunished without a rubric of disparate impact. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 989 (1988) (using this concern to extend disparate-impact theories to claims involving subjective evaluation systems). However, because there is such a high nondiscriminatory correlation between parental status and adverse impacts, see *supra* note 170, allowing disparate impact likely would create more false positives than disparate treatment would create false negatives.

¹⁸⁵ See *supra* note 180.

