

# Legislative Initiative for Work-Family Reconciliation in South Korea: A Comparative Analysis of the South Korean, American, French, and German Family Leave Policies

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*This thesis compares the family leave policies (maternity, paternity and parental leave) of South Korea, U.S., France, and Germany by exploring the cultural context and purposes in adopting family leave laws. Unlike Western nations, family leave legislation has been ineffective in South Korea since family leave laws were adopted as a means to achieve the ranks of a developed nation, with little consideration as to internal cultural values. Traditional influences of Confucianism, which support gender inequality have hindered implementation of family leave laws, which are based on democratic principles. One method to embrace family leave in Korea is through recognition of a collective goal of increasing women's workforce participation through family leave, since collectivism has historically been accepted and valued by the Korean people. By shifting responsibility for children from parents to government, children can be regarded as public goods, and the establishment of public childcare centers can support the implementation of family leave policies to assist working families in South Korea.*

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## INTRODUCTION

In recent years, the South Korean government has adopted various legislative measures to overcome the historically low birth rate and impending labor shortage crisis. Family leave<sup>1</sup> laws are significant since

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1. For purposes of this Article, “family leave” includes maternity leave, paternity leave, and parental leave. “Maternity” and “paternity” leave are taken immediately following childbirth, and “parental” leave is long-term leave intended for child-rearing. This Article will refer to maternity,

childbirth is the point where many working women in South Korea experience gender discrimination, in the form of lower pay, demotion, and terminations in the workplace. Maternity leave laws in South Korea stipulate that all employed workers shall be provided with job-protected time away from work for the birth of a child.<sup>2</sup> However, despite the existence of protective laws, a majority of workers experience negative effects of family leave in the workplace or are unable to utilize family leave. In South Korea, approximately 1,950,000 women, or one out of five women, have exited the workplace due to marriage, pregnancy, childbirth, and childrearing.<sup>3</sup> Non-compliance of family leave laws is a common occurrence in South Korea. From 2010 to 2012, nearly 4,000 female workers were terminated during family leave.<sup>4</sup> In 2012, a meager 19.3% of South Korean mothers used maternity leave.<sup>5</sup> In contrast, in France, 97% of eligible mothers took advantage of maternity leave in 2007,<sup>6</sup> and in Germany, approximately 73%<sup>7</sup> of eligible women took advantage of maternity leave in 2001.<sup>8</sup>

Laws do not exist in a vacuum and cultural contexts have shaped

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paternity and parental leave, comprehensively, as “family leave.”

2. Namnyeo Goyong Pyungdeungwa Il Gajung Yanglip Jiwonae Gwanhan Beobyul [Act on Equal Employment and Support for Work-Family Reconciliation], Act. No. 3989, Dec. 4, 1987, art.3 (S.Kor.) [hereinafter Act on Equal Employment], <http://www.ilo.org/dyn/travail/docs/1593/Act%20on%20Equal%20Employment%20and%20Support%20for%20Work-Family.pdf>. According to the above Act, family leave includes maternity and paternity leave immediately following childbirth, and parental leave for childrearing. This Act applies to all private sector jobs and proclaims equal opportunity and treatment for both sexes in employment. The Act prohibits discrimination against workers based on age, marriage, pregnancy, or childbirth.

3. STATISTICS KOREA, *2013 Statistical Report on Career Break Women*, [http://kostat.go.kr/portal/korea/kor\\_nw/2/1/index.board?bmode=read&aSeq=310384](http://kostat.go.kr/portal/korea/kor_nw/2/1/index.board?bmode=read&aSeq=310384) (last visited Apr. 30, 2014).

4. KOREAN MINISTRY OF CULTURE, SPORTS, AND TOURISM, *2014 Blue House Presidential Policy Briefing*, (Feb. 11, 2014), <http://www.korea.kr/special/2014briefingMobileView.do?pkgId=49500590&newsId=148773780&newsPageIndex=1&infoPageIndex=1&flag=1>.

5. STATISTICS KOREA, *supra* note 3. In addition, only 13.2% of Korean women used parental leave. *Id.*

6. *Use of Childbirth-Related Leave by Mothers and Fathers*, ORG. FOR ECON. COOPERATION AND DEV., <http://www.oecd.org/els/soc/41927348.pdf> (last visited Apr. 30, 2014) (Also, 66% of French fathers used paternity leave while 14.3% of German fathers used paternity leave).

7. Marlene Schmidt, *Family Friendly Policy and the Law: Germany: Employment, The Family, And the Law: Current Problems in Germany*, 27 COMP. LAB. L. & POL'Y J. 451, 464, 467 (2006) (noting that in 1985, mother's leave or maternity leave, consisting of six weeks prior and eight weeks post-confinement, was replaced by parental leave).

8. In Germany, women receive 100% of salary during maternity leave and there is no ceiling. 2% of maternity leave payments is paid for by national health insurance and the rest is covered by employers. See Ben Shore, *Maternity and Paternity Leave: The Small Print*, BBC.COM (Oct. 20, 2010), <http://www.bbc.com/news/business-11587797>. When asked about the costs of the extended leave mandated in Germany, one employer noted, “We don't think about it, your question is like asking how we feel about workers receiving Sunday as a day off.” Joseph P. Allen, *European Infant Care Leaves: Foreign Perspectives on the Integration of Work and Family Roles*, in THE PARENTAL LEAVE CRISIS: TOWARDS A NATIONAL POLICY 257 (Edward F. Zigler & Meryl Frank eds. 1988).

family leave laws in the U.S., France, and Germany. In the U.S., liberalism,<sup>9</sup> capitalism,<sup>10</sup> and minorities<sup>11</sup> have molded family leave laws into its current unpaid form.<sup>12</sup> In France, pronatalism,<sup>13</sup> unemployment,<sup>14</sup> and emphasis on large families<sup>15</sup> have propelled generous family leave policies together with a state-sponsored childcare system.<sup>16</sup> In Germany, maternalism, and focus on traditional families has led to policies that facilitate women to leave the workforce in order to care for children.<sup>17</sup> Unlike these three countries, South Korea traveled a uniquely different path to the adoption of family leave laws. In South Korea, family leave laws were not the product of internal conflict and reflection, but rather adopted as a tool to achieve modernization. Without consideration as to the traditional values inherent in Korean society, family leave laws were adopted as a governmental scheme to join the ranks of developed nations.<sup>18</sup> As a result, these laws have collided with traditional notions of ordered gender inequality<sup>19</sup> and hierarchical social structures. A family leave policy that has been effective in Western states may not function properly in South Korea due to different cultural values. In South Korea, a democratic constitution was adopted in 1948, and family leave laws are based on the gender equality principles of that constitution. However, traditional Confucian ideology of gender inequality and hierarchical social order has hindered the establishment of constitutional norms in Korean society.<sup>20</sup>

9. Myra Marx Ferree, *An American Roadmap? Framing Feminist Goals in a Liberal Landscape*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 284–97 (Janet Gornick & Marcia Meyers eds., 2009).

10. RUTH COLKER, AMERICAN LAW IN THE AGE OF HYPER CAPITALISM: THE WORKER, THE FAMILY AND THE STATE 5–22 (1998).

11. Joel F. Handler, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization, and Obligation in Social Welfare History*, 56 BROOK. L. REV. 899, 907–08 (1990).

12. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2006).

13. Pronatalism refers to the ideology of favoring a high birth rate and promoting such measures. See Marie-Monique Huss, *Pronatalism in the Inter-war Period in France*, 25 J. OF CONTEMP. HIST. 39, 40 (1990).

14. Kimberly J. Morgan & Kathrin Zippel, *Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe*, 10 SOC. POL. 49, 60 (2003).

15. Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 397.

16. Carol Lawson, *How France is Providing Child Care to a Nation*, N.Y. TIMES (Nov. 9, 1989), <http://www.nytimes.com/1989/11/09/garden/how-france-is-providing-child-care-to-a-nation.html>.

17. Sonya Michel, *Maternalism and Beyond*, in MOTHERHOOD, WELFARE AND SOCIAL POLICY IN THE TWENTIETH CENTURY 22–24 (Klein et al. eds., 2012) (defining the ideology of maternalism as exalting women’s capacity to mother and to attach values such as care, nurturance, and morality).

18. See Jenny Ma, *Of “Females and Minors”: A Gendered Analysis of the Republic of Korea’s Labor Standards Act and Reforming Labor Market Dualism*, 49 COLUM. J. TRANSNAT’L L. 717, 725–26 (2011).

19. Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: the Family Law*, 14 B.C. THIRD WORLD L. J. 145, 145–150 (1994) (describing the South Korean social regime where sexual inequality is mandated by governance policy).

20. SEUNG-KYUNG KIM, CLASS STRUGGLE OR FAMILY STRUGGLE? THE LIVES OF WOMEN

Thus, the historical influences of Confucianism, which spans over 600 years, and its emphasis on ordered inequality need to be addressed to promote compliance with family leave laws.<sup>21</sup> Unlike the rapid economic developments that ensued following the Korean War, traditional values and customs have largely remained intact and the remnants of Confucian ideology are particularly acute in gender relations.<sup>22</sup> Despite a democratic constitution that embraces the ideals of equality and fairness, South Korean society has been slow to accept these values as its own.<sup>23</sup> The concept of individual rights has yet to mature, and women's rights in the workplace remains a peripheral issue.<sup>24</sup>

In South Korea, Confucian gender inequality has hindered the implementation of family leave, which is based on South Korea's constitutional principles of gender equality and individual rights.<sup>25</sup> Confucianism's emphasis on collectivism, however, remains relevant as a method to accept family leave as a nation-building scheme to overcome the looming labor shortage crisis through female employment.<sup>26</sup> Collectivism has been proven to be a means to unite people during times of national crises. Throughout war, poverty, and times of financial difficulty, Koreans united as a people to overcome adversity. Similarly, although initially adopted as a superficial law for the purpose of modernizing the nation, family leave law can be a means to increase women's participation in the workforce when it is embraced rather than set aside as a law anomalous with Korean society. The functional rule of law can be strengthened in South Korea when family leave is implemented through the collective

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FACTORY WORKERS IN SOUTH KOREA, 5–55 (1997) (describing how Confucianism remains an important cultural legacy in Korea and endorses filial piety, social harmony, and deference to superiors).

21. CHUNG-HEE SOH, *THE CHOSEN WOMEN IN KOREAN POLITICS: AN ANTHROPOLOGICAL STUDY* 16–24 (1991) (describing how Confucian ideology of male superiority still remains in South Korea, and how the separation of male-public and female-domestic roles persists).

22. In the modern setting, hierarchical gender relationships are realized in male supervisors overseeing female employees. See HWA-SOON CHO ET AL., *LET THE WEAK BE STRONG: A WOMEN'S STRUGGLE FOR JUSTICE* 55–73 (1988).

23. MIJEONG LEE, *WOMEN'S EDUCATION, WORK AND MARRIAGE IN KOREA: WOMEN'S LIVES UNDER INSTITUTIONAL CONFLICTS* 28–34 (1998) (describing how gender inequality within the family unit remains a challenge for many Korean women as obedience to one's husband is a highly regarded virtue of a wife).

24. See generally CHO ET AL., *supra* note 22.

25. 1987 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], Oct. 29, 1987, art. 32 (S. Kor.), available at [http://korea.assembly.go.kr/res/low\\_01\\_read.jsp?boardid=1000000035](http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035) (“Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages, and working conditions”).

26. See, e.g., Randall S. Jones, *Labour Market Policies to Promote Growth and Social Cohesion in Korea* 6–28 (OECD Economics Department, Working Paper No. 1068, 2013), available at <http://dx.doi.org/10.1787/5k43nxrmq8xx-en> (noting that if female employment rates were to match male rates by 2050, the labor force employment rate would be 19% higher than in the case of unchanged rates).

efforts of workers, employers, and policymakers.<sup>27</sup>

This Article will focus on a comparative analysis of family leave policies from the U.S., France, and Germany to contemplate how existing family leave policies can be embraced in South Korea. The U.S. is a nation of comparison since it is South Korea's closest military ally, trade partner, and often the object of comparison for national policy in the media. France has become a gold standard for many nations with its workable family leave policies and universal childcare systems. Germany is a nation that shares strong similarities with South Korea in that it was once a divided nation and both cultures value maternal care.

Although the family leave policies of the four countries appear similar upon cursory review, each country's policies have distinct features due to varying cultural influences. A study of the cultural contexts that influence family leave laws will be presented for each country, and factors that hinder establishment of laws in South Korea will be explored. Lastly, policies based on the French childcare system where children are regarded as "public goods" will be offered as a solution that comports with South Korea's collectivist culture. Part I will examine the influence of culture, politics, and ideology on family leave laws in each country to determine the context of family leave law adoption. Part II will investigate structural factors that hinder full implementation of family leave policy in South Korea, specifically the legacy of Confucianism and its influence on the rule of law,<sup>28</sup> ordered gender inequality, low male participation of family leave, devaluation of care work, and low-income workers with difficulty accessing family leave. Part III will examine the need for subsidized childcare facilities as part of a holistic approach to support women's employment. The cost and lack of availability of quality childcare facilities have contributed to a work-family dilemma in South Korea. Subsidized universal childcare can ensure workers can return to work after the family leave period to maintain continuity in the workplace.

#### I. IDEOLOGY, CULTURE, POLITICS, AND THEIR EFFECT ON FAMILY LEAVE POLICY

State policies on paid family leave develop within specific cultural contexts and as such, a policy from one state cannot necessarily be transplanted to another. Such a transplanted policy would likely face significant resistance, and may not be politically or socially viable. For this reason, it is important to consider the different historical and cultural

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27. Daikwon Choi, *The State of Fundamental Rights Protection in Korea*, in CURRENT ISSUES IN KOREAN LAW, 118–31 (Laurent Mayali & John Yoo eds., 2014).

28. See generally Joseph Raz, *The Politics of the Rule of Law*, 3 *RATIO JURIS* 331, 331–35 (1990) (describing how the rule of law restricts governmental behavior and protects individual rights).

contexts of various family leave policies to determine how South Korea's policies can be effective.

In the U.S., France, and Germany, political and cultural ideologies have permeated policies concerning families and children. Family leave policies have been influenced by the philosophies that have historically shaped each nation. Socialist party influences in France brought about increased government regulation on family leave policy, whereas the laissez-faire economic principle of the U.S. has favored deregulation.<sup>29</sup> Emphasis on traditional family and maternal care has driven family leave policies in Germany. Internal pressures have determined family leave policies in France, Germany, and the U.S., whereas in South Korea reaction to outward pressures caused legislative initiative for family leave. In South Korea, creating legitimacy as a developed country and obtaining status among advanced nations has been the main force in adopting family leave policies.

Unlike western nations, South Korea's rapid modernization, industrialization, and democratization did not coincide with corresponding changes in cultural values inherent to Korean society. This has culminated in a clash between traditional values of ordered inequality and modern democratic ideals of gender equality and individual rights, which are embodied in the South Korean Constitution but not fully established in Korean society.<sup>30</sup> Furthermore, the neoliberal economic model and market-based policy approaches following the 1997 Asian financial crisis, which were premised on formal equality have led to deep tensions with Korea's hierarchical social order.<sup>31</sup> The ineffectiveness of family leave policy in South Korea can be attributed to resistance by Confucian groups and conservatives, as family leave collides with notions of individual sacrifice, social order, and deference to employer and state.<sup>32</sup>

Though each country's family leave policies look similar at first glance, Table 1 illustrates their differences. The U.S. and South Korea have similar maternity leave periods, but paternity leave is much shorter in South Korea and the U.S. lacks a paid leave system. South Korea's policies may appear closer to European policies that allow for generous parental leave. However, unlike France and Germany, due to the cultural factors

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29. Myra Marx Ferree, *An American Roadmap? Framing Feminist Goals in a Liberal Landscape*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 283–315 (Janet Gornick & Marcia Meyers eds., 2009).

30. Jenny Ma, *Of "Females and Minors": A Gendered Analysis of the Republic of Korea's Labor Standards Act and Reforming Labor Market Dualism*, 49 COLUM. J. TRANSNAT'L L. 717, 725 (2011).

31. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 437 (2001).

32. Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL OF RTS. J. 405, 441 (2011).

shown in Table 2, paid family leave fails to benefit a majority of South Korea's working families. Although the family leave policies in France and Germany share a resemblance, Germany lacks paternity leave, which is a deviation that finds its cause in a cultural emphasis on the traditional male breadwinner/female homemaker family structure.

**Table 1: Family Leave Policies of South Korea, U.S., France, and Germany**

	South Korea	U.S.	France	Germany
Maternity Leave	90 days <sup>33</sup> for all employed women at 100% of income with ceiling of approximately \$3680 USD for three months <sup>34</sup>	Leave is for each individual, not to the family. Gender neutral individual entitlement of up to 12 weeks <sup>35</sup> (for women with at least a 12 month employment history and 1250 hours worked during the 12 months prior to start of leave. Unpaid, but approximately 12% of workers receive paid leave through employers) <sup>36</sup>	1st/2nd birth 16 weeks, 3rd and subsequent or multiple births 26 weeks <sup>37</sup> (for women with 10 months of insurance contributions at 100% of income with ceiling of approximately \$4000 USD) <sup>38</sup>	14 weeks, or 18 weeks for multiple births <sup>39</sup> (for all insured women at 100% of income with no ceiling) <sup>40</sup>

33. ORG. FOR ECON. COOPERATION AND DEV., KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS, available at [http://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems\\_1May2014.pdf](http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems_1May2014.pdf) (last visited Mar. 3, 2015).

34. *Maternity Leave Before and After*, MINISTRY OF EMPLOYMENT AND LABOR, <http://www.moel.go.kr/policyinfo/woman/view.jsp?cate=9&sec=1> (last visited Mar. 3, 2015).

35. *Family and Medical Leave Act Overview*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/fmla/> (last visited Mar. 3, 2015).

36. *The Family And Medical Insurance Leave Act (The FAMILY Act) Fact Sheet*, NAT'L P'SHIP FOR WOMEN & FAMILIES (Mar. 2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf>.

37. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*



<b>Paternity Leave</b>	5 days within 30 days of birth <sup>41</sup> (extended to one month at the end of 2014)	12 weeks <sup>42</sup> (same criteria for maternity leave, unpaid)	2 weeks, or 3 weeks for multiple births <sup>43</sup> (100% for first 3 days, maximum limit afterwards) <sup>44</sup>	No statutory entitlement <sup>45</sup> (many workers utilize vacation time or parental leave instead)
<b>Parental Leave</b>	1 year for each parent <sup>46</sup> at 40% of income <sup>47</sup> (in October of 2014, this increased to 60% if parent chooses to work part-time and 100% for first month of second parent's use with ceiling of approximately \$1400 USD) <sup>48</sup>	No statutory entitlement <sup>49</sup>	Family shares 3 years or 156 weeks of additional leave <sup>50</sup> (approximately \$780 USD per month, 3 years if 2+ children, 6 months for one child) <sup>51</sup>	Family shares 3 years or 156 weeks of additional leave <sup>52</sup> (67% of income for 12 months, minimum pay for parents with no prior income) <sup>53</sup>

Table 2 illustrates that despite the similarities shown in Table 1, the justifications and motivations behind policies remain extremely different. For example, in South Korea and the U.S., the policies themselves share a resemblance but the underlying purposes are distinct; Korean family leave laws were adopted as an effort toward acceptance into the community of industrialized nations, while U.S. family leave policies were adopted to achieve formal equality and privatization of care. Upon first glance, France and Germany seem to have similar policies. However, in France, children

41. *Id.*

42. U.S. DEP'T OF LABOR, *supra* note 39.

43. *Id.*

44. *Id.*

45. *Id.*

46. Act on Equal Employment, *supra* note 2.

47. Employment Insurance Act, Act No. 4644, Dec. 27, 1993, *amended by* Act No. 6124, Jan. 14, 2001 (S. Kor.) (described in Chapter V, "Childcare Leave Benefit," Article 70(2), found in Presidential Decree Chapter V, "Parental Leave Allowance," Article 95(1)), *available at* [http://www.ilo.org/dyn/travail/docs/109/\\_0\\_EMPLOYMENTINSURANCEACT](http://www.ilo.org/dyn/travail/docs/109/_0_EMPLOYMENTINSURANCEACT).

48. Press Release, Ministry of Strategy and Finance (Feb. 4, 2014), *available at* [http://www.mosf.go.kr/\\_bbs/rss.jsp?boardType=general&hdnBulletRunno=60&cvbnPath=&sub\\_category=&hdnFlag=&cat=1&hdnPage=1&&actionType=view&runno=4020377&hdnTopicDate=2014-02-04](http://www.mosf.go.kr/_bbs/rss.jsp?boardType=general&hdnBulletRunno=60&cvbnPath=&sub_category=&hdnFlag=&cat=1&hdnPage=1&&actionType=view&runno=4020377&hdnTopicDate=2014-02-04) (translated to English by author).

49. U.S. DEP'T OF LABOR, *supra* note 39.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

are regarded as “public goods,” and generous paid leave is accompanied by subsidized childcare and universal preschool in which most families participate. In contrast, Germany has historically valued maternal care for children, and as a result, provides minimal subsidized childcare or preschool. Understanding the differences between France and Germany requires looking beyond the policies themselves and considering the culture and childcare systems of each country.

**Table 2: Culture, Purpose of Policy, and Childcare in South Korea, U.S., France, and Germany**

Country	Culture	Motivation and Purpose	Publicly Subsidized Childcare
<b>South Korea</b>	<b>Ordered Inequality:</b> Confucian focus on preservation of harmonious relationships rather than on individuals; emphasis on hierarchy, harmony, and order in society; deference to elders.	Desire to achieve the status of a developed nation and signaling this status by adhering to international standards; promoting fertility.	Publicly subsidized childcare facilities comprise 5.2% of all childcare facilities in South Korea. <sup>54</sup>
<b>U.S.</b>	<b>Liberal Democracy:</b> Laissez-faire market-based society; private responsibility for family; individualism; formal equality and liberty; minimalist state.	Equality of women in the workplace; enable private care of children and family members; two track welfare system of work-connected benefits and AFDC/TANF.	Head Start, the only government subsidized childcare program, enrolled approximately 9% of children ages 3–4 in 2005. <sup>55</sup>
<b>France</b>	<b>Social Democratic:</b> Pronatalist, emphasis on children as public goods, state and people bear collective responsibility for the welfare of children	Public demand for choice and flexibility for women; overcoming low fertility; reducing unemployment by encouraging women to exit from the labor force.	Subsidized public childcare facilities are utilized by 95% of children in France.

54. *Number of Childcare Facility and Children*, STATISTICS KOREA (2012), [http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=1583](http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1583) (translated to English by author).

55. *Head Start: Indicators on Children and Youth*, CHILD TRENDS (Mar. 2015), [http://www.childtrends.org/?indicators=head-start#\\_edn12](http://www.childtrends.org/?indicators=head-start#_edn12).

<b>Germany</b>	<b>Maternalist:</b> Traditional male breadwinner/female homemaker model of social relations; preference for and valuing of maternal care in the home.	Conservative desire to maintain traditional family; reduce unemployment by encouraging women to exit from the labor force; overcome low fertility.	In 2000, less than 6% of West German children under three were enrolled in public childcare centers. <sup>56</sup>
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### A. Political Drive Towards Modernization in South Korea and Fertility

#### 1. Modernization and Democratization

Most industrialized countries developed labor laws and family policies through internal conflict and political struggle.<sup>57</sup> In South Korea, it was the political will to achieve the status of a developed nation rather than internal pressures that motivated the adoption of family leave laws. The purpose of these laws was to attain membership among the international community, such as the International Labor Organization and United Nations, as a legitimate, developed country.<sup>58</sup> Thus, the inception of family leave laws lacked sincere discourse on advancing gender equality in South Korea or assisting working families. Unlike Western states, South Korea did not contemplate workers' rights when promoting economic success through its export-driven economy. Throughout South Korea's rapid transition from monarchy to democracy, government administrations emphasized economic advancement<sup>59</sup> at the expense of social justice to achieve national stability.<sup>60</sup>

In Korea, the fall of the Yi dynasty of Chosun, which lasted more than five hundred years from 1392 to 1910,<sup>61</sup> was abruptly followed by brutal colonialism from 1910 to 1945,<sup>62</sup> and civil war from 1950 to 1953.<sup>63</sup> Upon

56. See Schmidt, *supra* note 7, at 467; but see Michaela Kreyenfeld et al., *A Forgotten Issue: Distributional Effects of Daycare Subsidies in Germany* (Institute for the Study of Labor, Working Paper No. 198, 2000), <http://ftp.iza.org/dp198.pdf> (finding a high 41% of East German children were enrolled in public childcare facilities in 1994).

57. Ma, *supra* note 18, at 725.

58. See *id.* at 725–27.

59. Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y J. 1, 8–11 (2000).

60. Choi, *supra* note 27, at 114.

61. PYONG-CHOON HAHM, *THE KOREAN POLITICAL TRADITION AND LAW*, 8 (1971).

62. See generally DAI SIL KIM-GIBSON, *SILENCE BROKEN: KOREAN COMFORT WOMEN* (1999) (also noting that one of the worst atrocities committed during the Japanese occupation was the use of over 400,000 girls from the age of twelve as sex slaves for Japanese soldiers stationed across China and Southeast Asia. Many girls were forced to accommodate hundreds of soldiers on a daily basis. Most were unable to return home and lost their lives in the war zones).

gaining independence in 1945,<sup>64</sup> the Korean government adopted a democratic constitution in 1948 where “sovereign power vested with the people.”<sup>65</sup> However, the concept of individual rights did not have a chance to mature as swiftly as the economy.<sup>66</sup> Democratic constitutional values were slow to be established in Korea due to strong traditional roots of Confucianism, which had been used as a governing ideology to subordinate the masses by the Yi dynasty for centuries.<sup>67</sup>

Unlike Western states, which experienced gradual economic growth and democratization, South Korea transformed itself from an underdeveloped nation to the twelfth largest exporter in the world within a span of forty years from 1960 to 2000.<sup>68</sup> In the 1960s and 1970s, a national five-year economic plan and “New Community Movement” or *Saemaul Oondong* was implemented with the goal of transforming the nation’s agrarian economy and elevating per capita income.<sup>69</sup> During this time, diligence, self-reliance, and cooperation were emphasized with a common goal of nation-building through individual sacrifice. The Park Chung-hee Administration (1963–1979) focused on an export-driven, conglomerate-based economic growth model to position the country for rapid industrialization and modernization.<sup>70</sup> Through painstaking national efforts by male and female workers alike,<sup>71</sup> South Korea’s per capita annual income rose exponentially from \$82 USD in 1961 to approximately \$10,000 USD in 2000.<sup>72</sup>

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63. Bruce Cumings, *Korea’s Place In The Sun: A Modern History*, 237–38 (2005).

64. See generally, DAI SIL KIM-GIBSON, *SILENCE BROKEN: KOREAN COMFORT WOMEN* (1999).

65. HUNBEOB, *supra* note 25

66. Unlike Korea, fundamental principles such as freedom, equality, and democracy that shaped American society were embodied in the drafting of the U.S. Constitution. See Kim, *supra* note 59, 8–11.

67. HAHM, *supra* note 61, 8–9.

68. Kim, *supra* note 59, at 14.

69. *Id.*

70. During the unprecedented economic growth period of the 1960s and 1970s, major conglomerates such as Samsung, Hyundai, and LG emerged with the support of government investment. See *id.*

71. Population growth following the Korean War supplied the labor market with a ready pool of workers to accelerate production of goods for export. In the years immediately following the war, the government focused its policy on developing labor-intensive industries. Beginning in 1974, male workers were recruited to Middle Eastern countries such as Saudi Arabia and Kuwait by South Korean construction companies to provide hard labor, and these construction contracts alone generated ten billion dollars in revenue annually by 1978. See *id.*; see also *Koreans Have Made it in Germany—50 years of the Korean-German Labour Recruitment Agreement*, GOETHE INSTITUTE, <http://www.goethe.de/ges/pok/pan/en10986481.htm> (last visited Apr. 30, 2014) (noting that in 1963, under the Korean-German Labor Recruitment Agreement, the first two-hundred Korean men, mainly students and skilled workers arrived in Germany to work as miners, and by 1977, the numbers reached 8,000, while close to 10,000 women were deployed as nurses. These young workers brought in precious foreign currency to a war torn country).

72. See Kim, *supra* note 59, at 13.

The Park Chung-hee Administration's efforts towards modernization led to the adoption of family leave policies that were considered necessary to join the ranks of developed nations. The South Korean Constitution contains a section against gender discrimination in employment and for protection of labor, such that "all citizens shall have the right to work. The State shall endeavor to promote the employment of workers."<sup>73</sup> Additionally, the Labor Standards Act of 1953, the primary statute covering labor and employment in South Korea, included a section on protection of maternity to promote maternal and infant health.<sup>74</sup> However, it was not until 1987 that maternity leave was implemented to meet International Labor Organization standards when policymakers urged for the Labor Standards Act to allow minimum levels of "legally acceptable" working conditions.<sup>75</sup> One year before the 1988 Seoul Olympics, the government adopted a maternity leave policy as a part of the Act on Equal Employment and Support for Work-Family Reconciliation.<sup>76</sup> In 1996, the year that South Korea became a member of the Organization for Economic Cooperation and Development (OECD), the legislature adopted a mandatory wage replacement for maternity leave through national employment insurance.<sup>77</sup> International pressure from the impending Seoul Olympics and the desire to attain recognition as a developed nation ultimately led to the enactment of a paid maternity leave provision.<sup>78</sup>

The autocratic military regimes of the 1960s to the late 1980s deprived civil liberties from the people.<sup>79</sup> During this time, minimal checks were placed on arbitrary government powers, and the law was utilized as an

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73. South Korea's Constitution was established in 1948 and contains democratic principles of equality and fundamental rights of people. HUNBEOB, *supra* note 25.

74. Labor Standards Act of 1953, Chapter V, art. 72 (S. Kor.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/46401/65062/E97KOR01.htm> (last visited Apr. 30, 2014).

75. Ma, *supra* note 18, at 725.

76. Act on Equal Employment, *supra* note 2. In addition to the maternity leave policy, childcare facilities were mandated to be built within businesses. According to the Infant Care Act of 1991, companies with 300 employees or more were mandated to create childcare facilities on-site. See *Infant Care Act Information Sheet*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/dyn/travail/docs/1764/Infant%20Care.pdf> (last visited Apr. 30, 2014). Currently, due to lack of enforcement, among all the children who attend care facilities in South Korea of approximately 900,000, only 2% enjoy the privileges of workplace childcare. The overall use of care facilities for 0–2 year olds is 16.2% and for 3–6 year olds is 64%, which is lower than most OECD countries. See also Moon-Hee Seo, *A Study on Measures to Improve Childcare*, FORUM FOR HEALTH AND WELFARE (2005), <http://www.dbpia.co.kr/Article/736980>.

77. Employment Insurance Act, *supra* note 37.

78. *Id.*

79. See Hongsik Cho, *A Challenge for Korean Legal Scholarship* (Apr. 18, 2014) (unpublished paper) (on file with author) (noting that development of Korea's legal regime can be divided into three stages: Japanese colonization and formalism where ideology, morality, and values were largely disregarded; military rule and the instrumentality of law where the focus was on national economic growth; and democratization and genuine jurisprudential discourse starting in the early 1990s).

instrument of the government in the economic development of the country.<sup>80</sup> The dictatorships of this time maximized power by extracting bribes from businesses and severely punishing citizens who expressed opposition.<sup>81</sup> As a result, deep distrust in the political and legal system became prevalent among the people,<sup>82</sup> and the law's status as an instrumentality weakened the validity of the rule of law in South Korea.<sup>83</sup> The development of the legal system as a vehicle of justice was inhibited during this period of military regimes, and legal principles were disregarded in favor of social norms.<sup>84</sup> It was amidst these weak legal foundations that family leave laws, premised on principles of equality, fairness, and liberty, were adopted.

Although South Korea adopted a democratic constitution in 1948, it was with the creation of the Korean Constitutional Court in 1988 that the rule of law in Korea achieved widespread validity.<sup>85</sup> The Constitutional Court was able to gain public trust through constitutionalism and decisions based on constitutional analysis.<sup>86</sup> In 2005, the Constitutional Court upheld the validity of penalty provisions for violation of family leave laws, which applies criminal sanctions of up to five years of imprisonment and a maximum monetary penalty of \$30,000 USD toward employers who unlawfully terminate employees on family leave.<sup>87</sup> Although sanctions are rarely imposed on employers, the Constitutional Court's decision to uphold the penalty provision suggests there is room for improvement in the enforcement of family leave laws.

Despite advancement in the legal arena and strengthening of the rule of law, non-compliance of family leave laws is so prevalent that in 2005, 48% of businesses were in violation of parental leave laws mandated by the Equal Employment Opportunity Act.<sup>88</sup> Employers' refusal to abide by

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80. *Id.* at 13–18.

81. In 1996, autocratic leaders Chun Du-Hwan and Roh Tae-Woo were both sentenced to imprisonment for military insurrection, massive corruption, treason, and murder. During his presidency, Chun ordered the massacre of thousands of civilians including women and children in Gwangju on May 1980 when military troops were dispatched under the guise of defeating communist sympathizers, which turned out to be false. This incident is now referred to as the Gwangju Democratization Movement. James West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y J. 85, 94–6 (1997).

82. Cho, *supra* note 79, at 38–40.

83. *See id.*

84. *See id.*

85. Jonghyun Park, *The Judicialization of Politics in Korea*, 10 ASIAN-PACIFIC L. & POL'Y J. 62, 63–68 (2008).

86. In addition to creation of a Constitutional Court in 1987, a revised Constitution was adopted to provide broader rights for citizens and a check against governmental powers. Established in 1988, the Constitutional Court undertakes constitutional review of cases referred to by the Supreme Court and lower courts in South Korea. *Id.*

87. Labor Standards Act, *supra* note 74.

88. Kyungmin Baek & Erin L. Kelly, *Noncompliance with Parental Leave Provisions in Korea*:

government mandated policies can be attributed to an attitude of disregard for laws and reliance on business custom and industry practices.<sup>89</sup>

Modernization's swift pace did not allow Korean society to fully absorb the transformation in values.<sup>90</sup> Although South Korea achieved large strides in economic growth, the democratic system and basic constitutional concepts of equality and individual rights have yet to fully take root.<sup>91</sup> Hierarchical social structures prevail and impede the establishment of democratic principles.<sup>92</sup> As a result, progressive laws and formal constitutional norms became incongruous with traditional values.<sup>93</sup> Unlike the U.S., which achieved its economic power over the course of two hundred years, South Korea was unable to gradually transform its hierarchical social structure. Modern democratic legal principles did not reflect traditional values of the Korean people, and Korean society experienced a lack of a "constitution-supportive consciousness."<sup>94</sup> The lack of synchronization among economic development, law, and society has led to a weakening of the law's ability to protect individual rights, as the economy speeds forward while legal institutions follow and social values trail behind.<sup>95</sup>

## 2. Fertility in South Korea

Until the early 1990s, South Korea struggled to control its population. From 1962 to 1996, the South Korean government enforced a family planning regulation to restrict and control population growth.<sup>96</sup> In 1961, a governmental proposal for the implementation of family planning was first

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*Extending Institutional Research to a New Legal Context*, 39 LAW & SOC. INQUIRY 176, 177 (2014). (finding that according to the Korean Workplace Panel Survey of 1,750 Korean workplaces surveyed in 2005, 48% of the sampled establishments are in apparent violation of the parental leave provisions of the Equal Employment Opportunity Act).

89. *Id.*

90. Economic growth caused changes to the traditional family structure as well. By 1985, South Korea had transitioned from an agrarian to an industrial economy. Urbanization of towns created cities with large factories, which attracted an influx of population from the countryside. During this time, traditional agricultural families where three or four generations cohabited together shifted towards nuclear unit families. Three-generation families have now become the exception and constitute less than 10% of all households, whereas two-generation families comprise two-thirds of South Korean households. The shift in family structure has raised the need for policies directed at nuclear families. See Kim, *supra* note 59, at 24–25.

91. See Choi, *supra* note 27, at 97–118.

92. See *id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Nam Hoon Cho, *Understanding Basic Plans for Low Fertility and Aging Population*, KOREA INSTITUTE FOR HEALTH AND SOCIAL AFFAIRS, 47–48 (2006). See also Naryung Kim, *Breaking Free From Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States*, 17 UCLA PAC. BASIN L.J. 301, 310–15 (2000).

introduced to combat the high fertility rate of 5.9,<sup>97</sup> which administrators feared was impeding economic growth.<sup>98</sup> As a result of the legislation and the promotion of contraception,<sup>99</sup> South Korea's birth rate experienced a sharp decline during the late 1990s to less than replacement levels.<sup>100</sup> The country witnessed a steady decline in the birth rate during the 1980s and 1990s, with a fertility rate of 2.73 in 1980, 1.70 in 1985, and 1.59 in 1990.<sup>101</sup> By 2002, the rate was 1.17, and in 2005, a historically low 1.08.<sup>102</sup> Extremely low birth rates prompted government action and led to the enactment of policies to promote fertility.<sup>103</sup>

During the progressive administrations of Presidents Kim Dae-jung<sup>104</sup> (1998–2003) and Roh Moo-hyun (2003–2008), legislation was introduced to address women's low employment levels, although the underlying purpose was to increase fertility.<sup>105</sup> During Kim's administration, three major labor law amendments were launched to protect maternity. In 2001, the Labor Standards Act was revised to increase maternity leave from sixty to ninety days.<sup>106</sup> The Act on Equal Employment and Support for Work-Family Reconciliation was revised to allow for an increase in wage replacement levels during maternity leave, with both parents eligible to apply for parental leave, while termination during that period became prohibited.<sup>107</sup> Also in 2001, the Employment Insurance Act was amended so that parental leave participants would be eligible for wage replacement

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97. *Fertility Rate, Total (Births Per Woman)*, THE WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN> (last visited Apr. 7, 2015).

98. Slogans such as “too many children will bring on poverty” and “let's raise two children regardless of sex” were promoted by the government. Chang Soo Yoon, *When Was Family Planning Introduced? In 1961 . . . When did low birthrate become an issue? In 2006*, SEOUL SHINMUN (July 11, 2014), <http://m.seoul.co.kr/news/newsView.php?id=20140711025017&cp=go>.

99. See P.J. Donaldson et al., *Abortion and Contraception in the Korean Fertility Transition*, 36 POPULATION STUDIES 227, 235 (1982).

100. Chung Goo Hyun, *Development of Korea's Population and Prospects*, STATISTICS KOREA 3, <http://kostat.go.kr/attach/journal/5-2-6.PDF> (last visited Apr. 30, 2014) (translated to English by author).

101. *Id.*

102. Guk Jin Kang, *Population Policy of Former Administrations*, SEOUL SHINMUN (Dec. 15, 2013), <http://news.zum.com/articles/10516256>.

103. Cho, *supra* note 96, at 9–16.

104. President Kim Dae-jung received the Nobel Peace Prize in 2000, for his contribution to democracy and human rights in South Korea and his efforts in advancing relations with North Korea. *Kim Dae-Jung—Facts*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2000/dae-jung-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2000/dae-jung-facts.html) (last visited Apr. 30, 2014).

105. President Kim Dae-Jung's administration was the first to establish a Ministry of Women's Affairs to tackle issues pertaining to women's employment. Byung Yuk Chun, *The Past and Present of Female Employment Policies*, KYUNGHYANG SHINMUN (May 31, 2013), [http://news.khan.co.kr/kh\\_news/art\\_print.html?artid=201305310600085](http://news.khan.co.kr/kh_news/art_print.html?artid=201305310600085).

106. Labor Standards Act, *supra* note 74, at art. 74(1).

107. Act on Equal Employment, *supra* note 2.



through the national employment insurance fund.<sup>108</sup>

President Roh Moo-hyun's administration adopted several policies on family leave with birth rate and women's employment as a framework. In May of 2005, the National Assembly passed the Act on Aging Society and Population, and in September of that year, President Roh launched a commission for the same purpose.<sup>109</sup> In 2004, before the Act on Aging Society and Population was adopted, a task force had already been organized under the Prime Minister's office.<sup>110</sup> In 2007, a provision was included to allow a three-day paternity leave within thirty days of childbirth, and in 2011, the length was extended to five days.<sup>111</sup> In 2008, the Act on Promotion of the Economic Activities of Career Break Women was adopted to encourage women's reentry into the labor force after childbirth and childcare through work training and educational opportunities.<sup>112</sup> Despite fierce opposition from the right, President Roh increased investment on family leave policies by five times the amount of previous administrations.<sup>113</sup> However, the subsequent conservative administration of Lee Myung-bak drastically reduced funding for work-family policies, and relevant committees were demoted in status.<sup>114</sup>

Gender discrimination in the workplace and the poor usage of family leave has not garnered the attention and interest that low birth rates have received in mass media. Unfortunately, past administration efforts to increase women's employment rates have led to a gendered division of the labor market, where most low paid, low quality jobs in the service industry are delegated to women.<sup>115</sup> Additionally, the reproductive rights of women

108. Employment Insurance Act, *supra* note 37.

109. Act on Aging Society and Population, Act No. 11444, June 7, 2005 (S. Kor.), available at <http://www.law.go.kr/lsInfoP.do?lsiSeq=125558#0000>.

110. *Id.* at art. 8(3).

111. Act on Equal Employment, *supra* note 2, at ch. III art. 18-2.

112. Act on the Promotion of the Economic Activities of Career Break Women, Act No. 9101, June 5, 2008 (S. Kor.), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86776/98443/F293968292/KOR86776%20Eng.pdf>.

113. President Roh spent many years prior to his presidency as a human rights attorney and implemented several social welfare policies to benefit low-income citizens. President Roh was the first president to point out that low fertility in Korea is a human rights issue by stating during a staff meeting that, "the country should not be obsessed with fertility numbers. The choice of marriage and childbirth is a basic human rights issue. We need to address the cause instead of only looking for results." See *President Roh's One Phrase that Changed Policy on Population: Low Fertility is a Human Right*, SLOW NEWS (Dec. 19, 2013), <http://slownews.kr/16856>.

114. Chun, *supra* note 105.

115. Service industries encompass childcare, elderly care, food services, and hospitality work. *Id.* In Korea, many employers build disparate treatment structures in the workplace, which lead to "gendered labor patterns and segregated jobs." A majority of working women in Korea are confined to dead-end jobs in the feminized care industry which suffer from low wages and long work hours. In corporations, women mostly comprise support staff that are less promotable and have little room for advancement. Biases against women's work exacerbate the hostility towards women workers who exercise care leave. See also DONALD N. CLARK, CULTURE AND CUSTOMS OF KOREA 176 (2000).

have been framed as a social and national issue of interest rather than as a basic human right.<sup>116</sup> As a point of comparison, low fertility was a concern for France in the 1990s, but the French government was able to boost birth rates by focusing on the overall issues affecting working women.<sup>117</sup> South Korean policymakers should also comprehensively view the social context that influence working women in order to overcome low fertility.<sup>118</sup>

*B. Influences on the Family and Medical Leave Act  
of the United States*

*1. Liberalism and Capitalism*

South Korean policy makers opposing current family leave laws should be wary of making reference to the U.S. system of family leave. The South Korean family leave policy is distinct from the U.S. since it provides for monetary compensation and parental leave.<sup>119</sup> The South Korean corporate sector criticizes the government's one year paid parental leave policy as being unnecessarily broad.<sup>120</sup> Industry leaders suggest that the stagnant market cannot sustain paid family leave and turn to U.S. policies as an example. However, several factors distinguish the U.S. from South Korea in adoption of family leave policies.

The purposes behind family leave in the U.S. include gender equality, maintaining the female labor force, and assisting working families.<sup>121</sup> Nevertheless, the U.S. has one of the weakest family leave policies of all industrialized countries due to economic liberalism that dominates the political agenda.<sup>122</sup> The Family and Medical Leave Act (FMLA), which

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116. See generally Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1 (1996).

117. France has several measures to ensure that female employment rates remain high: paid leave for childbirth and childcare, state supported childcare facilities, childrearing subsidies, universal preschool, and the ability to use flexible schedules with ease in the workplace. JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 179–218 (2003).

118. K. Lee Adams, *The Family Responsibilities Convention Reconsidered: The Work-Family Intersection in International Law Thirty Years On*, 22 CARDOZO J. INT'L & COMP. L. 201, 250 (2014).

119. See Table 2, *supra*.

120. Hae-ran Hyun, *76% of Companies Perceive Family Leave Takers as a Burden*, HANKOOK SHINMUN (June 18, 2013), <http://news.hankooki.com/lpage/economy/201306/h2013061809223121540.htm> (translated to English by author).

121. See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 5–20 (2005).

122. See Ferree, *supra* note 9, at 284–97 (describing how weak social protections for families in general have led to a “miserly” welfare regime that ranks the U.S. at the bottom for infant mortality and child poverty). See also Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2158 (1994) (noting that a statutory scheme for gender equality in the workplace cannot be addressed without recognizing that only women become pregnant and must take leave of absence).

governs family leave in the U.S. was signed by President Bill Clinton in 1993, but does not allow for paid leave, limits the length to twelve weeks for each parent, and only applies to workers employed in workplaces with fifty or more employees.<sup>123</sup> The U.S. is distinct in that it is the only industrialized country without a national paid leave policy.<sup>124</sup> The narrow scope of the FMLA originates from laissez-faire economic principles that have underlined the U.S. economy for the past century.<sup>125</sup>

Adam Smith's economic model, which influenced early American economic policy, opposed government intervention due to a monarchy that did not represent the working class and an assumption that "merchants would exercise control over government and impose restraints to serve their self-interest."<sup>126</sup> Scholars have pointed out that

"[i]t is wrong, therefore, to use Smith's philosophy as an excuse to undermine the limited protections legislated on behalf of workers and the family. Yet while purporting to draw on the work of Adam Smith, modern American capitalism has not been willing to use the state as a weapon against the selfishness of the merchant class. Instead, American law is premised on the assumption that welfare moms, not entrepreneurs, are selfish . . . .

. . . The much heralded FMLA applies only to those workers who can afford to take unpaid leave and also happen to work for the 5 percent of American corporations that employ more than fifty employees."<sup>127</sup>

Capitalism in the U.S. "tolerates state intervention in the marketplace" to a certain extent but it is undeniably less protective of workers and families compared to other industrialized countries.<sup>128</sup> It is distinguished from Western Europe where families and workers are protected by a "social safety net" with a conviction that such policies benefit society as a whole by achieving "class equity."<sup>129</sup> Despite the long-term benefits of government-initiated childcare policies, the U.S. is the only country in the OECD that leaves the development of such policies to entrepreneurs.<sup>130</sup> Consequently, workers' rights in the U.S. are less prioritized than in France

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123. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2006).

124. On December 12, 2013, the Family and Medical Insurance Leave Act was introduced to propose a national paid leave policy via U.S. House Resolution 3712. H.R. Res. 3712, 113th Cong. (2013), available at <http://beta.congress.gov/bill/113th-congress/house-bill/3712>.

125. COLKER, *supra* note 10, at 5–22.

126. *Id.* at 21.

127. *Id.* at 22.

128. *Id.* at 9.

129. *Id.*

130. *Id.*; see also HEATHER BOUSHEY & ANN O'LEARY, THE SHRIVER REPORT: A WOMEN'S NATION CHANGES EVERYTHING 75–105 (2009).

or Germany. The relatively high female employment rate and fertility level has supported the maintenance of the current unpaid leave system in the U.S.

From its inception, the FMLA was not written to be universal in application. It applies only to workers who have been employed by the same employer for the previous twelve months for at least 1,250 hours, and workers in small establishments, defined as those with less than fifty employees, are ineligible. Employees who have the privilege of family leave benefits provided by employers are mostly professionals and high earners.<sup>131</sup> As a result, only half of all workers in the U.S. are eligible for job-protected leave and those who are in most need of protection—low-income workers—cannot rely on the FMLA.<sup>132</sup> Undoubtedly, the FMLA was enacted to protect the basic rights of workers, but its limited scope magnifies a class-based inequality, which places low-income workers in unstable work environments in a precarious position.<sup>133</sup> Laissez-faire economics in the U.S. has resulted in a maximization of interests of the upper class at the expense of the poor.<sup>134</sup> No other Western industrialized country has “tipped the balance so far against the interests of the middle and lower class” as the U.S.<sup>135</sup>

## 2. *Minority Status and Welfare Benefits*

Social policy and legislation that affect welfare in the U.S. has been marred by the preoccupation with restricting governmental benefits for minorities. Since the 1830s, the “domestic code”—which refers to a working husband and housewife—marginalized poor single mothers, who were disproportionately represented by immigrant women and women of African descent.<sup>136</sup> Poor single mothers who were forced to work were simultaneously condemned for violating the domestic code and for “bad mothering.”<sup>137</sup> In 1911, the Aid to Dependent Children was enacted as a “mothers’ pension” to provide support for single mothers but, as it was written, this was a restrictive program that resulted in benefiting mostly white widows with children.<sup>138</sup> Throughout U.S. history there has been a disenfranchisement of minorities of proper citizenship which has resulted

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131. JACOB S. HACKER & ANN O’LEARY, SHARED RESPONSIBILITY, SHARED RISK 162–77 (2012).

132. *Id.*

133. *Id.*

134. COLKER, *supra* note 10, at 23.

135. *Id.*

136. Handler, *supra* note 11, at 907 (1990).

137. *Id.* at 908.

138. *Id.* at 909, 910; *see also* WINIFRED BELL, AID TO DEPENDENT CHILDREN 9–13 (1965) (noting 82% of Aid to Dependent Children participants were widows and 96% of participants were white).

in weak social policies overall.<sup>139</sup>

Efforts to assist working families were narrowly construed in order to preserve American industrialism.<sup>140</sup> The New Deal of 1933 allowed for grant-in-aid programs for dependent children, but due to concerns of compromised industrial discipline, the government drastically decreased the number of recipients shortly after its adoption.<sup>141</sup> In the 1990s, in response to public backlash against undeserving minority mothers,<sup>142</sup> the U.S. government started limiting welfare entitlements for poor single mothers in an effort to wage war against welfare, as opposed to the past “war against poverty.”<sup>143</sup> In 1996, President Clinton created the Temporary Assistance to Needy Families (TANF) program under the Personal Responsibility and Work Opportunity Act to appease the public regarding the previous Aid to Families with Dependent Children (AFDC), which provided “cash assistance to mainly female-headed households with children.”<sup>144</sup> As the name suggests, TANF limited the benefit receipt period to sixty months within a lifetime, while allowing states to implement shorter relief periods or eliminate relief altogether.<sup>145</sup> Rather than alleviate the poverty and low wage work that single minority mothers were experiencing, these policies seemed to undermine welfare mothers’ ability to fulfill both work and parental duties.<sup>146</sup>

The strong backlash against welfare benefits correlates with the emphasis on industrialism in the U.S. American liberal capitalism mandates

139. Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 HARV. C.R. – C.L. L. REV. 127, 127–131 (2008).

140. See Handler, *supra* note 11, at 908–10 (A fear that an extensive social welfare program would negatively affect American industrialism led legislators to set limits on welfare benefits). In what became an attempt to redefine the meaning of work in the U.S., in 1930 Kellogg initiated a six-hour workday schedule to overcome high unemployment. However, when the cereal industry began modernizing operations in the 1970s, Kellogg concluded the experiment that had been highly welcomed by workers. See also BENJAMIN HUNNICUTT, *KELLOGG’S SIX-HOUR DAY* 13–45 (1996).

141. Handler, *supra* note 11, at 912, 913.

142. The public image of white “worthy widow” persisted during black activists’ fight to gain welfare support. Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. OF WOMEN & L. 341, 367 (2001).

143. During the 1960s, the war on poverty allowed welfare assistance for those who were previously ineligible. By the time President Clinton came to office criticisms were aimed at the excessive number of welfare recipients, around 14.2 million, which led to adopting policy that would reduce the number of welfare recipients. See Peter B. Edelman, *Changing the Subject: From Welfare to Poverty to a Living Income*, 4 NW. J. L. & SOC. POL’Y 14, 14–21 (2009).

144. See *id.* at 14.

145. Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF*, 61 MD. L. REV. 308, 328–332 (2002).

146. See *id.* at 314–15 (“It is as if parenthood does not exist for people on welfare. Indeed, it is possible to look at state after state, at welfare reform program after welfare reform program, and hear no mention of children at all, except as a “barrier” to work, a barrier that is fully resolved once child care is arranged. Those who fail to comply with work requirements are irresponsible, even if their ‘failure’ occurred because, in their view, they needed to meet the needs of a child.”).

that the state will offer “protection, comfort and support for those who participate in the productive system” through *labor*, and as such, industrialism is valued and rewarded.<sup>147</sup> On the other hand, those who are unable to work, particularly due to childbirth, are devalued in the eyes of employers and the state. Similar attacks are aimed at the physically disabled and mentally ill. Historically, women and the disabled were perceived as “nonworkers who could or should not work,” rather than as legitimate workers.<sup>148</sup> In the U.S., pregnant workers and disabled workers are treated similarly, where pregnancy is awarded at least the same protections as those who are “similar in their inability to work.”<sup>149</sup> The ability to participate in the workforce has been a common theme in the development of social welfare policies. The focus on industrialism is highlighted by the at-will employment system that is structured to easily punish workers and oftentimes allows employers unilateral control over the employment relationship.<sup>150</sup>

If the U.S. were to adopt a paid leave system, it would be strictly differentiated from welfare benefits, as paid family leave only pertains to those in the work force.<sup>151</sup> Critics of welfare mothers in the U.S. may be concerned that doling out cash will undermine labor discipline and the work ethic, which comprises the basic fabric of American society.<sup>152</sup> However, past policies involving welfare benefits should be separated from paid family leave for working families.<sup>153</sup> Paid family leave allows low-income mothers to return to the workforce as active income earning taxpayers, and escape passive welfare recipient status.<sup>154</sup>

### C. Pronatalism in France and Maternalism in Germany

As in the U.S., France and Germany adopted family leave policies in correspondence with values inherent to each society. In both France and Germany, conservative parties with traditional values have propelled the adoption of family leave policies with the purpose of overcoming high unemployment, tight fiscal budgets, and low fertility.<sup>155</sup> One noticeable

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147. Handler, *supra* note 11, at 906.

148. Catherine R. Albiston, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 5 (2010).

149. *Id.* at 69.

150. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. OF LAB. AND EMP. L. 65, 65–70.

151. Ferree, *supra* note 9, at 293–300.

152. See Edelman, *supra* note 143, at 6–10 (The large number of black welfare recipients after the Second World War fueled criticism for the “lazy and shiftless person who preferred to live on welfare rather than get a job”).

153. See Ferree, *supra* note 21, at 297–300.

154. See *id.* at 308–11.

155. Kimberly J. Morgan & Kathrin Zippel, *Paid to Care: The Origins and Effects of Care Leave*

motivation for family leave has been the “increasing salience of family” in political discourse, which has escalated political pressure to improve care policies in correlation with the increase of women in the workforce.<sup>156</sup> In France, public childcare has historically been a prerogative on the governmental agenda, which has aided in policy efforts to assist working families. In Germany, significant value is placed on maternal care, and family leave allows women to exit the labor force until children reach school age.<sup>157</sup>

### 1. France

#### a. Pronatalism and Socialism in France

Since the 1980s, the French social democratic welfare regime<sup>158</sup> has strived to overcome unemployment.<sup>159</sup> In the early 1990s, low fertility became a nationwide concern as France had maintained a relatively high birth rate among European countries in the past.<sup>160</sup> This sociopolitical environment engaged French politicians from both the left and right in a sincere discourse on family policies to encourage fertility.<sup>161</sup> Through collaborative effort, the French government adopted policies that supported working families in the form of tax codes, housing subsidies, and childrearing allowances.<sup>162</sup> To the envy of working families in South Korea, France has succeeded in creating a social welfare system that provides workers with generous protections before, during, and after childbirth.<sup>163</sup> In the U.S., the progressive family leave policies of France

*Policies in Western Europe*, 10 SOC. POL. 49, 56 (2003).

156. *Id.* at 60.

157. Laurent Toulemon et al., *France: High and Stable Fertility*, 19 DEMOGRAPHIC RES. 503, 506 (2008), <http://www.demographic-research.org/volumes/vol19/16/19-16.pdf>.

158. Michael Harrington, Foreword to WERNER SOMBART, *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?* 9–11 (1976) (“[S]ocial democracy and Socialism are not synonymous. Let the former term stand for a movement that mobilises workers on behalf of State intervention, planning and social priorities within capitalism, and the latter be a description of a political movement which seeks to transform capitalism fundamentally.”).

159. Family support policies in France were adopted as a measure to counter labor shortages created by the Second World War. Annie Pelletier, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall so far Behind Europe?*, 42 GONZ. L. REV. 547, 573 (2007).

160. France maintained a 1.8-1.9 birth rate in the 1980s. THE WORLD BANK, *supra* note 97.

161. Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 94 (1998).

162. Morgan & Zippel, *supra* note 14, at 63.

163. Minwoo Suh, *The Strength of the French Who Were Able to Overcome Low Fertility*, HANKOOKI.COM (May 29, 2012), <http://economy.hankooki.com/lpage/economy/201205/e2012052916470570070.htm> (In France, childbirth and childrearing are considered matters of national concern); Gitae Lee, *The Envious Childcare Systems of Developed Nations*, IBABYNEWS.COM (Mar. 7, 2013), <http://www.ibabynews.com/News/NewsView.aspx?CategoryCode=0005&NewsCode=201303071519259111255601> (noting that the French childcare system takes into consideration the quality of life of parents, such that public childcare facilities are usually within a five minute distance

have been the subject of media attention and scholarly debate.<sup>164</sup>

Among OECD countries, France is the only nation with variations in family leave benefit intake according to the number of children in a household.<sup>165</sup> In France, coverage for family leave benefits is restricted to large families, unlike the U.S., where the number of hours worked is the standard due to an emphasis on industrialism.<sup>166</sup> Uniquely, in France, pronatalism has driven policies affecting working families. Family leave and care allowances, provided to parents who care for children in the home were advanced by several groups, including conservative political parties, Catholic coalitions, and pronatalism advocates.<sup>167</sup> In 1985, with a goal of supporting large families, the government allowed paid family leave exclusively for parents with three or more children. Eventually, the criteria for paid family leave became more lenient to attract a larger pool of applicants. In 1994, families with two or more children became eligible for the care allowances, which significantly expanded the recipient base for paid leave benefits.<sup>168</sup>

The French Health Ministry Secretary's rationale for family leave in 1994 was that the new policy would produce 50,000 jobs while caregivers were absent from the workforce.<sup>169</sup> This policy shift was intended to benefit large families while addressing high unemployment, which is evidenced by family leave allowances being introduced when unemployment was at its peak.<sup>170</sup> For decades, tackling unemployment had been a priority on the French political agenda, and legislation encouraging "women's exit from the labor force" was perceived as the solution.<sup>171</sup> Fiscal pressures and stunted national growth have internally functioned as a motivation for family leave. Solving fiscal pressures on government through family leave

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from a child's home).

164. Kerry Anne Hoffman, *The Work-Family Balance: New York's Struggle to Harmonize Domestic and Employment Spheres*, 16 CARDOZO J.L. & GENDER 93, 108–09 (2009) (noting that in a 2007 New York Times article, paid family leave can be found around the world in a majority of countries but the United States is an exception, and remarked that "American women sometimes joke that they plan to move to Sweden or France before they become pregnant, to take advantage of the generous paid maternity leave those countries provide").

165. Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 397 (1994) (noting that the French income tax formula favors third or later children over the first two with the purpose of encouraging large families).

166. See COLKER, *supra* note 10, at 5–22.

167. GORNICK & MEYERS, *supra* note 9, at 180–200.

168. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 33.

169. Morgan & Zippel, *supra* note 14, at 61.

170. *Id.* at 60.

171. *Id.* at 61 (noting that in the 1980s, with unemployment in mind President Mitterand refused the Socialist Party's proposal for 300,000 new childcare facilities and chose to embrace paid family leave). See also GORNICK & MEYERS, *supra* note 9, at 73 (Although the French government has allowed more part-time opportunities during care leave, only one-fifth of leave takers worked part-time during leave).



was considered an economically sound policy, since leave allowances were cheaper than unemployment benefits.<sup>172</sup> The French government's will to lower unemployment coincided with traditional values placed on large families and workers' need for family leave.

Generous in its support for working mothers, the French government introduced long-term family leave income during the 1940s in response to the political debate about respecting women's choice.<sup>173</sup> French policymakers focused on the choice and flexibility of family leave legislation in order to appeal to public demands.<sup>174</sup> In 1986, a center-right government increased family leave to the current three years to appeal to its constituency of working families.<sup>175</sup> In strong support of the government's decision on paid leave, after its implementation, paid family leave quickly became a popular choice among French mothers.<sup>176</sup> Due to proactive family policies, almost all female workers in France today take advantage of family leave for pregnancy and childbirth.<sup>177</sup>

Despite a spectrum of choices for working families, gender and class dictate family leave policies in France. One such example is that care allowances are not on par with income levels.<sup>178</sup> Critics argue that the French government is keen on promoting population growth rather than gender equality.<sup>179</sup> In a 2001 decision,<sup>180</sup> a French court struck down a provision in the French Civil and Military Retirement Pensions Code, which favored women civil servants by bestowing a one-year pension service credit for each child raised.<sup>181</sup> The statute reflects the assumption in France that women are the primary caregivers of children and that female and male workers should be treated differently.<sup>182</sup> Indeed, of the 540,000 parents who take advantage of France's generous parental leave policies, only 18,000, or 3%, are men,<sup>183</sup> and women married to higher-earning men

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172. GORNICK & MEYERS, *supra* note 9 at 180–200.

173. Morgan & Zippel, *supra* note 14, at 30.

174. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 3 (2010).

175. Morgan & Zippel, *supra* note 14, at 61.

176. Suk, *supra* note 174, at 32.

177. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 33.

178. Morgan & Zippel, *supra* note 14, at 66.

179. Theresa Bresnahan-Coleman, *Current Development: The Tension Between Short-Term Benefits for Caregivers and Long-Term Effects of Gender Discrimination in the United States, Canada, and France*, 15 NEW ENG. J. INT'L & COMP. L. 151, 175–177 (2009).

180. *Id.* at 175 (discussing the case of *Griesmar v. Ministre de l'Economie*, Case C-366/99, 2001 E.C.R. I-9383 (Fr.)).

181. *Id.* (noting that the court determined this provision as violating the principle of equal pay for men and women as it bestowed an extra benefit on women prior to retirement).

182. *Id.*

183. *French Fathers to Get More Time Off Under Parental Leave Reform*, AFP (Jan. 21, 2014) <http://www.france24.com/en/20140121-france-lawmakers-approve-reform-parental-leave-fathers-gender-equality-bill/>; see also Morgan & Zippel, *supra* note 14, at 72–73 (noting that in France, one

tend to take advantage of the law rather than low-income single mothers.<sup>184</sup> Whether intentional or not, a “reinforcement of the status quo of gender relations” has become the reality for many family leave-takers in France.<sup>185</sup>

*b. Subsidized Public Childcare in France*

The unique public childcare system of France stems from strong cultural roots that value the care of children. From early on, the French government adopted the theory that children are “public goods” and the working population as a whole, through the imposition of higher taxes, should collectively shoulder the burden of raising children.<sup>186</sup> French citizens pay 50% of per capita income in taxes, and the French government spends 7.1% of gross national product on public childcare and education.<sup>187</sup> This system is considered a loan of sorts from the current generation to the next, which will eventually be repaid through income taxes when those children become adults.<sup>188</sup> From the early nineteenth century, French politicians embraced the notion that children are not merely personal responsibilities of parents but a collective responsibility of the government, along with the elderly and unemployed.<sup>189</sup> The willingness of the French government to invest financial resources into childcare stems from the importance placed on children.<sup>190</sup> This allows the French social system to ensure a better-supported developmental environment for children.

Childcare in France has been considered a governmental responsibility since the 1840s when care centers first opened as shelters for children of low-income working parents.<sup>191</sup> The French government created public childcare through the *crèche* and *école maternelle* systems, which both begin at infancy and form a part of the public education system.<sup>192</sup> Universal preschool is provided for all children from the age of two-and-a-

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study indicated that among those who preferred a parent to stay at home, 67% indicated mothers should leave the work force, while 30.8% thought the lesser earning parent should be the one, and a meager 1% thought it should be fathers. Failure to achieve gender equity in care leave policies arises from a culture of “gendered labor market structures and gendered notions of caregiving” which leads to gender gaps in employment).

184. Morgan & Zippel, *supra* note 14, at 66.

185. *Id.*

186. Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994).

187. Lawson, *supra* note 16 (reporting that U.S. citizens spend 31% in taxes and the government allocates 5.5% of gross national product on public education).

188. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 63 (2002).

189. Hillary Clinton, *In France, Day Care is Every Child's Right*, N.Y. TIMES (April 7, 1990), <http://www.nytimes.com/1990/04/07/opinion/in-france-day-care-is-every-child-s-right.html>.

190. *See* Lawson, *supra* note 16.

191. ENCYCLOPEDIA OF HUMAN DEVELOPMENT 245 (Neil Salkind ed., 2006); *see also* Lawson, *supra* note 16.

192. GORNICK & MEYERS, *supra* note 9, at 199.

half or three, and is provided at no cost to parents.<sup>193</sup> Compensation for preschool teachers is competitive and salaries are on par with elementary school teachers or nurses.<sup>194</sup> Preschool teachers are required to have a master's degree in early childhood education and directors of infant programs are nurses or midwives with additional training in public health and child development.<sup>195</sup> Preschool is considered the starting point of a child's education and governmental efforts are aimed at ensuring a safe and nurturing environment.<sup>196</sup> In this manner, subsidized public childcare centers have been an integral part of working families' lives for more than 170 years.<sup>197</sup>

## 2. Germany

### a. Politics, Maternalism, and Childcare

Germany's social policies have historically been predicated on the male breadwinner/female homemaker model of social relations, which emphasizes the traditional "caregiver" role of women.<sup>198</sup> Most policies affecting families have been a result of political influence exercised by moderate and conservative parties.<sup>199</sup> During the 1980s, conservative political parties were the key figures in enacting family leave laws based on traditional family.<sup>200</sup> German political emphasis on traditional family bears a striking resemblance to South Korea, where even the most progressive parties are considered conservative by most Western standards.<sup>201</sup> Germany and Korea share a common national sentiment of valuing maternal care in childrearing.

The significance placed on maternalism has led to a family leave policy in Germany geared toward encouraging mothers to exit the workforce until children reach school age.<sup>202</sup> In Germany, family leave periods sharply contrast between mothers and fathers. For mothers, fourteen weeks of maternity leave is provided with 100% wage replacement with no ceiling for all insured women.<sup>203</sup> However, there is no

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193. GORNICK & MEYERS, *supra* note 9, at 202, 207–09; *see also* Lawson, *supra* note 16.

194. Lawson, *supra* note 16.

195. Lawson, *supra* note 16.

196. GORNICK & MEYERS, *supra* note 9, at 200–31.

197. ENCYCLOPEDIA OF HUMAN DEVELOPMENT, *supra* note 191.

198. Pelletier, *supra* note 159, at 575.

199. Morgan & Zippel, *supra* note 14, at 59.

200. *Id.* at 52–57.

201. *See* Cho, *supra* note 79, at 1–5 (noting that German law has deeply influenced Korean jurisprudence and many Korean legal scholars previously studied law in Germany).

202. *See* Morgan & Zippel, *supra* note 14, at 73 (noting that although part-time work is available, over 90% of women did not work during family leave).

203. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 33.

job-protected paternity leave mandated by statute.<sup>204</sup> Although parental leave is up to three years for both parents with 67% wage replacement, women comprise the majority of leave-takers.<sup>205</sup> Despite gender-neutral language, family leave legislation disproportionately affects women's work patterns and has minimal consequences on men's employment status.<sup>206</sup>

Conservative parties have shifted policy towards paid family leave in an effort to offer parents a choice in childcare and to value care work in the home, such as household duties and childrearing responsibilities.<sup>207</sup> Responding to cultural norms that placed a premium on care work when conducted by mothers, childrearing benefit legislation in 1986 explicitly stated that both employed and unemployed parents were eligible for benefits.<sup>208</sup> Such a policy was meant to ensure that care work in the home is valued as much as paid work outside the home.<sup>209</sup> As a result, regardless of connection to the work force, any parent who cares for a child during the first two years of the child's life can receive child-rearing allowances.<sup>210</sup> This policy is on par with the importance that German society places on full-time caregivers.<sup>211</sup> For those parents who have been in the labor force, a job is guaranteed for up to three years after returning from parental leave.<sup>212</sup>

Similar to France, internal political conflicts and social values have shaped German policies on families and childcare.<sup>213</sup> Initially, conservatives and socialists clashed as to whether benefits should be tied to employment. Although left-wing social democrats accepted the notion that young children should be cared for by mothers, socialists argued that

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204. *Id.*

205. *See* Schmidt, *supra* note 7, at 465–69; *see also* Morgan & Zippel, *supra* note 14, at 73 (noting that fathers have few incentives to utilize paid leave which has led to criticism that family leave policies solidify “gendered divisions of care”).

206. Morgan & Zippel, *supra* note 14, at 67.

207. *Id.* at 65.

208. *Id.* at 61.

209. *Id.* at 65.

210. *Id.* at 53.

211. D.A. Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 91, 120 (1998) (“Women never achieved full social equality in West Germany, and political and cultural practices conspired to make it impossible for them to do so. For example, the retail economy in West Germany served nuclear families consisting of a wage-earning husband and a housewife. German shops routinely closed at 6 P.M., making it impossible for working people to shop in the evenings”).

212. *See* Schmidt, *supra* note 7, at 465 (noting that once an employee informs the employer of an intention to take parental leave, at most eight weeks before the leave begins, the employer cannot terminate the employment relationship until the leave period has concluded).

213. W. Craig Williams, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 277 (1997) (noting that in Germany, all parental rights for a child born out of wedlock belongs to the mother, although the state has the “authority to determine paternity and secure maintenance and inheritance rights for the child” to ensure a stable financial base so the mother can raise the child independently).

family leave benefits should be linked to employment.<sup>214</sup> This argument was in opposition to conservative policies, which dictated that benefits should also be available to non-working mothers. Amidst this political climate, German feminists unsuccessfully insisted for investment in public childcare facilities as an alternative or addition to paid leave.<sup>215</sup>

Upon first glance, Germany's generous family leave policies place value on women's care work. However, there have been criticisms that, despite the preliminary rhetoric of valuing maternalism, parental leave allowances have ultimately failed to adequately finance care work, as allowances have only slightly increased since their inception in 2002.<sup>216</sup> German feminists have pointed out that family leave policies based on conservative values push women out from the workforce back into the household.<sup>217</sup> Concerns were stated that valorizing mothers' care work in the home would "accentuate the gendered dimensions of unpaid care work by women."<sup>218</sup> Surprisingly, a large number of young women in Germany still possess a traditional view of work and prefer women's absence from the workplace for childrearing to that of men.<sup>219</sup>

As in France, Germany's leave laws also originated from political pressures to overcome high unemployment."<sup>220</sup> Legislators advocating family leave and parental leave allowances pointed to the "beneficial labor market effects" that the new law would have on German society.<sup>221</sup> The underlying expectation behind the new family leave legislation was that unemployed workers would find temporary work as replacements for women on family leave, and that the replacements could become permanent when women failed to return from family leave.<sup>222</sup> This concept of women as a reserve pool of labor was not foreign to Germany, as it had

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214. Morgan & Zippel, *supra* note 14, at 59.

215. Morgan & Zippel, *supra* note 14, at 59 (In both Austria and Germany, feminists pointed to the need for expanded access to public childcare).

216. *Id.* at 53–59.

217. See Schmidt, *supra* note 7, at 453–54 ("In Germany, even today (full-time) employment of mothers is not socially accepted without reservation. A good mother simply has to be with her children. Mothers of (smaller) children who nevertheless have to or, even worse, want to work are regarded as bad mothers. For these, the metaphor *Rabenmutter* (literally: a raven's mother, meaning a cruel and uncaring mother) has been coined") (emphasis and parentheses in original).

218. See *id.* at 467. (noting that in Germany, conservative values and men's higher income result in a very small number of women who choose not to take parental leave).

219. See *id.* at 467, 469–70. ("The view that the traditional role model is still to be preferred is also shared by many younger women: A survey among 1,000 mothers between 18 and 60 years revealed that only a third of mothers in Germany think that both parents should take parental leave. Particularly younger women are surprisingly conservative: Only 12% of mothers between 18–29% find a shared parental leave attractive, 63% think that mothers should not work before their children go to kindergarten, and 9% even think that mothers should not work at all").

220. Morgan & Zippel, *supra* note 14, at 61.

221. *Id.* at 62.

222. *Id.*

been realized during times of war.<sup>223</sup>

Until recently, childcare in Germany for children under three years of age was nonexistent, and kindergarten and elementary schools ran on half-day schedules based on the assumption that there was a stay-at-home parent.<sup>224</sup> Concerns over low fertility rates<sup>225</sup> and a depressed number of female workers in the labor force<sup>226</sup> prompted conservative parties to concede to the need for a subsidized childcare system.<sup>227</sup> With additional pressure from parents to shorten the burdensome waits for entrance into early education centers, the government recently introduced a radical measure to provide childcare for all children between the ages of one and three.<sup>228</sup> As of August 1, 2013, all parents with such children will be guaranteed a spot in a government childcare facility with the right to bring suit if they are unable to find one.<sup>229</sup> Since the adoption of this public childcare policy, as of March 2014, there has been a 10.6% increase or 64,000 more children attending public childcare facilities.<sup>230</sup> Despite the new legislation, there continues to be a shortage of available childcare facilities, but nevertheless the German Federal Ministry of Family Affairs has noted that this is a positive start for a new policy, which will continue to be funded to meet the needs of working parents.<sup>231</sup> Since the 2013 policy, 56% of German children under three spend at least thirty-five hours in a public childcare facility, which is similar to the amount of time spent by workers in the workplace.<sup>232</sup>

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223. Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U.J. GENDER SOC. POL'Y & L. 369, 375 (1998) (noting that in Central and Eastern Europe, the social welfare system developed a structure of instrumentally utilizing women such that women could be a "reserve labor pool" who would work in times of need and could be pushed out when unemployment was high).

224. Morgan & Zippel, *supra* note 14, at 56.

225. *Low Fertility in Europe: Is there still reason to worry?*, RAND CORP. (June 17, 2011), <http://www.rand.org/news/press/2011/06/17.html> (reporting German speaking countries have lower fertility levels compared to northwestern European states).

226. Morgan & Zippel, *supra* note 14, at 67–70.

227. However, critics have argued that a new childcare subsidy introduced in 2013, which provides parents with 150 euros a month if they choose not to place children in a care facility, will have a chilling effect and repress women from returning to work after childbirth. *See e.g.*, *Guaranteed Daycare for Under-Threes Starts in Germany*, DEUTSCHE WELLE (July 31, 2013), <http://www.dw.de/guaranteed-daycare-for-under-threes-starts-in-germany/a-16990407>.

228. Friederike Heine, *A Place for Everyone: Germany Promises Daycare for All Parents*, ABC NEWS (Aug. 4, 2013), <http://abcnews.go.com/International/place-germany-promises-daycare-parents/story?id=19847116>.

229. *Id.*

230. Ji-eun Park, *New Public Childcare Policy in Germany Lacks Availability*, SISA NEWSLINE (July 22, 2014), <http://www.sisanewsline.co.kr/news/articleView.html?idxno=8922> (reporting that although 42% of parents have requested seats in public childcare facilities only 32% is available).

231. *See id.*

232. Ji-eun Park, *Large Increase in the Time Spent by Under Threes in Public Childcare Facilities*, THE EURO JOURNAL (Sept. 22, 2014), <http://www.eknews.net/xenews/German/445525>.

## II. FACTORS THAT HINDER THE IMPLEMENTATION OF FAMILY LEAVE POLICY IN SOUTH KOREA

Family leave policies in the U.S., France, and Germany vary according to the specific culture of each nation and developments within that culture. The adoption of work-family reconciliation policies is a product of the cultural context of each country. Consequently, policies cannot be transplanted without considering the cultural background of a nation. In South Korea, despite the presence of a democratic constitution, deeply rooted notions of ordered gender inequality based on Confucianism have persisted in society. Such cultural influences need to be addressed in order for effective family leave laws to be implemented in South Korean workplaces.

In South Korea, the pursuit of modernization and the need to overcome low fertility rates led to the adoption of family leave policies.<sup>233</sup> However, policymakers have underestimated the strong influence of Confucianism and its vertical social order. In the South Korean workplace, oftentimes male and female workers are perceived and evaluated with different standards.<sup>234</sup> As a result, despite the adoption of family leave laws, these laws have largely been disregarded as inapplicable and the violation of these laws has become common.<sup>235</sup> The implementation of such laws are challenged by the ideological gap between traditional vertical human relations that exist in the workplace and democratic horizontal relations, which support family leave laws based on the Korean Constitution.<sup>236</sup>

Industry critics in South Korea point out that employers may perceive women workers as a costly and risky investment since replacement workers are needed if they decide to take family leave.<sup>237</sup> In the competitive job market, the overall costs of family leave may be borne by women workers as a group, which can result in lower employment rates or lower wages for women.<sup>238</sup> However, this “cost shifting” by employers can be mitigated by an overall increase in the number of working women, when those women are able to stay in one workplace by utilizing family leave.<sup>239</sup> When paid leave is implemented properly, women tend to return to the same employer

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233. See Ma, *supra* note 18, at 725.

234. See generally Cho, *supra* note 22.

235. See generally Baek & Kelly, *supra* note 88.

236. See Kim, *supra* note 32, at 405–35 (noting that Confucian ideology was used by the upper class as a means to perpetuate wealth and maintain power. The aristocracy was excluded from the application of laws while general citizenry suffered from its structural oppression).

237. Morgan & Zippel, *supra* note 14, at 70.

238. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POLICY ANAL. MANAG. 281, 283 (1999).

239. *Id.* at 283.

to retain seniority, salary level, and to develop their earning potential.<sup>240</sup> Employers benefit by saving on costs associated with hiring and training replacements.<sup>241</sup>

Contrary to some public opinion, researchers in the U.S. have found family leave policies lead to more positive, rather than negative, outcomes on women's wages and employment in general.<sup>242</sup> One researcher has found that women who returned from family leave experienced a premium in their income that outweighed the penalties they incurred while participating in family leave.<sup>243</sup> By allowing for continued attachment to the workforce, leave laws "improve women's work outcomes by ensuring continuity" and decrease career breaks.<sup>244</sup> U.S. employers who have implemented paid family leave in workplaces have reported a positive or non-noticeable effect on productivity and significant increases in employee morale.<sup>245</sup> South Korean employers wary of present family leave laws should consider the possibility of such beneficial outcomes.

Unlike Western cultures, which value individualism, Korea retains a collectivist culture that prioritizes the interests of the group over the rights of the individual.<sup>246</sup> This collectivism found in Korean society stems from Confucian values of harmony and a focus on cooperation.<sup>247</sup> Values encouraging collective action have contributed to the miraculous growth of the South Korean economy from the 1960s to the present.<sup>248</sup> Sharing a collective goal of economic stability enabled a war-torn country to elevate its status and escape poverty. The ability to unite under a common objective remains a strong trait of the Korean people.

The significance placed on collectivism can become a tool to embrace family leave in the workplace to promote women's work as a means to strengthen the labor force. In more recent years, citizens have come together to add to the foreign exchange reserve by voluntarily giving up personally owned gold during the 1997 financial crisis.<sup>249</sup> The poor quality

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240. Ariane Hegewisch & Janet C. Gornick, *The Impact of Work-Family Policies on Women's Employment: A Review of Research from OECD Countries*, *Community Work & Family*, 14 TAYLOR & FRANCIS ONLINE 120, 124 (2011).

241. *Id.* at 122.

242. *Id.*

243. Catherine R. Albiston, *Institutional Perspectives on Law, Work and Family*, 3 ANN. REV. L. SOC. SCI. 397, 404 (2007).

244. *Id.*

245. Eileen Appelbaum & Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, CENTER FOR ECONOMIC AND POLICY RESEARCH 4, 7-8 (2011), <http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf>.

246. Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement*, 27 MICH. J. INT'L L. 1, 29-35 (2005).

247. *Id.* at 29.

248. *See generally id.*

249. Jae-Joon Lee, *Gold Collection During IMF Crisis*, CHOSUN ILBO (Apr. 17, 2014),



and low level of women's employment should similarly motivate Koreans to accept family leave as a necessary measure to improve the condition of women's work in South Korea.<sup>250</sup> This Section explains how South Korean government policies with the goal of assisting working families through family leave has been inhibited by four structural factors: the cultural legacy of Confucianism, ordered gender inequality, low male participation of family leave, and the devaluation of care work.

### A. Cultural Legacy of Confucianism

#### 1. Philosophy

Confucianism provided the basis for jurisprudence and proscribed the moral landscape that regulated social behavior in Korea.<sup>251</sup> Founded on the teachings of the Chinese philosopher Confucius, the influence of Confucianism in Korea can be traced to the eleventh century.<sup>252</sup> Scholars indicate that Confucianism was used as a governance tool for the Yi Dynasty of Chosun, which preceded modern Korea.<sup>253</sup> Confucian principles allowed the ruling class to subordinate the masses through emphasis on social order based on hierarchy.<sup>254</sup> According to Confucius, the focus is on the maintenance and preservation of harmonious relationships rather than on individuals.<sup>255</sup> There is a proper role for individuals according to gender, class, and age, and respect or deference within vertical relationships takes priority over justice or equality.<sup>256</sup> The four basic vertical relationships in Confucianism are between lord and servant, father and child, old and young, and husband and wife.<sup>257</sup> These ideological influences have created a preference for upholding hierarchical order in the workplace between employer and employee.<sup>258</sup>

Throughout modernization and industrialization, South Korea has

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[http://news.chosun.com/site/data/html\\_dir/2014/04/17/2014041700090.html](http://news.chosun.com/site/data/html_dir/2014/04/17/2014041700090.html).

250. RUTH BARRACLOUGH AND ELYSSA FAISON, GENDER AND LABOUR IN KOREA AND JAPAN: SEXING CLASS 60–96 (2009) (“Even in female dominated industries, such as textile, shoe, and electronics, a rigid gender hierarchy puts male workers in higher and supervisory positions above female workers. Sociologist Seungsook Moon suggested that at the macroscopic level, there is a link between the pattern of sexual division of labour in the economy and the gendered nature of the nation-building strategy of the Park Chung Hee regime during the 1960s and 1970s”).

251. Soh, *supra* note 21, at 15–25.

252. HAHM, *supra* note 61, at 7–10 (1971) (noting that the non-religious ideology of Confucianism that dominated the Yi dynasty of Chosun can trace its origins to the time of Jen Tsung of Sung from the year 1023 to 1063).

253. See Soh, *supra* note 21, at 15–25.

254. *Id.*

255. *Id.*

256. *Id.*

257. Lee, *supra* note 246, at 23.

258. *Id.* at 24.

remained one of Asia's most archetypal patriarchal and hierarchical societies.<sup>259</sup> For six hundred years, Confucianism's influence has permeated into South Korea's culture, legal structure, and politics.<sup>260</sup> Confucian principles have withstood the swift changes toward modernization and the democratic ideals of South Korea. Although originating from China, many scholars indicate that Confucianism was developed much further during the Yi dynasty and its influence is still prevalent in modern Korean society.<sup>261</sup> Confucian values continue to remain relevant in the dominant-subordinate configuration of relationships between men and women in Korean society.<sup>262</sup>

Confucianism emphasizes hierarchy, harmony, and order within society. Women are expected to preserve the peace in a household and foster harmony within the extended family.<sup>263</sup> Those adhering to Confucian values regard men as the structurally relevant citizens in Korean society, and believe men and women should inhabit separate spheres of public and private life, respectively.<sup>264</sup> Despite the rise in the numbers of working women, the rigid social structure of South Korea continues to relegate women to the traditional roles of housewife and dedicated mother.<sup>265</sup> Confucianism's prevalence in Korean society serves to justify gender inequality by emphasizing social order.<sup>266</sup>

Confucianism has also influenced Taiwan and Japan, and vertical social order remains an integral part of the culture.<sup>267</sup> Both Taiwanese and Japanese governments have introduced legislation promoting maternity and paternity leave benefits to overcome significantly low fertility levels without initiating universal public childcare.<sup>268</sup> Currently, women's workforce participation rate in Taiwan is similar to South Korea at 50%.<sup>269</sup> In Japan, the female employment rate is a higher 63%, but according to one

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259. Kim, *supra* note 32, at 437–40.

260. See Hahm, *supra* note 61.

261. Kim, *supra* note 32, at 437–40.

262. *Id.*

263. Erin Cho, *Caught in Confucius' Shadow: the Struggle for Women's Legal Equality in South Korea*, 12 COLUM. J. ASIAN L. 125, 176 (1998).

264. *Id.*

265. IN-RYUNG SHIN, LEGAL RIGHTS OF WOMEN AS WORKERS: ON GENDER DIVISION OF LABOR IN SOUTH KOREA 88 (Hyoung Cho & Pil-hwa Chang eds., 1994).

266. HYAWEOL CHOI, GENDER AND MISSION ENCOUNTERS IN KOREA: NEW WOMEN, OLD WAYS 21–44 (2009).

267. Mary E. Tucker, *Confucianism and Ecology: Potential and Limits*, THE FORUM ON RELIGION AND ECOLOGY AT YALE (1998), available at <http://fore.research.yale.edu/religion/confucianism/>.

268. Wan-I Lin & Shin-Yi Yang, *From Successful Family Planning to the Lowest of Low Fertility Levels: Taiwan's Dilemma*, 3 ASIAN SOC. WORK AND POL'Y REV. 95, 108 (2009).

269. Teng Po-jen, *Taiwan Women's Labor Force Participation Rate Remains at 50%*, WANT CHINA TIMES (May 4, 2012), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20120504000021&cid=1103>.

survey, close to 70% of women exit the workforce permanently after childbirth.<sup>270</sup> Taiwan, Japan, and South Korea continue to struggle with birth rates that are lower than replacement levels.<sup>271</sup>

## 2. *Implications of Confucianism on South Korea's Rule of Law*

The Confucian tenet of patrilineal succession has dominated the legal landscape of family law in South Korea.<sup>272</sup> The patriarchal family headship system known as *hoju* ordered the eldest son to have priority in succession, while women lost membership from their natal families when they wed.<sup>273</sup> Feminists such as South Korea's first female attorney, the late Lee Tae Young, have sought to abolish the *hoju* system and its resulting inequalities on divorce and child custody proceedings.<sup>274</sup> Under the *hoju* system, wives are incorporated into their husband's family registers upon marriage and children are automatically registered under their father's names.<sup>275</sup> As a result of 30 years of persistence by women's rights advocates, South Korean women obtained the legal right to marital assets upon divorce and rights to custody of children, with the 1989 revision of family law.<sup>276</sup> In 2008, in a triumphant feat, the *hoju* system was abolished as incompatible with modern ideals of gender equality.<sup>277</sup>

Demonstrations by conservatives indicated the dominance of patriarchal values in South Korea, which was marked by public outcry against full compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>278</sup> The General Assembly of the United Nations unanimously adopted the CEDAW in December of 1979. Confucian groups held aggressive campaigns to prevent the government from signing CEDAW under the notion that CEDAW

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270. *Holding Back Half the Nation*, THE ECONOMIST (Mar. 29, 2014), <http://www.economist.com/news/briefing/21599763-womens-lowly-status-japanese-workplace-has-barely-improved-decades-and-country>.

271. THE WORLD BANK, *supra* note 97 (indicating that Taiwan's fertility levels are lower than South Korea at 1.11. Japan is 1.4, similar to South Korea at 1.3.).

272. See Cho, *supra* note 263, at 175.

273. *Id.* at 175. Based on patrilineal principles, the wife is an associate member of her husband's lineage and acceptance is premised on faithful fulfillment of duties as daughter-in-law, wife, and mother. Only after these roles have been achieved can the wife attain the status of ancestor in her husband's clan to be included in ancestral worship ceremonies. See also Hahm, *supra* note 61.

274. Erin Cho, *supra* note 263, at 146–170.

275. Mijeong Lee, *supra* note 23, at 30–31.

276. Erin Cho, *supra* note 263, at 150–166 (discussing women's rights advocates' triumph by significantly revising long-standing family laws that favored a patriarchal system where custody of children was automatically awarded to fathers upon divorce).

277. *Id.* at 165 (stating that in 1991, women's advocates achieved a milestone when inheritance laws were amended to allow married daughters to have an equal share with male siblings. Previously an unmarried daughter could only receive one quarter of a son's portion of inheritance and married daughters received even less).

278. *Id.* at 178.

would destroy the order and ethics of South Korean society.<sup>279</sup> Conservative groups, with a desire to preserve patriarchal traditions and customs, expressed concern with the CEDAW provision that required the government to take action to modify the stereotypical roles of men and women.<sup>280</sup> In 1984, the National Assembly compromised with conservative groups by ratifying CEDAW on the condition that provisions conflicting with South Korean domestic law would be ignored.<sup>281</sup>

Historical adherence to Confucian values has resulted in a difficult employment environment where democratic laws have strived to overcome six hundred years of cultural ideology. During the five hundred years of the Chosun dynasty from 1392 to 1910, South Korean women were largely confined to their duties as housewives with little opportunity to engage in paid work in the public arena.<sup>282</sup> The wave of industrialization during the 1960s and 1970s brought about the introduction of female workers into the labor force to sustain the national export drive.<sup>283</sup> Consequently, female workers in the labor force have been increasing in number.<sup>284</sup> However, despite the increase in the number of women working outside of the home, many of these female workers continue to be viewed as “exclusionary or contingent workers,” rather than as “legitimate normative workers” that contribute to the national economy.<sup>285</sup>

Regardless of their competence and high levels of performance, women workers have often been viewed as inferior workers.<sup>286</sup> Many family leave participants are punished by termination, lower pay, and demotions upon return to work.<sup>287</sup> The gap between “laws on the books” and “laws in action” remains acute because progressive laws continue to

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279. *Id.*

280. *Id.*

281. *Id.* at 179.

282. CHOI, *supra* note 266, at 21–44.

283. *See generally* CHO, *supra* note 22.

284. *See id.*

285. JANICE C. H. KIM, TO LIVE TO WORK: FACTORY WOMEN IN COLONIA KOREA 1910–1945 61–62 (2009) (discussing that the most pervasive form of work for single women during the early to mid-1900s was live-in domestic servant who worked for meager wages in exchange for food and board).

286. Jung-Jin Oh, *Case law on Women’s Employment Internationally and in Korea*, KOREA WOMEN’S DEVELOPMENT INSTITUTE, 41–117 (2003), <http://www.kwdi.re.kr/reportView.kw?currPg=5&sgpr=S01&siteCmsCd=CM0001&topCmsCd=CM0002&cmsCd=CM0004&pnum=1&cnum=0&sbjCdSel=SB01&rptCdSel=&src=TITLE&srcTemp=&ntNo=393&pageSize=10> (showing case law indicating women were forced to sign resignation forms upon marriage where employers hired unmarried women or men as replacements. Past cases also present discrimination in hiring practices where employers have refused to provide female applicants with applications since women tend to take family leave; certain employers have set age limitations when hiring women; and employers have classified men and women differently for purposes of wage discrimination and promotions).

287. *Id.*

conflict with traditional views.<sup>288</sup> Despite an advancement in policy, the laws in practice fall short of attaining egalitarian results for working families. The hierarchical order stipulated by Confucianism that pertains to gender and age endorses gender inequality in the workplace. The “gendered history” of ordered inequality contributes to women earning less and occupying temporary, rather than long-term employment positions.<sup>289</sup> Unfortunately, the remnants of ordered gender inequality in Korean society create a barrier for recognizing women as valuable workers.

*B. Ordered Gender Inequality, Male Participation of Family Leave, Devaluation of Care Work, and Low Income Workers*

*1. Ordered Gender Inequality in South Korea*

Gender discrimination in the recruitment, hiring, wage provision, and use of family leave is illegal in South Korea.<sup>290</sup> Nevertheless, ordered gender inequality has contributed to gender discrimination in the workplace and low female workforce participation rates.<sup>291</sup> In 2012, the labor force participation rate of women was close to 50%, which has remained fairly constant for the past ten years.<sup>292</sup> According to OECD reports, in 2011, the employment rate for women with a college degree was 60.1% in South Korea—the lowest of all 34 OECD countries, which averaged 82.5%.<sup>293</sup> The hiring gap between Korean men and women with advanced degrees was 29%, the greatest among OECD countries, with South Korea being the only country with a percentage higher than 20%.<sup>294</sup> The number of college-educated women in the workforce is also the lowest among all OECD countries.<sup>295</sup> South Korean women experience more barriers when

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288. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 25 (1910) (“Law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning”).

289. Oh, *supra* note 286, at 319–30.

290. Act on Equal Employment and Support for Work-Family Reconciliation, Act. No. 3989, Dec. 4, 1987, arts. 7–8, 19 (S. Kor.).

291. Oh, *supra* note 286, at 319–30.

292. *Labor Participation Rate, Female (% of Female Population Ages 15+)* (Modeled ILO Estimate), WORLD BANK, <http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS/countries/1W?display=graph> (last updated Dec. 16, 2014); see also ORG. FOR ECON. COOPERATION AND DEV., *Closing the Gender Gap: Act Now, The Economic Case, Social Norms and Public Policies* 1, 1–14 (2012), <http://www.dx.doi.org/10.1787/9789264179370-en> (showing that although the OECD indicates that close to 50% of women in Korea participate in paid work, one third of those women constitute self-employed workers, which is the highest among OECD countries).

293. Victoria Kis and Eunah Park, *A Skills Beyond School Review of Korea*, ORG. FOR ECON. COOPERATION AND DEV., <http://www.oecd.org/korea/SBS%20Korea.pdf> (last visited Apr. 30, 2014).

294. Labor Participation Rate, *supra* note 292; see generally ORG. FOR ECON. COOPERATION AND DEV., *supra* note 292, at 109–11 (showing that in the European Union, the gender gap is 7.2% between male and female university graduates).

295. *S. Korea Ranked Last in OECD in Employment of Female College Graduates*, YONHAP

unemployment is high and the economy is slow.<sup>296</sup> A 2012 OECD survey indicated that in South Korea, one third of the population thinks that during high unemployment, men are more entitled to a job than women, which is in contrast to the OECD average of 10% who believe that men are more entitled to work when jobs are scarce.<sup>297</sup>

Figure 1 presents the female workforce participation rates of the four surveyed countries.<sup>298</sup> From 1990 to 2012, which is shown on the horizontal axis, the percentage of women workers vary between 40–60%, as shown on the vertical axis. In the U.S., the workforce participation rates of women have been relatively high in accordance with U.S. family leave laws' policy goals of encouraging female employment. By contrast, in South Korea, female workforce participation rates have remained more or less close to 50% for over twenty years, even after the enactment of family leave laws. Women's employment rate in South Korea experienced a sharp decline following the 1997 financial crisis when many female workers were terminated due to corporate restructuring.<sup>299</sup> The global recession in 2008 triggered another decline in employment. In France and Germany, generous family leave policies have aided in the steady increase of female workers into the workforce. As seen in Figure 1, the adoption of family leave policies boosted women's employment in Germany where working women have been steadily increasing in numbers for the past twenty years.

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NEWS AGENCY, <http://english.yonhapnews.co.kr/business/2013/01/20/4/0503000000AEN20130120000800320F.HTML> (Jan. 20, 2013).

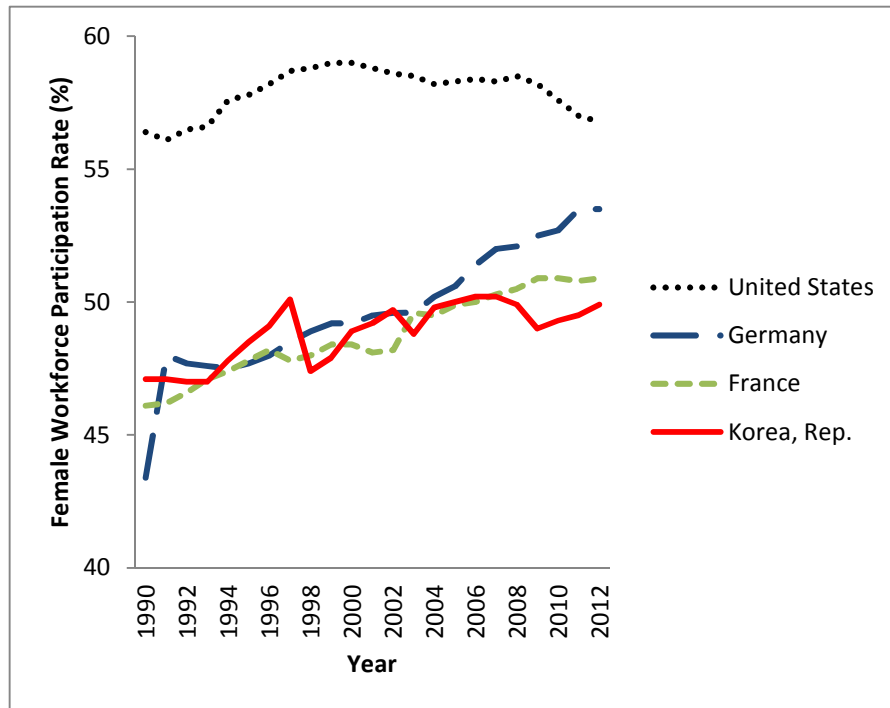
296. See ORG. FOR ECON. COOPERATION AND DEV., *Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012*, 1, 19–24, (2012), <http://www.oecd.org/social/family/50423364.pdf>.

297. *Id.*

298. Labor Force Participation Rate, *supra* note 292.

299. Gina Kong, *Are Women-Only Trade Unions Necessary in South Korea? A Study of Women Workers' Struggles in Korea's Labor Market*, 29 NW. J. INT'L L. & BUS. 217, 225 (2009).

**Figure 1: Female Workforce Participation Rate in U.S., Germany, France and South Korea<sup>300</sup>**



Korea's cultural adherence to ordered inequality relegates many women as suboptimal employees. In a 2014 survey, over 60% of employers expressed their preference for male employees based on speculative reasons such as "a lack of appropriate work for women" (39.7%) and "no particular reason" (15.2 %).<sup>301</sup> The same survey indicated that women under the age of thirty have a 30% greater chance of being hired than those over the age of thirty, the period when many women decide to start a family.<sup>302</sup> Despite the increasing number of women in the workforce, many Korean employers continue to perceive women workers as a burden.<sup>303</sup>

300. Labor Participation Rate, *supra* note 292.

301. Jung Hwan Kim, *60% of Companies Still Prefer Males*, MAEIL NEWS (Mar. 9, 2014), <http://news.mk.co.kr/newsRead.php?no=361802&year=2014> (from survey conducted by the City of Seoul for 1000 employers).

302. *Id.*; see also, MARY C. BRINTON, *WOMEN'S WORKING LIVES IN EAST ASIA* 96–124 (2001) (noting that due to a lack of promotional opportunities and low wages, many Korean women decide to quit their jobs upon marriage or childbirth, which remains a dominant pattern).

303. Special Investigation Team, *Mid-age Business Owners Indifferent to Hiring Female*

Such a work environment has hindered the implementation of family leave policies in South Korea.

Among the twenty-three countries reviewed, the OECD ranked South Korea last among industrialized countries with regard to its gender wage gap.<sup>304</sup> For South Korean women the average gap was 39% whereas the OECD average was closer to 18%.<sup>305</sup> Among working women, 70% reported discrimination in promotions and pay increases.<sup>306</sup> The number of female managers in South Korea remains at a low 10% compared with the OECD average of one-third of the workforce.<sup>307</sup> Among one hundred corporations in South Korea, the percentage of women board members is 1.9%, the lowest of all industrialized nations.<sup>308</sup>

Figure 2 displays the gender wage gap of the four surveyed countries starting in year 2000, as depicted on the horizontal axis. The vertical axis is the percentage in gender wage gap between men and women, which ranges from 10–45%. South Korea's gender wage gap has slowly decreased, but it remains at a high 39%, where for every dollar a male worker earns, a female worker earns sixty cents. This is in contrast to France, where the gender wage gap is less than 15% and Germany, where the gender wage gap is currently less than 20%. In the U.S., despite the high numbers of women in the workforce, the gender wage gap lags behind Germany and France, which indicates there is room for improvement through family leave policies.

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*Employees*, KYUNGHYANG SHINMUN (June 14, 2013), <http://ztgeist.khan.kr/609>. (finding that 32% of employers stated that the reason they avoid hiring women is due to a concern in the increase in costs during family leave. Small business employers, with less than 200 employees, admit that costs associated with women taking family leave are considered a burden on business).

304. ORG. FOR ECON. COOPERATION AND DEV., *OECD Fact Book 2013: Economic, Environmental and Social Statistics*, <http://www.oecd-ilibrary.org/sites/factbook-2013-en/13/02/02/index.html?itemId=/content/chapter/factbook-2013-106-en> (last visited Apr. 30, 2014).

305. *Id.*

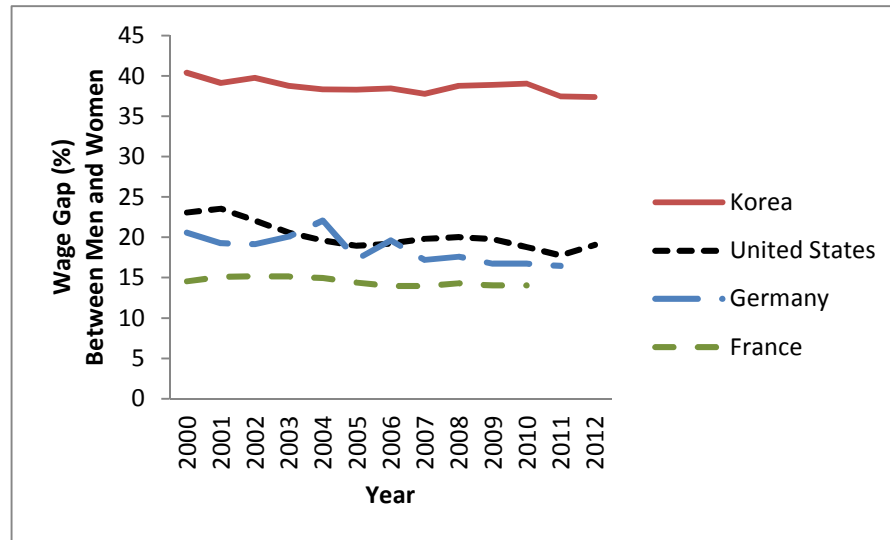
306. Yun Yoon Jung, *Jikjang Yeosung 72% Seungjin Yeonbongseo Chabyul [72 Percent of Working Women Experience Discrimination in Pay and Promotion]*, DAILY LABOR NEWS (Mar. 7, 2003), available at <http://labortoday.co.kr/news/articleView.html?idxno=30623>.

307. *Id.*; see also ORG. FOR ECON. COOPERATION AND DEV., *Highlights Korea: Babies and Bosses—Policies Towards Reconciling Work and Family Life*, <http://www.oecd.org/korea/39696376.pdf> (last visited Apr. 30, 2014) (noting only 8% of women in Korea hold supervisory responsibilities in companies); Nam Jung Min, *Seungjineunkunyeung Twajik Abbak? Jikjangnyeo Yooli Chunjang Yeojun [No Room for Promotions but Rather Pressure to Resign: Glass Ceiling Persists for Working Women]*, SBS NEWS (Mar. 7, 2014), [http://w3.sbs.co.kr/news/newsEndPage.do?news\\_id=N1002283543](http://w3.sbs.co.kr/news/newsEndPage.do?news_id=N1002283543) (reporting that in Korean companies that have implemented flexible hour arrangements for employees and work-from-home options, the number of women who experience a break from their careers due to childrearing has significantly decreased. POSCO, which is a leading company that has adopted such family-friendly policies as a company rule, retains a female manager percentage of 18%).

308. *The Glass Ceiling Index*, THE ECONOMIST (Mar. 8, 2014), <http://www.economist.com/news/business/21598669-bestand-worstplaces-be-working-woman-glass-ceiling-index>.



**Figure 2: Percentage of Wage Gap Between Men and Women in South Korea, U.S., Germany, and France<sup>309</sup>**



As a result of the 1997 financial crisis in South Korea,<sup>310</sup> corporate restructuring prompted large-scale layoffs where women were the first to be terminated.<sup>311</sup> In 1998, one year after the International Monetary Fund (IMF) bailout, one of South Korea's largest banks, Nonghyup Bank, dismissed 688 female employees.<sup>312</sup> All the women had spouses employed by Nonghyup Bank, and the Bank justified its termination by claiming that the former employees would still have a household income.<sup>313</sup> In 2010, to

309. ORG. FOR ECON. COOPERATION AND DEV., *Gender Wage Gap*, <http://www.oecd.org/gender/data/genderwagegap.htm> (last visited Apr. 9, 2015).

310. Kong, *supra* note 299, at 224–25 (noting that the 1997 financial crisis prompted major changes in South Korea's corporate environment, and the fifty-seven billion dollar bailout loan from the International Monetary Fund (IMF) required strict financial and corporate restructuring programs); *see also* Haejin Kim & Paula B. Voos, *The Korean Economic Crisis and Working women*, 37 *J. Contemp. Asia* 190, 191 (2007).

311. Kong, *supra* note 299, at 224–25. As a result of corporate restructuring through bankruptcies and mergers and acquisitions, large scale layoffs were practiced such that the number of unemployed increased from 426,000 in 1996 to 1.5 million in 1998. Unemployment rose from a stable 2.6% in 1997 to 6.8% in 1998 and reached 8.6% by 1999. *Id.*

312. *Id.* Some of the 688 female workers were terminated then later reinstated as non-regular or contract-based temporary employees. In 1998, 86.7% of non-regular workers were those who had been laid off then re-hired as non-regular workers by their previous employers. *Id.*

313. Special Investigative Team, *Sanggaenun Namjaeui Chaikimiranun Gabujangjuk Nonli, Yeosung Haego Deungae Akyoung [Paternalistic View on Work Negatively Affects Women's Termination]*, THE KYUNGHYANG SHINMUN (May 29, 2013), available at [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=201305290600065&code=940702](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201305290600065&code=940702).

the dismay of women's groups, a court in Seoul dismissed a lawsuit filed by two previous female employees against Nonghyup Bank for violation of the Equal Employment Opportunity Act.<sup>314</sup> Since the 1997 financial crisis, the practice of recommended resignation has been used against female workers as a punishment tactic.<sup>315</sup> In a recent survey of 1623 women workers in January of 2011, 24.4% stated that they had been pressured to sign a recommended resignation form after use of family leave.<sup>316</sup>

Although maternity leave laws have been in place for nearly thirty years in South Korea, less than one out of every five pregnant female employee takes advantage of family leave.<sup>317</sup> In one report that asked women why family leave laws cannot be fully implemented, 29.9% stated fear of disrupting the workload, 19.1% cited guilt for fellow workers, 13% stated policy inadequacy, and 12% stated fear of dismissal, or penalties in promotions and salary.<sup>318</sup> Many women return from maternity leave to find that their desk is no longer in the office, that they are assigned to another team with inferior responsibilities or that they are transferred out of town where it is not feasible to commute to work.<sup>319</sup> Oftentimes, employers are aware of the sanctions of terminating a post-partum worker on leave, so they wait until workers return to bully them into signing a resignation form.<sup>320</sup> Employers allow little deference, if at all, to women workers who contribute to the overall success of South Korean businesses.

Many employers in South Korea are "unwilling to make changes on behalf of a group of employees whose needs are so different from their own and who have very little influence in the workplace."<sup>321</sup> In 2007, a female

314. Hwa-Young Kim, *Sungchabyul Haego Kikak Panyulae Binan Itdara [Criticisms Aimed at Judgments Dismissing Cases by Terminated Female Employees]*, LABOR TODAY (Dec. 1, 2010), available at <http://www.labortoday.co.kr/news/articleView.html?idxno=6597> (reporting the court's holding that all employed couples had a choice as to which spouse would choose to sign the resignation form, and thus this was not a case of gender discrimination).

315. Aera Lee, *Yuga Hyujik Ssutduni Ayaе Chaeksang Chiwwaebuliutsuyo [Desk Removed After Care Leave]*, OhmyNews (July 15, 2011), [http://www.ohmynews.com/nws\\_web/view/at\\_pg.aspx?CNTN\\_CD=A0001595020](http://www.ohmynews.com/nws_web/view/at_pg.aspx?CNTN_CD=A0001595020) (noting that 54.7% of survey respondents stated that they feel guilty for using maternity leave).

316. *Id.*

317. STATISTICS KOREA, *Chulsan Mit Yuga Hyujik Hyunhwang [Status on Care Leave Participants]*, [http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=1504](http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1504) (last visited Apr. 30, 2014) (noting that in 2013, out of the twenty-five million women in South Korea, 49% were employed and less than 20% took advantage of maternity or parental leave) (translated in English by author).

318. Nam-Hee Do, *Kiupeui Janyeo Yangyuk Jiwon Shiltaewa Junkchekgwajae [Current State of Company Assistance on Care Leave and Remaining Legislative Tasks in Korea]*, KOREA INSTITUTE OF CHILDCARE AND EDUCATION (2012), [http://www.kicce.re.kr/kor/publication/02\\_03.jsp?mode=view&idx=6396&startPage=0&listNo=5&code=report05&search\\_item=subject&search\\_order=&order\\_list=10&list\\_scale=10&view\\_level=2012](http://www.kicce.re.kr/kor/publication/02_03.jsp?mode=view&idx=6396&startPage=0&listNo=5&code=report05&search_item=subject&search_order=&order_list=10&list_scale=10&view_level=2012).

319. Oh, *supra* note 286, at 43–117.

320. *Id.*

321. See e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace*

employee at a large bank filed suit for unlawful termination after returning from family leave.<sup>322</sup> Before going on family leave, this employee was a bank teller. After returning from family leave, the bank assigned her to conduct janitorial work and greet customers.<sup>323</sup> Additionally, the bank sent a message to her coworkers to isolate and pressure the employee to resign. As a result, she suffered from depression, and after forty days of sick leave, she was terminated.<sup>324</sup> The circumstances of this case represent the plight of many female workers in South Korea who choose to take family leave.<sup>325</sup>

In 2013, a female attorney brought suit against her employer, a small law firm, for unlawfully firing her upon discovering she was pregnant.<sup>326</sup> While the district court found that the law firm was not liable, the appeals court reversed but only awarded the plaintiff \$2,000 USD.<sup>327</sup> In South Korea, female workers continue to be perceived as “marginal participants in the workplace, [who] seek an alteration in a central workplace norm for the purpose of childrearing—an activity that may be straightforwardly devalued and is at least thought to be incompatible with serious work.”<sup>328</sup> The skewed view of women workers has contributed to the high number of terminations before, during, and after the use of family leave. Such patterns have exacerbated the exodus of women from the workforce and resulted in underutilization of South Korea’s human capital, despite recommendations from the OECD to encourage women’s employment.

In South Korea, maternity leave laws were adopted in 1987, and paid maternity leave was introduced in 1996. During this time, women’s workforce participation rate, despite its low numbers, nevertheless increased from less than 45% in 1981 to close to 50% in 2001.<sup>329</sup> In a recent review of the South Korean economy, the OECD indicated that more women in paid employment would significantly strengthen the labor force, lead to national productivity, help sustain output growth, and contribute to the country’s wealth.<sup>330</sup> Higher female employment rates also support better

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*Norms*, 42 VAND. L. REV. 1183, 1239 (1989).

322. Sun-young Park, KOREA WOMEN’S DEVELOPMENT INSTITUTE, *Yeosung Gajok Gwanryun Panrae Daehan Sunginjjuk Bunsuk Mit Ibbub Gwajae [Gender-conscious Analysis of Case Law on Women and Family Issues and Legislative Tasks]*, 231–52 (2012).

323. *Id.*

324. The plaintiff was later awarded approximately \$20,000 USD for damages. *Id.*

325. *Id.*

326. Seoul Central District Court [Dist. Ct.], *Hwang v. Lim*, Criminal Appeals Section 9, Feb. 13, 2014 (S. Kor.).

327. *Id.*

328. See Abrams, *supra* note 321, at 1243.

329. ORG. FOR ECON. COOPERATION AND DEV., *Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries* (May 2004), <http://www.oecd.org/social/labour/31743836.pdf>.

330. See Jones, *supra* note 26, at 5–9; see also *id.*; cf. Morgan & Zippel, *supra* note 14, at 67–69. As in South Korea, West Germany has historically had low numbers of female participation in the

job opportunities for women and reduce market dualism where women comprise the majority of the support industry.<sup>331</sup> When women are able to retain employment during their prime years, they are less susceptible to poverty in later years of life.<sup>332</sup> Proper implementation of family leave policies will enable women to strengthen ties to the workforce, accumulate earnings over a lifetime, and sustain a livelihood through retirement income in later years.<sup>333</sup>

## 2. *Male Participation of Family Leave to Promote Equal Parenthood*

In countries with paid leave policies, the focus has been to increase male participation to lessen penalties on women and encourage men's role in care work.<sup>334</sup> In France, Germany, and South Korea, long-term parental leave is predominantly taken by women despite the existence of wage replacement for the duration of the period.<sup>335</sup> Recent legislative proposals in South Korea to extend the current five-day paternity leave to one month have been welcomed by working families. However, feminists express concern that enforcement of paternity leave is critical and further argue that paternity leave should be mandatory or at least equal in length to maternity leave as in the U.S.<sup>336</sup> Scholars indicate that promoting family leave

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workforce. After paid leave legislation was adopted, West Germany experienced an increase in working women and more women returned to jobs at a quicker pace after childbirth. For women with children from the ages of three to six labor force participation increased from 38% in 1986 to 59% in 2000. *Id.*

331. See Jones, *supra* note 26, at 10–12.

332. Hegewisch & Gornick, *supra* note 240, at 120–25.

333. *Id.*

334. *Id.* In Iceland, with the purpose of promoting gender equality in leave taking, each parent is given a non-transferable amount of time for care leave. Families as a whole are allowed nine months of paid leave for one child, at 80% wage replacement, with three months for each parent and an additional three months that can be divided between mother and father. In 2006, a high 88% of fathers used the three month leave entitlement although women accounted for 83% of the shared entitlement period. GORNICK & MEYERS, *supra* note 117, at 112–46. Germany has seen an increase in paternity leave takers after family leave reform in 2007, which grants parents 67% of previous income and includes two 'daddy months' or paternity quota which is lost to a family if the father chooses not to use it. See Esther Geisler & Michaela Kreyenfeld, *How Policy Matters: Germany's Parental Leave Benefit Reform and Fathers' Behavior 1999–2009* 2–3 (Max Planck Inst. for Demographic Research, Working Paper No. WP 2012-021, July 2012), available at <http://www.demogr.mpg.de/papers/working/wp-2012-021.pdf>. Before the 2007 reform parents received a flat rate of approximately USD 411 per month which contributed to the large proportion of mothers taking leave in contrast to fathers, since benefits were too low compared to the length of leave. *Id.*

335. See GORNICK & MEYERS, *supra* note 117, at 133 (explaining that policies that have been successfully utilized by European countries to encourage fathers include high parental leave wage-replacement rates with a high cap and public education campaigns to educate the public which alter the discourse about fathers' engagement in caregiving).

336. See Seung-A Hong, *Gajungnae Yukajiwonjungchek Hyunhwanggwga Gaesunbangan [Policy Improvements to Encourage Male Participation of Family Leave]*, KOREA WOMEN'S DEVELOPMENT INSTITUTE (2013), <http://www.kwdi.re.kr/reportView.kw?currPg=1&sgrp=S01&siteCmsCd=CM0001&topCmsCd=CM0002&cmsCd=CM0004&pnum=1&cnum=0&sbjCdSel=SB01&rptCdSel=&src=TITLE&srcTemp=&ntNo=1048&pageSize=10>. In order to ensure gender equality in the use of leave

participation of fathers is important as it leads to increased time spent in care work and child-bonding in the years following childbirth.<sup>337</sup>

In South Korea, the “highly gendered labor market and entrenched cultural norms” increase the difficulties of implementing laws to promote gender equality through family leave.<sup>338</sup> In South Korea, male participation rates for parental leave have remained less than 3% since 2005.<sup>339</sup>

Even in Western states such as France and Germany, the choice to interrupt a career overwhelmingly burdens women more than men.<sup>340</sup> In Germany and France, despite availability of paid parental leave, more women than men tend to sacrifice their work since it is more “logical” and “rational” for the family unit to preserve the higher income of men.<sup>341</sup> In Germany, parental leave by fathers has increased to 27.3% since the 2007 increase in family leave wages.<sup>342</sup> However, despite the increase, German public opinion has been divided as to whether men should stop working when a child is born.<sup>343</sup> Popular opinion dictates that mothers should take long leaves such that half of German fathers have not even considered taking family leave.<sup>344</sup>

Although family leave policies have positive effects on women’s work and wages, women continue to experience a motherhood penalty, which disadvantages mothers as a form of discrimination in the workplace.<sup>345</sup> In both the U.S. and South Korea, the motherhood penalty and fatherhood bonus leads to mothers earning less than men, regardless of marital status, and less than women with no children.<sup>346</sup> In the U.S., the average hourly

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policies, the Portugal government adopted an obligatory five-day paternity leave legislation. *See* Hegewisch & Gornick, *supra* note 240, at 127. Portugal experienced an exponential increase in the number of fathers taking leave and a notable increase in the number of men taking additional care leave for the birth of a child.

337. Liza Mundy, *Daddy Track: The Case for Paternity Leave*, THE ATLANTIC (Dec. 22, 2013, 9:25 PM), <http://www.theatlantic.com/magazine/archive/2014/01/the-daddy-track/355746/> (discussing how high use of paternity leave has been shown to decrease the gender wage gap and contribute to gender equality in the workplace).

338. Morgan & Zippel, *supra* note 14, at 72.

339. *Chulsan Mit Yukahyujik Gaesunbangan [Parental Leave Participant Status 2005–2013]*, STATISTICS KOREAN, [http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=1504](http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1504) (last visited May 2, 2014) (translated to English by author).

340. Morgan & Zippel, *supra* note 14, at 72. Many fathers choose not to take advantage of laws encouraging family time, despite paid leave options. Cultural norms as well as economic incentives simultaneously influence male decision-making.

341. Morgan & Zippel, *supra* note 14, at 72.

342. Sonja Kuch, *In Germany, Fathers Take Parental Leave More Often, Even Though For a Short Period of Time*, HENKEL (June 17, 2013), <http://www.henkeldiversity.com/2013/06/17/in-germany-fathers-take-parental-leave-more-often-even-though-for-a-short-period-of-time/>.

343. Morgan & Zippel, *supra* note 14, at 72–73.

344. *Id.*

345. *See generally*, Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001).

346. *See generally*, Shelley J. Correll, Stephen Benard, & In Paik, *Getting a Job: Is There a*

wage of married men is 29.7% higher than non-married men,<sup>347</sup> and a 1994 study indicated that American mothers' hourly wages were 31% lower than non-mother wages.<sup>348</sup> In South Korea, married men earn 10–18% more than non-married men.<sup>349</sup> In addition, the 39% wage gap between men and women in South Korea is the largest among all OECD countries and 17% higher than the U.S.<sup>350</sup>

Employers are less inclined to hire, promote, and educate mothers based on assumptions of lack of competence and suitability to corporate culture.<sup>351</sup> One study showed that in the hiring process, employers favor women who are not mothers in comparison to women who are mothers, but the same rule did not apply to fathers.<sup>352</sup> Employer stereotypes and cognitive biases that mothers do not prioritize paid work lead to mothers being held to higher standards of performance when it comes to attendance and punctuality.<sup>353</sup> On the other hand, employers held men to more lenient job performance and work commitment standards when they indicated they were fathers.<sup>354</sup> Studies indicate that women are perceived to be less capable and punctual when they start a family, whereas men are viewed as reliable, responsible leaders.<sup>355</sup>

Policy should encourage male participation of family leave to ensure that women are no longer perceived and penalized as “non-normative workers” taking advantage of extended leave periods for childrearing.<sup>356</sup> Scholars have suggested that male participation of family leave and

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*Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

347. Hyun-Bae Chun & In-Jae Lee, *Why Do Married Men Earn More: Productivity or Marriage Selection?*, 39 ECON. INQUIRY 307, 311 (2001).

348. Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 142 (1997); see also *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, U.S. CENSUS BUREAU, [https://www.census.gov/newsroom/releases/archives/income\\_wealth/cb13-165.html](https://www.census.gov/newsroom/releases/archives/income_wealth/cb13-165.html) (last visited Apr. 30, 2014).

349. Ji-Eun Lee, *Korean Birth Rate to Rise in 2050*, YONHAP NEWS (Feb. 11, 2014, 11:00 AM), <http://www.yonhapnews.co.kr/economy/2014/02/11/0301000000AKR20140211077400002.HTML>.

350. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 304.

351. See Stephen Benard, In Paik, & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1373 (2008) (“In one study, researchers asked participants to evaluate a candidate for an entry-level attorney position. The candidates were either fathers, men without children, mothers, or women without children. Mothers were less likely to be hired than women without children, but men were not penalized for being fathers.”).

352. *Id.*

353. Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1472–73 (2008).

354. Benard et al., *supra* note 351, at 1373.

355. See Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES, 341, 342 (2013) (“Working mothers are mommy-tracked, stereotyped as incompetent and passed over for promotions, regardless of qualifications or performance”).

356. See generally, *id.*

contribution to care work in the home can help relieve the gender wage gap.<sup>357</sup> Research indicates that the amount of time women spend in care work negatively affects their wages.<sup>358</sup> Becoming a nurturer is not an inherent trait but rather a socially imposed characteristic.<sup>359</sup> A nurturing father can have a positive impact on improving the quality of life of mother and child by reducing the negative effects that care work can have on women's psychological health.<sup>360</sup> By increasing the number of male family leave participants, the penalties on mothers can be diffused and the stigma associated with family leave can be relieved.

### 3. Devaluation of Care Work and the Effects on Women's Work

In all four surveyed countries, care work has remained the domain of women. In the U.S., the lack of a paid leave policy reflects a devaluation of care work conducted in the private sphere. Although populism contributed to the adoption of paid leave in France, overcoming unemployment and encouraging fertility were the main driving forces. Initial government propaganda for care work valorization in Germany only recently gained traction when wage replacement levels were increased to 67% in 2007.<sup>361</sup> In South Korea, traditional values relegate women to care work, which is devalued compared to the work men carry out in the public sphere. Although female workers in South Korea significantly contributed in times of national economic crises by toiling to meet export goals, many women continue to be considered peripheral workers in the workplace.<sup>362</sup>

Historically in Korea, the institutionalization of gender inequality forbade women from participating in activities pertaining to the public sphere.<sup>363</sup> Women were thus confined to the work of the private sphere. According to democratic principles, "the ideal of justice" requires that

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357. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 781 (2000) (noting that gender inequality in the workplace can be measured by the gender wage gap and promoting wage equality is related to more men taking family leave).

358. Daniel N. Kuperstein, *Finding Worth in the New Workplace: The Implications of Comparable Worth's Reemergence in the Global Economy*, 24 HOFSTRA LAB. & EMP. L.J. 363, 373 (2007).

359. Barbara Bennett Woodhouse, *Hatching the Egg*, 14 CARDOZO L. REV. 1747, 1766 (1993).

360. *See id.* (noting that the social norm of ideal housewife and dedicated mother can impose negative effects, such as depression, on women's psychological health); *see also* Marion Crain, *Where Have All the Cowboys Gone? Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1878–1906 (1999) (finding that despite the increased awareness of women's rights, the institution of homemaking remains a reality for many women).

361. Geisler & Kreyenfeld, *supra* note 334, at 3.

362. Kim, *supra* note 20, at 5. During the 1970s, a large number of women were employed as factory workers and many considered themselves as "industrial soldiers." Managers emphasized the need for sacrifice and women workers toiled until their fingers were bleeding. *Id.*

363. Cho, *supra* note 263, at 128–29.

society place equal value on women's and men's work.<sup>364</sup> In South Korea, the "universal devaluation" of women's care work in the home has been embedded in its traditions, history, and culture.<sup>365</sup> Patriarchal notions of order led to a gendered segregation of labor and were used as a tool to legitimize restrictions on women's employment.<sup>366</sup>

Despite the increase of dual earning couples, the gendered division of care work in South Korea has persisted with women still performing the bulk of household responsibilities.<sup>367</sup> Figure 3 indicates time spent by men and women conducting unpaid care work in 2014.<sup>368</sup> Among OECD countries, South Korean men spent the least amount of time conducting housework and childcare (approximately 45 minutes per day) where the average was 141 minutes.<sup>369</sup> This uneven division of time men and women spend engaging in care work is especially acute in South Korea, compared to the U.S., Germany, and France, due to historical emphasis on assigning women's work to the private sphere. Even though family leave policies are similar in the U.S. and South Korea, traditional values have led to a significantly larger care work gap between men and women in South Korea. In fact, as to time spent in unpaid care work, the U.S. is much more similar to France and Germany, due to an emphasis on the egalitarian share of care work, despite less generous family leave policies.

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364. Polly Beth Proctor, *Toward Mythos and Mythology: Applying a Feminist Critique to Legal Education to Effectuate a Socialization of Both Sexes in Law School Classrooms*, 10 *CARDOZO WOMEN'S L.J.* 577, 580 (2004).

365. Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 *CONN. L. REV.* 871, 873-74 (1994).

366. Cathryn L. Claussen, *Incorporating Women's Reality Into Legal Neutrality in the European Community: The Sex Segregation of Labor and the Work-Family Nexus*, 22 *LAW & POL'Y INT'L BUS.* 787, 788 (1991).

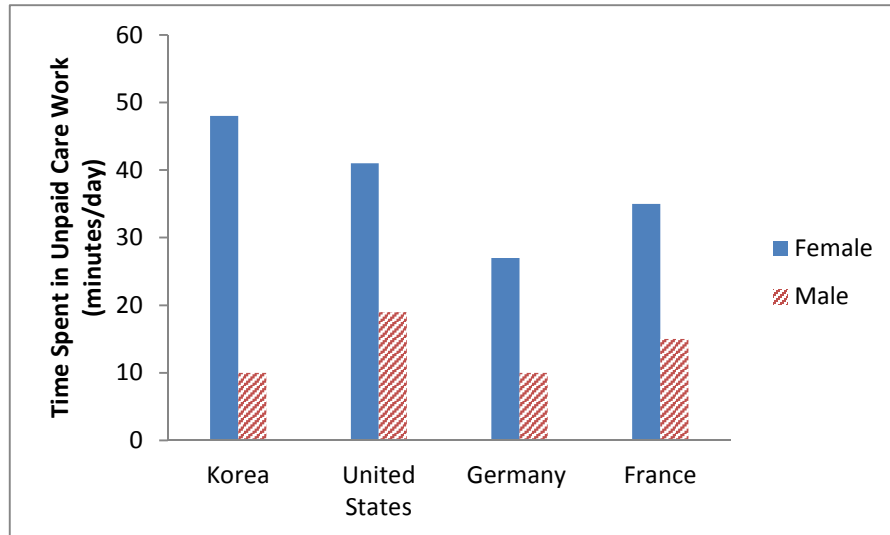
367. See *ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3-21 (1989). Although feminists were optimistic that the increasing number of women in the work force would empower women in the home and workplace the realities remain unchanged for many working families. *Id.*

368. *Balancing Paid Work, Unpaid Work and Leisure*, *ORG. OF ECON. COOPERATION AND DEV.* (July 3, 2014), <http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure.htm>.

369. *Id.*



**Figure 3: Time Spent in Unpaid Care Work by Men and Women in South Korea, U.S., Germany, and France<sup>370</sup>**



South Korea can overcome the gendered division of care work by accepting working mothers as a social norm and national necessity. An OECD report has revealed that according to a 2010 government survey, 53% of Korean women stated that family responsibilities were the primary obstacle to employment.<sup>371</sup> Coupled with long working hours, only 43% of married women are in the labor force.<sup>372</sup> In addition, despite the increase of working women, few women occupy the “upper echelon of politics and business” in South Korea.<sup>373</sup> For example, South Korea ranks 105th in the number of women in the legislature among 190 nations.<sup>374</sup> South Korea’s labor market could benefit not only from more working women, but also more women in managerial and leadership positions are needed to overcome antiquated notions of gender hierarchy.

370. ORG. OF ECON. COOPERATION AND DEV., *supra* note 368.

371. Jones, *supra* note 26, at 9.

372. *Id.*

373. Seungsook Moon, *The Production and Subversion of Hegemonic Masculinity: Reconfiguring Gender Hierarchy in Contemporary South Korea*, in UNDER CONSTRUCTION: GENDER AND CLASS IN CONTEMPORARY KOREA 79, 115 (Laurel Kendall ed., 2001).

374. *Women in Parliament*, ORG. OF ECON. COOPERATION AND DEV., <http://www.oecd.org/gender/38172505.pdf> (last visited Apr. 30, 2014).

#### 4. *Low Income Workers and Family Leave*

In South Korea, the traditional segregation of care work in the domestic sphere, and the residual effects of the IMF bailout has led to a bifurcated labor force in which more than half of all female employees are non-regular workers (i.e. temporary, part-time, and contract workers).<sup>375</sup> Unlike regular workers, non-regular workers have little access to employee benefits or job stability and earn significantly lower wages.<sup>376</sup> By 1999, more than half of all workers in South Korea became non-regular workers,<sup>377</sup> and presently, 57.5% of all female workers, and 37.2% of all male workers are non-regular workers.<sup>378</sup> On average, non-regular female employees receive half the wages of regular female employees and 28.5% were unable to receive minimum wage.<sup>379</sup> OECD data indicates that regular employees take advantage of maternity leave 30% more than non-regular employees,<sup>380</sup> a majority of whom have difficulty accessing family leave at all. Critics argue that the non-regular worker structure needs to be abolished entirely.<sup>381</sup>

Adopting family leave policies without addressing the disproportionately large number of non-regular female workers has resulted in an only partially effective policy. In France, policymakers argued that paid leave would allow single mothers of low income to raise children without being stigmatized as mothers on welfare support.<sup>382</sup> However, only 4% of single French mothers take advantage of family leave, despite 82% of single mothers in the work force compared to 68% of married mothers.<sup>383</sup> In the U.S. and South Korea, the lack of discourse on the effects of family leave for low-income families has resulted in policies geared towards middle class families that have a stable male income, which calls for an improvement in policy.<sup>384</sup>

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375. Jones, *supra* note 26, at 65–70.

376. JENNIFER JIHYE CHUN, ORGANIZING AT THE MARGINS: THE SYMBOLIC POLITICS OF LABOR IN SOUTH KOREA AND THE UNITED STATES 44–67 (2009). (“In South Korea, the marginalized workforce consists primarily of native Korean women who are overrepresented on the bottom rungs of the expanding service sector”).

377. Hagen Koo, *Engendering Civil Society, The Role of the Labor Movement in Korean Society: Civil Society, Democracy and the State* 109, 126–27 (Charles K. Armstrong ed., 2002) (Non-regular workers include part-time, temporary, contract, contingent or daily workers).

378. Jones, *supra* note 26, at 65–70.

379. *Average Monthly Pay of Female Non-Regular Worker Less than 1000 USD*, YTN NEWS (Mar. 11, 2014), [http://www.ytn.co.kr/\\_ln/0102\\_201403111558347340](http://www.ytn.co.kr/_ln/0102_201403111558347340).

380. Jones, *supra* note 26, at 65–70.

381. *Id.*

382. Morgan & Zippel, *supra* note 14, at 74 (noting that France provides single mothers with wage assistance, for three years, up to 71% of income for one child, and 18% of minimum wage for additional children).

383. *Id.*

384. *Id.* at 75.

Due to the unpaid nature of family leave in the U.S., family leave participants are primarily white, middle-class, married individuals who have significant financial and familial resources.<sup>385</sup> Similarly, in South Korea, participation of family leave is concentrated in middle-class women with financial cushions who can afford to forego several months of full pay.<sup>386</sup> Research has indicated that low-income women fear more negative on-the-job consequences, face more pressures not to use family leave, and are often denied permission from employers to use family leave.<sup>387</sup> Requests for family leave use becomes detrimental for South Korea's low income, non-regular workers whom employers oftentimes are ready to terminate without cause.<sup>388</sup> South Korea's family leave policy has resulted in benefiting the 'haves' of society to the exclusion of 'have-nots'.<sup>389</sup> In order to fully implement family leave policies, South Korea should concentrate on efforts to eliminate the non-regular worker regime.

### III. SUBSIDIZED PUBLIC CHILDCARE FACILITIES AND THE IMPLEMENTATION OF FAMILY LEAVE

Due to demanding work schedules across all income levels, "weekend parenting" has turned into a common social phenomenon in South Korea.<sup>390</sup> Despite governmental efforts to support working families, long work hours and hierarchy in the workplace<sup>391</sup> continue to impede the successful

385. Albiston, *supra* note 243, at 403.

386. Oftentimes low-income, non-regular female employees are excluded from utilizing family leave. Eun-hwa Goo, *Need For Universal Childcare Subsidies and Public Childcare*, LABOR TODAY (June 27, 2012) <http://www.labortoday.co.kr/news/articleView.html?idxno=112101>.

387. Ruth Milkman & Eileen Appelbaum, *Unfinished Business: Paid Family Leave in California and the Future of U.S. Work-Family Policy* 85–110 (2013). Although low-wage workers stand to gain the most from paid family leave in California, many were simply not aware of the existence of paid family leave laws. For those low-income workers who were aware, many chose not to take family leave for fear of negative on-the-job consequences. *Id.*

388. Eun-sung Kim, *The Neglect of Terminated Non-Regular Female Workers*, WOMENNEWS.CO.KR, (July 24, 2009), <http://www.womennews.co.kr/news/40819#.VG-HyeLrILM>.

389. See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. AND SOC. REV. 95, 95–98 (1974). Oftentimes, parties with better resources receive more advantages in the legal process. *Id.*

390. Due to long work hours, many working parents are unable to take care of childcare responsibilities during the workweek and look to the weekend to spend time with children. Young-ju Kim, *The Fury of Weekend Parenting*, OHMYNEWS (Aug. 16, 2013), [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A000189516](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A000189516).

391. For example, in many workplaces, new recruits are forbidden from leaving for the day until all predecessors have left the workplace. Oftentimes male recruits are subject to excessive alcohol consumption during after-hour socials. Eun-mi, Park, *Sul Kwonhanun Sahwae? Dangshineui Hwaeshikeun Uttusubnikka?, Is Korea a Drinking Society? What does Your Company Social Hour Look Like?*, WOMENNET (Sept. 1, 2014), [http://www.women.go.kr/new\\_women/women/common/bbs/view.do?menuId=M00224&selectedSeq=122728](http://www.women.go.kr/new_women/women/common/bbs/view.do?menuId=M00224&selectedSeq=122728); see also Jieun Son, *Doumi Watnae, Sul Tarabwa, Here Comes A Hostess, Come Pour a Drink*, OHMYNEWS (Sept. 10, 2014), [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0002030382&PAGE\\_CD=ET](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0002030382&PAGE_CD=ET)

implementation of family leave policies. Currently two-thirds of the Korean population lives as a nuclear family unit with two generations comprising one household.<sup>392</sup> As more women enter the workforce, working parents are left to rely on family support, private nannies, and for-profit facilities for childcare. Cost, quality, and availability of childcare are all hindrances to working families when returning to work from family leave.

Public childcare facilities can significantly reduce the burden on working families and encourage more women to remain in the workforce. Studies on women's employment have shown that better childcare alternatives increase the likelihood that women will return to work after family leave.<sup>393</sup> Research indicates that when public childcare is available workers opt to return to the workplace before the conclusion of the family leave period.<sup>394</sup> Critics point out that a parental leave policy without universal childcare will simply lead more women out of the workforce and aggravate the current gendered labor market.<sup>395</sup>

South Korea has the largest gender wage gap and lowest workforce participation rate of female college graduates among all OECD countries.<sup>396</sup> Women are a minority in the workplace and oftentimes considered a liability for employers. For family leave to be possible, male as well as female participation should be supported so that women are no longer penalized by bearing the cost of family leave in the form of terminations. Once women workers become a reliable source of steady labor, employers will be less inclined to regard them as a risky investment. Stabilized family leave policies in conjunction with public childcare will increase female workforce participation to enhance the nation's economy through utilization of a previously untapped pool of skilled workers. Fortunately, the current debate in the National Assembly as to the amount of government subsidy that should be awarded for children in preschool (ages three to five) signals a shift in the national welfare regime towards

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000&BLCK\_NO=1&CMPT\_CD=T0000. Female employees oftentimes experience sexual harassment by male predecessors during after-hour socials. In one case, a female employee committed suicide after being repeatedly harassed sexually by three male predecessors. *Id.*

392. Kim, *supra* note 59, at 24–25.

393. Diane Sainsbury, *Gender and Welfare State Regimes* 117–39 (Oxford University Press 1999).

394. Jane Waldfogel, *International Policies Toward Parental Leave and Childcare*, 11 CARING FOR INFANTS AND TODDLERS 99, 101–04 (2001), [http://futureofchildren.org/futureofchildren/publications/docs/11\\_01\\_06.pdf](http://futureofchildren.org/futureofchildren/publications/docs/11_01_06.pdf).

395. See Hegewisch & Gornick, *supra* note 240.

396. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 304; see also, ORG. FOR ECON. COOPERATION AND DEV., *supra* note 296. The existence of a gender wage gap is “virtually universal” across nations but it is particularly acute in South Korea. Once young women enter the workforce they are manipulated to be “inferior, subordinate and marginal vis-à-vis males.” Management utilizes existing local patriarchal philosophies such as Confucianism to control female workers. See also KIM, *supra* note 20, at 8–20.

universal subsidized childcare.<sup>397</sup>

### A. Childcare in South Korea

Currently, South Korea's childcare system mirrors the U.S. in its highly privatized nature, whereas its family leave and wage replacement policies reflect that of Western Europe.<sup>398</sup> In South Korea, public childcare facilities only constitute 5.2% of all childcare facilities.<sup>399</sup> The vast majority of children are cared for by non-public facilities and government subsidies are minimal.<sup>400</sup> In 2002, the governmental budget on care facilities including kindergarten was 0.13% of the Gross Domestic Product (GDP), which was less than one third of the rate in France, Germany and the U.S., which spent 0.66%, 0.36%, and 0.36% of their GDP, respectively.<sup>401</sup> One survey indicates that 33.3% of South Korean families pay approximately 10% of family income for childcare, 35.2% pay close to 20%, and 8.8% pay more than 30%.<sup>402</sup>

Generally, governments have been reluctant to invest in public childcare facilities due to the long-term costs of construction, maintenance, and training of relevant childcare personnel.<sup>403</sup> In the past, France and Germany have increased spending on family leave allowances due to the expedience and convenience of distributing childrearing benefits as opposed to the complexities in creating an infrastructure for childcare facilities.<sup>404</sup> Similarly, the South Korean government has injected large sums into care allowances, but it has chosen to shy away from increasing the number of public childcare facilities.<sup>405</sup> Ultimately, France then

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397. Byung-su Kim, *Ruling Party and Opposition Disagree as to Subsidy for Preschool*, YONHAP NEWS (Nov. 20, 2014), <http://www.yonhapnews.co.kr/politics/2014/11/20/0505000000AKR20141120082500001.HTML?template=2087>.

398. Although the current administration has proposed free childcare up to five years of age, due to budget constraints the level of allowance is less than \$370 USD per month for parents who choose to send children to care centers. Critics argue policy should focus on increasing the number of public childcare facilities rather than provide allowances that do not fully meet the needs of families sending children to private childcare facilities. Hyo-Jung Chung, *Repetition of Failure in Policy for Free Childcare from Zero to Five*, WOMEN CONSUMER PERIODICAL (Jan. 28, 2013), <http://www.wsobi.com/news/articleView.html?idxno=6827>.

399. Seo, *supra* note 76, at 1–10.

400. *Id.*

401. *Id.*

402. ORG. OF ECON. COOPERATION AND DEV., *Childcare Costs*, in SOCIETY AT A GLANCE (2007), available at <http://www.oecd-ilibrary.org/docserver/download/8107021ec011.pdf?expires=1396298061&id=id&accname=guest&checksum=C7277EA745BEAF38748FCF21C56C7432>.

403. Morgan & Zippel, *supra* note 14, at 62.

404. *Id.*

405. Misun Yang, *Extreme Lack of Public Childcare Facilities—More Efforts Required of the Government* (Feb. 10, 2013), CHILD CARE POLICY RESEARCH INSTITUTE. Of all childcare facilities in South Korea, including private, public, and business operated, public facilities only constitute 5.2%, and

Germany later shifted policy from promoting family leave allowances to public childcare since paid leave alone has shown to be ineffective in fully supporting working families.<sup>406</sup>

Childcare in France before age three is government subsidized and accomplished through social welfare institutions.<sup>407</sup> As a result of full government subsidization and high quality care, 99% of the French population takes advantage of public childcare for three to five year olds.<sup>408</sup> In France, preschool schedules provide full day programs until children reach school age and preschool education is an essential part of the educational system with an emphasis on child health.<sup>409</sup> This system is possible through governmental expenditures that allocate a significant part of taxable income into childcare.<sup>410</sup> In the U.S., although early childcare is lacking, all states provide kindergarten services for five-year-old children, and three states and the District of Columbia provide pre-kindergarten services for four-year-olds.<sup>411</sup> In South Korea, public elementary education starts at age seven<sup>412</sup> for first graders and operates half-day school schedules until second grade, which burdens working families and women trying to reenter the workforce.<sup>413</sup>

France is one of the few countries that have been able to progress from merely investing in care allowances to implementing universal childcare facilities.<sup>414</sup> Due to the value placed on childcare, education, and health, government sponsored childcare has been the norm for many years.<sup>415</sup> In Germany, maternalism has motivated the creation of policies that favor the caretaking of children by mothers, until a recent decision to

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children enrolled in public facilities only comprise 10.1% of all children attending a care facility. *Id.*

406. Clinton, *supra* note 189; *see also* Heine, *supra* note 228.

407. Parents pay a minimum amount of less than 10% of income regardless of income level for a public childcare facility or licensed nanny who looks after two to three children in her home. Gornick & Meyers, *supra* note 117, at 199–212.

408. French childcare facility workers receive governmental benefits in the form of free housing or tax-free housing allowances. *Id.*

409. Hours accommodate working parents with options available for additional care at childcare facilities after seven in the evening. *Id.*

410. Folbre, *supra* note 186, at 89.

411. Gornick & Meyers, *supra* note 117, at 199–212.

412. In Korea, once a child is born, he or she is considered a year old. Thus, in Korean age, a child enters elementary school at age eight.

413. Eun-kyung Choi, *Elementary School Entrance Age Should be Decreased by a Year*, DAILY ECONOMICS (Nov. 26, 2009), <http://www.kdpress.co.kr/news/articleView.html?idxno=9380>; *see also*, Ju-eun Cho, *Act for Work-Family Reconciliation is a Policy for Death by Overwork of Women*, KYUNGHYANG SHINMUN (June 6, 2013), [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=201306062120515&code=990100](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201306062120515&code=990100) (discussing that despite its good intentions, work-family reconciliation policy can end up burdening working women even more in Korean society where childcare and household duties are considered the responsibility of women and that a better solution would be to increase public childcare facilities).

414. Gornick & Meyers, *supra* note 117, at 202–09.

415. *Id.*

provide universal childcare in an effort to boost fertility rates and female employment.<sup>416</sup> Both countries have succeeded in creating policies that overcome the deficiencies of original family leave policies, maximize the working potential of parents, and meet the needs of working families. Similar steps towards universal childcare are required in South Korea to overcome the work-family crisis that most working families experience.

### B. Need for Universal Subsidized Public Childcare

In South Korea, there is a need for high quality, universal, subsidized childcare to supplement family leave policies, as many women find that adequate childcare is a barrier when returning to work after the leave period concludes.<sup>417</sup> Researchers have found that work-family policies in general increase the overall employment possibilities for women.<sup>418</sup> Although France, Germany, and South Korea all adopted paid family leave legislation, only France has a history of long-term investment in childcare.<sup>419</sup> In France, public childcare has historically assisted working families in conjunction with family leave policies. Such a holistic approach to promoting work-family balance is required for family leave to be successfully implemented in South Korea.<sup>420</sup> In South Korea, where public childcare centers are minimal and families spend a significant portion of income on privatized childcare, OECD data indicate that Korean families would substantially benefit from increasing government investment in childcare.<sup>421</sup>

Family leave policies can become meaningful when surrounded by an “overall policy support system that facilitates the reconciliation of work and family life” with gender equality in mind.<sup>422</sup> The social democratic system of France contributes to a strong support mechanism for public childcare, which aptly functions due to the historical emphasis on the well-being of children and the significance placed on governmental responsibility.<sup>423</sup> Historically and during modernization, social values in

416. Heine, *supra* note 228.

417. Ga-young Min, *Why Female Unemployment is Higher*, CHOSUN ILBO (May 21, 2005), <http://www.chosun.com/culture/news/200503/200503210362.html>.

418. Albiston, *supra* note 243, at 400–6.

419. *Employment Rate of Women*, ORG. FOR ECON. COOPERATION AND DEV. (July 16, 2013), [http://www.oecd-ilibrary.org/employment/employment-rate-of-women\\_20752342-table5](http://www.oecd-ilibrary.org/employment/employment-rate-of-women_20752342-table5).

420. See Hegewisch & Gornick, *supra* note 240, at 121.

421. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 6.

422. See Hegewisch & Gornick, *supra* note 240, at 121.

423. Thomas R. Marton, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, U. Chi. L. Sch. Roundtable 313, 334–40 (1993) (explaining that in France, the “public policy mission of child care” embraces child health, development, and preschool educational concerns and that to ensure quality of care, teachers and professional staff are “systematically recruited, well-trained, assisted by general staff in physical care tasks, and recompensed at professional salary levels comparable to those for other jobs requiring similar credentials”).

South Korea have dictated that children are the responsibility of mothers rather than the government.<sup>424</sup> A shift is needed to place attention on the responsibility of government for childcare. Policy makers should be aware that more mothers are in the workforce than ever in South Korean history, and shifts in policy should reflect the change from traditionally large families to nuclear family units.<sup>425</sup>

Research across nations suggests that when childcare is accessible, affordable, and of good quality, the number of women in the labor force increases, more women remain employed, and stay in better positions.<sup>426</sup> However, when childcare is expensive and of low quality and availability, women are more likely to receive low wages and exit the work force, which causes employers to experience high turnover.<sup>427</sup> The quality of childcare has also been shown to be related to productivity at work.<sup>428</sup> Research has indicated that a lack of childcare is a barrier for women trying to enter the workforce in many countries.<sup>429</sup> In South Korea, feminists argue that public childcare should be readily accessible and of high quality, with enforcement of safety measures, regulations on standard of care and credentialing for teachers.<sup>430</sup> Establishing universal public childcare will assist workers, especially low-income families, and contribute to the increase of women in the workforce.<sup>431</sup>

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424. See Cho, *supra* note 263.

425. See Baek & Kelly, *supra* note 88, at 3–8.

426. See Hegewisch & Gornick, *supra* note 240, at 128–29. In the U.S., the availability of subsidized care centers, despite its limited availability has aided in strengthening women’s attachment to the workplace. Across the U.S., childcare is predominantly privatized and cost oftentimes burdens families. The only form of public childcare for non-school age children in the U.S. is the Head Start program for children of low-income families, which was put in place during the 1960s. As a result of Head Start, the employment rates of low-income women significantly increased during this period. As Head Start has shown, subsidized childcare centers can increase the number of women in the paid work force and decrease reliance on welfare. *Id.*

427. See *id.* at 128.

428. See David Blau & Janet Currie, *Preschool, Day Care, and After School Care: Who’s Minding the Kids?* 4 (Nat’l Bureau of Econ. Res., Working Paper No. 10670) (2003), <http://www.econ.ucla.edu/people/papers/currie/currie291.pdf>.

429. See Kirstine Hansen et al., *Childcare and Mothers’ Employment: Approaching the Millennium*, NAT’L INST. ECON. REV., no. 195, Jan. 2006, at 84, 86, <http://ner.sagepub.com/content/195/1/84.short>.

430. See Seo, *supra* note 76. In South Korea, childcare facility staff are underpaid and overworked where teachers work 10.6 hours per day and 59 hours per week for minimum wage. *Id.*

431. *Increase in Public Childcare Centers*, CITY OF SEOUL (Nov. 13, 2013), <http://woman.seoul.go.kr/archives/22586>. Nationwide policy to implement public childcare centers can start with the lead of one city. In 2013, the City of Seoul expanded the number of public childcare facilities to 212 with the use of a “reduced cost model,” which consists of a fourth of the cost of new construction, by utilizing existing company, religious organization, school and personal property. *Id.* As a result, 13,000 children on the waitlist for a public childcare facility space will be able to benefit from these centers. *Id.* In addition, the City of Seoul has contracted with Samsung C&T Corporation, to designate childcare centers to be built in every new Samsung apartment complex as public care facilities, to benefit a wider range of recipients. *Id.*; see also Kathryn Abrams, *supra* note 306, at 1240



Despite the negative effects of Confucianism that encourage gender discrimination, the collectivist culture of Korean society<sup>432</sup> is amenable to recognizing that children are “public goods” and as such become the responsibility of society and government. Society as a whole reaps the benefits of the unpaid labor of parents raising well-nurtured children.<sup>433</sup> Those who benefit from the next generation’s future income do so partly at the expense of present day parents, especially mothers, who invest time, energy, and affection in raising and educating children.<sup>434</sup> Children who are well cared for grow up to be productive workers and taxpayers who will shoulder the burden of supporting the aging population.<sup>435</sup> Policies that shift childrearing costs from parents to taxpayers require all those who benefit from parents’ labor to make a monetary contribution.<sup>436</sup> Policymakers in Korea need to recognize that children are a collective responsibility and aim to provide quality universal public childcare facilities.

In accordance with the value that Korean society places on collectivism, public childcare is a policy measure that is consistent with the traditional focus on placing collective interest before the individual. Although collectivism stems from Confucian philosophy, it is in harmony with the democratic ideals of the South Korean Constitution. Government officials can justify establishment of public childcare centers by considering children as public goods and therefore a collective responsibility of society. A shift in the frame of gender equity from the ‘male worker and his family to the child and its parents’ can become a starting point in internalizing family leave and public childcare as a national necessity.<sup>437</sup> Data from the U.S. and France have shown that the presence of public childcare centers aid in increasing the number of employed women.<sup>438</sup> Similarly, in South Korea, subsidized public childcare

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(noting that employers can be incentivized to build care facilities by the following ways: 1. Low interest loans to those who build on-site childcare facilities and 2. Corporate tax credits to those who include childcare in their benefits package. The government can assist by providing information to employers regarding available options for employee childcare needs).

432. In collectivist societies, citizens are aware of and respect the collective goals of in-groups and form actions accordingly. Lee, *supra* note 246, at 30–35.

433. *Id.*

434. Folbre, *supra* note 186, at 86–90.

435. *Id.*

436. *Id.*

437. See Kathleen Gerson, *Changing Lives, Resistant Institutions: A New Generation Negotiates Gender, Work, and Family Change*, 24 SOC. F 735, 747–51 (2009) (noting that the modern definition of family has progressed beyond a rigid notion of traditional gender roles, and that a change in the definition of the ideal worker and partner has become inevitable). As families face the challenges of an unpredictable society, both partners are encouraged to provide financial support and devoted care for dependent children. *Id.* When both mother and father are able to meet the challenges of a modern society, families are better off as a unit to adjust to disruptions in family life, such as sudden job loss or illness. *Id.*

438. Hegewisch & Gornick, *supra* note 240, at 131.

facilities can become part of a nation-building scheme to motivate employers to employ the untapped pool of women workers.<sup>439</sup>

#### CONCLUSION

Recently, the Korean Ministry of Employment and Labor announced plans to take strict measures in enforcing family leave laws to ensure the elimination of unlawful terminations in the workplace.<sup>440</sup> Over the past thirty years, the Korean government has made incremental efforts to overturn society's traditional views on women's employment. Korea can embrace family leave as a policy consistent with its cultural values of collectivism when society strives towards a unified goal of assisting working families. Government should aim to educate businesses and the general public of the necessity for family leave to sustain working families. Family leave policies can be established as a workplace norm that operates within Korean culture as a method for nation-building and increasing women's employment.<sup>441</sup>

For South Korea, implementing family leave policies and universal subsidized childcare is necessary to expand the labor force through female participation. Germany has followed the example of France in implementing universal public childcare facilities to ease the burden on working families. The French childcare policy is an appropriate policy model for South Korea since the French have also experienced low female employment rates and low fertility. In France, the widespread use of family leave and universal childcare has led to an increase in women's employment and a decrease in the gender wage gap. For many working women in South Korea, childbirth and childrearing cause breaks in careers and force women to exit the workforce altogether. When women can use family leave with ease and without stigma, women remain in the workplace to attain higher income through seniority.

Rather than focus on the lack of egalitarian values in Korean society, a better approach would be to concentrate on the collectivist aspects of traditional Korean culture. The French culture of viewing children as public goods and placing collective responsibility on society corresponds to Korean values that place importance on the group over the individual. Accordingly, Korea can justify family leave and public childcare as a method to uphold its collectivist values and benefit working families overall. Implementing family leave and encouraging women to participate

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439. See generally Jones, *supra* note 26.

440. Jongsoo Han, *Thousands Terminated During Family Leave*, NEWS1 (Mar. 11, 2014), <http://news1.kr/articles/1579593>.

441. See generally Jones, *supra* note 26. See also NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 40.

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in the workforce can become a nationwide goal that will enable Korea to sustain its economy.

