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When Gender Differences Become a Trap: The Impact of China's Labor Law on Women

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I. INTRODUCTION

The Story of Ms. He and Twenty-Four Migrant Workers¹

Ms. He and twenty-four other migrant women workers from Laishui County, Hebei Province, China, worked for Beijing's Hua Yi garment factory from 1995 to 1997. The women often worked overtime under extremely harsh conditions. They were routinely beaten and insulted by their bosses. When wages were not paid at the end of each month, some of the women complained to the district labor supervisory committee. The committee took no action. A group of women workers then petitioned governmental departments for aid.² When the Centre for Women's Law Studies and Legal Services of Peking University took over the case, the lawyer handling the matter contacted the department in charge of Hua Yi Garment Factory and its controlling company several times. The department responded that, although it is a state-owned enterprise, the garment factory is operated by a private party to whom the state-owned enterprise contracted the business. When the lawyer contacted the manager of the factory, he challenged the women to bring suit in court. When the lawyer attempted to initiate a suit in court, the court informed her that she must first bring her labor dispute to the Labor Arbitration Department. When the lawyer petitioned the Labor Arbitration Department, however, she was told that the issue of payment must be settled in court. When the lawyer returned to

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1. CENTRE FOR WOMEN'S LAW STUDIES AND LEGAL SERVICES OF PEKING UNIVERSITY, A RESEARCH REPORT OF THE LEGAL AID CASES UNDERTAKEN BY THE CENTER FOR WOMEN'S LAW STUDIES AND LEGAL SERVICES UNDER THE LAW SCHOOL OF PEKING UNIVERSITY 9-11 (1996-2000) [hereinafter RESEARCH REPORT].

2. Out of a preference for confidentiality, the Centre for Women's Law Studies and Legal Services does not want to divulge the names of these governmental departments.

court she was told that this issue of payment for labor was not clearly defined in the law and that there was insufficient legal basis to file the case. It was only after the intervention of higher authorities that the Arbitration Committee of the Municipal Bureau of Labor agreed to hear the case. Throughout the process, legal representatives for the garment factory failed to appear. Similarly, the third party to the case, the department in charge of the garment factory and the factory's controlling company, remained absent from the hearings. In the face of the defendants' open defiance of the law, the Arbitration Committee passed a verdict by default. The Committee held that the factory's controlling company should pay 160,000 yuan to the women workers in unpaid wages. The factory then refused to comply with the verdict. The legal aid lawyers persuaded the court to reopen the case and used the media to gain public support. Ultimately, the migrant women workers were awarded 170,000 yuan as back wages and economic compensation. It took three years to completely resolve the case.

The case described above represents a success story: migrant women workers joining with legal advocates to successfully vindicate their rights. Sadly, successful outcomes for struggling female migrant workers in China are rare. Many women workers in China are vulnerable to exploitation and cannot assert their rights for a variety of reasons, ranging from ignorance of the law to lack of legal recourse. In fact, in the case described above, although over eighty women were impacted by the unfair practices in Beijing Hua Yi garment factory, only twenty-four had sufficient faith in the law to stand up for their rights.³

During the past two decades, women workers in China have suffered hardship and discrimination due to China's new economic policies and changing labor laws. Since 1978, China has opened its doors to a program of economic reform that emphasizes market forces, efficiency, reorganization of state-run enterprise, and privatization.⁴ The global marketplace and the free market system have had a dual effect on women in China.⁵ The opening of the market has created new job opportunities for both men and women.⁶ Chinese women have been increasingly able to engage in economic development, but private enterprises and foreign-owned enterprises exploit women by circumventing labor protections.⁷

3. RESEARCH REPORT, *supra* note 1, at 9-10.

4. Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L.J. 143, 144 (1993).

5. Allison J. Wells, *Chinese Women Experience A Negative Side Effect of the Growing Private Sector in Gender-Based Employment Discrimination*, 6 IND. INT'L & COMP. L. REV. 517, 527-28 (1996).

6. *Id.* at 528.

7. *Id.* at 527-29.

As more and more women have entered the workforce,⁸ China has developed legislation to protect women's interests and to promote equality between women and men. Such legislation includes generalized statutory law, specific regulations, local regulations, and administrative rules promulgated by government departments. China's protective legislation, which came into effect in the early 1990s, focuses on biological differences between men and women. By emphasizing these differences, the law places an added burden on employers who hire women. Although there is much progress for women seeking employment outside the home, many women find that the very laws designed to protect them subjects them to discrimination and disadvantage them in the labor market. Since China began to embrace free markets in the 1980's, the lay-off of women workers has been one of the greatest problems facing women in China.⁹

This paper explores the inherent duality and contradictions in some of the protectionist provisions of the Chinese labor laws and compares these provisions to historical gender-based employment discrimination in the United States. The Chinese labor laws may also be usefully viewed in the context of analogous labor laws in other countries, particularly in countries currently transitioning from communist economics to privatized, market-based economies. Part II of this paper looks critically at the Chinese government's protective attitude towards women. Part III of the paper examines Chinese labor legislation that focuses on women's bodies, highlighting the disparate impact these laws have on women. While these laws appear to protect women on paper, the practice and application of laws like these, in China as in other nations, distinctly subordinate women. Part IV discusses how other factors, such as economic restructuring, a large migrant labor supply, and under-enforcement of laws make Chinese women workers subject to even greater discrimination and exploitation. Part V compares current Chinese legislation with the protective labor legislation of the early twentieth century in the United States, in an attempt to analyze the difficulties inherent in formal equality and substantive equality. Even though the two countries have formulated different legal responses to gender-based inequality in the workplaces, women workers in China and the early twentieth century United States share much in common. This article concludes in Part VI that both the United States' formal equality anti-discrimination model and China's legally codified special treatment of women, when each taken alone, have the potential to perpetuate gender

8. In 1998, women employees comprised 48.7% of the total workers. At the founding of the People's Republic of China, women only constituted 7.5% of the total workers. CENTER FOR WOMEN'S LAW STUDIES AND LEGAL SERVICES OF PEKING UNIVERSITY, THEORY AND PRACTICE OF PROTECTION OF WOMEN'S RIGHTS AND INTERESTS IN CONTEMPORARY CHINA- INVESTIGATION AND STUDY ON THE ENFORCEMENT OF UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN IN CHINA 124 (2001) [hereinafter THEORY AND PRACTICE].

9. *Id.* at 148.

segregation in the workplace and discrimination against women. A new model, combining a strong equality/anti-discrimination ethic with gender-neutral supports for caregivers, is needed to meaningfully address continued gender inequality in the workplace.

II. A DOUBLE EDGED SWORD: GENDERED PROTECTIONISM IN CHINESE LABOR LAW

Throughout the Cultural Revolution, workers in the People's Republic of China enjoyed a wide array of benefits including permanent employment, medical care, housing, education, and a pension upon retirement.¹⁰ During this period, there was a blurring of differences between men and women,¹¹ and thus women were allowed to fill jobs involving heavy manual labor. At the same time, rigid authoritarian government control characterized the country.¹² Since the early 1980s, China has moved away from the employment system popularly known as the "iron rice bowl" system in which the state guaranteed life-time employment for every worker at a salary determined by the state. In its place, the country has shifted towards greater economic efficiency and the free market system.¹³ In the last two decades, a legal system protecting women's rights and interests has evolved, based on the Chinese Constitution¹⁴ and the Legal Provisions for the Protection of Women's Rights and Interests Law.¹⁵ Article 25 of the Women's Rights and Interests Law clearly articulates the protectionist theory behind the laws governing women and labor.¹⁶ Together, these laws not only provide for equal rights for women, but also provide that women as a group should enjoy special rights by law.¹⁷ The current Chinese constitution

10. Before China's advent into the market, rigid governmental control meant that employees at state-owned enterprises far exceeded the demand, and the government's monopoly of all management structures ensured job security for men and women. *Id.* at 164.

11. Ann Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured from a Socialist Bottle*, 8 J. CHINESE L. 47, 54 (1998).

12. THEORY AND PRACTICE, *supra* note 8, at 164.

13. *Id.* See also Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 804 (2001); Woo, *supra* note 4, at 144.

14. Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social, and family life. P.R.C. CONST., arts. 33, 34, 48, 49 (1993).

15. This law was created to respond to the greater numbers of women participating in the labor force during the period of China's economic reform. It also reflects China's desire to fulfill its state's parties obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). THEORY AND PRACTICE, *supra* note 8, at 9.

16. "In light of women's differences, all units should protect women's safety and health at work in accordance with the law, and should not assign women any work or labor that is unsuitable for them. Women should be given special protection during menstruation, pregnancy, purpereum and lactation." Law Safeguarding Women's Rights and Interests of the People's Republic of China, ch. IV, art. 25 (1992).

17. The philosophical underpinnings of the Chinese state's responsibility to provide special protection for women, especially during their reproductive stage, can be traced to the Confucian ethos of interdependence and the primacy of the group over the individual. See Woo, *supra* note 4, at 177-79.

guarantees women equal rights with men in all spheres of life.¹⁸ Specifically, it promises that the state will protect the rights and interests of women, apply the principle of equal pay for equal work, and train women workers.¹⁹ Apart from these constitutional rights, the Women's Rights and Interests Law guarantees women special, gender-specific rights.²⁰ Along with its protectionist provisions, the law stipulates that certain work categories or positions are unfit for women, thus restricting women's labor market choices and opportunities.²¹

On one level, a focus on accommodating the reproductive roles of women in the workplace benefits women; at the same time, this focus can stereotype women and reinforce traditional subordinate roles. During a period of economic and political transition, the added responsibility of employers to provide special treatment to women translates into a disincentive to hire women and an inducement to lay off female employees when demand wanes.²²

Recently, millions of workers have been laid off as a result of state revamping of industries.²³ Despite the general principle of equal access to employment,²⁴ a disproportionate percentage of those laid off are women.²⁵ As a result, women in China have become primary victims of the institutional restructuring of market reform.²⁶ During times of crisis, Chinese law allows gender and age based discrimination in order to accommodate the forces of change. Women, especially older women in industries that are being revamped, are asked to sacrifice their jobs for the greater good of the community.²⁷ An example of such legislation is a law providing that "the proportion of men and women should be decided according to local reality, the need of production,

18. P.R.C. CONST., arts. 33, 34, 48, 49 (1993).

19. *Id.*

20. See Law Safeguarding Women's Rights and Interests of the People's Republic of China, ch. VI (1992).

21. *Id.*

22. "During the process of transformation from planned economy to market economy, enterprises have more power in employment, which should be a good thing both to enterprises and the country. But women are influenced greatly by this transformation due to the lack of auxiliary measures. Women have more difficulties find[ing] jobs. Under an incomplete system of social insurance, employing units may risk production loss and increased cost if they hire women, because of women's physical and physiological characteristics as well as heavy burden of family affairs. Thus many employing units are unwilling to hire women." THEORY AND PRACTICE, *supra* note 8, at 155.

23. See *id.* at 156-59.

24. Women enjoy equal rights to employment with men. Labor Act of the People's Republic of China, ch. II, §13 (1994).

25. THEORY AND PRACTICE, *supra* note 8, at 160-61. According to the statistics made available by the China National Statistics Bureau the number of female employees has declined over the years. The number of female employees was 57.55 million in 1995, 57.45 million in 1996, 56.87 million in 1997 and 46.78 million in 1998. *Id.* at 156.

26. *Id.* at 155, 159-60.

27. See Christine Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B. C. THIRD WORLD L. J. 345, 353-54, 356-59 (2000). Periodic employment and age discrimination has been strongly criticized by the All-China Women's Federation, a Party-led organization established in 1949 to represent the interests of women. *Id.* at 357-58.

and labor resources. These jobs suitable for women should be given to young women if possible."²⁸

The State justifies discrimination against older women on the grounds that the workforce must be reorganized to improve profit margins. The State Council has promulgated the *Regulations on the Arrangement of Redundant Staff in State-Owned Enterprises*, which allows employees at state-owned enterprises to apply for resignation or early retirement or to terminate labor contracts by proper procedure.²⁹ These regulations also provide for a two-year leave of absence for female employees during pregnancy or breast feeding.³⁰ By giving women the option of early retirement or a two-year leave of absence after childbirth, employers can request that women workers retire early.³¹ The law thus enables employers to eliminate female rather than male workers. In fact, certain enterprises have enacted formal "return home" policies, under which older women and nursing mothers are encouraged to return home in exchange for a certain percentage of their previous salary.³² These practices parallel those used in other countries transitioning to a market economy.³³

Another troubling phenomenon is the government's tacit encouragement of the "courtyard economy," a form of economic reform that urges women and men to return home to the fields.³⁴ This policy threatens women's capacity to work as equals in the paid labor market, because women's work in the courtyard is underremunerated.³⁵ The underlying reason for this is the prevalent myth that women's rights must give way to massive economic development. In economic reform projects in many parts of the world, it is often women who have been forced out of employment and denied the opportunities of entering or reentering the market.³⁶ Even women tend to fall in line with the general theory

28. Ministry of Personnel and Labor of the People's Republic of China, *Temporary Regulations on the Employment and Examination of Workers* (1993).

29. See State Council of the People's Republic of China, *Regulations on the Arrangement of Redundant Staff in State-Owned Enterprises*, art. 10 (1993).

30. See *id.* at art. 8.

31. *Id.* See also Bulger, *supra* note 27 at 357; Jordan, *supra* note 11, at 55; Woo, *supra* note 4 at 164; THEORY AND PRACTICE, *supra* note 8, at 135.

32. Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Women*, 17 WOMEN'S RTS L. REP. 285, 304 (1996).

33. For example, Russian women, especially older women, have been disproportionately represented among those laid off during the transition to a market economy. Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AMER. U. J. GENDER & L. 369, 408 (1998).

34. Elizabeth Spahn, *Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China*, 50 ME. L. REV. 255, 264-65 (1998).

35. *Id.* at 268.

36. Apart from the negative side effect of market reform on Chinese women, women in Eastern Europe and the Former Soviet Union have disproportionately borne the brunt of an economy in transition. See Mertus, *supra* note 33, at 376-87. In response to one survey, women in every country in Central and Eastern Europe, except for the Czech Republic listed unemployment among women as a pressing concern. *Id.* at 389. See also Elizabeth Brainerd, *Women in Transition: Changes in Gender Wage Differentials in Eastern Europe and the Former Soviet Union*, 54 INDUS. & LAB. REL. REV. 138 (2000) (describing depression of women's wages post-Communism); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J.

that it is unreasonable to employ women when men are unemployed.³⁷ The phenomenon of women returning home to make room for men in the labor market only reinforces patriarchal notions that a woman's primary role is in the home and the man's is in the public sphere.³⁸ Although courtyard work brings in some income, it is nonetheless isolating work that offers little opportunity for skill development.³⁹ Furthermore, its close association with domestic work renders this work invisible.⁴⁰ As Elizabeth Spahn notes, "[e]ncouraging courtyard enterprises without the corollary rural pension system ensures that many Chinese women will be doubly and triply exploited for generations to come."⁴¹

III. EMPHASIZING DIFFERENCE: CHINESE LABOR LAW AND WOMEN'S BODIES

The effects of anti-discriminatory provisions in the Chinese labor legislation and Women's Rights Protection are diluted by Chinese laws' emphasis on differences between men and women. Chinese law directs special attention to women's sexuality and the gendered differences between men and women.⁴² These laws permit the State to encroach on women's lives and control their reproductive capacities. Labor legislation in China not only highlights the biological differences between men and women; it maintains control over women's bodies as it regulates and protects women's reproductive capacities.⁴³

China's labor law guarantees protection for women during pregnancy, nursing, child birth and neo-natal care.⁴⁴ The law stipulates that all female

TRANSNAT'L L. 503 (2000) (describing effects of globalization on women's well-being). In China, the transition to a market economy has also sadly had a direct impact on the increase of incidents of violence against women, which reinforces and reflects women's subordinate status in the labor market. See Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216, 244-67 (1996).

37. Elizabeth Spahn writes, "The attempt to domesticate female labor through the housewifization process is occurring in China through the official return home policy and by widespread rejection of the Iron Girl ideology of the Cultural Revolution, which promulgated the notion that anything a man can do, a woman can do." Spahn, *supra* note 34, at 264.

38. See Jordan, *supra* note 11, at 55; See also Human Rights in China, *supra* note 32, at 300.

39. Spahn, *supra* note 34, at 268.

40. *Id.*

41. *Id.* at 281.

42. Prime examples of this focus include the regulations constraining the work of menstruating women. Under Article 60 of the Special Protection for Female Staff and Workers and Juvenile Workers, "It is prohibited to arrange for female staff and workers during their menstrual periods to engage in work high above the ground, under low temperature, or in cold water or work with Grade III physical labor intensity as prescribed by the State." THEORY AND PRACTICE, *supra* note 8, at 714.

43. Certain protective labor regulations are not applicable to women workers who violate the state regulations concerning birth control. See State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art. 15 (1988). See also Human Rights in China, *supra* note 32, at 302.

44. The employer is prohibited from terminating the contract of women workers during pregnancy and nursing. Law Safeguarding Women's Rights and Interests of the People's Republic of China, ch.

workers are entitled to no fewer than ninety days of maternity leave,⁴⁵ but these provisions make women easy targets when enterprises seek to eliminate redundant staff.⁴⁶ Moreover, the law provides that even a labor contract that stipulates a certain date for terminating employment should not come into effect during pregnancy, maternal leave or breast-feeding.⁴⁷ Instead, the law dictates that the contract be carried over until the end of the breast-feeding period.⁴⁸ Even though this seems good in theory, it deters employers from hiring women who might become pregnant during the time in which the contract is to be terminated.⁴⁹ Moreover, effectuating these laws without a sound enforcement infrastructure only adds to the burdens of women seeking employment.⁵⁰

In addition, Chinese labor law includes certain paternalistic provisions that restrict women's work according to their biological functions. The law restricts the work that women can perform while they are menstruating.⁵¹ Some laws regulate pregnant women laborers' night shifts and rest periods.⁵² For example,

IV, art. 26 (1992). This is further emphasized in regulations issued by the Labor Department: "The labor contract with women employees should not be terminated during their pregnancy, maternity leave and breast feeding period even though the contract has matured. Instead the contract should be prolonged to the end of the breast feeding period." Ministry of Labor of the People's Republic of China, *Response to the Termination of the Labor Contract with Women Employees During their Pregnancy, Maternal leave and Breast Feeding Period in the Foreign Investment Enterprises*, No. 21, art.4 (1990). Other regulations provide that a contract does not terminate for a year since the time the birth of a child: "an employee is allowed a year to nurse the child after the birth of the child." Ministry of Labor of the People's Republic of China, *Regulation on the Labor Protection of Women Workers* (1998). The Labor Law of China provides that all laborers in enterprises within the nation's boundaries enjoy reproduction insurance according to law as long as they have signed a labor contract with the employers. Labor Act of the People's Republic of China, ch. IX, §73 (1994). The contract stipulates the fees of women workers for medical examination, reproduction, operation, staying in hospital and medicine should be reimbursed. The law provides that the labor administrative departments should order the repayment of these fees within a required period by enterprises that delay or refuse the reimbursement of the reproduction fee of the workers. For a discussion of special labor protection for female employees, see THEORY AND PRACTICE, *supra* note 8, at 189-195.

45. Every female employee shall be entitled to leave after child birth for a period of not less than 90 days. Labor Act of the People's Republic of China, ch. VII, §62 (1994).

46. See State Council of the People's Republic of China, *Regulations on the Arrangement of Redundant Staff in State-Owned Enterprises*, art. 10 (1993). (stipulating that redundant employees of state-owned enterprises have the right to apply for resignation, early retirement or to terminate labor contract by legal procedures).

47. Ministry of Labor of the People's Republic of China, *Response to the Termination of the Labor Contract with Women Employees during their Pregnancy, Maternal leave and Breast Feeding Period in the Foreign Investment Enterprises* No. 21, art.4 (1990); Labor Act of the People's Republic of China, ch. VII, §62 (1994).

48. *Id.*

49. Spahn, *supra* note 34, at 273.

50. Human Rights in China, *supra* note 32, at 302.

51. The following work is forbidden for female employees during menstrual periods: 1) work under low temperature; 2) work in cold water; 3) Grade three intensity labor. Labor Act of the People's Republic of China, chap. VII, §60 (1994).

52. See State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art.7 (1988). Women laborers who have been pregnant for seven months should not be arranged for night shifts or overtime. If women find it difficult to work, they can apply for prenatal leave. The salary during this period should not be below 75% of the standard salary. Furthermore,

work units are prohibited from prolonging the work time or appointing night duty for female workers while they are pregnant or breast-feeding.⁵³ *Regulations On the Labor Protection for Women Employees*, issued in 1986 by four ministries, including the Ministry of Labor and Personnel, increased maternity leave for women employees from fifty-six days to ninety days and prohibited night work for women workers during pregnancy and nursing.⁵⁴

Women's employment opportunities are also limited by laws that prevent them from performing certain physically arduous jobs. Women are altogether prohibited from engaging in work that is considered particularly hazardous, such as mining on hills or underground, scaffolding work, work that involves logging timber, high altitude work that entails continuously carrying the weight of twenty kilograms or carrying over twenty-five kilograms at different intervals, and other work categorized as physically intense.⁵⁵ Furthermore, the law provides that pregnant female workers shall not engage in work involving high intensity physical labor, as defined by the State.⁵⁶

Further regulations have been promulgated to provide special on-the-job facilities for women, including health care rooms, anterooms for pregnant women, feeding rooms, nurseries, and kindergartens.⁵⁷ The labor law also provides special consideration for pregnant or lactating women.⁵⁸ These

pregnant women who are unable to complete the original work can on doctors orders lighten their work assignments or be asked to assigned to other work. *Id.*

53. THEORY AND PRACTICE, *supra* note 8, at 714, 718 (citing Labor Act of the People's Republic of China, ch. VII, arts. 61, 63 (1994) and State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art. 7 (1988)).

54. *See id.* at 132. Also, for women who have trouble giving birth, fifteen days can be added to the official maternal leave period. *See* Ministry of Labor of the People's Republic of China, *Answers of the Ministry of Labor to Questions on the Regulations on the Protection of Women Laborers*, art. 8 (1998).

55. *See* Labor Act of the People's Republic of China, ch. VII, arts. 59-63 (1994); THEORY AND PRACTICE, *supra* note 8, at 134, 191.

56. The limits for pregnant female employees are as follows: 1) work where there is a concentration of lead and its compounds, mercury and its compounds, benzene, cadmium, beryllium, arsenic, cyanide, nitrogen oxide, carbon monoxide, carbon disulfide, chlorine, caprolactam, chlorobutadiene, chloroethylene, epoxythane, aniline and formaldehyde etc. in the air is above national sanitary standard; 2) employment in industries which produce anticancer medicine and diethylstilbesterol in medicine industry; 3) employment in the place where radioactive matter is beyond the limit of regulation; 4) manual earthwork and stonework; 5) the work in grade 3 in the classification level of intensity of labor; 6) work with violent vibrations such as a pneumatic drill, tamping fool, forging and driving etc. 7) work that requires frequent bending, climbing, and bowing, welding operations and 8) overtime work. THEORY AND PRACTICE, *supra* note 8, at 359-60. *See* Jordan, *supra* note 11, at 62; Wells, *supra* note 5, at 522.

57. *See* State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art. 11 (1988).

58. The time of antenatal examination of pregnant women employees should be treated as work time and employers should arrange for some rest time for pregnant employees during work time, and breast feeding mothers should be given thirty minutes for breast feeding twice a day. An additional thirty minutes will be added during the break for each baby. The time spent on breast feeding and travel time to the nursery should be treated as work time. *Id.* at art. 9. *See also* Labor Act of the People's Republic of China, ch. VII, §61 (1994). Also, a pregnant woman worker may receive prenatal examination during her working hours and this time spent on the examination will be included as time spent on work. State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art. 7 (1988). Apart from the ninety days of maternity leave, fifteen more days will

regulations, structured around a woman's reproductive cycle, limit the hours women may work and regulate the benefits a woman worker receives during menstruation, pregnancy, post-pregnancy, and menopause.⁵⁹ In effect, these regulations promote the notion that a woman's primary responsibility is to give birth, care for young children, and attend to their reproductive capacities. These intrusive regulations are viewed as necessary for the welfare of the family's community. Concerns for family and community, however, are not apparent in legislation covering male employees.⁶⁰ By focusing on biological differences in a way that excludes male workers from responsibility for neo-natal and post-natal visits and child care, Chinese labor law thrusts child bearing and child rearing responsibilities entirely upon women.

Under these laws, the work world, especially the blue-collar work world, is segregated by gender. The philosophy underpinning these laws views women as biologically unsuitable for the same work opportunities as men. The law thus provides powerful disincentives for women's movement into nontraditional occupations. Employers find that although the law forbids unequal treatment, it allows workplace segregation. In the final analysis, the law reinforces the construct of women as caretakers of the family and contributes to the shaping of women's work choices. Just as the law has profound power to dismantle sex segregation in the workplace, it has the power to reinforce it.

A look at the impact of protective labor regulations in other countries reveals an analogous cause-and-effect relationship between protective labor laws and gender bias in the hiring and firing of employees. In Central and Eastern Europe, protectionist provisions that prohibit pregnant mothers and women with small children from hazardous working environments only reinforce notions that motherhood is the "natural" role for women.⁶¹ Women workers are regarded as expensive and are accordingly sacrificed at the altar of economic efficiency.⁶² As Julie Mertus writes, "These deeply ingrained social practices had long-term consequences on women's images as workers, limiting their chances of being hired for posts that are more prestigious and reducing their opportunities for promotions . . . Managers came to view women as less

be added for anyone who has a difficult labor. *Id.* at art. 8. The unit may also assign a pregnant woman worker to any physical work falling within the Grade Three level of physical intensity as stipulated by the State. The work hours of a pregnant woman worker cannot be extended, nor can a woman over seven months pregnant be allotted night work. Based on the hospital recommendations, the work unit should reduce the intensity of labor performed by pregnant women workers. Women workers over seven months pregnant must be given adequate rest during the work day. *Id.* at art. 7.

59. During the menstrual period a woman worker may not be employed in work involving high-altitude, low temperature, cold water, or in physical labor within level three intensity as stipulated by the state. *Id.* at art. 6.

60. The Chinese labor laws do not provide for gender-neutral parental leave policies; leave provisions are explicitly designated for mothers.

61. See Mertus, *supra* note 33, at 372.

62. See *id.*; Brainerd, *supra* note 36, at 138.

'reliable' and more 'expensive.'"⁶³ Similarly, in Croatia, laws provide for mandatory maternity leave for the first six months of the child's life but do not extend this provision to fathers, and men are therefore preferred over women for employment.⁶⁴ In Kenya, women are prevented from working in an industrial undertaking between 6:30 p.m. and 6:30 a.m. and are also prohibited from mining unless the post is a management post, causing gender segregation in employment.⁶⁵

In the Czech Republic, laws preventing women from performing work deemed harmful to them, such as mineral extraction and mining, remain in the statute books, despite the abrogation of rules prohibiting women from performing night work in response to the International Labor Organization.⁶⁶ In Poland, the Labor Code prevents the employment of women in dangerous occupations. Thus, women are exempted from over ninety occupations in twenty fields of employment.⁶⁷ Further, the law prevents night work, overtime work, and work-related travel for pregnant women and women with children less than one year of age.⁶⁸

Argentina's labor laws, some of which prohibit hiring women for certain jobs, have had a discriminatory effect on women.⁶⁹ These prohibited jobs include distillation of alcohol; manufacturing of coloring toxic matters, flammable materials, explosives, or metals; mining work; and loading and unloading of ships.⁷⁰ In Mexico, employers are reluctant to hire women because of the high costs associated with protective labor legislation for women, such as laws providing for breaks during the work day for lactating mothers, adequate and sanitary nursing areas, sufficient seating for pregnant women, and prohibition of certain work.⁷¹ Many Mexican companies regard these regulations as burdensome and even ask women to state whether they are fertile or infertile on job applications.⁷² Apart from the negative impact of protective legislation on women's employment opportunities, these laws have reinforced women's traditional role as caretakers of the family.⁷³ Similarly, in Sri Lanka, there are indications that increases in maternity benefits has affected

63. Mertus, *supra* note 33 at 374

64. *Id.* at 400.

65. Jane Dwasi, *Kenya: A Study in International Labor Standards and their Effect on Working Women in Developing Countries: The case for Integration of Enforcement Issues in the World Bank Policies*, 17 WIS. INT'L L. J. 347, 354, 355 (1999).

66. *See* Mertus, *supra* note 33, at 402.

67. *See id.* at 406.

68. *See id.*

69. Gabriela T. Mastaglia & Valeri Oosterveld, *Women's Rights Under Labor Law: A Comparative Study of Argentina and Canada*, 19 LOY. L.A. INT'L & COMP. L. REV. 915, 935-36 (1997).

70. *Id.* at 931.

71. *See* Antoinette Sedillo Lopez, *Two Legal Constructs of Motherhood: Protective Legislation in Mexico and the United States*, 1 S. CAL. REV. L. & WOMEN'S STUD. 239, 246 (1992).

72. *Id.* at 247.

73. *Id.* at 253; *see also* Dwasi, *supra* note 65, at 353 (discussing work regarded as "dangerous" or "inappropriate" for women in Kenya).

hiring practices in the nation's Free Trade Zone.⁷⁴ In response to the 1985 enactment of Sri Lankan Maternity Benefits Ordinance Amendment No.43, employers warned that employee recruitment patterns would change based on the law's requirements.⁷⁵ Even though there is little data to support the argument that employers have changed their recruitment practices since the extension of maternity leave entitlements, field studies reveal that in 1994, in the country's Free Trade Zone, ninety-one percent of female workers were less than thirty years of age.⁷⁶ A little less than three-quarters of the forty-six employers interviewed in a study in 1996 admitted to gender discrimination in the recruitment of workers, while eleven percent stated explicitly that they preferred young unmarried workers and thirteen percent admitted that maternity leave and benefits were a negative factor in recruiting women for employment.⁷⁷

Protective laws like these have had no less of an impact on women in China. Chinese laws and regulations that attach to women's biological functions and prohibit women from engaging in hazardous physical work limit women's work opportunities. The theory behind these laws translates into actual practice when women are forced into the role of primary caretaker of the family, and women's work opportunities are considerably limited compared to those of men.

IV. ECONOMICS, MIGRANT WOMEN'S LABOR, AND THE PROBLEMS OF LEGAL UNDER-ENFORCEMENT

Multiple factors amplify the discriminatory effects of gender-specific Chinese labor laws and hamper their potentially positive features. Economic change, the unique problems facing migrant women workers, and systemic under-enforcement of labor laws foster discrimination and perpetuate poor working conditions in enterprises where women are employed.

In times of economic exigency, the law explicitly positions women as the most expendable workers. Although Article 42 of the Chinese Constitution provides that both men and women be paid equally for the same work, female workers are required to retire at age fifty, while male workers are allowed to remain in employment until age sixty.⁷⁸ Male government officials are allowed to work until age sixty, while female government officials must retire at age

74. See RAMANI GUNATILAKA, *LABOUR LEGISLATION AND FEMALE EMPLOYMENT IN SRI LANKA'S MANUFACTURING SECTOR*, RESEARCH STUDIES: LABOUR ECONOMICS SERIES 51 (JULY 1999).

75. *Id.* at 47.

76. *Id.* at 51.

77. *Id.*

78. Jordan, *supra* note 11, at 61; Bulger, *supra* note 27, at 358.

fifty-five, unless they are at the level of division chief or academic professor.⁷⁹ Moreover, the State attempts to deal with redundant staff by encouraging early retirement for women.⁸⁰ The predicament for female workers has become worse in the face of a fluctuating market. Although the labor law provides for social insurance, retirement insurance, medical insurance, and unemployment insurance to be paid by a work unit to those women laborers retrenched by age fifty and other women workers who are forced to retire by age fifty-five,⁸¹ this provision is waived if the factory is not profitable or on the brink of bankruptcy.⁸² Each province has different regulations regarding what constitutes profitability.⁸³ Even though in theory general law is higher than policy regulations, in practice this law is often subordinated to a current administrative policy.⁸⁴

In foreign owned enterprises, although the demand for cheap labor is high, exploitation of such labor is equally high. A majority of the labor force is comprised of migrant female workers, otherwise known as the "floating population."⁸⁵ Migrant women have very few rights in the cities to which they migrate.⁸⁶ Although the law provides reimbursement for overtime, employers often exploit the migrant women's lack of knowledge about their rights and their lack of labor union membership to deny them overtime payment.⁸⁷ In a society in transition, such as China, policies change rapidly. Many new enterprises, including private enterprises and collective enterprises, are poorly monitored. Often these enterprises delay social insurance payments and workman's compensation and use loopholes in administrative regulations to avoid responsibility.⁸⁸ Implementation of protective regulations is subject to the available resources of the enterprise. Most often, protective regulations are

79. Tanya S.J. Selvatratnam, *Backseat Driver: Steering Chinese Women's Voices Through the 1990s*, 12 J. L. & POL. 93, 99 (1996).

80. "Redundant women employees of state-owned enterprises have the right to apply for resignation, early retirement, or the termination of the labor contract by legal procedure." THEORY AND PRACTICE, *supra* note 8, at 135.

81. *Id.* at 134-35; P.R.C. CONST. art. 45 (1993).

82. THEORY AND PRACTICE, *supra* note 8, at 162; information gathered in conversation with the current Director of the Centre for Women's Law Studies and Legal Services of Peking University.

83. THEORY AND PRACTICE, *supra* note 8, at 130.

84. In order to restructure some governmental work units, certain work units such as the Peking Telephone and Telegraph Office, Peking Branch of Railway Administration, Sino-Japan Friendly Hospital, Peking Anzhen Hospital, and Huangshi Public Utilities have forced female experts over the age of 55 years to retire contrary to the Ministry of Personnel's *Notice on Some Problems Related to Retirees who are High Experts* No. 5 (1995), which states that the retiring age for female experts should be 60. See CENTER FOR WOMEN'S LAW STUDIES AND LEGAL SERVICES OF PEKING UNIVERSITY, FIVE-YEAR CONSULTING REPORT 14 (2001).

85. This information was gathered in conversations with lawyers from various women's legal services organizations in China. See also Spahn, *supra* note 34, at 270.

86. THEORY AND PRACTICE, *supra* note 8, at 184.

87. *Id.* at 174-185.

88. China's labor insurance regulation provides special rules for women's social insurance. The Temporary Regulations on Application of Labor Contract in State-owned Enterprises has established old-age insurance system for women who have signed a labor contract. *Id.* at 181-82.

rules on paper but ineffective in practice. In some of these unregulated businesses, workers even have their monthly wages withheld.⁸⁹ As was highlighted by the case at the beginning of this article, the workers most vulnerable to exploitation are the migrant workers who do not belong to a work unit, as they are considered temporary employees.⁹⁰

Recently, an explosion of migrant women workers in the Chinese labor market has facilitated more discrimination and exploitation. Under the *Regulation on Permanent Residence Registration of China* enacted in 1958, peasants were confined to land and were not allowed to move freely.⁹¹ After 1984, these regulations were loosened and the labor force in rural areas of China began to shift away from agriculture.⁹² Since the 1980s, an estimated 200 million Chinese have transferred out of agriculture.⁹³ While greater mobility has resulted in greater opportunities for women, many of these women suffer exploitation and discrimination. If the labor market is divided roughly into three groups—the local labor force, the outside labor force from urban areas, and the outside labor force from rural areas—the women from rural areas perform the lowest-level work and suffer the most discrimination. Migrant workers have little job security because they work either under short-term temporary contracts or as at-will employees.⁹⁴ Those who migrate from villages to find work do not have the right to be elected or to elect local government officials.⁹⁵ As such, they are not part of mainstream society and do not have the same protection of local government agencies who, in turn, tend to favor local enterprises over workers from outside their locality. Non-local residents also face problems. Although by law household registration follows the person, in practice household registration is considered fixed.⁹⁶ When disputes occur between non-local employees and the local enterprise, local government and local residents are partial to the local enterprise.⁹⁷

Private enterprise employees are often deprived of the social insurance and benefits guaranteed to state sector employees.⁹⁸ Furthermore, private employers wield enormous control over employees. Private enterprises adopt rules known

89. See the case of Mrs. Wei and 24 migrant workers, discussed *supra* note 1 and accompanying text.

90. See *id.* Migrant women workers in other countries are similarly vulnerable to exploitation. See Mertus, *supra* note 33, at 384 (discussing migrant women workers in Central Europe).

91. THEORY AND PRACTICE, *supra* note 8, at 175.

92. *Id.*

93. *Id.*

94. *Id.* at 179-86.

95. *Id.* at 184.

96. See THEORY AND PRACTICE, *supra* note 8, at 175-78 (analyzing traditions and local policies that hamper women migrants' effective change of residency). See also Human Rights in China, *supra* note 32, at 300 (discussing barriers facing rural migrant workers who need to change their residences).

97. *Id.* at 184.

98. *Id.* at 201. Private enterprises also often ignore labor protections for women workers and undermine the protective regulations. See Human Rights in China, *supra* note 32, at 299; Wells, *supra* note 5, at 536.

as "rules of the enterprise," which often override Chinese labor legislation and deny payment of social insurance benefits. Older women and female workers with the potential to become pregnant are considered burdensome and are more vulnerable to threats of layoffs. Women often need to seek the permission of the work units to become pregnant, and are sometimes made to promise that they will not get pregnant for a specified period of time.⁹⁹ Migrant women are subject to even greater exploitation and abuse, including unpaid overtime and unsigned contracts.¹⁰⁰

Though the labor law stipulates that a labor contract must be signed before establishing a labor relationship,¹⁰¹ many employing units are in reality in an advantageous position and are unwilling to sign labor contracts with employees.¹⁰² Thus, a huge population of female workers is excluded from the legal guarantees of protection afforded to those with whom the employer signs a contract.¹⁰³ Chinese law directs that the labor contract should include the deadline, the content of work, work protection, working conditions, wage, working discipline, the condition of termination of labor contract, and compensation.¹⁰⁴ Most often the labor contract is a worker's only protection against unfair dismissals. Most young women from the villages, ignorant of their rights and eager to be employed, do not sign labor contracts. Without this protective document, it is difficult to enforce the rights of female workers. Certain employing units deduct wages for no apparent reason and do not pay overtime.¹⁰⁵ Another frequent complaint is that enterprises get rid of older women and women at the peak of their child-bearing age.¹⁰⁶

Laws that might improve working conditions are grossly under-enforced. Many women, especially migrant women, are unaware of their rights or are reluctant to pursue a lengthy legal process with no guarantee of success.¹⁰⁷ The law requires that employees and employers first attempt to settle labor disputes through mediation and arbitration.¹⁰⁸ Only if the parties refuse the arbitration

99. Han, *supra* note 13, at 805-06.

100. THEORY AND PRACTICE, *supra* note 8, at 179-86.

101. See Labor Act of the People's Republic of China, ch. III, §17 (1994).

102. THEORY AND PRACTICE, *supra* note 8, at 179-80.

103. Migrant women who do not possess a labor contract do not enjoy the same reproductive insurance paid under Section 73 of China's Labor Act, available to women who have signed a labor contract. Under this Section, medical examination fees for women workers, reproduction, operation, hospital bills and medicine are to be reimbursed. Also, enterprises are ordered to compensate for losses incurred by workers.

104. Labor Act of the People's Republic of China, ch. III, §19 (1994).

105. According to Center for Women's Law Studies and Legal Services of Peking University, in a majority of the cases, employing units deduct the salaries of young women workers on various pretexts and do not pay for overtime work. See RESEARCH REPORT, *supra* note 1, at 11-12.

106. THEORY AND PRACTICE, *supra* note 8, at 183; see also Bulger, *supra* note 27, at 355, 358.

107. THEORY AND PRACTICE, *supra* note 8, at 186-87, 243-44.

108. Section 79 of the Labor Act provides that where a labor dispute takes place, the parties involved may apply to the labor dispute mediation committee of their unit for mediation; if the mediation fails and one of the parties requests arbitration, that party may apply to the labor dispute

decision can they file in a people's court.¹⁰⁹ Arbitration is mandatory and a first hearing, second hearing, and even re-hearing must be conducted.¹¹⁰ This is a lengthy and tedious process, and is not as effective as early access to the courts.¹¹¹ Enforcement of the arbitration award is often difficult.¹¹²

The capacity to monitor and enforce labor laws in general in China is weak. Often, enterprises do not comply with the protective provisions of the law. For example, the maternity leave period can be limited by rules of the enterprise.¹¹³ Overriding the labor provisions with the "rules of the enterprise," employers can circumvent the law with impunity.¹¹⁴ If the labor rights are violated, a female worker has the right to appeal to the department in charge of her unit or to the local labor department.¹¹⁵ As this is still very much an "in house" mechanism, redress of a grievance will be very difficult. Moreover, these protective labor provisions are not available to women who violate the government's regulations on birth control,¹¹⁶ and these safety mechanisms are therefore only partially effective.

Even though legal redress of grievances is available, as seen in the case discussed in the introduction, not all women choose to assert their rights to equal employment opportunity. Once they do so, there is very little guarantee of a decision based on legal analysis. The standards of equal protection review adopted by the United States Supreme Court in reviewing classifications based upon sex might be useful to consider. Courts in the United States apply an intermediate scrutiny standard that requires that courts look more closely at the challenged act than is required by the rational basis test to determine if government action violates equal protection. Judicial interpretation of this nature may be difficult in China, considering that not all judges are required to have any kind of legal training.¹¹⁷ Moreover, Chinese judges are called upon to defer to administrative policy in making judicial decisions.¹¹⁸ Currently, there are very few women judges in China;¹¹⁹ adding more women to the Chinese judiciary might help develop a standard that scrutinizes classifications based on sex.

arbitration committee for arbitration. If one of the parties is not satisfied with the adjudication of arbitration, the party may bring the case to a people's court.

109. *Id.*; see also Vai Io Lo, *Labor and Employment in the Peoples Republic of China: From a Nonmarket Driven to a Market-Driven Economy*, 6 *IND. INT'L & COMP. L. REV.* 337, 360-61 (1996).

110. *THEORY AND PRACTICE*, *supra* note 8, at 245.

111. *Id.*

112. *Id.* at 246.

113. *THEORY AND PRACTICE*, *supra* note 8, at 201.

114. *Id.*

115. State Council of the People's Republic of China, *Provisions of Labor Safety and Health for Women Workers*, art. 12 (1988).

116. *Id.* at art. 15.

117. LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND DEFENSE OF RIGHTS* 8-9 (1998); Bulger, *supra* note 27, at 387.

118. Bulger, *supra* note 27 at 377, 386.

119. *Id.* at 388.

In addition to the problems above, the capacity to monitor and enforce the settlement of labor disputes is weak. “[S]ome enterprises or institutions simply refuse to execute the arbitration or court’s verdict. As a result, the cases won by individual workers or cadres have become the rights and interests on paper only.”¹²⁰ The machinery for conciliation and arbitration should be made more effective and the integrity and impartiality of the process maintained. Critics of the system suggest that the arbitration agencies strengthen their independence and judicial nature while at the same time minimizing their administrative nature.¹²¹ Current law does not allow a worker to bypass the arbitration process and go directly to the People’s Court.¹²² The stringent requirement that the party dissatisfied with the arbitration award must bring a lawsuit within fifteen days of receiving the arbitration ruling¹²³ provides inadequate time to seek legal help.

In both the United States and China, employment discrimination law is enforced by means of non-binding mediation. However, the mediation process in the United States does not undermine the importance of litigation.¹²⁴ In fact, the initial mediation process centers around the enforcement of legal rights through the court process.¹²⁵ In China, the emphasis on the mediation process may de-emphasize legal rights and have little binding authority.

Many of the differences between the two countries with regard to enforcement of employment discrimination laws reflect cultural preferences. A general reluctance to resolve social problems through the court system has made mediation the preferable method of resolving labor disputes in China.¹²⁶ Chinese society is more accustomed to resolving disputes through informal compromise; furthermore, since the Chinese civil law system does not recognize previous case precedents as binding on later decisions, it is difficult for Chinese courts to develop a uniform definition of gender discrimination in employment.¹²⁷

120. RESEARCH REPORT, *supra* note 1, at 22.

121. THEORY AND PRACTICE, *supra* note 8, at 245.

122. *Id.* at 237-38; Labor Act of the People’s Republic of China, ch. X, §79 (1994).

123. *See* Labor Act of the People’s Republic of China, ch. X, §83 (1994).

124. Plaintiffs alleging employment discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 must first exhaust all administrative remedies within the Equal Employment Opportunity Commission (EEOC), the federal administrative agency that enforces and interprets Title VII, the Equal Pay Act, and the Age Discrimination Act. If, after investigation, the EEOC finds reasonable cause to intervene, it first attempts conciliation and, failing that, brings a civil suit in federal district court. However, complainants must only show a timely resort to the EEOC, rather than a total reliance on the bureaucratic mechanism. If the EEOC should choose to sue, the agency limits the plaintiffs right to intervene in the suit. *See* 42 U.S.C. §2000e-5(g) (2002); 42 U.S.C. §2000e-5(f)(1) (2002).

125. *See id.*

126. Margaret Woo argues that “the Confucian definition of the self was primarily contextual, dependent on one’s relationship to another.” These values of community and reliance on non-adversarial dispute resolution mechanisms shape Chinese labor law’s primary emphasis on mediation rather than litigation. Woo, *supra* note 4, at 178.

127. *See* LAWYERS’ COMMITTEE FOR HUMAN RIGHTS, *supra* note 117, at 8.

V. FORMAL EQUALITY V. SUBSTANTIVE EQUALITY: A COMPARISON TO U.S. EMPLOYMENT LAW

The protective measures of the Chinese labor laws are reminiscent of the early twentieth century in the United States, an era during which the U. S. Supreme Court upheld legislation that treated women workers differently from male workers. In the landmark case of *Muller v. Oregon*,¹²⁸ women's reproductive capacity was used to justify limiting work hours for women. The U.S. Supreme Court upheld an Oregon statute that established: "no female shall be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day."¹²⁹ Drawing upon Louis Brandeis's compilation of an exhaustive analysis of social science data, the Court stated: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."¹³⁰

This protectionist argument was not limited to the physical well-being of women, but also extended to their moral well-being.¹³¹ Brandeis's brief, crafted in support of the Oregon law, asserted that woman's special biological functions, her childbearing and maternal duties, and the need to prevent physical and moral debilitation all required restricting her to ten hours of labor per day.¹³² In Catharine MacKinnon's words, "*Muller* saw women legally the way men see women socially: as breeders, marginal workers, excludable."¹³³

The differential way in which the courts regarded men and women workers is readily apparent from a comparison of *Muller* to *Lochner v. New York*,¹³⁴ a case in which the Supreme Court, citing freedom of contract concerns, struck down legislation that would have restricted the number of hours bakers could work. The *Muller* Court thought it fit to deviate from its previous *laissez faire* position in *Lochner* to uphold restrictive hours legislation for women only, contributing to keeping women from competing equally with men.¹³⁵ The

128. 208 U.S. 412 (1908).

129. *Id.* at 416.

130. *Id.* at 421.

131. A host of legislation restricting women's access to work was enacted based on the notion that women as the physically weaker sex needed special protection and that certain work would coarsen women's gentle nature. As Sarah Gatson argues, women's present and future maternal functions also had a major influence on legislation limiting the number of hours a day women were allowed to work: "Indeed, the concern for the unborn legions was often the primary focus of the legislation as it was passed and upheld." Sarah Gatson, *Labor Policy and the Social Meaning of Parenthood*, 22 L. & SOC. INQUIRY 277, 281 (1997). Legislators in Nebraska, Washington, and Oregon passed statutes limiting working hours for women. Between 1909 and 1917, 19 states passed laws restricting women's working day. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 188 (1982).

132. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 167 (1989).

133. *Id.*

134. 198 U.S. 45 (1905).

135. 208 U.S. at 418-23. Recognizing the problems associated with gender based employment legislation, the Supreme Court struck down a price fixing system for women's labor. See *Adkins v.*

Muller Court was concerned with protecting women as mothers of their future offspring.¹³⁶ The reality, however, was that women of color were often excluded from this protective cocoon and exposed to health hazards in the workplace, without regard for their reproductive health or future children's well-being.¹³⁷

Faced with the dilemma of whether the Equal Rights Amendment (ERA) would invalidate protective labor legislation for women workers, many early feminists initially opposed the ERA.¹³⁸ With the burgeoning of a new feminist consciousness in the 1960s, civil rights groups began to fight against protective legislation that hampered equal employment opportunities for women and further perpetuated the notion that child bearing and child rearing should be a woman's priority.¹³⁹ Not until the 1960s did United States courts begin to strike down legislation that treated men and women differently.¹⁴⁰ It was only in the 1970s, in *Frontiero v. Richardson*,¹⁴¹ that the Supreme Court declared sex a suspect classification, and later in *Craig v. Boren*¹⁴² crafted the middle tier, or heightened scrutiny, for gender based classification. Title VII of the Civil Rights Act of 1964,¹⁴³ asserting the ideal of a gender blind workplace, was instrumental in striking most of the protective legislation of the early twentieth century.

Anti-discrimination laws such as Title VII are intended to address stereotypes of women as weaker than men. Although Title VII prohibits employment discrimination on the basis of sex, in *General Electric Co. v. Gilbert*,¹⁴⁴ the Supreme Court ruled that discrimination on the basis of pregnancy was not sex discrimination. In reaction to the *Gilbert* decision, Congress passed the Pregnancy Discrimination Act of 1978 (PDA), which mandates that pregnant employees "shall be treated the same for all employment-related purposes."¹⁴⁵ In *California Federal Savings and Loan*

Children's Hospital, 261 U.S. 525 (1923). This was overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

136. 208 U.S. at 421.

137. See Gatson, *supra* note 131, at 286.

138. See Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, available at <http://www.aclu.org/issues/women/nadine.html> (last visited May 3, 2002).

139. See, e.g., POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 393-98 (1986).

140. See, e.g., *White v. Crook*, 251 F. Supp. 401, 408-09 (M.D. Ala. 1966).

141. 411 U.S. 677 (1973).

142. 429 U.S. 190 (1976).

143. 42 U.S.C. §2000e *et seq.* (2002).

144. 429 U.S. 125 (1976).

145. 42 U.S.C. §2000e (k) (2002). Under the PDA, women are entitled to disability or other leave for pregnancy only to the extent that such leave is available to other employees for medical disabilities unrelated to pregnancy. The Family and Medical Leave (FMLA), passed in 1993, requires employers to provide to 12 weeks of unpaid leave in a 12-month period of time for the care of family members with serious health conditions, for an employee's own serious condition, or for the birth or adoption of a child. However, limitations on FMLA coverage, such as the fact that the law only covers employees who work in organizations that employ over fifty or more employees, excludes many low-income women workers from its application. Laura T. Kessler, *The Attachment Gap: Employment*

Ass'n v. Guerra,¹⁴⁶ the Supreme Court asked whether Title VII as amended by the Pregnancy Discrimination Act of 1978 pre-empted a state statute that requiring employers to provide leave and reinstatement to employees on pregnancy disability leave for up to four months. The Court, upholding the state statute, stated that "unlike protective labor legislation prevalent earlier in this century, Sec. 12945 (b) (2) does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal-employment opportunity."¹⁴⁷ In the debate over *Cal Fed*, equal-treatment advocates were concerned about the symbolic features of special treatment for pregnant women.¹⁴⁸ As Wendy Williams writes, "[t]he reality [is] that conceptualizing pregnancy as a special case permits unfavorable as well as favorable treatment of pregnancy."¹⁴⁹

China's fetal protection policies prohibit women from participating in environments considered hazardous to the health. Concerns about the welfare of the next generation underlie these protective clauses. In *UAW v. Johnson Controls, Inc.*,¹⁵⁰ the U.S. Supreme Court examined a company fetal protection policy similar to the protection policies in Chinese law. Employees at Johnson Controls challenged their employer's policy of excluding women from jobs that involved exposure to substances known or suspected of causing harm to fetuses.¹⁵¹ The question for the Supreme Court was whether the employer's interest in the health of the unborn children met the "bona fide occupational qualification" (BFOQ) exception to the statute.¹⁵² Striking down Johnson Control's fetal protection policy under Title VII, the Court stated that working parents should make their own decisions about whether to expose their future children to certain hazardous substances.¹⁵³ The Supreme Court stated that the employer's role was not to control women employees' individual decisions about family and work.¹⁵⁴

While Title VII has removed barriers for some women in traditionally male-dominated fields such as law and the sciences, the goal of Title VII has not been fully realized in the blue-collar workplace, where the environment is

Discrimination Law, Women's Cultural Caregiving, And the Limits of Economic and Liberal Legal Theory, 34 U. MICH. J. L. REF. 371, 422-23 (2001).

146. 479 U.S. 272 (1987).

147. *Id.* at 290.

148. See Wendy W. Williams, *Notes From a First Generation*, U. CHI. LEGAL F. 99, 108-110 (1989).

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

150. 499 U.S. 187 (1991).

151. *Id.* at 191-93.

152. *Id.* at 199-201.

153. *Id.* at 204-06.

154. *Id.* at 206.

still dominated by men.¹⁵⁵ In the United States, certain courts have defined work in gendered terms,¹⁵⁶ and have interpreted Title VII in line with some of the biases that have traditionally justified women's economic disadvantages.¹⁵⁷ Perceived gender differences segregate female employees into low-paying jobs, despite Title VII's mandate. This was manifest in the case of *EEOC v. Sears Roebuck and Co.*¹⁵⁸ The Equal Employment Opportunity Commission (EEOC) sued under Title VII, claiming that Sears had engaged in sex discrimination in hiring and promoting workers to commission sales jobs.¹⁵⁹ Company figures showed that commission sales jobs went mostly to men, while women were relegated to much lower-paying non-commission sales jobs.¹⁶⁰ Even though the EEOC's statistical studies showed that Sears had significantly excluded women from the more lucrative commission sales positions, the court held that Sears's segregation was attributable to women's own choices.¹⁶¹ In testifying for the EEOC, feminist historian Alice Kessler-Harris claimed that women's inhibitions about masculine work are externally imposed and can be modified by changes in employment policies.¹⁶² The expert testifying on behalf of Sears, however, maintained that women choose less competitive work by choice.¹⁶³ Many feminists agree that the view of women as caretakers and nurturers and the view that women are similarly situated to men both essentialize women in problematic ways.¹⁶⁴ As federal anti-discrimination laws based on formal equality dismantled some barriers to education and employment for American women, feminists began exploring alternatives to formal equality theory. The "different voice" theory emerged as an attempt to explore the limits of formal equality in addressing sex discrimination. This theory was shaped by attempts

155. See generally Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749 (1990). Schultz argues that separate and unequal job structures discourage women in their work aspirations, especially in blue collar environments. She further writes that these separate and unequal job structures not only lower women's work expectations but also imply that segregation is normal, thus causing male workers to resent any presence by women in what is traditionally thought to be "their" jobs. In Schultz's words, "Overtly sexual behavior is only the tip of a tremendous iceberg that confronts women in nontraditional jobs. They face a wide ranging set of behaviors and attitudes by their male supervisors and co-workers that make the culture of nontraditional work hostile and alienating." *Id.* at 1832-33.

156. *Id.* at 1801-02.

157. Schultz argues that "unfortunately, the courts all too often fail to respond, and in the process, they reproduce the very rationalizations for the two-tier system that keeps so many women in their place. When courts accept employer's arguments that women in female jobs lack interest in being promoted, they reinforce the sexist notion that there is something about womanhood itself that endows women with a penchant for low-paying, dead-end jobs." *Id.* at 1832.

158. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir.1988).

159. *Id.* at 1278.

160. *Id.* at 1315.

161. This argument was made most clearly by the proof offered by Sears' expert witness, Dr. Rosalind Rosenberg. See MACKINNON, *supra* note 132, at 223.

162. Mary J. Frug, *Sexual Equality and Sexual Difference in American Law*, NEW ENG. L. REV. 665, 681 (1992).

163. 626 F.Supp. at 1308.

164. Frug, *supra* note 162, at 667-676; see also Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47-56 (1988).

to understand the role of uniquely female experiences such as pregnancy and motherhood, as well as why women continued to face discrimination in the workplace.¹⁶⁵ From Carol Gilligan, who was one of the first to introduce the notion that women employ different modes of moral reasoning,¹⁶⁶ to Leslie Bender, who argues that work life must be reconstructed to eliminate the disadvantages women face as caregivers,¹⁶⁷ “different voice” theory challenges sex-blind notions of equality. Although “different voice” theory posits affirmatively using women’s different values and resources for the betterment of society, the challenge lies in applying these theories and laws in a way that does not reinforce stereotypes that subordinate women. As exemplified by Chinese women’s experiences, protective legislation based on differences between men and women disserves women absent a simultaneous focus on anti-discrimination provisions.

The danger in focusing on women’s capacity for nurturance is that intimate labor is not valued by the market economy, neither in China or the United States, nor elsewhere in the world. As Joan Williams points out, relegating women to the domestic sphere is not an effective way of critiquing capitalism’s effects on women.¹⁶⁸ Williams reminds us that Marxist feminists have argued that domesticity is a capitalist tool to privatize the costs of workers at the expense of women for the benefit of the employers.¹⁶⁹

However, this does not justify downplaying the importance of family, nurturance and care-giving. We must provide both men and women with equal opportunities to perform caretaking tasks and fill nurturing roles. Men, too, can learn to be caregivers. If the state and the legal system prioritize the welfare of the family in a gender-neutral way, then both men and women will enjoy equal opportunity to fulfill caretaking roles in the family.

In the United States in the 1920s, cases such as *Muller* invoked special treatment of women as mothers, in the name of the greater good of society. This same rationale is used to justify protective legislation for Chinese women

165. An example of this theory in operation is Cynthia Grant Bowman and Elizabeth Schneider’s discussion of barriers to women’s success in the legal profession:

Once women were admitted to law schools and law firms, they encountered problems that formal equal theory did not appear to address. Informal barriers to success in law firms proved even harder to surmount than outright denial of access had been. Hired as associates in numbers comparable to men, few women became partners or rose to positions of power within private firms, supporting the notion that some sort of “glass ceiling” prevented the promotion of women to positions at the top of the law firm hierarchy. Women’s continuing role as the primary caretakers of children (and of elderly persons and households in general) appeared to be incompatible with the structure of high-powered legal work, with its requirements for very long hours worked away from home.

Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249, 257 (1998).

166. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

167. Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 *FORDHAM L. REV.* 941 (1989).

168. Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797, 820-21 (1989).

169. *Id.*

workers. An argument focused on the greater good of society can be extended to men, and similar special treatment offered to men who choose to perform child caring and child rearing duties. The argument that the health of future generations is dependent on the health of mothers proves true only in a limited sense. A mother's health depends on the support she receives from the larger community, and the father can play a major role in this support.

Arguments focused on the physical well-being of the mother, which justified excluding women from certain occupations in the early twentieth century United States and currently justify excluding women from certain jobs in China, risk portraying women's "differences"¹⁷⁰ as weaknesses. Laws based on "difference" theory may also inscribe limited roles for women as mothers and wives, thus forcing more women into the private sphere, while the public sphere is controlled by men. A consequence of this is that when some women attain jobs in male dominated fields, these women must face a wide range of hostility, ranging from unfriendliness to harassment.¹⁷¹

At the same time, attempting to make women and men appear similarly situated in an existing context of social and economic inequality proves ineffective. Strict enforcement of formal equality, which promotes equal treatment over substantive improvement in welfare, presents hardship for women and minorities, who have been historically disadvantaged. On the other hand, highlighting women's distinct qualities becomes a trap. By unfairly stereotyping women as caretakers and focusing on women's domestic roles, laws like those in China—seemingly benign and actually complementary of women's differences—eventually drive women into lower paying, traditionally female jobs, and solidify social convictions that childcare is primarily women's work. Identifying women's unique reproductive capabilities runs the risk of reducing work opportunities for women.

Even though attempting to make women and men appear similarly situated in a context of social and economic disadvantage produces inequality, special treatment of women under the law subordinates women.¹⁷² Accentuating male/female differences in the workplace legitimates a power-structured relationship between men and women.¹⁷³ As Leslie Bender argues, we should

170. See, e.g., Law Safeguarding Women's Rights of Interests of People's Republic of China, ch. IV, art. 25 (1992).

171. See Schultz, *supra* note 155, at 1832-33.

172. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 8 (1987). MacKinnon argues that a discourse on gender difference serves legitimate disparities of power, even as it seems to criticize them. This does not mean that MacKinnon does not agree that gender differences do not exist, but that it would be undermining women's interests to use the lenses of domesticity to critique individualistic theory. *Id.* at 8

173. Vicki Schultz quotes from the following statement of a woman welder to capture how gendered power relations play out in predominantly male work environments to harass and exclude women workers.

"It's a form of harassment every time I pick up a sledge hammer and that prick laughs at me and it's real clear to me he does not want to give me any information whatsoever. It's a form

strive for an ideal society in which caregiving, cooperation, and an ethic of interpersonal care are not correlated to oppression but correlated to justice.¹⁷⁴ In such an ideal situation, an employer would be forbidden from presuming that all women are so different from men that they do not aspire to nontraditional work.¹⁷⁵

The constitutive and transformative power of laws can affect the ways in which women form job preferences. As Vicki Schultz argues, "women's work preferences are formed, created, and recreated in response to changing work conditions."¹⁷⁶ Schultz asserts that women adapt their work aspirations in response to restrictions in the organizational arrangements.¹⁷⁷ The role of the legal system should be to reconstruct workplace arrangements so that sex stereotypes are not reinforced. When Schultz contends that "in a very real sense the [United States] legal system has perpetuated the status quo of sex segregation by refusing to acknowledge its own power to dismantle it,"¹⁷⁸ her words also ring true for women in the Chinese legal system.

VI. CONCLUSION: TOWARD A FUSION OF EQUALITY AND CARE

In China, sex-based exclusionary laws, combined with other institutional and ideological constraints against women, have limited women's opportunities in the public sphere. Conversely, the United States' legal system, with its formal equality model, lacks the social safety nets available to women under Chinese law. Our efforts should be aimed at finding ways to accommodate the greater social good in a way that does not disserve women.

Values such as care-giving, cooperation, and responsibility are worthy in and of themselves. When we celebrate these values, we celebrate the responsibility of both sexes to fill caretaking and nurturing roles. We need to reinforce these values by providing corresponding safety nets and mechanisms so that both genders can choose to live by those values. Just as the law provides powerful tools to dismantle sex discrimination in the workplace, the law and its enforcers are capable of reconstructing workplaces along gender-neutral lines. There is an apparent tension when the law attempts to make men and women appear similarly situated in a context of historic gender discrimination; this

of harassment when the working foreman puts me in a dangerous situation and tells me to do something in an improper way and then tells me, oh, you can't do that!"

Schultz, *supra* note 155, at 1833.

174. See Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 36-42 (1990).

175. As Wendy Williams writes, "our mutual commitment is not finding places in the work world for women who can function like the traditional man with wife at home employee, but in restructuring work and family, and reordering the relations of the sexes." See Williams, *supra* note 148, at 109.

176. Schultz, *supra* note 155, at 1815.

177. *Id.*

178. *Id.* at 1816.

tension coexists with an inherent difficulty in seeking to promote justice for currently oppressed or disadvantaged groups.¹⁷⁹

The question remains to what extent differences between men and women should be accounted for in employment legislation. While sameness cannot be the standard of equality, the equal but separate premise can trap women alone into housework and caretaking, hampering their progression in the public sphere.¹⁸⁰ A critique of capitalism and the way wealth is created and distributed cannot be achieved by offering domesticity as an alternative. Societal transformation needs the engagement of both sexes and the dismantling of gender roles as they are traditionally known. The only fair answer to the dilemma concerning duties in the private and public sphere is to work towards an ideal in which both sexes will want to choose care giving without having to suffer discrimination. The legal system should try to facilitate and not hinder the equal sharing of paid and unpaid labor and the productive and reproductive labor among both sexes as far as possible.¹⁸¹

A model of equality which seeks to eliminate both types of gender disadvantages would, as Christine Littleton argues, focus "not on the question of whether women are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived-out experience of all members of the community. On this view, equality functions to make gender differences, perceived or actual, costless relative to each other. Ideally, anyone should be able to choose a male, female or androgynous lifestyle without being punished for following a female lifestyle or overly rewarded for following a male one."¹⁸²

Neutral rules do not take into account the extent to which historical stereotypes and material realities impact on women's lives. Similar treatment cannot effectuate equality between men and women when their circumstances are different. However, advocates such as Littleton do not argue that there should be no transformation of the workplace; rather they seek transformations that meet the basic needs of all workers and not just pregnant women. This view asserts that workplace restructuring must occur in ways that does not perpetuate work-family conflict as a woman's issue. The aim is to see that programs intended to help women do not at the same time devalue and subordinate them.

179. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 40-43 (1990). Martha Minow generally argues that while formally neutral rules and policies that ignore group differences often reinforce disadvantages, focusing on differences, gender or otherwise, risks perpetuating the difficulties these differences have carried in the past.

180. As Catharine MacKinnon writes: "The sameness route ignores the fact that the indices or injuries of sex or sexism often ensure that simply being woman may mean seldom being in a position sufficiently similar to a man's to have unequal treatment attributed to sex bias. The difference route incorporates and reflects rather than alters the substance of women's inferior status, presenting a protection racket as equal protection of the laws." MACKINNON, *supra* note 180, at 233.

181. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 171-73 (1989).

182. Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1297 (1987).

In the Chinese context, legislative amendments defining and prohibiting use of gender stereotyping in employment practices would be useful in preventing employers from excluding women from “men’s jobs,” channeling women into limited segments of the work force, and relegating women to jobs that are extensions of domestic responsibilities. In China and the United States, laws and public policy should ensure that the division of labor between the sexes does not result in unfairness. Nor should the laws privilege only working women. In effect, the benefits afforded by the Chinese labor laws should be made available to both sexes. There are ways in which these normative values can be actualized. Presenting a theory of justice in the family, Susan Moller Okin argues that “[p]arental leave during the post birth months must be available to mothers and fathers on the same terms, to facilitate shared parenting; they might take sequential leaves or each might take half-time leave.”¹⁸³ Gender-neutral policies for parental leave are careful not to link women with the care of children and disadvantage men who choose the bulk of the childrearing responsibilities.¹⁸⁴

Some lessons can be learned from the European Council’s June 2000 adoption of a resolution seeking reconciliation between paid work and family life in the European union.¹⁸⁵ The Council’s resolution provides no effective enforcement mechanisms to give teeth to the highly symbolic nature of these directives. Moreover, by focusing primarily on women’s access to the labor market, the Council’s policy statement ignores the need to address the disadvantages men face in the domestic sphere. As Clare McGlynn argues, this women-only focus has the potential to reinstate the very obstacles it aims to dismantle.¹⁸⁶ These policy directives have very little potential for change unless provisions regarding women’s access to the market are complemented by changes in the role of men.¹⁸⁷ Without these corresponding changes, a woman’s access to work is seen only in relation to her “natural” role as mother.¹⁸⁸ This call to restructure home and work life along more democratic lines mirrors Okin’s argument for shared parenting and equal work in all aspects of the domestic sphere.

183. OKIN, *supra* note 181, at 176.

184. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 175-76 (1990).

185. “The beginning of the twenty-first century is a symbolic moment to give shape to the new social contract on gender, in which de facto equality of men and women in the public and private domains will be socially accepted as a condition for democracy, a prerequisite for citizenship and a guarantee of individual autonomy and freedom, and will be reflected in all European Union policies. . . Both men and women, without discrimination on the grounds of sex, have a right to reconcile family and working life.” Press Release No. 8980100, Council and Ministers for Employment and Social Policy, *Resolution on the Balanced Participation of Women and Men in Family and Working Life* (June 6, 2000), cited in Clare McGlynn, *Reclaiming A Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy*, 7 COLUM. J. EUR. L. 241 (2001).

186. *Id.* at 256.

187. *Id.* at 256-59.

188. See *id.* at 263-67.

While formal equality legislation that does not make room for the different biological needs of women is inadequate, regulations that focus on biological differences between men and women have a discriminatory impact on women.¹⁸⁹ Legislators may recognize current gender practices as they exist, or take the lead in transforming gender roles by shaping both men and women's work and family aspirations. Laws that deter employers from hiring women—by dictating that women cannot perform certain tasks during menstruation, pregnancy, post-pregnancy and menopause—dilute equal opportunities for women in China. The added burden of providing the benefits required under the legislation may also discourage employers from hiring women. Enterprises find these regulations burdensome and opt to hire men, who are less expensive to maintain. Family needs should be recognized and privileged by the workplace, but they should not be seen as the primary duty of only women, but the shared duty of both sexes.¹⁹⁰ One way to overcome discrimination caused by gender specific protectionist labor laws would be to require both parents to share post-natal child care duties. Allowing men and women to take two years of leave of absence following the birth of a child would give both parents equal choice and not discriminate against one partner. Stipulating pregnancy leave not just for the mother but for the father as well would ease the burden of care on the mother. The workplace must be transformed to recognize the role that both parents play in child bearing and child rearing. This will equalize the burdens of domestic work and enable both parents engaged in caretaking tasks to return to the workplace with minimum loss to job opportunities. It is also important to restructure the workplace so that both men and women can work safely, without undue exposure to work hazards that might harm either sex's reproductive capabilities.¹⁹¹

As much as it is important that the virtues of connection, interrelatedness and community underlie legislative activity, we should recognize that these values are not exclusively female values. The recognition of these values as gender neutral will create community and relatedness in the public sphere and more equality in the domestic sphere. Finally, protective regulation must go hand in hand with anti-discrimination legislation. Even though equality requires the accommodation of women's differences, the recognition of these differences should not reinforce stereotypes or heighten discriminatory practices.

189. As Margaret Woo argues, Chinese protective legislation based on gender can subordinate women unless there is a simultaneous focus on anti-discrimination. *See Woo, supra* note 4, at 195.

190. Christine Bulger suggests a flat tax on male and female employees to cover the expenses associated with providing pregnancy related privileges. *See Bulger, supra* note 27, at 390.

191. For example, there is evidence that lead based products generally harmful to women workers of childbearing age have a similar effect on men's reproductive system. *See United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Rather than selectively excluding workers from the job, employers should try to minimize the health risks associated with the job for both men and women.

While law in China should focus more on formal equality, the United States should bear in mind that formal equality is inadequate to accommodate the common good. For example, under current labor laws and policies, pregnancy leave might cost a woman her job.¹⁹² Compared to Chinese women, American women possess stronger legal tools to challenge gender based discrimination in employment. American women's employment opportunities in the United States are not limited by protective legislation. However, traditional hiring practices and women's continued traditional familial role limit women's employment opportunities in practice.¹⁹³

Women's enhanced participation in the labor force, especially in countries with greater gender inequities, can have positive effects on women and in general development. The internationally respected economist Amartya Sen writes that the "limited role of women's active agency seriously afflicts the lives of all people."¹⁹⁴ Sen argues that the active agency of women, strongly influenced by women's ability to earn an independent income and to have employment outside the home, impacts on the well-being of women and the family.¹⁹⁵ Highlighting a correlation—especially in countries such as India, Pakistan and China—between women's labor force participation and the reduction in mortality rates of children, Sen claims: "[n]othing is as important today in the political economy of development as an adequate recognition of political, economic and social participation and leadership of women. This is indeed a crucial aspect of 'development as freedom.'"¹⁹⁶ For their national well-being, both China and the United States should seek to foster women's equality in the labor market by joining strong anti-discrimination protections with gender neutral supports to enable men and women to share equally in paid market and unpaid caretaking work.

192. Nancy Dowd argues that employers are not required to provide pregnancy-related disability coverage. She writes that "[c]ourts have read the PDA to require only the same disability coverage (or lack thereof) as that provided to male employees Most significantly, however, disability leave usually does not guarantee job security. Thus under existing policies and legislation, childbirth often results in loss of employment or of employment status." Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 121-22 (1989).

193. See, e.g., *Bruno v. City of Crown Point*, 950 F.2d 355 (7th Cir. 1991), *cert denied*, 505 U.S. 1207 (1992). During Micolette Bruno's only interview for a job as a paramedic with the City of Crown Point, the interviewer asked Ms. Bruno about the number of children she had and would have, her child care arrangements and how her husband would feel about the job. See *id.* at 358.

194. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 191 (1999).

195. *Id.* at 202.

196. *Id.* at 203.