

# A DEFENSE OF PAID FAMILY LEAVE

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## I. INTRODUCTION

The problem of combining work and family life is perhaps the central challenge for the contemporary American family. In this Article, I evaluate and defend government provision of paid family leave, a benefit that would allow workers to take compensated time off from work for purposes of family caregiving.

A legal intervention in the arena of work-family accommodation can only build on some prior normative understanding of the family, and embedded within that, contested value choices about women's identities and entitlements in workplace, family, and society. I am not the first legal scholar to advocate paid family leave of some kind.<sup>1</sup> The additional contribution

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<sup>1</sup> See, e.g., Jeremy I. Bohrer, *You, Me, and the Consequences of Family: How Federal Law Prevents the Shattering of the "Glass Ceiling,"* 50 WASH. U. J. URB. & CONTEMP. L. 401, 418–21 (1996); Erin P. Drew, *The Birth and Adoption Unemployment Compensation Experiment: Did the Department of Labor Go Too Far?,* 106 DICK. L. REV. 367, 387–88 (2001); Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time is Now To Help Build Stronger Families with a More Stable Economy,* 26 SETON HALL LEGIS. J. 73, 76–84 (2001); Mikel Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States,* 13 ARIZ. J. INT'L & COMP. L. 147, 167–74 (1996); Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?,* 17 COMP. LAB. L.J. 373, 383–90 (1996); Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993,* 42 WM. & MARY L. REV. 1507, 1532–38 (2001); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy,* 94 COLUM. L. REV. 2154, 2214–21 (1994); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace,* 3 AM. U. J. GENDER & L. 39, 53–54 (1994); Michael Selmi, *Family Leave and the Gender Wage Gap,* 78 N.C. L. REV. 707, 770–73 (2000); Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits,* 75 CAL. L. REV. 465, 467–76 (1987); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement,* 14 YALE. J.L. & FEMINISM 1, 16–68 (2002); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children,* 5 MICH. J. GENDER & L. 113, 154 (1998).

here is to offer a normative defense of such a program based on its potential to increase the workforce participation of those who bear the principal obligation of caregiving—women. This, I argue, will increase equality of economic opportunity and the distribution of social power associated with status in paid labor markets. It also will enhance women's capacity to determine the conditions of their lives. In advocating paid family leave, I distinguish myself from those who would make family care subsidies available equally to caregivers who do and do not participate in the paid workforce, and from those who would shun workplace accommodations in favor of more "commodified" caregiving institutions external to the family.

Paid family leave is particularly valuable, I argue, because other possible alternatives, such as daycare, cannot entirely replicate the value of personal time away from work to engage directly in family caregiving. For women currently working who want to give personal care to family members but cannot afford adequate time off to do so, paid family leave will improve their quality of life and benefit those they care for. For women on the margin between working and staying home, the availability of paid leave may make market work more feasible and attractive, and as a result, increase their attachment to the workforce. At the same time, we must be wary of overly generous leave provision. Very generous leave provisions might encourage such lengthy absences from the job as to undermine women's development of human capital and connection to the workforce. Further, the method used to finance the program must be sensitive to important issues of distributive justice and the challenge of ensuring that the program confers gains on its intended beneficiaries. The government should spread at least some of the costs of the program beyond those workers—women in their childbearing years—most likely to take leave.

Paid family leave would have two components. It would have a family illness leave component, i.e., temporary paid leave for someone who is not herself incapacitated, but who has a familial obligation to another person who is seriously ill or disabled. It would also have a parental leave component, covering non-medical temporary leave for purposes of allowing parents to nurture newborn children. The Family and Medical Leave Act ("FMLA") mandates that employers give up to twelve weeks of job-protected leave per year to workers who need to care for a newborn child or their own serious illness or the illness of a family member.<sup>2</sup> Coverage limitations mean that only about half of all workers, and less than one-third of steadily employed new mothers, receive these protections.<sup>3</sup>

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<sup>2</sup> Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000). Note that the FMLA provides both (unpaid) family and personal illness leaves. The analysis in this Article is limited to family leave. This is not because paid personal illness leave is unimportant, but because it raises a conceptually distinct set of questions that are not my central focus.

<sup>3</sup> Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. ECON. PERSP. 175, 177 (1997). "Steadily employed," as used here, means employed for at least

More importantly, the law does not require wage replacement. This makes the American system the least generous of industrialized nations. All western European nations have programs that give women workers the right to at least three months paid maternity leave, with as much as a year or more in some countries, as well as paid parental leave—for either parent.<sup>4</sup>

For workers who need to take time off to address family or medical needs, financial worries loom largest among their anxieties about taking leave.<sup>5</sup> The hardship of lost wages leads some workers to foreshorten their time away from work<sup>6</sup> or simply forgo a needed leave.<sup>7</sup> A sizeable percentage of workers who lack access to paid benefits resort to public assistance for support during family leaves.<sup>8</sup> Finally, although more difficult to measure, there are likely some workers who would enter or remain in the workforce if there were better prospects of supported family leaves, but who instead quit or stay home to address their family or medical needs.

Recently, the debate over paid family leave has been revitalized. In the past few years, twenty-one states have introduced bills to expand their unemployment insurance (“UI”) programs to provide wage replacement to parents following the birth or adoption of a child.<sup>9</sup> In addition, several states are considering bills that would expand existing temporary disability insurance (“TDI”) programs or create new public insurance schemes

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one year before childbirth. *Id.* The Act only covers employees who have worked for their employer for twelve months and 1250 hours in the previous year, and whose employer has fifty or more employees working within seventy-five miles of the worksite. 29 U.S.C. §§ 2611(2)(A)–(B).

<sup>4</sup> Ruhm, *supra* note 3, at 176.

<sup>5</sup> U.S. DEP’T OF LABOR, FMLA SURVEY: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, at tbl.4.1 (2001) [hereinafter BALANCING THE NEEDS] (reporting that among worries expressed by workers who took a leave in 2000 to care for a newborn child or their own or a family member’s serious illness, whether or not covered by the FMLA, not having enough money to cover their basic needs was cited most frequently (53.8% of leave-takers)), available at <http://www.dol.gov/asp/fmla/toc.htm> (last visited Nov. 18, 2004).

<sup>6</sup> *Id.* at tbl.4.8 (reporting that 37% of leave-takers in 2000 reported cutting short their leave time to cope with the hardship of lost wages).

<sup>7</sup> Although 16.5% of all employees in the United States took leaves of absence from work to handle family or medical needs in 2000, another 2.4% of workers did not take leave despite reporting that they needed it (i.e., roughly 13% of workers who needed to take a leave did not take it). *Id.* at tbls.2.1, 2.14. Among those who were unable to take a needed leave, the most common reason cited (77.6%) was not being able to afford it. *Id.* at tbl.2.17. Workers who take leaves generally are more educated, have higher incomes, and are more likely to earn a salary rather than an hourly wage than those who do not. *Id.* § 2.1.3.

<sup>8</sup> *Id.* at tbl.4.8 (reporting that 8.7% of leave-takers in 2000 used public assistance to finance leaves).

<sup>9</sup> These states include Arizona, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Vermont, and Washington. See NAT’L P’SHIP FOR WOMEN & FAMILIES, STATE PAID LEAVE INITIATIVES IN THE 2004 AND PRIOR STATE LEGISLATURES: MAKING FAMILY LEAVE MORE AFFORDABLE (2004) [hereinafter LEAVE INITIATIVES] (reporting updates of state legislative developments in paid family leave), available at <http://www.nationalpartnership.org/portals/p3/library/paidleave/stateroundup2004.pdf> (last visited Nov. 18, 2004).

to provide paid parental or family illness leave.<sup>10</sup> In 2002, California became the first state in the nation to provide employees paid leave benefits not only for personal illness (including maternity leave), but also for parental bonding and caring for sick family members.<sup>11</sup> These developments make closer examination of paid family leave timely.

Although this Article deals exclusively with paid family leave policy, the goal of equalizing men's and women's respective contributions to both market work and family caregiving can only be achieved through a composite of interlocking social policies. For example, affordable, high-quality, publicly available childcare, while not a substitute for paid leave, is a critical part of the picture.<sup>12</sup> Effective antidiscrimination laws,<sup>13</sup> income tax policies that do not penalize dual-income married couples,<sup>14</sup> and a shorter

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<sup>10</sup> *E.g.*, A.B. 173, 2004 Leg., 211th Sess. (N.J. 2004) (proposing "Family Leave Insurance," which would expand existing TDI and UI programs to cover family illness and birth/adoption leaves, respectively, to be paid for by a payroll tax on workers); H.B. 2399, 2004 Leg., 58th Sess. (Wash. 2004) (would create "Family Leave Insurance," which would pay employees a flat-rate weekly payment of \$250 financed by taxing employers and employees one cent each per work hour); S.B. 6272, 2004 Leg., 58th Sess. (Wash. 2004) (same); H.B. 25, 2003 Leg., 22d Sess. (Haw. 2003) (would establish "Family Leave Benefits Insurance" to be financed by a payroll contribution by employees and employers totaling a maximum of two cents per work hour); S.B. 772, 2003 Leg., 22d Sess. (Haw. 2003) (same); S.B. 778, 2003 Leg., 22d Sess. (Haw. 2003) (would expand Hawaii's existing TDI program to include parental and family illness leaves); H.P. 567, 2003 Leg., 121st Sess. (Me. 2003) (proposing "Family Security Fund," which provides between fourteen and twenty-eight weeks paid maternity leave financed by up to ninety cents employee deduction per week plus matched employer contribution); S.P. 389, 2003 Leg., 121st Sess. (Me. 2003) (would establish "Temporary Disability and Family Leave Benefits Program," which would provide insurance covering leaves taken for birth, adoption, and family illness financed by equal contributions from employee and employer).

<sup>11</sup> California Family Temporary Disability Insurance Program, CAL. UNEMP. INS. CODE § 3301 (Deering 2004) (amending state disability compensation program, which previously provided compensation for individuals unable to work due to their own temporary illness or disability, including pregnancy and childbirth, to also include up to six weeks of compensation for leaves to care for an ill family member, or the birth, adoption, or foster care placement of a new child).

<sup>12</sup> On public childcare reform, see, for example, JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 185–235 (2003); DEBORAH L. RHODE, *JUSTICE AND GENDER* 129–31 (1989).

<sup>13</sup> On antidiscrimination litigation in the area of work-family conflict, see, for example, Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

<sup>14</sup> See, e.g., EDWARD MCCAFFERY, *TAXING WOMEN* 16–23 (1999); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 365–77 (1994) (showing how income tax laws are biased against secondary earners—overwhelmingly women—in two-earner families, thereby creating disincentives for women to choose market labor over unpaid home labor). Although the 2001 tax reforms reduced the so-called "marriage penalty," federal income tax treatment still creates incentives for second earners to opt out of the labor market. See Jamie Heller, *How New Tax Law Relieves Marriage Penalty*, WALL ST. J., June 4, 2003, at D2 (explaining how despite recent amendments to the federal tax code that purport to phase out the marriage penalty, the poorest and wealthiest families get less than the full benefit due to the limitation of the amendments to the fifteen percent tax bracket, and highlighting the persisting marriage penalties in the earned income tax credit, phaseouts, capital loss offset provisions,

workweek<sup>15</sup> are also key components. In addition, any paid leave policy we adopt must contain effective incentives for men to take leaves, a challenge I pursue in some detail below.<sup>16</sup> Thus, paid leave is not the only way to advance the goal of greater gender equality in the balance of work and family responsibilities, and paid leave cannot achieve such equality alone. Nevertheless, it is a crucial piece of the puzzle, deserving extended reflection in its own right.

The Article begins, in Part II, by analyzing why private markets do not (for the most part) provide paid family leave insurance. In Part III, I present my argument that the goal of increasing women's workforce attachment is a defensible basis on which to justify state intervention to create paid family leave, and to finance it in a way that spreads its costs across society. In Part IV, I turn to theoretical predictions and empirical findings on the labor market effects of paid family leave programs. Part V presents objections to government subsidized paid family leave. Part VI analyzes different methods of benefit financing and explains how cost-shifting affects who actually pays for a benefit. In Part VII, I explore reform options. I discuss some general features a paid leave program ought to have and illustrate with some examples of implementation models.

## II. STATE INTERVENTION AT THE WORK/FAMILY NEXUS

The state might aim to reinforce various models of the contemporary family, employing different policy instruments to achieve a variety of goals.<sup>17</sup> Thus, for example, the state might aim to increase national birth-rates.<sup>18</sup> It could do this by paying direct flat-rate cash benefits (not de-

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and other areas of the tax code).

<sup>15</sup> On shortening or increasing the flexibility of work hours, see GORNICK & MEYERS, *supra* note 12, at 147–84; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 100 (2000) (reviewing ethnographic studies describing working-class women's anxiety about leaving children in low-quality daycare and the strains of housework and the "split shift" on marital and family life); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1956–57 (2000) [hereinafter, Schultz, *Life's Work*]; Vicki Schultz & Allison Hoffman, *Precarious Work and Working Time: The Case for a Reduced Workweek in the United States* (to be published in yet untitled book, Judy Fudge & Rosemary Owens eds., forthcoming 2005); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 357–58 (2002).

<sup>16</sup> I discuss incentives for men to take leaves in more detail in Part VII, *infra*.

<sup>17</sup> A helpful overview of the issues discussed in this paragraph, in the context of European social policy experiments, can be found in Sheila B. Kamerman & Alfred J. Kahn, *Trends, Issues, and Possible Lessons, in CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3s: POLICY INNOVATION IN EUROPE* 201 (Sheila B. Kamerman & Alfred J. Kahn eds., 1991) [hereinafter CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3s].

<sup>18</sup> *See id.* at 204 (identifying France, Germany, and Hungary as having explicitly pronatalist policies); Anne Hélène Gauthier & Jan Hatzius, *Family Benefits and Fertility: An Econometric Analysis*, 51 POP. STUD. 295, 295 (1997) (citing France and Luxembourg as examples of countries that have in recent years adopted explicitly pronatalist policies).

pendent on wage income) to families with children.<sup>19</sup> Or, the state might seek to recognize and reinforce a particular conception of “family values” by supporting traditional single-earner husband-wife families.<sup>20</sup> It could do so by skewing benefits toward married couples with children that have one primary caregiver who is not working full time, or by providing subsidies designed to create equivalency between paid work and work in the home.<sup>21</sup> The state might instead aim to encourage women’s workforce participation, through such policies as public daycare.<sup>22</sup> Yet another goal might be to support good child development.<sup>23</sup>

In short, government policy can influence the family form by shifting the relative economic rewards attached to competing paths of behavior. This is so even for policies neutrally described as endeavoring to “expand choice”: if a state intervention makes a choice previously unavailable to some portion of the population financially more attractive, the effect will be to encourage individuals on the margin toward the new option. As an example, the work-family benefits policies of the past fifteen years in the former Federal Republic of Germany, touted expressly by the government as advancing the principle of free choice—i.e., that people rearing children should have a choice between working and staying home—created multiple financial incentives for mothers to remain in or return to the home rather than work.<sup>24</sup> This puts before us the question of the social objectives that might be achieved through paid family leave policies.

### A. *Current Wage Replacement for Family Leaves*

Currently, there are limited sources of financial support—aside from savings or spousal earnings—for workers who take job leaves for child-rearing or family caregiving purposes. American families with children

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<sup>19</sup> See Gauthier & Hatzius, *supra* note 18, at at 295 (finding that in a study between 1970 and 1990 of family policies in twenty-two member countries of the Organisation for Economic Co-Operation and Development, cash benefits had a positive but limited effect on fertility).

<sup>20</sup> Kamerman & Kahn, *supra* note 17, at 205 (citing Austria and Germany as having this objective).

<sup>21</sup> LILJA MÓSESDÓTTIR, *THE INTERPLAY BETWEEN GENDER, MARKETS AND THE STATE IN SWEDEN, GERMANY AND THE UNITED STATES* 54 (2001) (describing German legislation over the past fifteen years giving incentives to mothers to interrupt their labor force participation to care for babies and toddlers as well as elders and to work part time while raising older children); Christiane Schiersmann, *Germany: Recognizing the Value of Child Rearing*, in *CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3s*, *supra* note 17, at 51, 63–67 (giving examples of German policies established in the mid-1980s that reward non-working married mothers relative to working mothers and single mothers).

<sup>22</sup> Kamerman & Kahn, *supra* note 17, at 205 (citing Finland and Sweden as articulating gender equity and encouraging women’s workforce participation as express objectives of family benefit policies).

<sup>23</sup> *Id.* at 214–16 (discussing various economic support initiatives in European countries motivated at least partly by this objective).

<sup>24</sup> See *supra* note 20 and accompanying text.

do receive some federal subsidies financed through general revenues in the form of tax credits. The Child and Dependent Care Tax Credit allows working families with children to deduct a percentage of childcare expenses from federal taxes owed.<sup>25</sup> The Earned Income Tax Credit (“EITC”), a refundable tax credit for low-income working families, gives more generous credits to families with children.<sup>26</sup> The Child Tax Credit allows taxpayers to apply a credit against their tax amount on a per child basis.<sup>27</sup> None of these federal programs specifically addresses wage replacement for workers who themselves take leaves to care for family members.

State legislators have made some progress toward provision of wage replacement for family caregiving, although here, too, coverage is limited. Most workers who receive any wage replacement during a family-related leave from work do so by patching together maternity leave, sick leave, and paid vacation benefits.<sup>28</sup> Just over half of all workers in private industry have sick leave, i.e., accrued time off that an employee is entitled to in the event of a nonwork-related personal illness.<sup>29</sup> Sick leave itself provides partial wage replacement for the period of actual incapacitation due to childbirth, or in extraordinary cases, more extended pregnancy-related illness. Roughly one-third of workers in private industry have paid short-term disability insurance.<sup>30</sup> In a handful of states, these benefits are mandated through a TDI program.<sup>31</sup> These benefits are not, however, directed toward any broader parental leave or family illness leave objectives

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<sup>25</sup> The credit is a percentage, based on adjusted gross income, of the amount of work-related childcare and dependent-care expenses an individual paid to a care provider to work or look for work. *See* I.R.S. Pub. No. 503 (Dec. 11, 2003). There is a ceiling of \$3,000 for one qualifying dependent and \$6,000 for two or more qualifying dependents. *Id.*

<sup>26</sup> The EITC reduces the amount of federal tax owed by workers and can result in a tax refund for individuals if the credit exceeds the amount of taxes owed. *See* I.R.S. Pub. No. 596 (Dec. 31, 2003). Income and family size determine eligibility for the EITC. *See id.*

<sup>27</sup> 26 U.S.C. § 24 (2004). The amount of the credit, unlike the EITC, cannot exceed the amount of tax owed, and thus can result only in a lowered tax and not a refund.

<sup>28</sup> U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961–1995, at 12 tbl.G (2001) (indicating for leave taken after birth, 24.7% through maternity leave benefits, 8.8% through sick leave, 9.7% through vacation leave, and 1.0% through “other paid leave”).

<sup>29</sup> Fifty-nine percent of employees in private establishments are covered by paid sick leave plans. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USDL 04-53, EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2004, at 12 tbl.8 (2004) [hereinafter EMPLOYEE BENEFITS], available at <http://www.bls.gov/ncs/ebs/sp/ebsm0002.pdf> (last visited Nov. 18, 2004).

<sup>30</sup> In 2004, 39% of workers in private industry were covered by short-term disability benefits. *Id.* at 16 tbl.12. Short-term disability benefits are an insurance benefit funded by contributions by the employer or employee (or both). Workers may combine sick leave and short-term disability benefits to increase the duration or amount of coverage.

<sup>31</sup> Five states (California, Hawaii, New Jersey, New York, and Rhode Island) and Puerto Rico currently have TDI programs. EMPLOYMENT & TRAINING ADMIN., U.S. DEP’T OF LABOR, TEMPORARY DISABILITY INSURANCE 8-1 (2004) [hereinafter TEMPORARY DISABILITY], available at <http://workforcesecurity.doleta.gov/unemploy/uilawcompar/2004/temporary.pdf> (last visited Nov. 18, 2004). Of workers in private industry covered by short-term disability benefits in 2004, 16% (about 6% of all workers) were given the benefits because of state mandates or public provision. EMPLOYEE BENEFITS, *supra* note 29, at 22 tbl. 18.

such as extended leaves by birth mothers who have medically recuperated from childbirth for purposes of bonding with their newborns, leaves by fathers or adoptive parents, or leaves to care for sick family members. Some states have passed laws requiring employers that have sick leave plans to permit employees to use their accrued benefits to cover work absences to care for sick family members.<sup>32</sup> Because most of these statutes only apply to public employees, and also because many private employees are not actually covered by sick leave plans, their impact is limited. Two states provide low-income workers some wage replacement to care for newborns or newly adopted children.<sup>33</sup> Also, a few states interpret their unemployment insurance laws to allow workers forced to quit by reason of pregnancy or work-family conflict to collect UI benefits, but for the most part, such work interruptions are considered voluntarily quits and foreclose benefits.<sup>34</sup> With the exception of California, which I will discuss in more detail below, there are no public insurance programs comparable to UI or TDI that are designed to provide workers with wage replacement for family-care needs beyond pure maternity-related personal disability.

In his final days in office, President Clinton directed the Department of Labor to develop regulations that would allow states to use UI trust fund monies to provide partial wage replacement to parents following the birth or adoption of a child.<sup>35</sup> The resulting regulation, Birth and Adoption Unemployment Compensation (“BAA-UC”), enabled states to amend their unemployment compensation statutes to exempt workers who voluntarily leave a job for birth- or adoption-related reasons from the usual requirement

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<sup>32</sup> States that permit extension of these rights to private employees are California, CAL. LAB. CODE § 233 (2004); Connecticut, CONN. GEN. STAT. § 31-511I (2003) (amended 2004); District of Columbia, D.C. CODE ANN. § 32-502 (2004); Hawaii, HAW. REV. STAT. § 398-3 (2003); Minnesota, MINN. STAT. § 181.9413 (2003) (applicable only for ill children); Oregon, OR. REV. STAT. §§ 659A.150–695A.186 (2003) (applies to use of paid vacation leave); Vermont, 21 VT. CODE ANN. § 472 (2004); Washington, WASH. REV. CODE § 49.12.270 (2004); Wisconsin, WIS. STAT. § 103.10 (2003).

<sup>33</sup> Missouri Early Childhood Development Fund, MO. ANN. STAT. § 313.835 (1992); Montana At-Home Infant Care Program, MONT. CODE ANN. § 52-2-710 (2003).

<sup>34</sup> See Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 142 n.48 (1996) (reviewing decisions in several jurisdictions finding work-family conflict to be cause for quitting); Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 317 n.107 (1995) (same); Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REFORM 41, 44–55 (1996) (describing how state unemployment compensation law treats maternity leave); David S. Rosettenstein, *Unemployment Benefits and Family Policy in the United States*, 20 FAM. L.Q. 393, 398–403 (1986) (asserting that many state unemployment compensation law systems prioritize the market over family).

<sup>35</sup> Press Release, The White House, Office of the Press Secretary, President Clinton Announces Actions to Offer Paid Leave to America’s Working Families (June 9, 2000), available at [http://clinton5.nara.gov/WH/New/html/20000612\\_1.html](http://clinton5.nara.gov/WH/New/html/20000612_1.html) (last visited Nov. 18, 2004).



that they be “able and available” for work to collect benefits.<sup>36</sup> Two years later, the Bush administration repealed the BAA-UC,<sup>37</sup> citing, inter alia, concerns about the solvency of state UI trust funds.<sup>38</sup> As mentioned, however, several states are still pursuing legislative options for expanding or creating social insurance programs to provide paid family leave.<sup>39</sup>

Private establishments offer some coverage through voluntary programs, but it, too, is quite limited. A national survey of private establishments (FLMA-covered and noncovered) in 2000 found that fewer than half (42%) provided fully or partially paid maternity leave benefits covering the period of physical incapacitation and recuperation immediately surrounding childbirth.<sup>40</sup> Still smaller percentages reported offering workers fully or partially paid leaves of absence to care for a newborn (31%) or seriously ill family member (31.8%).<sup>41</sup> Eligibility limitations are likely to mean that actual reciprocity of paid benefits is lower than the prevalence of employer policies. A 1996 survey by the U.S. Census Bureau found that only about one-third of women who worked during pregnancy actually received pay during their post-birth work absence.<sup>42</sup> Furthermore, the paid benefits that are available may be quite limited in duration. A study by economists Jacob Klerman and Arleen Leibowitz found that although a relatively high proportion of working women who took time off work following the birth of a child received paid benefits in the immediate post-birth period, reciprocity sharply declined thereafter.<sup>43</sup>

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<sup>36</sup> Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2000).

<sup>37</sup> Unemployment Compensation–Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003).

<sup>38</sup> Unemployment Compensation–Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 233 (proposed Dec. 4, 2002).

<sup>39</sup> *E.g.*, H.B. 25, 2003 Leg., 22d Sess. (Haw. 2003) and S.B. 772, 2003 Leg., 22d Sess. (Haw. 2003); S.B. 778, 2003 Leg., 22d Sess. (Haw. 2003); H.P. 567, 2003 Leg., 121st Sess. (Me. 2003); S.P. 389, 2003 Leg., 121st Sess. (Me. 2003); A.B. 173, 2004 Leg., 211th Sess. (N.J. 2004); H.B. 2399, 2004 Leg., 58th Sess. (Wash. 2004.), S.B. 6272, 2004 Leg., 58th Sess. (Wash. 2004).

<sup>40</sup> BALANCING THE NEEDS, *supra* note 5, at tbl.5.6. A further 15.4% of establishments stated that pay would depend on circumstances. *Id.*

<sup>41</sup> *Id.* Again, some establishments stated that pay would depend on circumstances (18% for a newborn and 23% for a family member).

<sup>42</sup> U.S. CENSUS BUREAU, *supra* note 28, at 12 tbl.G.

<sup>43</sup> Jacob Alex Klerman & Arleen Leibowitz, *The Work-Employment Distinction Among New Mothers*, 29 J. HUM. RESOURCES 277, 299 tbl.A3 (1994) (showing that 41% of employed mothers were on paid leave when their infant was one month old, and 16% were on paid leave when their infant was two months old, and by the third month, less than 5% were receiving any form of wage replacement). These data are fairly old (1986–88), but are consistent with the continuing practice of making benefits linked to physical recuperation from birth more available than more extended family leave benefits.

*B. Why Private Markets Fail To Provide Paid Family Leave*

An important question in thinking about any labor market intervention is why the practice in question does not arise in private markets. Many benefits in the United States are linked to employment, with the employer either self-insuring or acting as an intermediary between the workers and an insurance provider. In theory, then, workers will bargain for benefits they desire as part of their employment compensation packages.

Perhaps, then, the limited provision of insurance to cover leaves of absence to deal with family illness or caring for infant children reflects the fact that workers do not want such insurance. If paid leave were important to them, those workers who expect to have children or experience other family-related work conflicts could elect to substitute some wage compensation now for a promise of guaranteed wage replacement at a later time when work interruption occurs. However, there are a number of reasons why we might fail to observe this kind of bargaining even assuming family leave is valuable to some workers.

First, as readers of the literature on labor market regulation more generally will recognize, scholars have identified a number of information-based bargaining failures that might explain private market failures to provide workplace benefits that workers desire.<sup>44</sup>

Some explanations turn on mistakes workers are apt to make about their own interests. Workers might, for example, miscalculate their downstream needs because of poor information or because cognitive bias leads them to systematically underestimate future needs.<sup>45</sup> They might also systematically discount the value of future, as opposed to present, income, a phenomenon known to economists as “hyperbolic discounting.”<sup>46</sup> In addition, *ex ante* entitlements such as wealth might affect the value workers place on receiving wage versus non-wage compensation. Low-wage workers, for whom cash is in shorter supply, may believe that higher wages in the present are preferable to the promise of benefits at some future time, although they may later regret having made this tradeoff.<sup>47</sup> In other cases,

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<sup>44</sup> For general reviews of the extensive literature on bargaining failures in labor markets, see RICHARD EDWARDS, *RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA* 42–76 (1993); PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 74–78 (1990).

<sup>45</sup> See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1476–79 (1998) (summarizing research findings on the effect of various kinds of informational and cognitive failures that might lead to poor labor market decisions by workers); Deborah Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 *U. CHI. L. REV.* 1275, 1297–1311 (1991) (discussing savings failures caused by “myopia” (the irrational tendency to favor present over future consumption), time-inconsistent preferences, and impulsiveness).

<sup>46</sup> See generally David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 *Q. J. ECON.* 443 (1997).

<sup>47</sup> Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Antidiscrimination Provisions Desirable?*, 55 *U. CHI. L. REV.* 790, 808–09 (1988) (suggesting

workers who desire family leave benefits might not demand them for fear that they will signal to their prospective employer that they are likely to need them (and thus might be less reliable than other workers). Conversely, a desire to avoid attracting a disproportionate share of workers likely to need leaves may lead employers to resist offering benefits that workers would be willing to purchase.<sup>48</sup>

Collective action problems can also prevent workers from bargaining toward the outcome they desire: no one worker may be willing to incur the upfront costs of pressing for a new kind of benefit, and no good mechanism may be in place to help workers coordinate to overcome this problem. The fact that some workers have no need for family leave policies may make collective action even more difficult. Unions, although they may serve a coordination role, only represent a small percentage of American workers.<sup>49</sup>

In addition to these general labor market bargaining failures, family leave benefits may pose special challenges for private insurance markets. The two kinds of family leave benefits, family illness leave and parental leave, each present a distinct set of problems.

First consider family illness leave. When a worker's family member unexpectedly becomes ill, and the worker takes time off to provide care, the resulting lost wages may impose significant hardship. Protection against the risk of unexpected changes in fortune is traditionally the province of insurance, the social device that pools risks.<sup>50</sup> Insurance forms the backbone of healthcare financing in the United States.<sup>51</sup> For example, about 60% of Americans have private health insurance, most of them through employer plans.<sup>52</sup> Most employers that offer health insurance also offer wage re-

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that rank-and-file employees may place less value on pension benefits, at the expense of salary, than more highly compensated employees).

<sup>48</sup> David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1618 (1996) (suggesting that "firms may offer less extensive insurance coverage than workers would optimally purchase, out of a fear that more generous [coverage] would attract high-risk workers").

<sup>49</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS IN 2003, at 1 (2004) (citing that 12.9% of American workers in 2003 were represented by unions). Note that a 2004 survey of California employees found that unionized employees were 3.6 times more likely than nonunion employees to provide family and medical beyond those required by law. See RUTH MILKMAN & EILEEN APPELBAUM, PAID FAMILY LEAVE IN CALIFORNIA: NEW RESEARCH FINDINGS 6 (UCLA Institute of Industrial Relations, Research Brief, 2004).

<sup>50</sup> ROBERT RIEGEL & JEROME S. MILLER, INSURANCE PRINCIPLES AND PRACTICES 26 (4th ed. 1959) ("Insurance is a social device whereby the uncertain risks of individuals may be combined in a group and thus made more certain, small periodic contributions by the individuals providing a fund out of which those who suffer losses may be reimbursed.")

<sup>51</sup> David M. Cutler & Richard J. Zeckhauser, *The Anatomy of Health Insurance*, in 1A HANDBOOK OF HEALTH ECONOMICS 563, 566 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000).

<sup>52</sup> *Id.* at 570 tbl.1 (showing 56% through employer-sponsored plans, 6% through direct purchase). Roughly 25% of the population is insured through the public sector (e.g., Medicare and Medicaid), and 16% remains uninsured. *Id.* The predominance of employer sponsorship in the private health care market is likely the result of two factors: (1) the tax-free nature of employer-provided insurance contributions, as compared with wages, which are

placement benefits for personal illness (sick leave).<sup>53</sup> In addition, almost all employer plans offer family health insurance coverage.<sup>54</sup> One might think that a plausible extension of family coverage would be insurance covering wage loss in the event of job interruptions caused by family illness, analogous to personal sick leave. Like sick leave, paid family illness leave would cover the opportunity costs (lost wages) of illness rather than the direct costs (medical fees, hospital bills). Yet paid family illness leave is uncommon. What makes it so scarce in private markets?

Insurance in private markets uses an *actuarial* mechanism. The amount an individual is required to contribute to the pool, called the premium, varies with the level of risk insured. The cost of the premium cannot exceed the monetary equivalent of the expected disutility of self-insuring.<sup>55</sup> If a person's risk of experiencing a hazard is 100%, she will be unable to purchase private insurance. The market (or lack thereof) will simply reflect the fact that the premium for purchasing coverage would be the same as (or even higher than, given transaction costs) the cost of saving for the inevitable occurrence. An example of the kind of risk that might be excluded from private insurance because the likelihood of its occurrence approaches certainty is a preexisting condition such as a congenital illness.

From the outset, insurance against family illness-related work leaves would need to contemplate a much higher likelihood of hazard than coverage of personal illness leaves. Instead of merely contemplating the risk of a particular worker suffering a debilitating illness or injury, the pool would need to consider the probability of a debilitating illness or injury on the part of the worker, her partner, her parents, or her children. In addition, the average risk level of each individual whose illness might trigger eligibility for benefits would likely increase. On the whole, adult workers are probably more robust and self-sufficient than the children, elders, and disabled adults who might depend on them. Thus the aggregate level of risk in the pool would increase as the scope of coverage broadened, making insurance against these risks more costly to supply.

In addition, information problems would pose formidable barriers to private family illness insurance. Information problems can often cause failures in insurance markets. If insurance companies had full information about every applicant, they would be able to charge each person a premium that

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taxed, and (2) the likelihood of pooling economies associated with group insurance purchases. Jonathan Gruber, *Health Insurance and the Labor Market*, in 1A HANDBOOK OF HEALTH ECONOMICS, *supra* note 51, at 645, 651.

<sup>53</sup> See Gruber, *supra* note 52, at 653 tbl.2 (showing that 71.1% of firms that offered health insurance in 1993 also offered short-term disability benefits).

<sup>54</sup> See *id.* (showing that 91% of employers that offered health insurance in 1993 also offered family coverage).

<sup>55</sup> A competitive insurance premium would be  $\pi_i = p_i L + T$ , where  $p_i$  is the probability of the insured event occurring,  $L$  is the magnitude of the insured loss, and  $T$  represents the transaction costs.

perfectly reflected the risk of her need for indemnification. “Low-risk” individuals would pay low premiums, and “high-risk” individuals would pay high premiums. As mentioned above, some individuals—those certain to experience the hazard—would be priced out of the market entirely. In many areas of insurance, insurers do a good enough job of estimating the risks of applicants that they are able to offer insurance at a price that is both affordable to purchasers and profitable to insurers.

Where good information is not available to insurers, however, they may stay out of the market.<sup>56</sup> One informational barrier to insurance is the problem of *adverse selection*. If the insurer is unable to distinguish between high- and low-risk individuals (perhaps because risk is not obvious to outside observers, and high-risk individuals have an incentive not to disclose information likely to increase their insurance rates), it will be unable to price insurance efficiently. Averaging the price of premiums is no solution, because low-risk individuals—assuming they know that they are low-risk individuals—are likely to find the “averaged” premiums higher than they are willing to pay and drop out of the market.<sup>57</sup> As prices charged to those left behind rise, and more participants drop out with each successive increase in premiums, the market unravels.

When a worker is herself incapacitated due to illness or injury, the decision of whether to work is, in theory, relatively nondiscretionary. The question for the insurer is authentication of the claim of inability to work, usually done through a doctor’s verification of the existence and severity of the illness. When a worker’s family member becomes ill or disabled (even assuming adequate verification), the decision as to whether the *insured worker* must absent herself from work to care for the ill family member may involve a weighing of personal priorities and alternative options. This heightens the potential for adverse selection problems due to the insurer’s inability to anticipate what kinds of decisions different workers are likely to make.

Another likely barrier to family illness leave is *moral hazard*. One who must bear the full costs of her behavior will take precautions to reduce risk and stem losses. A person with insurance pays only the cost of premiums, rather than the full cost of loss. Because losses are cheaper for someone who has insurance, she may take fewer precautions. This phenomenon, known as moral hazard,<sup>58</sup> would not be a problem if insurers

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<sup>56</sup> My discussion here of adverse selection, moral hazard, and the potential role for the state in providing insurance relies extensively on Nicholas Barr, *Economic Theory and the Welfare State: A Survey and Interpretation*, 30 J. ECON. LITERATURE 741, 750–53 (1992). For more extensive citations, see Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 360–65 (2001) [hereinafter Lester, *Wealth Redistribution*].

<sup>57</sup> Offering two different premiums also fails for similar reasons. Barr, *supra* note 56, at 751–52.

<sup>58</sup> Economists distinguish further between *ex ante* moral hazard (referring to the situation before the hazard) and *ex post* moral hazard (referring to the avoidance of further

could fully observe people's levels of precaution and price premiums or restrict coverage accordingly. However, insurers often lack full information about individual precaution, and so they use copayments, deductibles, partial indemnification, or other devices to make insured individuals bear some of the costs of their own carelessness. If an insured event is very psychologically or physically costly (e.g., serious personal injury) the insured person's fear of harm may naturally temper moral hazard. But sometimes a person *prefers* that an insured event occur; the only barrier is that without insurance, it costs more than she is willing to pay. For example, elective cosmetic surgery is often excluded from health insurance policies for this reason.<sup>59</sup> In such cases, problems of moral hazard will usually make insurance impossible.

If wage replacement were available for family illness leave, the insured's incentive to avoid the insured event—in this case lost wages due to job interruption—would decline. For some workers, wage replacement would have no effect on their decisions. Sometimes, the decision to take a family illness leave as a practical matter is just as nondiscretionary as in the run of personal-illness cases: the worker may prefer not to interrupt her employment, but great potential hardship to a family member lies in the balance, with no realistic alternatives available. But in other cases, wage replacement would tip the balance for workers who wanted to take leave but felt they could not afford it. A private insurer may decide, for this reason, that paid family leave, like elective cosmetic surgery, presents too great a moral hazard problem. Paid family leave insurance may well trigger some inefficient decisions. For example, a worker whose productive value is \$300 per day might decide to take time off of work to care for an ill family member instead of hiring an external caregiver at a cost of \$100 per day. Insurance against wage replacement would make it easier to do this. As I will discuss in detail later, there may be good reasons, beyond efficient allocation of caregiver human capital, for making paid leave available even to this worker. For the moment, however, my point is that a private insurer might worry about inefficient overutilization of benefits and decline to enter this market.

Next, consider paid parental leave. From the outset, actuarial insurance (i.e., insurance against uncertain risk) seems unsuited to wage losses associated with parental leaves.<sup>60</sup> Squeezing the event of bearing or adopting

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losses after the hazard). See Peter Zweifel & Willard G. Manning, *Moral Hazard and Consumer Incentives in Health Care*, in 1A HANDBOOK OF HEALTH ECONOMICS, *supra* note 51, at 409, 413. Ex post moral hazard is at issue in the context of job leaves.

<sup>59</sup> Barr, *supra* note 56, at 780.

<sup>60</sup> Of course, some pregnancies are unplanned (and some unplanned pregnancies are unwanted). In 1994, 49% of pregnancies in the United States were unintended, meaning that they ended in abortion, the woman had wanted no children at that time, or she had wanted no more children ever. Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 26 tbl.1 (1998). Of these unintended pregnancies, 54% ended in abortion. *Id.*

a child into actuarial parameters encounters overwhelming problems of moral hazard. Whereas illness of a worker is usually unexpected and psychologically costly, as is a worker's need to miss work to care for family members, the birth or adoption of a child is normally anticipated and desired, even if the timing cannot be planned with precision.<sup>61</sup> And, unlike an illness, which can potentially strike any worker, bearing or adopting a child is certain *not* to happen for some workers. This stands in contrast to sick leave, in which even those who will never use benefits do not know this from the start, and thus will probably get some value from feeling protected in the event of possible bad luck.

With parental leave, the kind of need in question is not so much indemnification against unexpected, unwanted events as it is a need to ensure that adequate funds are available for workers to manage predictable, and often chosen, family demands that interrupt work. In other words, there is a need for redistribution of a worker's own income across the life cycle. One question is why workers do not simply borrow money or save for predictable interruptions in wage income due to the birth of a child. I have already discussed various cognitive failures that may lead workers to underestimate their future needs. In addition, however, even assuming perfectly rational planning, workers with families may have a difficult time accumulating savings to protect themselves against this kind of loss. For most families, the arrival of children corresponds to the parents' early career years, when wages are relatively low, and the opportunity to set aside surplus earnings for savings is more constrained. These workers, or other workers who have very low incomes throughout their working years, may find that the cost of daily life leaves them without savings despite a desire to save. In fact, Americans are very poor savers.<sup>62</sup> Recall that financial constraints prevent some workers from taking leaves, and workers who do take leaves have higher incomes and salaries than those who do not.<sup>63</sup> This suggests, although it does not prove, that for workers who do not take leave, their reasons may go beyond simply having other fixed costs like a mortgage or a college tuition debt resulting from other projects that enhance their quality of life and opportunity. Finally, capital markets are

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<sup>61</sup> See, e.g., Meryl Frank, *Costs, Financing, and Implementation Mechanisms of Parental Leave Policies*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 315, 320 (Edward F. Zigler & Meryl Frank eds., 1988) [hereinafter *THE PARENTAL LEAVE CRISIS*] (stating that a program of salary replacement for infant care does not meet the definition of insurance because pregnancy is typically a planned event with a known time and duration, and thus there is no "risk" against which to insure).

<sup>62</sup> See ERIC ENGEN & JONATHAN GRUBER, *UNEMPLOYMENT INSURANCE AND PRECAUTIONARY SAVINGS* (Nat'l Bureau of Econ. Research, Working Paper No. 5252, 1995) (showing that the median twenty-five- to sixty-two-year-old worker has gross financial assets equal to less than three weeks' income).

<sup>63</sup> See *supra* note 7.

not widely accessible to workers who wish to borrow against the promise of future earnings.<sup>64</sup>

In sum, private markets generally fail to provide family leave insurance for several reasons—some based on information or cognitive failures that may arise in all forms of bargaining between workers and employers, and some based on distinct challenges associated with pooling risks efficiently for this kind of insurance. It is possible that even if we could correct all market failures, we would conclude that private markets do undersupply paid leave. This would be so, for example, if paid leave benefits advance goals *aside from* aggregate efficiency that we nonetheless deem to be socially valuable.

### C. *The Role of State Intervention*

Where private markets fail to supply needed economic security—whether due to employment-related bargaining failures, private savings and capital market failures, insurance market failures, or other reasons—the state can play a role, either through public provision or by mandating some form of private provision. However, state intervention is not justified simply because private markets do not provide particular forms of economic security and state provision (or facilitation) is feasible. The normative desirability of compulsory provision as well as the particular form of compulsory provision must be defended.

Assuming private markets produce less paid leave than society deems desirable, the state can increase its prevalence in a range of ways. The choice of mechanism depends on our reasons for valuing the benefit. If we want to encourage some kind of behavior because we believe people will otherwise make poor decisions (perhaps because of informational or cognitive failures), the state can create incentives simply to correct “error” and encourage better personal decisions. We might, on the other hand, want to encourage behavior that has value beyond the benefit to those directly affected. In such a case, we may wish to finance the program in a way that deliberately spreads its costs across society. The redistributive level of a program turns both on who receives benefits and how revenues are generated to pay for benefits.

To illustrate, we may decide that it is valuable for individuals to have funds to pay for out-of-pocket medical expenses during the course of the year, but find that individuals are generally poor savers and tend not to save for this purpose. One way the state could ameliorate this problem is to offer tax incentives to individuals who save. Federal Health Savings

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<sup>64</sup> See Stephen P. Zeldes, *Consumption and Liquidity Constraints: An Empirical Investigation*, 97 J. POL. ECON. 305, 305 (1989) (finding that a significant portion of the population is constrained in the ability to borrow against the promise of future labor income).



Accounts are a version of this.<sup>65</sup> Here, the benefit is available only to those who make contributions and only in the amount they contributed. The tax incentive essentially encourages self-insurance. Redistribution occurs, but is limited to the tax savings enjoyed by those who participate in the program.

By contrast, the government may decide to create a program that is more aggressively redistributive. For example, the government may decide to make health insurance available to those who would be excluded from private markets on the basis of their health characteristics. As explained in the foregoing discussion, people with very high-risk characteristics will generally be unable to purchase private insurance; they will need to self-insure. By mandating across-the-board participation in an insurance pool, the government could force broader spreading of risks than we would see in a well-functioning private insurance market.<sup>66</sup> The state might do this believing that everyone materially benefits if economic security is widely distributed, or it might do so as a way to increase equality or social solidarity.<sup>67</sup> Medicare, which provides health insurance to elderly and disabled workers but is financed by a tax on *all* workers, depends on significant redistribution between low-risk and high-risk individuals.<sup>68</sup>

Although I have illustrated this with only two examples, a wide spectrum of redistribution is possible. The point is that any proposal for state-facilitated paid family leave requires an analysis of what motivates the

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<sup>65</sup> 26 U.S.C.S. § 223 (2004). The program allows an individual to make a tax deduction on an amount placed into a trust that is set up to allow her to pay for medical expenses of named beneficiaries. The maximum amount of the deduction is based on the yearly sum of monthly payments placed into the account, with monthly payments limited according to the type and level of deductible of their health insurance plan.

<sup>66</sup> Recall that in private actuarial insurance, individuals voluntarily pool their resources. When a member of the pool suffers a covered loss and therefore draws on the pool, there is redistribution between members of the pool. This constrained risk-spreading within a risk-adjusted (actuarial) insurance pool is part of a bargain between participants who have comparable risk characteristics or have paid different premiums based on their risk characteristics.

<sup>67</sup> A number of scholars have suggested that morality requires the state to provide health insurance to “high-risk” people who would be excluded from private insurance. *See, e.g.,* Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146, 165, 175 (1981) (applying John Rawls’s theory of justice to the health care context and concluding that health care institutions should be included on the list of basic institutions regulated by a fair equality of opportunity principle, and that no persons should face barriers, financial or otherwise, to initial access to the health care system); Donald W. Light, *The Practice and Ethics of Risk-Rated Health Insurance*, 267 JAMA 2503, 2507–08 (1992) (arguing that actuarial fairness in health insurance is morally unfair because it reduces access to life opportunities and increases suffering for those disadvantaged by risk, pain, and illness); Deborah A. Stone, *At Risk in the Welfare State*, 56 SOC. RES. 591, 623–33 (1989) (arguing that the use of health-risk classification for rationalizing health care treats disadvantaged individuals as undeserving and saddles those who are already in need with additional burdens). On the potential for universalistic social insurance schemes to increase social solidarity by incorporating both lower and middle classes, see GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 31–33 (1990).

<sup>68</sup> Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 226–27 (2003) (commenting on the high degree of cross-subsidization between the healthy and the sick in Medicare due to the fact that it is funded by a payroll tax that does not distinguish between individuals based on health risks).

proposal. The underlying normative justifications for intervention will have important implications for program design, in particular, how broadly the costs of the program should be shared. With that in mind, let us turn to the question of why a more equal distribution between men and women of family care obligations and participation in paid employment is important and how paid leave can help to achieve this goal.

### III. WOMEN, FAMILY CARE, AND LABOR MARKET PARTICIPATION

In this Part, I analyze the economic evidence that there is gender inequality in existing work and family arrangements. Second, I analyze why this inequality matters. In part, I argue that equalization of burdens and benefits at the work/family nexus is consistent with broader social equality ideals, and as such is something that all members of society have an interest in achieving. I also argue, based on psychological and sociological evidence, that participation in paid employment can increase women's capacity to flourish.

#### A. Bonding, Family Health, and Children as a Collective Concern

A number of scholars have defended family leave on the basis of its potential to improve child and elder welfare. A sustained period of parental care for a newborn infant would give working parents an opportunity to care for and bond with infant children. This bonding between parent and child may have distinctive benefits for both—a sense of personal achievement and intimacy on the part of the parent, and improved health on the part of the infant.<sup>69</sup> In addition, parents who are able to minimize financial strain while caring for infants may be better able to reduce family stress and create a safe, well-functioning household.<sup>70</sup> In the case of sick children, studies find that the presence of a parent lessens the severity of symptoms and speeds recovery.<sup>71</sup> Paid leave policies are themselves posi-

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<sup>69</sup> See DORIANE LAMBERT COLEMAN, FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM 48–50 (2002) (discussing attachment theory and its detractors); T. Berry Brazelton, *Issues for Working Parents*, in THE PARENTAL LEAVE CRISIS, *supra* note 61, at 36, 39 (claiming that there is likely to be a significant improvement in a mother's feelings of personal achievement and intimacy with her baby if she is able to remain home from work for at least three months after birth); C. R. Winegarden & Paula M. Bracy, *Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models*, 61 S. ECON. J. 1020 (1995) (studying the effect of increased generosity in paid maternal leave policies in seventeen OECD countries between 1959 and 1989 and finding an inverse correlation between duration of paid maternity leave available and infant mortality).

<sup>70</sup> Robin Harwood, *Parental Stress and the Young Infant's Needs*, in THE PARENTAL LEAVE CRISIS, *supra* note 61, at 55 (reviewing studies finding that high levels of parental stress may hinder parents' ability to be emotionally responsive to their infants, suggesting that among the most vulnerable are low-income or single working parents, and arguing that a curtailed postpartum work schedule without financial loss may significantly reduce the stressfulness of this time period).

<sup>71</sup> Comm. on Hosp. Care, Am. Acad. of Pediatrics, *Family-Centered Care and the Phy-*

tively correlated with better child health outcomes, perhaps because they increase working parents' ability to care personally for their children, and this care is better than the alternatives relied on in its absence.<sup>72</sup> At a minimum, then, these arguments suggest that individuals who lack the savings to take a leave from work to care for their infants or sick children might be better off if the state intervened to encourage better financial planning.

Some defend state involvement in mandated paid leave policies on the basis that the benefits to children have broader value to society. They argue that caring for infants and children is a collective concern because it is an investment in the future of society: healthy, well-adjusted children will eventually become good citizens and workers.<sup>73</sup> Some emphasize burdens on caregivers more generally, arguing that society owes a debt to those who perform these society-preserving labors.<sup>74</sup> They make the liberal claim that caregiving labor is a public responsibility because it ensures the conditions for children's development into autonomous adults.<sup>75</sup>

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*sician's Role*, 112 PEDIATRICS 691, 693 (2003) (reviewing medical literature showing that family presence while children are sick, inter alia, decreases child anxiety, speeds recovery, and reduces need for medication). See generally JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT* 57 (2000) (citing several studies finding a positive correlation between the presence of a parent and health outcomes of sick children).

<sup>72</sup> Christopher Ruhm, *Parental Leave and Child Health*, 19 J. HEALTH ECON. 931, 933, 947 (2000) (finding rights to paid parental leave in sixteen European countries over twenty-five-year period associated with substantial decreases in pediatric mortality, but no relationship between rights to unpaid leave and infant mortality).

<sup>73</sup> Nancy Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 345-47 (1993) (defending public subsidy of family leave policies on the grounds that children are a societal concern, benefit, and investment in the future for all of us); Marianne A. Ferber, *Commentary on Chapter 5*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 162, 162 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) (arguing that parental leaves are useful because children will do better when cared for in their home for some months after birth, and such children will grow up to be productive workers and good citizens); Young, *supra* note 1, at 158 (defending state-subsidized paid leave policies on the basis that society has an economic interest in the well-being of its children). But see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How High the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753, 1775-78 (2001) (criticizing efforts to characterize children as "public goods" to justify subsidies to parents); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 192-95 (2001) (criticizing arguments that characterize children as the next generation of workers to justify subsidies). See generally Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 19 (2000) (arguing that caretaking labor provides for citizens, voters, consumers, students, and others who populate state institutions, and because these institutions depend on such labor, it should be compensated by the state).

<sup>74</sup> See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 161-64 (1995) (arguing that society must recognize the material costs and consequences of the uncompensated caretaking burden borne largely by women); Fineman, *supra* note 73, at 18-19 (arguing that caretaking labor is an unrecognized subsidy to all of society and as such should be compensated by the state).

<sup>75</sup> See, e.g., Linda McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1683 (2001) (arguing that care for children, which fosters children's capacity to live successful lives and be good citizens, is a

In the case of elders, a family caregiver can assist in many of the tasks necessary for daily living, but can also be a source of emotional support.<sup>76</sup> The responsibility of giving personal care to disabled elders can be extremely stressful for family members.<sup>77</sup> Easing the financial burden of taking time away from work to provide care, and thus reducing some of this stress, may improve the health of both the ill family member and the worker who gives care. Improving the life conditions of disabled elders and their caregivers in this way also may redound to the benefit of society as a whole by reducing the social burden of health care.

These arguments have some force, but the question remains why *paid leave* policies, as opposed to other policies that might advance the same ends, are desirable. Society might enjoy the benefits listed above to an even greater degree if social policy were designed to encourage single-earner partnerships: a financially supported adult staying in the home could devote greater time than a worker to child and eldercare. Alternatively, we might create a more comprehensive infrastructure for externally provided caregiving, such as publicly provided daycare, or state-subsidized home healthcare and eldercare provision. Paid leave, although it may facilitate parent-child bonding and family health, may not, in fact, be the *best* method for maximizing these goods. My defense of paid family leave instead rests principally on other normative goals: increasing labor market equality and enhancing women's autonomy.

### B. Women, Caregiving, and the Family Gap

Although estimates vary somewhat across studies, researchers consistently find that women spend significantly more time than men engaged in caregiving activities for children<sup>78</sup> and the disabled elderly.<sup>79</sup> Many women

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public value and responsibility).

<sup>76</sup> Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 386-87 (1984-85) (arguing that families can provide not only the physical care that would be available in an institutional setting, but also love, intimacy, affection, and solidarity).

<sup>77</sup> *Id.* at 387; Lynn M. Martire & Mary Ann Parris Stephens, *Juggling Parent Care and Employment Responsibilities: The Dilemmas of Adult Daughter Caregivers in the Workforce*, 48 SEX ROLES 167 (2003).

<sup>78</sup> See Joseph H. Pleck, *Paternal Involvement by U.S. Residential Fathers: Levels, Sources, and Consequences*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 66, 71 (Michael E. Lamb ed., 3d ed. 1997) (meta-analysis of research findings during the mid-1980s and early 1990s, estimating that fathers spend an average of 43.5% of the time that mothers spend directly engaged in childcare activities, and that their accessibility, defined as availability to the child in the absence of direct involvement, is on average 65.6% of the accessibility of mothers). More recently, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL 04-1797, TIME-USE SURVEY—FIRST RESULTS ANNOUNCED BY BLS, at tbl.7 (2004), available at <http://www.bls.gov/tus> (last visited Nov. 18, 2004) (reporting results of 2003 survey of American adults in households with children under eighteen years of age, which found that men spent 46% of the time women did engaged in the primary activity of caring for household children).

<sup>79</sup> See Robyn I. Stone & Peter Kemper, *Spouses and Children of Disabled Elders: How*

with caregiving obligations also hold paid employment.<sup>80</sup> Even when they are working full time, women still invest considerably more time than men caring for their children and disabled parents.<sup>81</sup> For many women, though, family care obligations lead them to loosen their attachment to the workforce. Women are more likely than men to interrupt work or quit their jobs to care for children or parents.<sup>82</sup> In addition, some women are deterred from working at all because of these obligations.<sup>83</sup> Decisions within the heterosexual household to have the woman rather than the man decline or reduce paid work to give care are partly the result of divergent opportunity costs due to the gender wage gap.<sup>84</sup> Yet this creates a self-reinforcing cycle of gender inequality—the different labor market wages and opportunities of men and women influence household decisions about allocating home versus market work, and these decisions in turn reinforce the wage gap.<sup>85</sup>

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*Large a Constituency for Long-Term Care Reform?*, 67 MILBANK Q. 485, 494 (Milbank Mem'l Fund 1990) (1989) ("Among children who are primary caregivers [of disabled parents], daughters outnumber sons by more than 3 to 1; among primary caregivers of more disabled elders, the ratio is even higher—4 to 1."); Robyn Stone et al., *Caregivers of the Frail Elderly*, 27 GERONTOLOGIST 620, 620 (1987) [hereinafter Stone et al., *Caregivers*] (estimating that daughters were twice as likely as sons to assume primary responsibility for the frail elderly with no assistance).

<sup>80</sup> See, e.g., Stone et al., *Caregivers*, *supra* note 79, at 620 (finding that 44% of adult daughter caregivers are employed).

<sup>81</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD EMPLOYMENT OUTLOOK 137, 140 tbl.4.5 (2001) (reporting that U.S. fathers in 1995 spent an average of thirty-three minutes per day, compared to sixty-two minutes per day for full-time working mothers, engaging in childcare activities, defined as feeding, dressing, changing, bathing, and giving medication to children); see also Eleanor Palo Stoller, *Parental Caregiving by Adult Children*, 45 J. MARRIAGE & FAM. 851, 856 (1983) (being employed decreases the average level of sons' assistance in parental caregiving by 22.9 hours per month, but has no effect on levels of assistance by daughters, who might make up the time by reducing leisure).

<sup>82</sup> BALANCING THE NEEDS, *supra* note 5, at tbl.A2-2.6 (showing that 26.7% of women who took a leave from work in 2000, whether or not covered by the FMLA, used the leave to care for children (not including leave taken to care for newborns or newly adopted children) or elders, as compared with 21.4% of male leave-takers); Kristen Keith & Abigail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 INDUS. & LAB. REL. REV. 460, 465 tbl.1 (1999) (estimating that 8.4% of women, compared with 3.8% of men, quit their jobs for family-related reasons between 1979 and 1984); Stone et al., *Caregivers*, *supra* note 79, at 622 tbl.3 (finding that of adult children with eldercare responsibilities, 11.6% of daughters, compared with 5% of sons quit their jobs as a result).

<sup>83</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PERSONS NOT IN THE LABOR FORCE BY DESIRE AND AVAILABILITY FOR WORK, AGE, AND SEX, Chart A-37 (2004), available at <ftp://ftp.bls.gov/pub/suppl/empstat/empstat37.txt> (last visited Nov. 18, 2004) (showing that among those who were not in the labor force in September 2004 and not available to work but wanted a job, 44.96% of women but only 11.89% of men reported family responsibilities as the reason for not working).

<sup>84</sup> Christine A. Littleton, *Does It Still Make Sense To Talk About Women?*, 1 UCLA WOMEN'S L.J. 15, 36 (1991) (noting that the wage gap between men and women makes it economically more rational for married women than their husbands to take an unpaid leave from work to engage in caretaking).

<sup>85</sup> Joni Hersch & Leslie S. Stratton, *Housework, Wages, and the Division of Household Time for Employed Spouses*, 84 AM. ECON. REV. 120, 124 (1994) (identifying a self-reinforcing cycle in which women spend significantly more time than men on housework, time spent on housework has a direct negative effect on wages, and women engage in rela-

The “career costs” to women of interrupting work to care for children and other family members are considerable.<sup>86</sup> Empirical researchers who have compared the wages of women workers with and without children estimate a wage penalty for having children of between 10% and 15%; this wage differential is known as the “family gap.”<sup>87</sup> There is no similar penalty for men; on the contrary, married men, most of whom have children, enjoy a wage premium relative to unmarried men of 10–15%.<sup>88</sup> Much of the family gap among women may be explained by differences in productivity between mothers and nonmothers. Once researchers control for differences in human capital, the family gap shrinks, with the wage penalty for having one child at about 5%, and larger penalties for the birth of additional children.<sup>89</sup> It would be misleading, though, to rely exclusively on estimates that control for human capital differences to discourage the re-shaping of family leave policy—the very fact of a significant productivity gap between women who do and do not have children is sufficient reason for exploring policy interventions, especially given the contrasting pattern for men.<sup>90</sup>

Human capital theorists explain the effect of children on women’s productivity in several ways.<sup>91</sup> First, the presence of children can reduce mothers’ human capital. Work interruptions due to childbirth and infant care result in foregone work experience, as well as depreciation of accumulated skills during the periods of interruption. If a worker switches jobs

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tively more housework in part *because* their market wages are lower).

<sup>86</sup> See generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* (2001).

<sup>87</sup> Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 143 (1998) [hereinafter Waldfogel, *Understanding the Family Gap*] (citing several studies).

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

<sup>89</sup> Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 282 (2003) (finding a 5% wage penalty for having one child and a 7% penalty for two or more children); Charles L. Baum, *The Effect of Work Interruptions on Women’s Wages*, 16 LAB. 1, 18 tbl.4 (2002) (reporting a 4% wage penalty for birth of first child and 2–3% penalty for additional children); Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689, 705 (2000) (finding a 5% wage penalty for birth of first child by married women and 9% premium for their husbands); Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?*, 16 J. LAB. ECON. 505, 516 tbl.2A (1998) [hereinafter Waldfogel, *The Family Gap in the U.S. and Britain*] (finding a 4.57% wage penalty for one child and a 12.60% penalty for two or more children). Each of these studies controlled for observable factors such as education, job experience, and age, and used fixed-effects models to control for unobserved differences, such as work commitment.

<sup>90</sup> See, e.g., Lundberg & Rose, *supra* note 89, at 706 tbl.4 (finding that even though their study controlled for observable and unobserved difference, married fathers still enjoyed a 9% wage premium for the birth of one child compared to married men with no children, and that this premium fell to 7% for men whose wives worked relatively continuously through the birth of their first child).

<sup>91</sup> See generally Baum, *supra* note 89, at 3–4; Joyce P. Jacobsen, *How Family Structure Affects Labor Market Outcomes*, in *THE ECONOMICS OF WORK AND FAMILY* 133 (Jean Kimmel & Emily P. Hoffman eds., 2002); Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 J. POL. ECON. S76 (1974).

following a work interruption, either because her old job is unavailable or because she needs a job with more flexibility, some of her human capital may be underutilized because it is specific to her previous employment.<sup>92</sup> Additionally, a worker who anticipates needing to interrupt work in the future may make fewer investments in training because she knows that there is a limit on how much she will be able to recoup through later earnings. A firm may also decide to invest less in training women in their child-bearing years because it fears that it will not recoup its investment. In sum, those who take leaves from work or quit to take more flexible jobs pay a significant “career tax” when they do so.

With the increased burden of household responsibilities, mothers may also have less time to allocate to market work. They may take jobs with greater flexibility and lower wages on average to accommodate the new demands on their time. Note that for men, the effects of having children may be the exact opposite. Following the birth of a child, fathers tend to work longer hours to support the family; this phenomenon may explain some of the paternal wage premium. However, the capacity of fathers to work longer hours relies on the social assumption that women should—and the social reality that women do—take on a proportionately greater burden of post-childbirth household labor.<sup>93</sup>

Some economists further suggest that in addition to children reducing mothers’ productivity, women who are “less productive” may be more likely to have children.<sup>94</sup> Empirical researchers refer to this as a form of “unobserved heterogeneity.” The argument is that although it cannot be observed in conventional human capital measures, some women may be less career oriented and more motivated by a desire to have children.<sup>95</sup> Some may also channel significant productivity into supporting their husbands’ careers, e.g., planning dinners for their husbands’ work associates and accompanying them on business trips.<sup>96</sup>

In addition to reflecting real differences in human capital, the family gap also reflects employers’ discriminatory assessment of workers’ productivity. If employers cannot perfectly observe productivity, they may estimate a worker’s productivity according to perceived work commitment, in other words, according to stereotype. For example, employers may en-

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<sup>92</sup> Baum finds that wage reductions associated with women’s work interruptions are substantially eliminated for women who return to their previous job. *See* Baum, *supra* note 89, at 25–30. He suggests that returning to the old job allows the worker to preserve a good job match, enjoy the benefit of relearning old skills rather than learning new skills, retain seniority, and continue benefiting from firm-specific human capital. *Id.* at 25.

<sup>93</sup> *See* Lundberg & Rose, *supra* note 89, at 705–06 (attributing the divergent wage effects of having children that men and women experience to increased specialization, with mothers spending proportionally more hours in the home and fathers spending proportionally more time in the workforce following the birth of a child).

<sup>94</sup> *See, e.g., id.* at 692.

<sup>95</sup> *Id.*

<sup>96</sup> Jacobsen, *supra* note 91, at 142.

gage in “statistical discrimination” against women in their childbearing years. The fact that women in this age group are more likely than their male counterparts to interrupt work for caregiving purposes may serve as a proxy for an actual finding of a weak work commitment of a particular worker. Employers, therefore, may be less willing to hire or train these women or may channel them into predominately female occupations that pay less and that have lower career prospects than those of male-dominated positions.<sup>97</sup> Similarly, employers may make negative judgments about workers who have been unemployed or employed in a part-time or temporary job. These stereotypes may make it difficult for a worker who has quit or switched to a part-time job during her childbearing years to return to a full-time, permanent job that suits her skills and preferences.<sup>98</sup>

Gender differences in labor market outcomes also operate on a deeper plane. Workers’ preferences may themselves be socially constructed. The hypothesis stated above, for example, that lower average productivity may be a preexisting characteristic of mothers, is complicated by the fact that social norms validating women’s devotion to family over career may shape their preferences before and after the arrival of children.<sup>99</sup> Starting early in life, social pressures and influences may skew women’s preferences toward motherhood.<sup>100</sup> Once women reach working age, their experiences or

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<sup>97</sup> See Schultz, *Life's Work*, *supra* note 15, at 1894–96 (arguing that women’s lower pay is due mainly to the segregation of women into “separate-but-less-remunerative occupations, firms, and jobs,” rather than the fact that women have more family responsibilities and therefore select lower paying but more flexible jobs or exert less work effort); Selmi, *supra* note 1, at 721–25, 730–33 (suggesting that employers may discriminate against women when making training opportunities available and that women occupy positions that tend to offer fewer training opportunities, and reviewing data challenging the work effort hypothesis and the notion that women choose more flexible jobs).

<sup>98</sup> See Barry McCormick, *A Theory of Signalling During Job Search, Employment Efficiency, and “Stigmatized” Jobs*, 57 REV. ECON. STUD. 299, 308 (1990) (discussing the “stigma” attached to occupying unskilled jobs or being unemployed between jobs and how these situations “signal” to employers that the worker will not be committed and productive); Ian M. McDonald & Robert M. Solow, *Wages and Employment in a Segmented Labor Market*, 100 Q.J. ECON. 1115, 1124–25 (1985) (arguing that experience in secondary employment can stigmatize a worker and may subsequently block access to primary employment).

<sup>99</sup> There is a huge literature on the social construction of choices. See, e.g., L. Richard Della Fave, *The Meek Shall Not Inherit the Earth: Self-Evaluation and the Legitimacy of Stratification*, 45 AM. SOC. REV. 955 (1980) (arguing that those who do poorly in the distribution of social rewards may grant legitimacy to the very social structures and hegemonic norms that deny them status, adopting those norms as part of their self-identity); Herbert Gintis, *Education, Technology, and the Characteristics of Worker Productivity*, 61 AM. ECON. REV. 266 (1971) (criticizing neoclassical economists for assuming that education is linked to future earnings solely due to skill development, and arguing that social institutions such as schools affect not only the skills of future workers, but also their tastes and personalities); George Sher, *Our Preferences, Ourselves*, 12 PHIL. & PUB. AFF. 34 (1982) (discussing and critiquing feminist arguments that women’s traditional preferences, which are induced by sexual stereotypes and conditioning, reinforce gender inequalities).

<sup>100</sup> Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 534 (1999) (arguing that society socializes women to want to perform household work and childcare as well as resist working outside the home to affirm their identity as



prospective experiences in the workplace are likely to reflect and reinforce these preferences.<sup>101</sup> Finally, interrupting work or dropping out of the labor market all together, for example, after childbirth, may cause depression, helplessness, loss of self-esteem, and other psychological scars particularly common among young women.<sup>102</sup> Social constructivist theorists thus postulate that diminished market prospects after childbirth are a self-fulfilling prophecy.

It is unlikely that either the theory of human capital or that of social construction entirely explains labor market circumstances for women.<sup>103</sup> More plausible is that both operate together, and thus, policymakers committed to equality in the paid labor economy ought to take both seriously. Specifically, in response to the human capital theory, we should promote women's investments in market-based human capital, encourage men to shoulder more family caregiving obligations, and eliminate discrimination against women workers. At the same time, we must respond to the problems presented by the social constructivist theorists by encouraging cultural and attitudinal changes concerning the role of women in the home.

### C. Women's Workforce Participation and Self-Determination

I discussed above the idea that social norms and women's experiences may shape their personalities and preferences in ways that deter their par-

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women); 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, 90 (1989) (arguing that work-family conflicts arise in part from socialized views of appropriate gender roles); Fineman, *supra* note 73, at 21–22 (arguing that women's "individual choices" are actually produced by patriarchal ideology, history, and traditions); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 935–37 (1987) (reviewing DAVID L. KIRP ET AL., *GENDER JUSTICE* (1986), and arguing that gender roles are socially constructed as opposed to a result of "natural preferences" and "free choice").

<sup>101</sup> See Dowd, *supra* note 100, at 147 (discussing whether employers should be held responsible for sex discrimination since workplace structures play a significant role in shaping an individual's perceptions of her range of employment opportunities in a gendered manner); Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815–24 (1990) (arguing that both conservative and liberal theories explaining sex segregation in the paid labor economy have failed to take into account the fact that "employers arrange work systems so as to construct work and work aspirations along gendered lines").

<sup>102</sup> See Knut Gerlach & Gesine Stephan, *A Paper on Unhappiness and Unemployment in Germany*, 52 ECON. LETTERS 325, 328–29 (1996) (discussing the decreases in happiness and satisfaction caused by unemployment in German men and women); Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. SOCIO-ECONOMICS 333, 334, 350 (1996) (discussing the significant psychological trauma of joblessness, particularly among female youth); Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 89–90, 116–17 [hereinafter Lester, *Careers*] (discussing the identity- and ambition-shaping aspects of unemployment and employment in jobs that underutilize the worker's talent).

<sup>103</sup> See generally Lester, *Careers*, *supra* note 102.

ticipation in the workforce. Given this premise, it makes sense to probe whether increasing women's workforce participation could reshape and reconstruct women's personalities and preferences in self-affirming ways.

Market work can be a source of wealth, a locus of self-realization, a source of self-esteem (either for intrinsic reasons or flowing from the esteem of others), a source of community membership, social contacts, and friendships, an escape from isolation, and a means of structuring everyday life.<sup>104</sup> Clearly, the *status* of being a paid worker can confer certain kinds of benefits on the worker and can represent a good way of life. I am not, however, defending paid work per se as a superior substantive vision of the good life. Instead, I argue that greater involvement of women in paid employment will enhance their capacity to determine the conditions of their lives.

### 1. Feminist Arguments Encouraging Women's Paid Employment

Unequal participation in paid work within a household, and thus unequal access to the benefits of paid employment, creates a dynamic of dependency—traditionally, women's dependence upon men.<sup>105</sup> Some feminists have advocated women's involvement in paid work on the basis of its potential to enhance women's personal development and self-esteem.<sup>106</sup> Increasing women's participation in full-time, paid work could give them the independent economic means, and perhaps the confidence, to have bargaining power in domestic relationships, both in day-to-day decisions that affect family life, and in the ability to walk away from oppressive relationships.<sup>107</sup> Note that this argument based on independent economic means

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<sup>104</sup> See, e.g., HERBERT APPLEBAUM, *THE CONCEPT OF WORK: ANCIENT, MEDIEVAL, AND MODERN* 572 (1992) (arguing that market work is associated with status and self-esteem and forges unique and intense human bonds); Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 AM. POL. SCI. REV. 1127, 1132 (1990) (linking employment to "the satisfaction of earning one's own keep," self-esteem, social bonds, and autonomy); Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *DEMOCRACY AND THE WELFARE STATE* 53, 62–67 (Amy Gutmann ed., 1988) (emphasizing the value of paid work and enumerating its personal benefits).

<sup>105</sup> Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 533–34 (1998) (arguing that women's dependency as a result of investment in their families at the expense of investment in their own human capital undermines their autonomy); see also Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 83 (1997) (describing how the unpaid nature of domestic labor reinforces women's dependency and inferiority, leads to depression, disintegration of self, and passivity, and diminishes their capacity to resist or organize with other women).

<sup>106</sup> KIMBERLY A. YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* 121–28 (2003) (arguing that a married women's paid employment advances her intellectual and moral development and financial self-sufficiency and leads to greater "self-love," i.e., the belief that her own desires and ends have value independent of her husband's); Schultz, *Life's Work*, *supra* note 15, at 1891–92 (describing the positive effects of increased opportunities in the paid labor force on women's self-esteem).

<sup>107</sup> See RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 211 (1995) (arguing that working part time makes the mother the "flexible

is not merely about the potential for paid employment to increase a woman's personal wealth;<sup>108</sup> it is about the psychological independence that personal economic power confers. Taken together, these arguments posit that women's participation in paid employment will help them develop the confidence, awareness, and economic freedom to shape their own life paths in a fulfilling way.

On the other hand, paid work can be monotonous, degrading, and isolating. This begs the question of whether policies that increase women's participation in the workforce will truly increase the quality of their lives, given that for many workers, the job available to them may be less satisfying than working—albeit uncompensated—in the home.<sup>109</sup> This may be especially true for working-class women with young children, for whom affordable, high-quality childcare and housekeeping assistance may be beyond reach.<sup>110</sup> For some of these women, given the type of market work available to them, staying home full time may be an appealing aspiration, as devotion to family may be a source of pride and personal reward, a sign of middle-class status, or a haven from the degradations of exploitive market work.<sup>111</sup> In light of these competing narratives, assuming that paid work does in fact influence a woman's personality and capacities, an important question is whether reshaping the incentive structure so as to encourage more women to enter the workforce for different kinds of jobs, i.e., not just privileged jobs, is likely to lead to greater independence, self-esteem, and moral growth.

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parent," undermining her bargaining power within the family); YURACKO, *supra* note 106, at 123–26 (arguing that a full-time homemaker's financial dependency on her husband and consequent lack of self-sufficiency so as to have no "exit option" from unsafe relationships may breed insecurity and servility that is inconsistent with human flourishing); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 202–03 (2000) (describing the ambivalence of some feminists toward the argument that women wield power in the home through their role in caregiving, as this role ultimately puts them in a weaker bargaining position relative to men and erodes their power); Schultz, *Life's Work*, *supra* note 15, at 1945.

<sup>108</sup> The decision to marry a high-salaried man and to become a full-time homemaker may in fact make a woman wealthier than she would be had she chosen to work. See YURACKO, *supra* note 106, at 107–08 (describing and critiquing feminist arguments criticizing the choice of homemaking on the grounds of financial and emotional dependence as opposed to economic vulnerability).

<sup>109</sup> See Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 838 (2002) (stating that for many women, unpaid labor in the home is more satisfying than their paid jobs); Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 832 (2002) (commenting that "[g]oing to work is no picnic for many women" and thus questioning "the point of knocking oneself out, and penalizing one's kids to boot, when work seems an uphill battle?").

<sup>110</sup> WILLIAMS, *supra* note 15, at 157.

<sup>111</sup> *Id.* at 156–57.

## 2. *Psychological Studies of Work and Women's Well-Being*

A well-known literature at the juncture of psychology and sociology examines the relationship between work and the personality.<sup>112</sup> A worker's place in an organizational structure, her opportunities for occupational self-direction, job pressures, and the extrinsic risks and rewards built into a job can affect the worker's "values, self-conceptions, orientations to social reality, and cognitive functioning."<sup>113</sup> An important component of these findings is their generalizability to other aspects of life—people who do self-directed work, for example, come to value self-direction more highly, both for themselves and for their children.<sup>114</sup> The provocative implication of this for class and social stratification has garnered much attention.<sup>115</sup>

Some researchers have examined how women's participation in paid work versus unpaid housework might affect their personalities. The two types of work are characterized by different sets of structural features, which may in turn differentially affect personality development.<sup>116</sup> Sociologists Chloe Bird and Catherine Ross compared the effect of various qualities of unpaid housework and paid work on individuals' sense of personal control.<sup>117</sup> Sense of personal control is the belief that events in one's life depend on one's own behavior, rather than luck or fate.<sup>118</sup> It in turn contributes to one's capacity for self-determination, sense of self-worth, flexibility in responding to stressful circumstances, ability to learn from experience and avoid repeating past behavior that has led to bad outcomes, ability to cope with adversity, persistence, and capacity to ward off anxiety and depression.<sup>119</sup> Researchers Bird and Ross found that full-time housework, including child and eldercare, involves more actual on-the-job autonomy

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<sup>112</sup> See generally Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, in *THE NATURE OF WORK* 36 (Kai Erickson & Steven Peter Vallas eds., 1990) (summarizing research in this area, particularly the paradigm-setting work of Melvin L. Kohn and Carmi Schooler); Kenneth I. Spenner, *Social Stratification, Work and Personality*, 14 *ANN. REV. SOC.* 69 (1988) (reviewing and critiquing Kohn & Schooler's work and subsequent research supporting and extending it).

<sup>113</sup> Kohn, *supra* note 112, at 40–42.

<sup>114</sup> *Id.* at 42–43.

<sup>115</sup> See, e.g., Adina Schwartz, *Meaningful Work*, 92 *ETHICS* 634 (1982) (using the Kohn-Schooler findings as a basis to advocate for government intervention to change the distribution of work so that persons across social classes have access to supervisory positions as opposed to routine jobs); Spenner, *supra* note 112, at 80–84 (discussing and reviewing evidence for thesis that parents from different socioeconomic classes exhibit different personality traits, values, and childrearing behavior as a result of differences in occupation).

<sup>116</sup> See generally Carmi Schooler, Melvin L. Kohn, Karen A. Miller & Joanne Miller, *Housework as Work*, in *WORK AND PERSONALITY: AN INQUIRY INTO THE IMPACT OF SOCIAL STRATIFICATION* 242 (Melvin L. Kohn & Carmi Schooler eds., 1983).

<sup>117</sup> Chloe E. Bird & Catherine E. Ross, *Houseworkers and Paid Workers: Qualities of the Work and Effects on Personal Control*, 55 *J. MARRIAGE & FAM.* 913 (1993).

<sup>118</sup> Sarah Rosenfield, *The Effects of Women's Employment: Personal Control and Sex Differences in Mental Health*, 30 *J. HEALTH & SOC. BEHAV.* 77, 79 (1989).

<sup>119</sup> *Id.* at 79–80.

than paid employment, and that greater autonomy increases one's sense of personal control.<sup>120</sup> Yet, on all other measures that contribute to a sense of personal control—degree of routinization, fulfillment, recognition from others for the quality and value of the work, and of course pay—unpaid housework was inferior to paid work.<sup>121</sup> Taking all the measured qualities into account, subjects whose primary activity was unpaid housework had a significantly lower sense of control over their lives than those whose primary activity was paid work.<sup>122</sup>

Another important line of research suggests that the *division* of household labor, as opposed to simply the amount, can affect women's psychological health. An unequal division of household labor is associated with women's distress and depression.<sup>123</sup>

Most women who participate in paid employment continue to shoulder family caregiving obligations. This raises the question of whether combining work and caregiving undermines any psychological benefits of paid work due to the emotional strain and exhaustion of having conflicting commitments. Many studies have looked at the question of how multiple roles affect women's psychological and physical health. One hypothesis predicts that the strain of juggling multiple roles will lead to deleterious health effects in worker-caregivers.<sup>124</sup> However, there is also significant support for the alternate view that occupying multiple roles can enhance rather than deplete individuals' energy and health, and that notwithstanding the psychological distress of balancing work and caregiving, women who combine caregiving with full-time work are happier and physically healthier than women who do no paid work at all or who work part time.<sup>125</sup> This may be

<sup>120</sup> Bird & Ross, *supra* note 117, at 919–20; see also Mary Clare Lennon, *Women, Work, and Well-Being: The Importance of Work Conditions*, 35 J. HEALTH & SOC. BEHAV. 235, 240 tbl.2 (1994) (a sample of full-time housewives reported a greater sense of autonomy in their work than a sample of working wives).

<sup>121</sup> Bird & Ross, *supra* note 117, at 913; see also Lennon, *supra* note 120, at 243 (finding that greater routinization of homemaking as compared with paid work offset the psychological benefits of autonomy).

<sup>122</sup> Bird & Ross, *supra* note 117, at 913.

<sup>123</sup> See Chloe E. Bird, *Gender, Household Labor, and Psychological Distress: The Impact of the Amount and Division of Housework*, 40 J. HEALTH & SOC. BEHAV. 32, 42–43 (1999) (finding that inequity in the division of household labor, more than the actual amount of time spent doing housework, contributes to gender differences in depression); Beth Anne Shelton & Daphne John, *The Division of Household Labor*, 22 ANN. REV. SOC. 299, 316 (reviewing literature finding that both women's time spent on housework and an unequal division of household labor positively associated with women's depression); Schultz, *Life's Work*, *supra* note 15, at 1907–09 (reviewing studies that support these propositions).

<sup>124</sup> Martire & Stephens, *supra* note 77, at 169–70 (reviewing studies showing that work interferes with the caregiving role and vice versa, leading to psychological distress).

<sup>125</sup> *Id.* at 170 (reviewing research showing that employed caregivers tend to have better physical health, higher self-esteem, and lower psychological distress than nonemployed caregivers, and finding that part-time work does not have the same stress-reducing impact); see also ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF* 24–38 (1996) (reviewing relevant research and contesting the notion that women who combine family caregiving with full-time paid jobs are less healthy and happy than their stay-at-home or part-time counter-

because feelings of confidence and accomplishment in one role spill over into other roles, that full-time employment can give family caregivers a respite from the daily responsibilities of caregiving, and that the availability of alternatives per se increases one's sense of personal control by decreasing dependency on any one object, activity, or individual.<sup>126</sup> Taking this literature as a whole, it appears that even if having multiple roles generally enhances women's sense of personal control in many ways, *excessive* role strain (e.g., working while continuing to bear a disproportionate burden of caregiving) might undermine and offset some of these benefits.<sup>127</sup>

The nature of the paid work is another variable that will affect women's psychological health. Much of the research finding that paid work improves women's well-being controls for social class. When researchers have taken social class into account, however, they have found a class gradient of distress associated with combining work and family. Unskilled and semi-skilled workers experience higher levels of distress associated with balancing work and family life than skilled manual workers, who in turn experience more distress than professional and managerial women.<sup>128</sup> Closer analysis of the data in these studies, then, suggests that in addition to the existence of multiple roles, the qualitative features of the tasks or experiences associated with the different roles, which are directly related to socioeconomic class, have a significant influence on psychological well-being.<sup>129</sup>

parts).

<sup>126</sup> Martire & Stephens, *supra* note 77, at 170–71 (on spillover and respite); Rosenfield, *supra* note 118, at 80 (on personal control).

<sup>127</sup> Rosenfield, *supra* note 118, at 80; Peggy A. Thoits, *Multiple Identities: Examining Gender and Marital Status Differences in Distress*, 51 AM. SOC. REV. 259, 265 (1986) (finding curvilinear relationship between number of roles and psychological distress such that individuals with very few and very many roles are more distressed than those falling in between).

<sup>128</sup> Sharon Matthews & Chris Power, *Socio-Economic Gradients in Psychological Distress: A Focus on Women, Social Roles and Work-Home Characteristics*, 54 SOC. SCI. & MED. 799, 803, 804 fig.2 (2002); *see also* K. Jill Kiecolt, *Satisfaction with Work and Family Life: No Evidence of a Cultural Reversal*, 65 J. MARRIAGE & FAM. 23, 31 (2003) (predicting that blue-collar workers are more likely to find home a "haven" rather than deriving high satisfaction from combining work and family roles); Mary Secret & Robert G. Green, *Occupational Status Differences Among Three Groups of Married Mothers*, 13 AFFILIA 47, 56, 58 tbl.2 (1998) (finding individual well-being of married mothers in professional-managerial occupations higher than that of blue-collar or stay-at-home mothers, and stay-at-home mothers' marital, parental, and family well-being higher than that of mothers with blue-collar jobs).

<sup>129</sup> *See* Martire & Stephens, *supra* note 77, at 170–71 (finding that women with full-time employment may enjoy greater "stress-buffering" benefits from combining work and caregiving than women working fewer hours due to the greater amount of time away from caregiving); Matthews & Power, *supra* note 128, at 805 (showing that lack of learning opportunity, monotony, and psychosocial strain were strongly associated with low social class for women at age thirty-three); Secret & Green, *supra* note 128, at 60–62 ("The authors [of cited studies] speculate that the positive relationship between multiple roles and psychological well-being is observed primarily for mothers in professional-managerial occupations with prestige . . . and a degree of challenge or self-direction . . . , whereas less psychological benefit is realized by mothers who are employed in working-class/blue-collar

Ultimately, using women's psychological well-being to gauge the value of policies designed to facilitate combining work and caregiving has limitations. For example, these studies must compare women who have already chosen one path or another, rather than being able to randomize subjects' choices. As a result, selection bias may distort findings: it may be more likely, for example, that people who suffer from depression stay home rather than work because of their distress, rather than the reverse.<sup>130</sup> On the flip side, the data may also understate the potential psychological benefits of working. Even if the balance of empirical evidence were to show that women who combine caregiving with full-time work experience more stress and unhappiness than those who stay home, it would not necessarily follow that social policy should discourage caregivers from working. Acting in a manner inconsistent with expected social roles can be stressful, and therefore any effort to change social roles will involve a transitional period of psychological conflict. In addition, looking at the relationship between role conflict and stress may unduly emphasize women's experiences during a discrete life period rather than their overall experience. Life might be difficult for mothers who continue full-time employment while they have babies and toddlers at home, but in the long run these mothers may experience greater psychological benefits for having remained active in the labor market.<sup>131</sup>

Moreover, this analysis is complicated by a core policy circularity. Participation in the paid labor market is a way for women to acquire independence borne of personal economic power. But whether the conditions prevail for work to be a positive rather than negative experience, and whether women on the margin are likely to choose market work, will depend on the quality of jobs available. This, in turn, may be influenced by workplace benefits such as paid family leave. Paid leave alone cannot do all the work required to achieve this. At the same time, it has the potential, if properly designed, to make an important and distinctive contribution.

#### *D. Reasons for Increasing Women's Labor Market Attachment Redux*

The effects of caregiving obligations on women are intimately tied to their labor market participation and to the qualitative features of their

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occupations that are thought to be less emotionally rewarding and by mothers in the less-valued homemaker role. Such findings are consistent with the growing consensus that experience in the work role, rather than the role itself, is the major contributor to well-being . . . .").

<sup>130</sup> ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 231 n.8 (2004).

<sup>131</sup> Kiecolt, *supra* note 128, at 31. Workers with very young children are more likely to find home a haven as opposed to finding work a haven or finding combining work and family highly satisfying. *Id.* However, as children get older (six to twelve years old), working mothers are more likely to find combining work and family highly satisfying than to find home a haven. *Id.*

employment in terms of pay and career advancement. Status in the paid labor economy is an important indicator of economic and social power in our society.<sup>132</sup> Indeed, our laws reflect an understanding that equality in the paid labor economy is a fundamental component of social justice. Anti-discrimination statutes, for example, embodying core national values, are centrally concerned with justice in the employment setting.<sup>133</sup> The text of the FMLA explicitly acknowledges that unequal family care burdens affect the working lives of women,<sup>134</sup> and that promoting the goal of equal employment opportunity for women and men is consistent with the Equal Protection Clause of the Fourteenth Amendment.<sup>135</sup> Recently, the Supreme Court spoke very powerfully to the importance of the preventative remedial measures embodied in the FMLA for achieving gender equality in the distribution of family caregiving obligations and paid employment opportunities.<sup>136</sup> If the social norm that women bear the bulk of family caregiving obligations plays a causal role in producing inequality between men and women in paid labor markets, then addressing this causal link is a concern for *all of society*, not just for working women. Work-family policies that erode gender inequality in paid employment will in turn enhance solidarity in a society that values such equality.

At the same time, participation in paid employment may have significant psychological benefits for women. Increasing women's opportunities to engage in market work may enhance their ability to live a life free from dependency, and thus create the conditions for reaching their fullest human potential.

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<sup>132</sup> APPLEBAUM, *supra* note 104, at 571 (arguing that the centrality of the work ethic in our society means that participation in paid work is an important determinant of status and influence).

<sup>133</sup> See, for example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

<sup>134</sup> Family and Medical Leave Act of 1993, 29 U.S.C. § 2601(a)(5) (2000) (“[Congress finds that] . . . due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . .”).

<sup>135</sup> *Id.* § 2601(b)(4)–(5).

<sup>136</sup> Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003). In this case, the court upheld the constitutionality of Congress's decision to abrogate state immunity from FMLA liability on the basis of evidence of the states' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits. *Id.* at 729–35. In analyzing and implicitly approving Congress's motives for creating the FMLA's gender-neutral unpaid family leave entitlement, the majority wrote:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men . . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

*Id.* at 736.



Although both of these reasons might justify labor market interventions designed to erode the existing differentiation in men's and women's market and family roles, they may implicate different mechanisms for *financing* these interventions. An argument for financing a social program in a way that redistributes wealth is best supported with evidence that the program will confer a benefit on society as a whole rather than just on those who receive the specific program benefits. When the societal benefits of a program are highly targeted, it is normatively easier to justify state intervention if the method for financing the program involves cost-internalization by program beneficiaries. In the foregoing analysis, I have offered a basis for defending labor market intervention to increase equality between men and women in the domestic and market spheres on both grounds. Such intervention would confer benefits on women themselves, in the form of their greater autonomy, and society as a whole, in the form of upholding the fundamental societal value of equality in the paid labor economy.

#### IV. THE EFFECT OF PAID FAMILY LEAVE ON WOMEN'S WORKFORCE PARTICIPATION

##### *A. The Theoretical Impact of Family Leave Policies on Women's Workforce Attachment*

Although paid leave alone cannot completely equalize the division of men's and women's respective contributions to family and market labor, in this section I argue that both theory and data suggest that it is a crucial piece of broader reform.

In Part III.B, I explained how the wage gap between men and women, as well as cultural factors, make it highly likely that if one parent decides to leave work to stay home and care for a new child, it will be the mother. Furthermore, once a worker has decided to quit or gets laid off after interrupting work to care for a family member, it may be very costly to search for a new job later on, especially with increased family obligations. Limited job availability and discrimination may make it difficult for the worker to find a match between her skills and the tasks of the job so that she can find a position as good as her previous employment.<sup>137</sup> As a result, she may decline to reenter the workforce, or may underinvest in developing her skills, knowing that downstream job-switching may reduce returns to the investment.<sup>138</sup>

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<sup>137</sup> See *supra* notes 92, 97, 98 and accompanying text; Jacob Alex Klerman & Arleen Leibowitz, *Job Continuity Among New Mothers*, 36 DEMOGRAPHY 145, 146 (1999) [hereinafter Klerman & Liebowitz, *Job Continuity*] (discussing the labor market choices a new mother confronts with respect to maternity leave).

<sup>138</sup> Employers may also decline to invest in women's skills because they fear that they will not recoup their investment. See *supra* note 92 and accompanying text.

The availability of family leave can alter these incentives, thereby increasing women's workforce attachment. Unpaid, or job-protected, leave such as the leave that the FMLA provides, reduces the risk of having to switch jobs after interrupting work to care for family members. Job-protected leave might, on the one hand, increase job interruptions because women who previously worked continuously for fear of losing their jobs will no longer face this risk. For other women, the availability of job-protected leave will increase their willingness to invest in skills that will advance their career with a particular employer because they know they will be able to recoup their investment. By allowing workers to return to their pre-leave position, job protection also reduces the degree of downward mobility associated with family-related career interruptions. It might also encourage some women to accept employment in the first place if they know that future family-related work interruptions will not jeopardize their employment security.

Adding a wage replacement component may further influence workers' leave decisions. Job protection is insufficient encouragement for some workers who need leave to actually take it.<sup>139</sup> Compensation would likely increase the willingness of these workers to take needed leaves. The fact that some workers may take longer leaves than they would have taken otherwise does not necessarily mean they will become less attached to work or experience downward mobility in the workforce. Some women, especially those who cannot afford *not* to work, will maintain a strong attachment to the workforce with or without paid family leave. In these cases, the availability of leave benefits may have a positive effect regardless of its neutrality with respect to workforce incentives. It may reduce the stress associated with balancing work and family, as well as improve the welfare of children and elders who receive care from these workers.

For other workers, the availability of paid family leave will decrease their workforce attachment. If wage replacement makes it possible for a worker to take a very long leave, for example, by combining paid and unpaid leave, the worker's workforce commitment may erode during the extended time away. She might decide she would prefer to exit the workforce, thus taking a longer hiatus from employment than she would have if she were limited to unpaid leave. In addition, skill erosion as well as the severing of her former employment relationship may mean that if she reenters the workforce later, she will find an inferior job match.

For still other workers, we would expect wage replacement to increase workforce participation. First, the availability of wage replacement in conjunction with job-protection during family-related work interruptions will make working (and investing in job skills) more attractive for some

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<sup>139</sup> See *supra* notes 5–8 and accompanying text (discussing the phenomenon of workers feeling financial anxiety about taking leaves for family or medical reasons, and in some cases, shortening or forgoing leave for that reason).

women on the margin between working and staying home or between working and accepting public assistance. In families with children, for example, a dual-earner arrangement, while increasing household wage income, also imposes opportunity costs in terms of foregone opportunities to give personal care and attention to those children. In addition to the financial cost of obtaining childcare, the family may also view the foregone opportunity of having a parent provide care *personally* as being psychologically costly.<sup>140</sup> For some workers in their childbearing years, especially those of average or low income, the anticipation of unpaid work interruptions in the approaching years may lead them to feel that their economic contribution to the family through paid employment will be outweighed by the economic and noneconomic opportunity costs of market work. A policy of providing wage replacement during leaves of absence may tip the balance of opportunity costs in such cases. Moreover, for reasons I address in Part V.D, the availability of the benefit in the form of a paid leave, as opposed to a subsidy for purchasing externally provided childcare, such as daycare, has distinctive appeal in light of the psychological costs of foregone parenting opportunities.

In addition, we might predict that some women who would have quit and switched employers if the leave were unpaid will be more likely to return to their previous employer if the leave is paid. A worker who receives wage benefits while on caregiving leave may feel a sense of reciprocity for having received paid benefits and may be more likely to return to the former employer as a result. Sociologists have observed that workers may develop norms of reciprocity akin to those in a gift-giving relationship as a result of receiving generous treatment.<sup>141</sup> Of course, if paid benefits are mandated, as this Article suggests, the worker who is attentive to the sources of the various components of her compensation package will not treat the wage replacement as a gift, and this impulse to reciprocate will not arise. I think it is plausible and indeed likely, however, that for many workers, the accounting behind what makes up a paycheck may not be so clear cut. The worker's experience of continuing to receive a paycheck from her employer during a period of family leave may well have the effect of boosting her morale, commitment, and sense of loyalty to the employer. In addition to the morale-boosting effect on workers, the existence of "mandated generosity" may have a spillover effect on some employers. Basic government mandates may encourage firms that wish to be seen as "high road" employers to go beyond minimum compliance and offer benefits that exceed the floor. In light of this phenomenon, we might expect paid leave, even if mandated by the government, to play a norm-

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<sup>140</sup> Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 J. MARRIAGE & FAM. 1008, 1012 (1997).

<sup>141</sup> See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 543-44 (1982).

setting role for at least some employers, and in turn trigger reciprocity impulses that enhance employee loyalty in the aftermath of family-related work interruptions.<sup>142</sup>

We might also expect wage replacement to increase women's workforce attachment beyond job-protection mandates because some family units will make structural adjustments in response to reduced income. If a worker is unable to take an income-supported leave from work, the whole family may make adjustments to accommodate reduced income, e.g., moving to a cheaper apartment or having the father take on more work responsibility.<sup>143</sup> These adjustments may, in turn, create a new set of family norms, expectations, and economic needs, and reduce the impetus for the caregiving spouse to return to work following job interruption. Wage-protected family leave, because it will minimize shocks to family income from workers' job interruptions, may inhibit more permanent adjustments that in the short run simply ease the strain of downward mobility, but in the long term tend to entrench the division of men and women into their traditional roles.

In sum, economic theory predicts that government mandates requiring paid leave for maternity purposes will affect different mothers differently: some will be unaffected, some will take longer leaves, some will take leaves instead of quitting, and some will enter the workforce who would not have done so otherwise. How aggregate labor supply (and demand) will change are empirical questions. Certainly, paid leave may confer benefits on workers and society aside from its effects on women's workforce participation. For example, it may have the beneficial effects of improving parent-infant bonding, and improve the health outcomes of sick children and disabled elders. However, from the normative perspective of encouraging women's involvement in market work, a leave program that results in some women taking more and longer leaves, thus decreasing their workforce experience, will have a net positive effect only so long as it: (1) does not actually lead them to quit or take extremely long leaves, and (2) has the offsetting effect of encouraging other women to join the workforce or refrain from quitting.

The next Section, which analyzes empirical studies on the relationship between family leave policies and women's labor market behavior,

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<sup>142</sup> See, e.g., Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 *DEMOGRAPHY* 191, 196 (2003). This study of the impact of unpaid leave mandates in state and federal law found an increase in the likelihood and duration of leaves taken by workers who were *not* beneficiaries of the mandate. *Id.* The authors speculate that this reflects the following spillover effect: as the laws became more generous, so too did firms covered by the laws, extending benefits even to workers they were not required to cover. *Id.*

<sup>143</sup> See Lundberg & Rose, *supra* note 89 (finding that fathers' income tends to increase following the birth of a child, possibly because fathers increase their work hours as mothers spend more hours at home).

suggests that on balance, paid leave policies may enhance, rather than erode, women's workforce attachment.

## *B. Empirical Findings on the Relationship Between Family Leave and Women's Labor Market Outcomes*

### *1. The Effect of Unpaid Family Leave Laws on Women's Workforce Attachment*

Economists Jacob Klerman and Arleen Liebowitz compared female labor force behavior before and after the passage of state laws in the 1980s that provided unpaid maternity leave.<sup>144</sup> They found these laws had positive but insignificant effects on new mothers' labor market behavior.<sup>145</sup> An analogous study based on a more recent population sample found that the passage of the FMLA had similarly modest effects.<sup>146</sup> The authors of these studies concluded that in the absence of wage replacement, parental leave laws may do little to alter the status quo.<sup>147</sup>

Two other studies, measuring the effects of the FMLA alone, found that it had moderately positive effects on women's workforce attachment. One study that tracked mothers for a full two years after birth found that after the passage of the FMLA, mothers returned to work more quickly and in greater numbers, and were more likely to return to their former employer.<sup>148</sup> Another study found that the FMLA increased employment of women with children under the age of one.<sup>149</sup> Taken as a whole, studies of

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<sup>144</sup> Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 65 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) [hereinafter Klerman & Leibowitz, *State Maternity Leave*].

<sup>145</sup> *Id.* at 81–82, 82 tbl.3.5 (finding no considerable effect of state unpaid leave laws on new mothers' employment levels, leave taking, or work levels during the first year after birth of a child).

<sup>146</sup> Han & Waldfogel, *supra* note 142, at 196 tbl.1, 197 tbl.2 (finding no significant impact of FMLA on incidence of leave-taking or duration of leaves taken in the first three months by mothers or fathers eligible for benefits). These statistics controlled for state fixed effects, i.e., other changes in states that might have led to increased leave-taking during that time.

<sup>147</sup> *Id.* at 198; see also Klerman & Leibowitz, *State Maternity Leave*, *supra* note 144, at 66.

<sup>148</sup> SANDRA L. HOFFERTH & SALLY C. CURTIN, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD SOCIAL, EMPLOYMENT AND MIGRATION WORKING PAPER SERIES NO. 7, THE IMPACT OF PARENTAL LEAVE ON MATERNAL RETURN TO WORK AFTER CHILDBIRTH IN THE UNITED STATES 14 tbl.1, 17 tbl.3 (2003). The study found that after the enactment of the FMLA, on average mothers returned to work over four months sooner than before its enactment. *Id.* These effects, perhaps not surprisingly, disappeared if the sample was limited to the states (roughly half) that had a maternity leave statute in place prior to the passage of the FMLA. *Id.*

<sup>149</sup> Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281, 295–96 (1999) [hereinafter Waldfogel, *Impact of the FMLA*] (finding only a 1.2% increase in women's overall employment between 1992 and 1995, and a 7.6% increase when considering only those women with children under the age of one in 1995).

state and federal unpaid leave laws suggest that these laws led to increases in both maternal leave-taking and workforce attachment, but the effects were only modest.<sup>150</sup>

## 2. *The Effect of Paid Leave Laws on Women's Workforce Attachment*

Some researchers have tried to measure the incremental effects of adding wage replacement to family leave policies. Economist Jutta Joesch found that women with access to paid leave were more likely to take time off from work during the birth month than women with access to unpaid leave only.<sup>151</sup> However, mothers with paid leave worked longer into their pregnancy and returned to work sooner once their infant was one month old.<sup>152</sup> These data suggest that in the absence of wage replacement, mothers are more likely to make "all-or-nothing" choices: either return to work immediately or significantly decrease attachment to the workplace by quitting or taking a very extended leave of one year or more.<sup>153</sup> By inducing some women who otherwise would quit or take a very lengthy leave and possibly switch jobs to remain with their employer and return fairly quickly, paid leave may improve their labor market attachment and status. As we have seen, returning to work for one's previous employer after taking time off has the advantage of allowing the worker to exploit firm-specific human capital, retain seniority, and relearn old skills rather than acquire new ones.<sup>154</sup>

A study published by the U.S. Census Bureau suggests that paid leave increases the likelihood that a worker will return to her previous employer rather than quitting or switching jobs.<sup>155</sup> In a sample of women between

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<sup>150</sup> Another study also found positive effects of leave policies on the likelihood of recent mothers to return to their former employer, but is less helpful for present purposes because it did not distinguish between paid and unpaid or public versus private coverage. Jane Waldfogel et al., *Family Leave Policies and Women's Retention After Childbirth: Evidence From United States, Britain, and Japan*, 12 J. POPULATION ECON. 523 (1999) [hereinafter Waldfogel et al., *U.S., Britain, and Japan*]. This study found that after controlling for age, education, and first versus later birth, maternity leave coverage substantially increases the probability that a woman will return to her prior employer following childbirth. *Id.* at 536. In Britain, there was a 16% increase in likelihood that a mother would return to her prior employer within twelve months of childbirth; in the U.S., that figure was 23%; and in Japan, the chances that a mother returned to work within twenty-four months increase by 73%. *Id.*

<sup>151</sup> Joesch, *supra* note 140, at 1016–17.

<sup>152</sup> *Id.* at 1017 tbl.4. The authors control for observable differences between groups, such as age, education level, race, and marital status but caution that unobserved differences may explain some of the variance. *Id.* at 1013, 1018. For example, women who want to return to work sooner may tend to select employers that offer paid leave policies and vice versa. *Id.* at 1013.

<sup>153</sup> *Id.* at 1018–19.

<sup>154</sup> See Baum, *supra* note 89, at 25.

<sup>155</sup> KRISTIN SMITH ET AL., U.S. DEP'T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961–1995 19 (2001), available at <http://www.census.gov/prod/2001pubs/p70-79.pdf> (last visited Nov. 18, 2004).

1991 and 1994, among women who returned to work by the twelfth month after giving birth, those who returned to their pre-birth employer were more likely to have received paid leave (61%) than unpaid leave (48%) or no leave, i.e., quit (5%).<sup>156</sup> Conversely, among women who returned to work within a year but switched jobs, most had previously quit (63%), but a sizeable proportion had been on an unpaid leave (29%).<sup>157</sup> Only 12% of “switchers” had done so following a paid leave from their pre-birth employer.<sup>158</sup> The study found that workers who switched jobs had lower hours, lower pay, and jobs demanding fewer skills than workers who returned to their previous employer.<sup>159</sup>

These studies suggest a strong association between paid leave policies and rapid returns to work. What is difficult to discern from these studies is the direction of causality. Are women with access to private employer-paid leave policies on average more motivated and career oriented than those whose jobs or employers do not provide such benefits, or does the provision of paid leave itself increase workforce commitment and motivation?

Studies of paid maternity leave policies in Europe are helpful in this regard. In Europe, paid leave benefits are government mandated, eliminating the possibility of selection bias between comparison groups. European studies cannot compare paid and unpaid leave policies because the norm for many years across European countries has been paid leave. However, the fact that European countries have been experimenting for several decades makes it possible to study the long-term effects of paid leave policies on workforce composition.

Economist Christopher J. Ruhm studied the economic effects of mandated paid parental leave in nine European countries over the twenty-four-year period of 1969 through 1993.<sup>160</sup> During that time, government-mandated leave entitlements roughly tripled in generosity.<sup>161</sup> Ruhm found these changes associated with a 3–4% increase in women’s employment

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<sup>156</sup> *Id.* fig.6.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 18 tbl.K. For example, 23.7% of those mothers who found a different employer experienced a pay reduction, while only 4.1% of those who returned to previous employers had a pay reduction. *Id.* Similarly, while 21.2% of mothers with new employers experienced a drop in skill level required for their work, only 1.8% of mothers returning to their previous employer experienced a drop in skill level. *Id.* See also HOFFERTH & CURTIN, *supra* note 148, at 18, 19 tbl.4 (sampling working mothers who gave birth between 1984 and 1997, and finding that those who returned to the same employer within two years after having a child earned about two dollars more per hour than those who switched jobs).

<sup>160</sup> Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. ECON. 285 (1998) [hereinafter Ruhm, *Economic Consequences of Parental Leave*].

<sup>161</sup> *Id.* at 295, 296 fig.1a (finding that entitlements grew from an average of ten to an average of thirty-three weeks of job-protected leave, and from an average of seven to an average of twenty-two weeks of fully paid leave).

levels.<sup>162</sup> He also suggests that the increase would still be substantial even after adjusting for the likelihood that some women who would not otherwise work temporarily enter the workforce solely to trigger benefit eligibility,<sup>163</sup> and the likelihood that some women, while on parental leave, are counted as “employed” though they are physically absent from work.<sup>164</sup> Ruhm also analyzed the effects of paid leave laws on the employment levels of women in their childbearing years as compared with older women and found the effects to be concentrated in the younger cohort: for women aged twenty-five to thirty-four years, forty weeks of job-protected paid leave increased employment-to-population ratios by around 7–9% compared with an approximately 4% increase for all women.<sup>165</sup> Similarly, economists Cal Winegarden and Paula Bracy found that as the generosity of public paid leave programs in seventeen member countries of the Organisation for Economic Co-operation and Development (“OECD”) increased over a thirty-year period, so too did the workforce participation of women in their childbearing years.<sup>166</sup>

A recent OECD analysis also concluded that paid family leave policies increase workforce participation for women in their thirties.<sup>167</sup> The report grapples with the issue of causality, pointing out that in countries where women are more present in employment, they may be better positioned to agitate for benefits, making the causality run from increased attachment to stronger policies, rather than the reverse.<sup>168</sup> Yet the report is skeptical that this alone explains women’s employment growth in countries with strong policies, pointing out that many countries with currently high levels of female workforce participation, in particular, the Nordic

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<sup>162</sup> *Id.* at 304 tbl.IV, 305, 311 (finding a 3.1% increase in women’s employment-to-population ratio for policies permitting up to twenty weeks of paid leave, as compared with no leave, and a 4.2% increase for policies permitting up to forty weeks of paid leave). The analysis controlled for state-fixed effects, i.e., other changes in states (such as the growth of subsidized childcare) that might have increased women’s employment during that time, although Ruhm acknowledges that it might not have captured them fully, meaning these numbers may slightly overstate the employment increase. *Id.* at 311.

<sup>163</sup> *Id.* at 312–13 (suggesting that this phenomenon might account for anywhere between a 0.4% and 1.0% increase in women’s employment). Note, importantly, that some of these “opportunistic entrants” will ultimately decide to remain in the workforce, offsetting at least some of this discount, but Ruhm does not attempt to measure the latter phenomenon.

<sup>164</sup> *Id.* (suggesting that this phenomenon may explain between 25% and 50% of the increase in women’s employment associated with longer entitlements, but should have a smaller effect for shorter entitlements).

<sup>165</sup> *Id.* at 310 tbl.VII, 311.

<sup>166</sup> See Winegarden & Bracy, *supra* note 69, at 1029 tbl.III (estimated marginal effect of an added week of leave ranges from about 0.60 to 0.75 percentage points in the labor force participation rate for women ages twenty to thirty-four, with significance rates that are uniformly very high). The authors found no support for the possibility of reverse causation. *Id.* at 1030.

<sup>167</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 81, at 153.

<sup>168</sup> *Id.*



countries, were among the first to introduce work-family reconciliation policies, prominently including paid family leave programs as part of a deliberate effort to increase female employment levels.<sup>169</sup>

Finally, if one's goal is to increase workforce attachment, there may be a limit on how generous a paid leave policy ought to be. The Joesch study found that among women with access to paid leave, the amount of leave available affected how much time they took: with more leave available, women took longer leaves, although this effect eventually leveled off.<sup>170</sup> Leaves of very lengthy duration might lead to a loss of work experience and depreciation of human capital.<sup>171</sup> Perhaps consistent with this, a study of social attitudes in countries with family leave benefits of varying generosity found that countries with extremely generous parental leave policies (Germany, with more than eighteen months leave, and Austria, with more than one year leave, though both with only a portion at full pay) tended to have the most "traditional" attitudes about working mothers.<sup>172</sup>

In sum, empirical studies suggest that paid leave policies increase the likelihood that women will take leave. At the same time, modestly generous leave policies appear to hasten women's return to work and increase the likelihood that they will return to their former employer. Such returns are associated with higher pay, greater use of skill, and more hours of work. Looking at labor market supply generally, paid leave policies appear to increase women's overall labor market participation.

## V. OBJECTIONS TO GOVERNMENT SUBSIDIZED PAID FAMILY LEAVE

There are a number of potential objections to state-subsidized paid family leave policies. These include concerns about child and elder welfare, the efficiency and justice of redistribution to those who make costly family planning choices, equity between working and stay-at-home par-

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<sup>169</sup> *Id.*

<sup>170</sup> Joesch, *supra* note 140, at 1017.

<sup>171</sup> Ruhm, *Economic Consequences of Parental Leave*, *supra* note 160, at 314–15; see also Jeanne Fagnani, *Parental Leave in France*, in PARENTAL LEAVE: PROGRESS OR PITFALL? 79 (Peter Moss & Fred Devin eds., 1999) (arguing that France's policy of allowing up to three years of leave, taken overwhelmingly by women, leads to erosion of job skills and may reinforce employer prejudice regarding women's work commitment); Waldfoegel, *Understanding the Family Gap*, *supra* note 87, at 142 (suggesting that Germany's policy of permitting up to three years of maternity leave, including a period in which women are prohibited from returning to work, has increased the wage gap between single women and single men and between married women and married men).

<sup>172</sup> See James W. Albrecht et al., *A Cross-Country Comparison of Attitudes Toward Mothers Working and Their Actual Labor Market Experience*, 14 *LABOUR* 591, 597 tbl.3, 598 (2000). The authors qualify their conjecture to this effect, noting that the direction of causality is uncertain. I will also note that the attitudes polled were with respect to either part-time or full-time work without distinction. This leaves open the possibility that some societies have positive attitudes toward mothers working part time but negative attitudes about them working full time, a posture that I would argue is still fairly traditional.

ents, and concerns that workplace accommodations will reinforce, rather than erode, gender inequality. I will discuss each in turn.

### A. *Child and Elder Welfare*

Some whose principal concern is child and elder welfare may argue that whatever benefits paid leave policies may have once women decide to work, encouraging women to work in the first place will have a negative net effect on the lives of their children and the elders for which they care. There is an extensive literature comparing outcomes of children whose mothers work during the first year of the child's life with those whose mothers do not. Several studies in the 1980s and early 1990s found that maternal employment during a child's first year was correlated with negative cognitive and behavioral outcomes that may persist through the later childhood years.<sup>173</sup> However, studies of the relationship between maternal employment and child outcomes will tell a misleading story unless they also account for quality of childcare and for maternal, child, and family characteristics. For instance, adverse effects appear to be concentrated in families of moderate income.<sup>174</sup> These same families have been found to receive the lowest-quality external childcare, raising the question of whether it is maternal employment per se, or the quality of available childcare, that causes the adverse effects.<sup>175</sup> There is also some evidence that mothers who work hardest during a child's preschool years have lower educational attainment;<sup>176</sup> this factor may be correlated with fewer resources on the part of these mothers to improve their children's cognitive attainment. Finally, maternal employment may actually improve child outcomes in the longer term by increasing family income.<sup>177</sup> In sum, it is far from clear that maternal employment, as opposed to independent factors correlated with maternal employment, causes negative child outcomes.

More to the point, though, is that even if subsidies allowing women to stay home full time improved child and elder outcomes relative to paid leave policies, they would not advance the goal of optimizing between satisfying child and eldercare needs and enabling women to choose full participation in paid work. The single-earner model will tend to reinforce women's decision to remain in the home or accept jobs with inferior long-term career prospects to achieve the flexibility of moving in and out of the workforce.

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<sup>173</sup> See Jane Waldfogel, *Child Care, Women's Employment and Child Outcomes*, 15 J. POPULAR ECON. 527, 536–39 (2002) (reviewing American and European studies on the impact of childcare and maternal employment in the preschool years on child outcomes).

<sup>174</sup> See *id.* at 537.

<sup>175</sup> *Id.* (explaining that moderate income families tend to receive the lowest-quality childcare, likely because they lack the income of wealthier families and the subsidies of poorer families that often allow them to purchase high-quality childcare).

<sup>176</sup> See *id.* at 538–39.

<sup>177</sup> *Id.* at 529, 536–37.

*B. General Objections to Family Subsidies: Savings Failures and Costly Family Planning Choices*

Two general themes sounding against redistribution of the kind that would be involved in a paid leave program involve savings failures and the justice (or injustice) of redistribution to assist families with child and eldercare needs. Neither argument is particular to the case of paid leave. The first could be leveled against any state insurance scheme, and the second could be leveled against any subsidy directed at families.

The savings failure objection is that paid family leave would be unnecessary if workers saved their earnings in a responsible fashion. Perhaps, then, to the extent that poor savers' circumstances are the result of their own imprudence, they should pay for their own bad planning. Arguments for redistribution tend to be more politically palatable when the beneficiaries of a wealth transfer are needy for reasons beyond their control.<sup>178</sup> A related objection is that subsidized or cross-subsidized wage replacement will discourage careful financial planning. Studies have shown that the existence of public insurance can "crowd out" private insurance coverage.<sup>179</sup>

What these objections understate is how difficult it can be to distinguish between those whose need results from imprudence and those whose inability to save is beyond their control.<sup>180</sup> Policies designed to make poor savers bear the consequences as a matter of desert will probably be over-inclusive. Furthermore, we currently see very poor savings among Americans notwithstanding the dearth of financial support for family leave.<sup>181</sup> In other words, even if funding family leave reduces private saving, it does not have far to fall.

Another class of objectors focus on the justness of redistribution to those who make costly family planning choices. For these critics it is not obvious why the state—or citizens who do not themselves have child caregiving needs—should pay taxes (directly or indirectly) to buffer others from the ordinary private hardships that accompany the decision to have children. For the most part, people choose to have children, and arguably should

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<sup>178</sup> See, e.g., Christina Fong, *Social Preferences, Self-Interest, and the Demand for Redistribution*, 82 J. PUB. ECON. 225, 227–28 (2001) (reviewing theoretical and empirical literature arguing that people may prefer more redistribution to the poor if they believe that poverty is caused by circumstances beyond individual control); Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity and Accommodation*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270, 272–73 (R. Jay Wallace et al. eds., 2004) (noting consensus among egalitarians and nonegalitarians alike that a fair distributive scheme would require individuals to internalize the costs of their voluntary choices).

<sup>179</sup> David M. Cutler & Jonathan Gruber, *Does Public Insurance Crowd Out Private Insurance?*, 111 Q. J. ECON. 391 (1996).

<sup>180</sup> See *supra* notes 62–64 and accompanying text (suggesting that savings failures may well be beyond the control of some and perhaps many, workers who are unable to take an adequate family leave).

<sup>181</sup> See *supra* note 62.

then undertake the costs of rearing them.<sup>182</sup> Furthermore, caregiving (for children in particular) can be seen as having very powerful private benefits. Caring for children is usually a source of personal joy and satisfaction, perhaps commensurate with the joy a childless person could experience given additional resources to take time away from work to travel, nurture friendships, or pursue personal projects.<sup>183</sup> This might make mandated subsidies especially troubling, or perhaps even offensive, to those who are excluded from this pleasure, e.g., gay and lesbian couples in states where they are not eligible to adopt children.<sup>184</sup> Also, one's children may be a source of security, as adult children often look after the needs of their parents in retirement. Finally, some are troubled by the notion of the state providing public subsidies for children while still treating childrearing choices as purely private, demanding no further accountability for the manner in which children are raised.<sup>185</sup> Related to these arguments is the concern that paid family leave will simply encourage people to have more children, thus commandeering further subsidies from nonparents.

The arguments for requiring family caregivers to internalize the costs of eldercare on the basis of choice stand on shakier ground. This is in part because children do not choose to have parents and do not always willingly choose to undertake their care.<sup>186</sup> In addition, although some caregivers will experience intrinsic benefits from giving care to elders, for many, the personal gratification associated with eldercare is lower than for raising children; indeed, in some cases the former is clearly more burdensome than gratifying.<sup>187</sup> Finally, elders themselves, in contrast to children, have

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<sup>182</sup> See ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 20–21 (2000) (arguing that raising children should be the responsibility of those who bear them); see also Case, *supra* note 73, at 1782–84 (arguing that those who make alternative choices shouldn't have to subsidize those who choose to have children, both because it will undermine prudent individuals' decisions to refrain from having children when they cannot afford them, and because those who choose not to be parents owe no debt to those who do).

<sup>183</sup> See, e.g., Case, *supra* note 73, at 1767 (describing societal lack of sympathy for the idea that a childless worker should have paid time off to pursue a valuable and sustaining hobby rather than to have a baby); Franke, *supra* note 73, at 190–91 (discussing purely personal (as opposed to altruistic) reasons mothers have children, and criticizing the societal tendency to contrast "altruistic" mothering with "selfish" private consumption).

<sup>184</sup> See, e.g., FLA. STAT. ch. 63.042(3) (2003) (stating that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual"). The Eleventh Circuit recently upheld this statute against challenge on due process, privacy, and equal protection grounds. See *Lofton v. Sec'y of the Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

<sup>185</sup> See, e.g., Case, *supra* note 73, at 1772–73 (noting that parental leave mandates include no "quality control" component to monitor how people actually use their leave time); Franke, *supra* note 73, at 191–92 (raising the example of parents who seek subsidies to educate their children outside the public school system based on their rejection of the values of toleration, equality, and humanity taught in the public schools).

<sup>186</sup> See Jacobsen, *supra* note 91, at 153–54. In addition, many caregivers are daughters-in-law who, when they chose their life partner, may not have contemplated a future of caring for their partner's parents.

<sup>187</sup> See Martire & Stephens, *supra* note 77, at 168 (canvassing literature on potentially

had an opportunity during their lifetimes to save and plan for future needs, and if successful in planning, some means to purchase care during their time of need.<sup>188</sup> One still might argue, however, that adult children's obligations to their parents are long-anticipated duties flowing from moral reciprocity for past benefits received, and that adult children should therefore shoulder the costs themselves rather than enjoy subsidies from other citizens.

In contrast to these views, I see the demand for care, both for children and elders, as a societal concern rather than purely a matter of private family obligation. Some families or individuals will make choices that result in higher burdens of care, e.g., by having many children, and I do not make the strong claim that they should be able to externalize the full costs of those choices. I do, however, support a general conception that regulatory intervention involving some net distributive transfers to families for dependent care is an appropriate role for the state.<sup>189</sup> Furthermore, even supposing that providing wage replacement for family caregiving would "reward" imprudent savings failures or family planning decisions, I argue that to the extent they increase women's workforce participation and autonomy, the benefits of paid family leave programs outweigh their costs. Aside from this instrumental claim (and its necessarily subjective assessment of the tradeoffs involved), there may also be noninstrumental arguments for redistribution, even to persons whose needs stem from actions within their control.<sup>190</sup>

Empirical research suggests that maternity leave policies do increase the fertility of workers.<sup>191</sup> Projections of the effect of maternity leave policies on fertility in the entire population (as opposed to just working women), however, suggest that as maternity leave policies become available, more women are likely to enter into the workforce, and for those women, fer-

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deleterious psychological and physical health effects of providing care to a disabled elder). For a vivid personal account of how difficult and unpleasant it can be to give care to a disabled parent, see Case, *supra* note 73, at 1754 n.5.

<sup>188</sup> See Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fine-man and Williams*, 76 CHI.-KENT. L. REV. 1557, 1561 n.15 (2001) (commenting that eldercare raises distinctly different issues from childcare given that many of the elderly are capable of taking care of themselves, either financially or physically and mentally).

<sup>189</sup> Note that this is not purely a transfer to traditional families. Partnered but unmarried workers, including gay men and lesbians, may use paid leave to care for disabled parents. In addition, my proposal for paid leave would also cover care for opposite- and same-sex domestic partners.

<sup>190</sup> See, e.g., Shiffrin, *supra* note 178, at 284–95 (arguing that accommodation, even assuming it involves subsidizing others whose needs are partly or wholly the result of chosen behaviors, is consistent with egalitarianism because it enhances all individuals' freedom to make choices that express certain values, feelings, and relations).

<sup>191</sup> Susan L. Averitt & Leslie A. Whittington, *Does Maternity Leave Induce Births?*, 68 S. ECON. J. 403, 414–16 (2001) (finding that widespread adoption of guaranteed maternity leave policies in the United States would increase births among young, working women, although it would not affect the probability of having a first child).

tility will decline.<sup>192</sup> This latter effect should offset the increase in fertility among women already in the workforce. Indeed, a recent study examining a large sample of countries over a twenty-year period found no significant net effect of paid maternity leave benefits on total fertility rates.<sup>193</sup>

### C. *Equity Between Working and Stay-at-Home Parents*

Some who support the notion of subsidizing family caregiving nevertheless depart from my position because they believe that fairness requires any state subsidies designed to offset the costs of family caregiving to be available equally to working and stay-at-home parents.<sup>194</sup> A core aspect of my defense of paid leave, as mentioned, is that it would encourage the entrance and retention of women in full-time employment as compared to low-hours part-time employment or full-time caregiving.<sup>195</sup> I do not oppose across-the-board benefits to families with caregiving needs. There may be sound reasons to assist families, especially those burdened with unusually large caregiving expenses, e.g., a disabled child. But it is central to my proposal that such subsidies be an alternative to distinct, targeted subsidies for working caregivers because across-the-board caregiver subsidies, standing alone, would not necessarily change the relative attractiveness of paid versus unpaid work. Affirmatively boosting women's incentives for market workforce participation is necessary to counter the skew of existing cultural and economic incentives<sup>196</sup> toward women compromising their workforce attachment to bear the disproportionate household share of unpaid family labor.<sup>197</sup>

<sup>192</sup> Winegarden & Bracy, *supra* note 69, at 1020, 1029–34.

<sup>193</sup> Gauthier & Hatzius, *supra* note 18, at 300–01 (finding paid maternity leave benefits did not significantly affect total fertility rates in a sample of twenty-two OECD countries between 1970 and 1990, but paying families direct cash benefits upon the birth of a child had a positive and significant effect on fertility).

<sup>194</sup> See, e.g., ALSTOTT, *supra* note 130, at 142–45 (criticizing work-family policy advocates who unduly emphasize work as the route to self-realization); Noah Zatz, *Beyond Employment: Work Requirements, Caretaking, and Liberal Justice* (unpublished manuscript on file with author) (arguing that limiting redistributive benefits such as childcare subsidies to working caretakers is unjust because it fails to recognize parental care in the home as work on par with market work).

<sup>195</sup> I am also wary of proposals to make paid leave available to workers with low workforce attachment because relaxed eligibility requirements would not provide adequate incentives for meaningful workforce attachment. See *supra* notes 170–171 and accompanying text and *infra* Part VII.F.

<sup>196</sup> I discuss these cultural and economic forces at length in Part III.B, *infra*.

<sup>197</sup> Professor Alstott would limit the use of subsidies to enhance caregivers' opportunities to combine childrearing with other projects (e.g., caregiver support accounts to be used only for childcare, education of caregiver, or retirement savings of caregiver). See ALSTOTT, *supra* note 130, at 191–95. Although Professor Alstott's caregiving subsidies would not be an actual cash equivalent, I believe they would offer considerably weaker incentives than paid leave for ultimately altering the traditional division of household labor. For example, although some women might use their subsidy to purchase childcare while working full time, the option of using the caregiver subsidy to augment retirement savings would also reduce the opportunity costs of foregoing paid employment to engage in full-time unpaid

The problem with proposals that would compensate women for housework is similar. Such proposals take a variety of forms, but their common thread is a reaction against the devaluation of unpaid household labor and the failure to recognize it as a crucial component of economic productivity.<sup>198</sup> A thorough analysis of the very complex problems raised by these proposals is beyond the scope of this Article, but the idea that policies aimed at encouraging women's labor force participation will ultimately devalue household labor must be examined.<sup>199</sup> Social policy should not foreclose women's option to stay home full time, nor assume that paid market work is intrinsically superior to unpaid domestic labor. However, a policy such as paid leave that tips the balance of incentives need not force a singular substantive outcome. It must be understood against the backdrop of current incentives and opportunities that unduly discourage women caregivers from pursuing a diverse set of contributions both within the family and the market. The opportunity for greater diversity of experience is essential to women's freedom from dependency on the family as the sole locus of identity, responsibility, and moral awareness. Remunerating primary caregiving would not transform it into market work.<sup>200</sup> It would re-

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caregiving. I am skeptical whether support accounts offering this degree of flexibility would significantly alter women's opportunity sets in light of existing social pressure and economic incentives to remain in the home.

<sup>198</sup> See, e.g., Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 29-37 (1998) [hereinafter Ertman, *Commercializing Marriage*] (arguing that premarital security agreements would secure repayment of the primary wage earner's debt to the homemaker upon dissolution of a marriage, thus protecting women and children upon divorce and commodifying women's domestic work); Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's Life's Work*, 102 COLUM. L. REV. 848, 850-53 (2002) (arguing that focusing only on the importance of wage labor risks devaluing women's domestic contributions, and that we ought to instead compensate women for housework); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) [hereinafter Silbaugh, *Turning Labor into Love*] (illustrating a number of ways in which the law devalues domestic labor and advocating for a systematic attempt to value houseworkers' contributions to family wealth on par with those of wage-earners); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) [hereinafter Silbaugh, *Family Economy*] (advocating nonenforcement of premarital agreements as a way to counter alternate tendency to devalue non-monetary contributions to the household economy relative to monetary contributions); cf. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (arguing that taxing women's housework would serve to recognize the social and economic value of unpaid household labor).

<sup>199</sup> See Silbaugh, *Family Economy*, *supra* note 198, at 94-97 (distinguishing the characterization of housework as creating opportunity costs for women ("loss thinking") from its characterization as a valuable contribution ("gain thinking"), and arguing that loss thinking reinforces the devaluation of housework).

<sup>200</sup> *Contra* Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 CHI.-KENT L. REV. 1733, 1750 (2001) (arguing that remunerating primary caregiving would make it market work). Professor Ertman is, nevertheless, sensitive to the concern that compensating unpaid domestic labor will create incentives to reinforce traditional roles. See, e.g., Ertman, *Commercializing Marriage*, *supra* note 198, at 19-20, 75-76 (discussing gender-neutral compensation of housework through security agreements, in which homemakers receive a security interest in marital property produced by their wage-earning spouses, and suggesting that such compensation could create an incentive for men to dissuade women

main one kind of work, with the combined force of social norms and economic incentives inhibiting more free-ranging opportunities for women to forge a satisfying life path, whatever that path may be.<sup>201</sup>

#### D. "Accommodationism" as Reinforcing Inequality

In contrast to compensating carework within the family, public provision of caregiving resources (e.g., public daycare) would increase the range of options available to workers who have work-family conflicts, and for some even make it possible to work without interruption, possibly enabling stronger workforce attachment than leave policies. Indeed, some scholars have raised the objection that because they will be utilized mainly by women, policies that accommodate worker-provided care (as opposed to externally provided care) may merely reinforce traditional family roles.<sup>202</sup>

As the availability of adequate external care, such as high-quality daycare, is essential to the viability of the dual-earner family model, I strongly support public investment in and improvement of external caregiving institutions.<sup>203</sup> External institutions, however, cannot substitute for paid leave. Although the availability of quality childcare, for example, might be necessary to encourage returning to employment after taking a leave following the birth of a child, it is not sufficient to prevent at least some mothers from exiting the workforce immediately after the birth. For many parents, daycare will not be an acceptable alternative to parental care and bonding in the early months of an infant's life. For acute but temporary family health events or the birth or adoption of a child, many workers seek the financial means to take *personal* time away from work to tend to these needs.<sup>204</sup> In other words, regardless of whether parental care is superior to externally provided care, workers may prefer the opportunity to give care personally. Paid leave policies target this specific demand in a way that external care provision cannot, and therefore may increase the workforce attachment of a significant subset of workers who might otherwise avoid, limit, or truncate a career in the paid workforce. Supporting these choices is good social policy, both as a pragmatic response to the many workers'

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from embracing traditional roles to relieve themselves of the security interest encumbering their income, induce men to shoulder more domestic tasks, and lead men to encourage their female mates to engage in market labor).

<sup>201</sup> In addition, working exclusively in the home, even if compensated, is unlikely to bring the enhanced personal development benefits of market work. See *supra* Part III.C.

<sup>202</sup> See, e.g., Schultz, *Life's Work*, *supra* note 15, at 1954–57 (criticizing accommodationists for being relatively untroubled by the segregationist implications of reforms, including maternity and family leave, that would encourage intermittent workforce participation by women).

<sup>203</sup> For a thoughtful discussion and critique of public childcare in the United States, see GORNICK & MEYERS, *supra* note 12.

<sup>204</sup> See WILLIAMS, *supra* note 15, at 48–54 (arguing that there is a strong norm of parental care in the United States, and that this partly explains the failure of full-scale commodification of domestic work through policies such as daycare).



strong desire to engage personally in some family caregiving, and as a way of permitting, and indeed validating, the role duality of worker-caregivers.

One problem is that offering paid family leave as a response to the demand for personal caregiving time assumes that workers (especially women workers, who currently engage in far more carework than men) in fact want this option, and that denying them this choice will discourage their workforce participation. However, there are at least some workers for whom the “freedom” to take personal time off is more burdensome than liberating. This may be especially true in the context of eldercare.<sup>205</sup> Certainly many workers will perceive the increased opportunity to interrupt work to give personal care to ill family members as a benefit that improves their quality of life. For others, though, the very availability of the option will make it harder to resist feelings of guilt or pressure from a spouse, parent, or sibling to undertake a task they feel is unpleasant. Thus, for example, wage replacement may effectively deny the adult child of a disabled elder the relief from caregiving that a less accommodating policy would provide.<sup>206</sup> My proposal cannot entirely avoid this risk.<sup>207</sup>

One solution could be to narrow the kinds of support available, for example, by eliminating the eldercare leave option. To do so, though, would be shortsighted in the long run. Inclusion of the eldercare leave benefit reduces the disproportion of heterosexual families with children as beneficiaries of the transfer program, and thus promotes greater fairness and increases the legitimacy of the program.

There remains the valid concern that efforts to accommodate the demands of family within the workplace will serve unwittingly to create a “second-class workforce,” mostly women, perceived by employers as less committed to their jobs and thus channeled into jobs with lower pay and more limited career potential. This is not a trivial concern. As stated in Part III, if paid leave benefits are excessively generous, they may encourage career interruptions lengthy enough to undermine women’s workforce attachment, just as some critics of accommodation fear.<sup>208</sup> Therefore, if we want to increase women’s workforce participation by making it easier for them to take leaves, while at the same time protecting against the risk

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<sup>205</sup> See *supra* notes 186–187 and accompanying text.

<sup>206</sup> Note, though, that the FMLA excludes care of in-laws. Thus, if a paid leave policy were to adopt FMLA rules for benefit-triggering events, pressure to give in-law care would not be a problem. See The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113(b) (2004).

<sup>207</sup> In Part II.B, *supra*, I also identified the possible inefficiencies at stake if a worker pressured to take leave has a higher marginal productivity (and wage) than the external caregiver she would hire to perform the same task.

<sup>208</sup> See Barbara R. Bergmann, *Subsidizing Child Care by Mothers at Home*, 6 FEMINIST ECON. 77, 84 (2000) (suggesting that long leaves would make the distinction between paid parental leaves and subsidies for all at-home parents less cogent).

of excessive human capital erosion among those who do take leave, we must ensure that paid leave benefits are offered in moderation.

## VI. FINANCING PAID LEAVE

The cost of a paid family leave policy and who will pay for it are both issues central to my proposal. I argue in this Part that at least some of the costs of paid leave should be spread beyond leave-takers, in part to avoid undermining the normative goal of work-attachment that informs this analysis, and in part in keeping with the ethical argument made earlier that society has a broad interest in this form of social provision. Following a brief discussion of the fiscal costs and benefits of paid family leave benefits, I will explain the distinction between payroll tax and general revenue financing, with particular attention to the phenomenon by which employers may shift the cost of a payroll tax to employees in the form of reduced wages, reduced hiring, or both. Payroll tax financing, depending on how it is designed, can spread costs beyond leave-takers, but is still principally a tax on workers as a class, rather than a broader cross-section of society. General revenue financing spreads costs more broadly, and thus purely ethical considerations should lead us to favor at least partial use of general revenues. Finally, I review the quite limited empirical studies of the relationship between paid leave programs and women's earnings, and speculate on the interplay between the method of financing and female workforce participation.

### *A. Fiscal Costs and Benefits of Paid Family Leave*

Most research on the costs of family leave policies has focused on unpaid leave of the form currently mandated by the FMLA. For this reason, this discussion will first explain what we know about the costs of unpaid leave and then project what we could expect if we were to add a wage replacement component.

Providing workers with job-protected leave imposes several monetary costs on employers. First, despite relief from wage obligations, employers may still pay some direct compensation costs. Although not all employers provide health insurance coverage, those that do have been estimated to pay an average of about \$250 per year to continue health insurance provision for a worker taking leave and the worker's family.<sup>209</sup>

Some costs, though, are indirect, and these are more difficult to measure. As mentioned earlier, employees who take leave will experience some depreciation of their human capital over time, possibly requiring the employer to invest in retraining them upon return. For leaves of short duration, such as the twelve-week maximum under the FMLA, the costs of hu-

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<sup>209</sup> Waldfoegel, *Impact of the FMLA*, *supra* note 149, at 283 & n.5 (in 1993 dollars).

man capital depreciation are likely to be negligible.<sup>210</sup> For leaves of longer duration, however, the depreciation of human capital might become an important cost consideration.

Reorganizing the workplace in the leave-taker's absence presents another cost. The most common employer solutions for covering the work responsibilities of the leave-taking employee are temporarily assigning work to other employees (which involves administrative costs and may sap resources in other areas of production), and hiring temporary replacements (which involves both hiring and training costs).<sup>211</sup> In the Department of Labor's 2000 survey, most U.S. employers covered by the FMLA reported no noticeable impact of FMLA compliance on their establishments' productivity, profitability, and growth.<sup>212</sup> These reports may understate the actual costs of job-protected leave, however, given that many establishments covered by the FMLA already had policies in place either voluntarily or under state law.

Employers enjoy several compensating monetary benefits of unpaid leave. Although the employer will incur reorganization costs as described above, at least some (and possibly much or all) of these costs will be offset by salary savings during the leave-taker's absence. Additionally, to the extent job-protected leave reduces employee turnover, the employer saves on the costs of hiring and training permanent replacements. The 1990 U.S. Small Business Administration Employee Survey estimated that it takes an average of two and one-half weeks to replace a terminated employee and that the termination costs averaged at least \$1,100.<sup>213</sup> The employer will save on these costs if a leave policy increases the likelihood of a leave-taking employee's return. Employers may also benefit from improved worker morale, which would presumably translate into increased productivity.<sup>214</sup> Ultimately, taking both costs and benefits into account, it is difficult to de-

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<sup>210</sup> Dorothea Alewell & Kerstin Pull, *An International Comparison and Assessment of Maternity Leave Legislation*, 22 COMP. LAB. L. & POL'Y 297, 299 (2001).

<sup>211</sup> See BALANCING THE NEEDS, *supra* note 5, at tbl.6.3 (reporting that in 2000, 98% of FMLA-covered establishments temporarily assigned work to other employees and 41% hired outside temporary replacement workers). Other strategies include leaving the work for leave-takers when they return, and having leave-taking employees continue some work while on leave.

<sup>212</sup> *Id.* at tbl.6.5 (noting that 77% of establishments reported no noticeable effect of FMLA compliance on business productivity, 88% reported no noticeable effect on business profitability, and 88% reported no noticeable effect on business growth).

<sup>213</sup> Arindrajit "Arin" Dube & Ethan Kaplan, PAID FAMILY LEAVE IN CALIFORNIA: AN ANALYSIS OF COSTS AND BENEFITS 41 (2002) (noting estimates are larger for large businesses), <http://www.laborproject.org/publications/pdf/dube.pdf> (last visited Nov. 18, 2004).

<sup>214</sup> Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273, 290 (2001). Note that there could also be a loss of morale on the part of employees forced to take up the slack when coworkers take leave, but recent employee survey data suggests that this has not been a significant problem in the first decade of the FMLA. See BALANCING THE NEEDS, *supra* note 5, at tbl.6.5 (finding in 2000, only 11% of covered establishments reported negative effects, 24% reported positive effects, and 65% reported no noticeable effects of FMLA compliance on employee morale).

termine whether unpaid leave actually imposes net “disruption costs” on employers, and if it does, to what extent.

The provision of wage replacement, of course, introduces distinct costs. First there is the actual cost of replacing workers’ wages. Any estimate of the financial costs of wage replacement would necessarily depend on the generosity of the program, including coverage, duration, degree of wage replacement, benefit ceilings, and so on. Thus, for example, the program might cover half the workforce, providing 50% wage replacement for six weeks, or it might cover 80% of the workforce, providing 100% wage replacement for six months. Clearly there would be a wide cost difference between various options, making it difficult to estimate “typical” benefit expenditures.

Another factor is that availability of the paid benefit would change current behavior. It would be inadequate simply to count the number of workers who currently take family leaves and compute the financial costs of replacing those workers’ wages because adding wage replacement to existing leave benefits would likely increase the number of leaves taken as well as the duration of leaves. In addition, we would expect some measure of benefit substitution. Some employers currently allow workers to use vacation days, sick leave, or personal days to replace pay during family emergencies.<sup>215</sup> For these workers, the availability of paid family leave will free up benefits they previously used to finance family leave so they can be used for their designated purposes.<sup>216</sup> Worker turnover also should decline further compared with unpaid leave, with attendant savings for employers.

The discussion thus far has focused on potential costs and benefits in the workplace, some of which would redound to the employer, regardless of how the program were financed. But we could also expect some savings to the state. Approximately 11% of workers on unpaid leave, and, perhaps surprisingly, 5% of those who receive at least partially paid leave, rely on some form of public assistance.<sup>217</sup> The availability of paid leave benefits would reduce these workers’ reliance on public assistance. Health benefits to children, the elderly, and spouses who receive care from leave-takers would presumably also translate into fiscal savings to the state. Finally, if paid leave programs have the predicted effect of strengthening women’s workforce attachment, by reducing quits and encouraging new entrants, governments will be able to collect more income tax revenues.

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<sup>215</sup> Cf. Dube & Kaplan, *supra* note 213, at 23–24.

<sup>216</sup> In fact, we may see less of this than one might initially think: if family leave benefits provide less generous wage replacement than do vacation days (70% wage replacement for family leave compared to 100% for vacation), some workers could still opt to take the vacation days, forgoing their right to collect the family leave benefit to collect full pay. *Id.* at 24.

<sup>217</sup> *Id.* at 44; see also BALANCING THE NEEDS, *supra* note 5, at tbl.4.8.

Having discussed both costs and benefits, I will not attempt to derive a precise net “price” of paid family leave, in part because that would depend on the generosity of a program, but also because a core predicted benefit is difficult or impossible to monetize. A more equal balance in men’s and women’s respective contributions to market and family work may well be productively efficient, but it is hard to assign a dollar value to the benefit. In any event, I do not rest my argument on the claim that greater gender equality will be productively efficient. Instead, I will assume that, at least in the short run, a program of paid family leave will require a net fiscal expenditure. A question, then, is who ought to shoulder the fiscal burden.

### *B. Financing Mechanisms*

A program of social welfare benefits, including a paid leave program, can be designed to be more or less redistributive.<sup>218</sup> One way to ensure that workers have a buffer against the risk of job loss but internalize the costs of that protection is to force them to save part of their earnings on an ongoing basis. The state could encourage or require each employee to invest money into a personal account which, prior to retirement, the employee could draw upon only for certain qualifying work interruptions (e.g., the birth of a child). When the employee retired, any remaining balance in his account could be rolled over into a pension. A system of purely personal accounts modulates spending across an individual’s lifetime, but does not redistribute between individuals except to the extent that it reduces the relative tax burden of those who participate in the program.

I argued earlier that women who have greater freedom to participate in paid employment may benefit because of their increased autonomy.<sup>219</sup> A system of personal family leave accounts might encourage better financial planning and reduce work interruptions by women likely to have family care obligations.<sup>220</sup> Any autonomy benefit of increased workforce attachment could be seen as redounding mainly to women in heterosexual relationships who have care obligations. As such, a tax subsidy just large enough to encourage private savings might be quite appealing because for the most part it internalizes the costs of paid leave to leave-takers themselves. However, as I have argued, paid family leave would confer important benefits on society by reducing labor market inequality. In this sense, there is also a strong ethical basis for financing benefits in a way that results in more redistribution to leave-takers.

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<sup>218</sup> See *supra* Part II.C.

<sup>219</sup> See *supra* Part III.C.

<sup>220</sup> A 2003 legislative bill in Nebraska proposed a scheme of this nature, but the bill was not reintroduced in the 2004 session. L.B. 37, 98th Leg., 1st Reg. Sess. (Neb. 2003).

Two common ways to finance social welfare benefits to redistribute wealth are payroll taxes and general revenue financing. Relying on payroll taxes allows for the redistribution of costs between workers, and using general revenues can produce an even broader spreading of costs. The next two sections discuss each of these mechanisms in light of the social objectives of paid family leave.

### 1. Payroll Taxes

In the United States, social insurance programs have historically been financed using payroll taxes rather than general revenues.<sup>221</sup> All the major social insurance programs—Social Security, Medicare, federal long-term disability insurance, state temporary disability insurance, and unemployment insurance—are financed in whole or in large part through payroll taxes.<sup>222</sup> Moreover, the trend is toward increasing reliance on the payroll tax.<sup>223</sup>

A payroll tax may be imposed on employers, employees, or both. The focal point of public debates about payroll taxes often centers on whom, as between employers and employees, should bear the tax, the assumption being that it will have implications for wealth distribution.<sup>224</sup> Such debates, however, overlook the important issue of tax incidence. The economic burden of a payroll tax may differ from the legal burden. Both theory and empirical evidence suggest that whatever the statutory burden may be, a payroll tax does not significantly redistribute wealth from employers to employees.

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<sup>221</sup> For general discussions of the historical origins of this practice, see Beth Stevens, *Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 123 (Margaret Weir et al. eds., 1988); MARIE GOTTSCHALK, *THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES* 65 (2000); Frank R. Dobbin, *The Origins of Private Social Insurance: Public Policy and Fringe Benefits in America, 1920–1950*, 97 AM. J. SOC. 1416, 1423–1445 (1992).

<sup>222</sup> Of course, the accounting after revenues are generated may be quite artificial. Payroll taxes collected for Social Security may not fund pensions directly. The point here is that the payroll tax is increasingly used as a method of raising revenues to support a variety of government programs. Moreover, the continuing political viability of many social welfare programs may depend on the sustained presence of payroll taxes as a significant component of federal revenue.

<sup>223</sup> Cf. Jonathan Gruber, *Payroll Taxation, Employer Mandates, and the Labor Market*, in *EMPLOYEE BENEFITS AND LABOR MARKETS IN CANADA AND THE UNITED STATES* 183, 183 (William T. Alpert & Stephen A. Woodbury eds., 2000) (noting a rise in the use of payroll taxes as a source of public finance, from 12.4% of federal revenues in 1960 to 38% in 1993); Andrew Mitrusi & James Poterba, *The Distribution of Payroll and Income Tax Burdens, 1979–1999*, 53 NAT'L TAX J. 765, 772 tbl.3 (2000) (calculating that payroll taxes exceeded income taxes for 42% of families in 1979 and 62% of families in 1999).

<sup>224</sup> See Bohrer, *supra* note 1, at 420 (advocating financing paid family leave through employee payroll contributions because “most businesses simply cannot afford to” pay for it); John M. Broder, *Family Leave in California Now Includes Pay Benefit*, N.Y. TIMES, Sept. 24, 2002, at A20 (noting that proposed employer contribution was a sticking point in the California legislative process leading to paid leave and was ultimately eliminated).

It is commonplace for economists to assert that the “statutory incidence” of a tax will typically differ from the “economic incidence” of the tax because the party on whom the tax is imposed will try to shift its burden to others.<sup>225</sup> Thus a business faced with a costly mandate may pass the cost of that mandate to workers in the form of reduced wages. In addition, if an activity is taxed, the party taxed may do less of that activity—e.g., if there is a tax on wages earned, the worker may work fewer hours.<sup>226</sup> Both demand- and supply-side phenomena operate in an equilibrium that will adjust following imposition of the tax. Trying to project (or empirically test) the outcome of this reequilibration is an important exercise if one is interested in the distributional consequences of a particular employment mandate.

*a. Employer Mandates and the Problem of Cost-Shifting*

In recent years a good deal of scholarly attention has focused on the distributive implications of “employer mandates.” By this I mean the legal imposition on employers of either affirmative duties or restraints in setting the terms and conditions of employment. For example, employers might be required to maintain minimum health and safety standards in the workplace, accommodate the special requirements of workers with disabilities, or refrain from discriminating against women in wages and hiring. Assuming mandates are costly to employers, the mandate operates like a payroll tax on the employer.

The economics of employer mandates have been formalized in a seminal article by economist Lawrence Summers and others who have expanded on his analysis.<sup>227</sup> For ease of illustration, consider the simple supply-demand framework in a competitive labor market from Figure 1 below, and assume (again, solely for illustrative ease) that employers are required to bear the entire cost of the mandated benefit. If the government requires employers to offer a benefit to workers that they do not already provide, then employers will adjust their demand for labor.<sup>228</sup> Specifically, employers’ demand for labor will shift downward by an amount equal to the cost of providing the benefit (reflected in a shift from demand curve  $D_0$  to  $D_1$  in Figure 1). Workers, in turn, will see the mandated benefit as a form of additional nonmonetary compensation and be willing to work more. The labor supply curve will shift downward by an amount equal to the

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<sup>225</sup> See, e.g., RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 250 (4th ed. 1984).

<sup>226</sup> See *id.*

<sup>227</sup> See Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180–81 (1989) (formally describing the predictions I summarize in this paragraph using a partial equilibrium analysis based on price theory).

<sup>228</sup> For expositional ease, the effect of the tax is illustrated in Figure 1 as a uniform shift. Under a payroll tax the shift would most likely be a percentage shift and, therefore, not uniform at every wage. Nothing in this analysis turns on that distinction, however.

valuation that workers place on the benefit (reflected in a shift from  $S_0$  to either of the  $S_1$  curves, explained more fully below). Taken together, these adjustments will lead to a new equilibrium in which wages are unambiguously lower, but employment levels may increase or decrease, depending on how highly employees value the benefit. In Figure 1, a low employee valuation is reflected by the shift to  $S_1'$ , while a high valuation is reflected by the shift to  $S_1''$ .

The net value of the benefit—whether the benefit is efficient—is the difference between how much the workers value the benefit and the cost of the benefit. If workers value the benefit by more than its cost (reflected by  $S_1''$ ), there will be an increase in employment levels, and total social efficiency (i.e., employee plus employer surplus) will increase. If they value the benefit at less than its cost (reflected by  $S_1'$ ), wages will fall by more than they value the benefit, leading to a decrease in employment and a net efficiency loss.<sup>229</sup> Whatever the efficiency gain or loss, though, this analysis does not predict a systematic *redistribution* from the employer to workers.

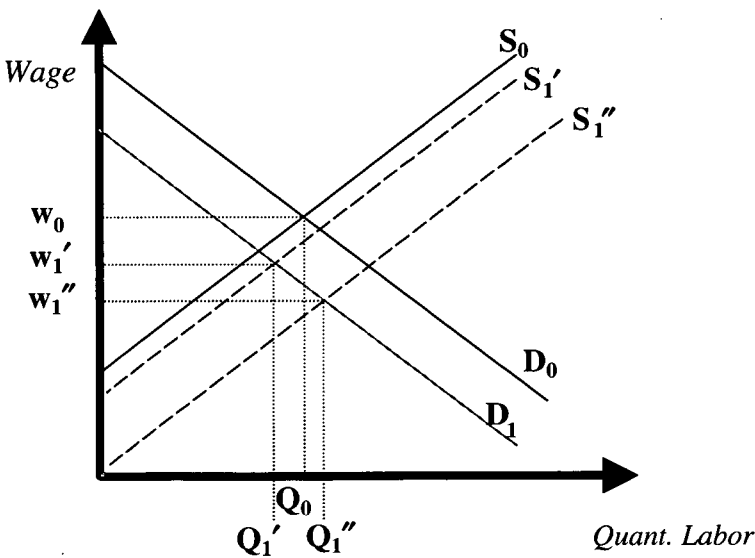


FIGURE ONE

<sup>229</sup> Relative elasticities of supply and demand may affect the magnitude, but not the existence or direction, of the three effects described. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 238 (2000); Sharon Rabin-Margalioth, *Cross-Employee Redistribution Effects of Mandated Employee Benefits*, 20 HOFSTRA LAB. & EMP. L.J. 311, 320 (2003) [hereinafter Rabin-Margalioth, *Cross-Employee Redistribution*] (cautioning that because of this phenomenon, it is misleading to assume that a large reduction in wages accompanied by relatively unaffected employment levels necessarily reflects a highly efficient mandate).



The result of the equilibrium I just described is highly dependent on whether the cost of the mandate varies with the number or kind of worker employed. A mandate might impose a fixed cost on the employer regardless of number or kind of workers (e.g., the requirement that the employer install a ramp at the entrance for wheelchair access). The employer may either absorb the cost or pass it along to others, but it cannot avoid or reduce the tax by hiring fewer or different workers. A mandate might, alternatively, impose costs that multiply with each additional worker hired, akin to a surcharge (e.g., a requirement that every worker receive health insurance). Here, the employer might choose to hire fewer workers and perhaps ask them to work longer hours to avoid the “benefit premium” associated with hiring additional workers. Or, a mandate might impose costs that vary with the number of worker-hours, or wages paid, a common example being Social Security taxes. Here, too, the employer might simply hire fewer workers or reduce workers’ hours in response to the tax. Finally, a mandate might impose costs associated with hiring a certain class of workers. The employer here may have an incentive to avoid hiring workers who fall within that class.

*b. Unpaid Leave Under the FMLA as an Accommodation Mandate*

Some have argued, for example, that the unpaid leave benefit provided by the FMLA, while not limited to women, acts like an “accommodation mandate” because it is in fact more likely to be utilized by women of childbearing age than by other workers.<sup>230</sup> Although I explained earlier that whether the employer bears any net costs in connection with unpaid job-protected leave is contested, if we assume that it does impose net costs, these costs may be shifted to women of childbearing age. This is because the disparate costs of accommodation cause the demand curve for workers in the accommodated group to shift downward relative to the demand curve for other workers. On the supply side of the equation, because only accommodated workers receive the benefit, they will value it more highly, on average, than other workers. Accommodated workers will be inclined to supply more labor at a given wage than other workers (their supply curve will shift downward relative to the supply curve of other workers).<sup>231</sup> Assuming wages and/or employment can adjust freely, then, unpaid leave will reduce accommodated workers’ relative wages, even as it may increase their relative employment levels. As in the discussion above, which assumed universally applicable mandates, efficiency will depend on how much the workers who pay for the benefit value it relative to its cost.

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<sup>230</sup> See Jolls, *supra* note 229, at 290 (analyzing the cost-shifting likely to occur under the FMLA); Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren’t They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 152 (2003).

<sup>231</sup> See Jolls, *supra* note 229, at 241–42.

If wages and/or employment cannot adjust freely, we may find redistribution to the accommodated workers. A variety of institutional barriers—e.g., legal rules and workplace norms—may prevent relative wages and employment levels from shifting in response to a costly mandate.<sup>232</sup> Law professor and economist Christine Jolls elaborates on the importance of antidiscrimination laws in this regard.<sup>233</sup> In many instances, the targeted beneficiaries of accommodation mandates are also protected by antidiscrimination laws. If antidiscrimination laws are effective, they will prevent wage or hiring discrimination between the accommodated (and protected) group (the “disadvantaged workers,” to use Jolls’s terminology) and “nondisadvantaged workers” who are not covered by the mandate.<sup>234</sup> As such, the costs of the mandate will be shifted to nondisadvantaged workers.<sup>235</sup> If antidiscrimination laws, either wage restrictions or hiring restrictions, are not binding, however, we would expect a different outcome. If wage restrictions are binding but hiring restrictions are not, members of the accommodated group will bear the costs of the accommodation mandate in the form of reduced employment.<sup>236</sup> If employers are free to discriminate in wages but not in hiring, the situation essentially reverts to what Summers predicted, with workers who use the benefit paying for it in the form of lower wages.<sup>237</sup>

Jolls argues that even where antidiscrimination laws are in place to prevent sex discrimination in wages, occupational segregation of women and men will have a tendency to dampen their effect.<sup>238</sup> Where occupational segregation exists, the cost of providing accommodations to women can be shifted to workers in female-dominated industries in the form of reduced wages across-the-board.<sup>239</sup> In the absence of male employees working at the same jobs, proof of wage discrimination is unlikely or impossible. Jolls makes just this prediction with respect to unpaid leave under the FMLA. She speculates, though, that because the costs of providing unpaid leave are difficult to monetize, an employer will tend in the short run to shift

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<sup>232</sup> Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 623, 626 (1994) [hereinafter Gruber, *Maternity Benefits*].

<sup>233</sup> See Jolls, *supra* note 229.

<sup>234</sup> *Id.* at 240–54.

<sup>235</sup> This is true even when the cost of the mandate exceeds the value of the mandate to its beneficiaries, although certain caveats apply, e.g., the proportion of the workforce that is nondisadvantaged must not be too small. *Id.* at 249–51.

<sup>236</sup> See *id.* at 255–56.

<sup>237</sup> See *supra* Part VI.B.1.a.

<sup>238</sup> Jolls, *supra* note 229, at 284. Note that women’s relative employment levels may or may not also fall according to this model: if the value of the mandated benefit exceeds its cost, women’s relative employment levels will rise, and vice versa. Other factors that might have an effect include the ratio of disadvantaged to nondisadvantaged workers in a market and the degree to which the costs of the mandate can be monetized. *Id.* at 268–71.

<sup>239</sup> Jolls notes that accommodation mandates in integrated markets might even increase occupational segregation, as nondisadvantaged workers who bear the costs of the mandates exit those markets. *Id.* at 270–71. This would, in turn, further erode the redistributive effect of the mandates. See *id.*

the costs to workers in the form of reduced employment rather than reduced wages, or perhaps will not shift the costs at all, until the actual costs of giving unpaid leaves become more quantifiable.<sup>240</sup>

*c. Shifting the Costs of Wage Replacement*

A wage replacement component would add a new cost. If paid leave were funded by requiring the employer to pay the cost of wage replacement each time an employee takes leave, the analysis would look very similar to the one we just completed for job-protected leave. Due to a variety of cultural factors, wage replacement would still be used disproportionately by female workers of childbearing age.<sup>241</sup> Because the cost of wage replacement would be “attached” to individual leave-takers who fall disproportionately into a particular demographic group, employers would reduce their demand for workers in this group.

Many workplace benefits, though, are financed through a tax on the wages of *all* workers, regardless of which workers use the benefit. If wage replacement were funded this way, there would be no cost difference, aside from the fixed disruption costs of leave, between workers who take up the benefit and those who do not. The employer’s demand for labor in general would fall by an amount equal to the total taxes on payroll.

On the supply side, workers would be willing to work more in response to the benefit, shifting their supply curve downward. But workers may value the benefit differently. Those who intend to have children, for example, presumably value wage-replacement benefits for family leave more highly on average than do other workers.<sup>242</sup> The former group of workers would be willing to supply more labor at the going wage in response to

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<sup>240</sup> *Id.* at 269–70, 291. Another phenomenon that may shift the costs of accommodation mandates disproportionately to women is the more general tendency of mandated benefits, accommodation or otherwise, to entrench labor market segmentation. Employers may shift costs disproportionately to secondary labor market workers (those who are easily replaceable because their human capital is basically irrelevant) in an effort to avoid cutting compensation of incumbent primary employees (those whose human capital is necessary to their job). See generally DANIEL S. HAMERMESH, LABOR DEMAND 46–55 (1993); Olivia S. Mitchell, *The Effects of Mandating Benefits Packages*, in RESEARCH IN LABOR ECONOMICS 297, 304–05 (Laurie J. Bassi et al. eds., 1990); Rabin-Margalioth, *Cross-Employee Redistribution*, *supra* note 229, at 328–43. Women tend to be disproportionately employed in the secondary sector. See Shultz, *Life’s Work*, *supra* note 15, at 1894–95.

<sup>241</sup> See discussion *supra* Part III.B.

<sup>242</sup> Valuation issues are actually more complex than uptake (i.e., who is likely to use the benefit). In addition to women of childbearing age, men whose employment provides family leave coverage to their spouses or partners will place a significant value on the social provision of family leave benefits even if they are not themselves covered or do not intend to take leave. For these men, the ability of their partners to take a subsidized leave is effectively a subsidy to the whole family. Note also that although workers who do not intend to have children may place no value on the ability to take parental leave, they may highly value the ability to take leave to care for an ill spouse or disabled elder. Thus we would predict a more even valuation of family leave benefits across demographic groups than this example suggests.

the addition of the benefit. Other workers would value the benefit less (assume no value for simplicity), and therefore would supply less labor at the going wage, as some portion of the wage/benefits package would then be worthless to them. So long as the zero-valuing workers did not exit the labor force entirely, the net effect would likely be redistribution from lower- to higher-valuing workers. There would still be no wealth transfer from employers to workers—only redistribution between groups of workers.

In theory, this analysis would not change if the tax were nominally imposed on employees rather than employers. The tax would not affect employers' demand for labor because, a fortiori, there would be no cost difference between workers. On the supply side, workers across-the-board would now directly pay the tax in proportion to their earnings. Higher-valuing workers would still value the benefit by the same amount, and would be willing to supply the same additional amount of labor in response to introduction of the benefit as in the earlier scenario. Others would still value it at zero, and perhaps some on the margin would drop out of the labor market. In sum, the same redistribution between groups of workers would be expected regardless of whether the tax were statutorily imposed on employers or workers.<sup>243</sup>

In practice, though, if employers nominally bore the tax, it might be difficult for them to shift costs to workers immediately or fully. Abrupt wage adjustments might undermine employee morale, and thus employers might phase in wage reductions as they hire future employees. Also, employers might find it difficult to shift the full costs of the tax to employees if it would undermine their ability to attract workers who did not stand to gain as much from the leave policy. Thus despite theoretical predictions, employers and workers might partly share, at least temporarily but perhaps also in the long run, the cost of a mandate financed by a tax nominally imposed on employers.

In addition, there may be an interaction between the availability of wage replacement benefits and the "disruption costs" of job-protected leave. This interaction may in turn affect the cost-shifting dynamic. We would predict, for example, that for some workers the availability of wage replacement will increase the likelihood or duration of leave. Thus even if the state tries to reduce discrimination against "high uptake" demographic groups in a paid leave program by using a financing mechanism that com-

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<sup>243</sup> There may be some cost differential between workers due to the fact that payroll taxes tend to have a ceiling. Once the tax ceiling is reached, the tax behaves like a fixed-cost benefit: the relative tax paid per worker begins to diverge for workers whose income exceeds the ceiling. High-wage workers are, in essence, a better value, and as I explained earlier, the employer may have an incentive to work them more hours rather than hire new workers, thus redistributing from low-wage to high-wage workers. See sources cited *supra* note 240. This is part of a more general problem with the regressivity of payroll taxes. Payroll taxes are regressive because of the tendency toward ceilings on tax bases, and because at the high end, wages tend to fall as a proportion of total income. MUSGRAVE & MUSGRAVE, *supra* note 225, at 258.

pletely decouples the cost of wage replacement benefits from workforce composition (e.g., by using general revenues), the very availability of paid leave may increase benefits uptake and thus costs for the employer. Simultaneously, though, wage replacement will prevent some workers from quitting, thereby reducing the costs of turnover, and thus the disruption costs of leave-taking. In sum, whatever the incremental costs of wage replacement, its presence might either increase or decrease the disruption costs associated with having a leave policy in place, and by extension, the costs shifted to female workers of childbearing age.

This Article's defense of paid leave hinges on the empirical assumption that it will encourage women to enter or remain in the workforce despite competing caregiving obligations. Financing the program in a way that leads employers to avoid hiring women in their childbearing years risks thwarting this central goal. Because women's labor market decisions often turn on an assessment of the comparative opportunity costs of paid work versus staying home, a financing method that shifts costs to women in the form of reduced wages may also undermine the program's goal. As the forgoing discussion explained, however, a payroll tax will not necessarily create this problem. It might spread costs sufficiently between workers to accomplish the instrumental goal of increasing women's workforce participation, even if accompanied by some reduction in women's wages. Nevertheless, I have defended paid leave as advancing the broader goal of gender equality in paid employment. This value affects society broadly. On this basis, there may be a distinct argument, aside from its "incentivizing" effects on female labor supply, for spreading the costs of paid leave beyond workers to a broader base of society.

## 2. *General Revenues*

General tax revenues, either state or federal, are a common source of funding for social insurance programs outside of the United States. For example, many European Union countries have paid family leave programs financed at least partly by general revenues.<sup>244</sup>

Financing through general funds distributes the economic costs of a benefit most broadly. Included in general revenues are all income taxes (not just wage income), corporate taxes, excise and sales taxes, estate and gift taxes, and payroll taxes. In essence, all taxpayers contribute to general revenues in proportion to their tax burdens. Therefore, this method of financing draws revenues from a broader swath of the population than a payroll tax, which targets employers and workers alone.

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<sup>244</sup> See Kamerman & Kahn, *supra* note 17, at 211–12. (listing several European countries in which family benefits are financed at least partly through general revenues); Ruhm, *Economic Consequences of Parental Leave*, *supra* note 160, at 291–92.

At the same time, using general funds leads to opportunity costs: people's ability to use their money for private uses is restricted by the state's decision to make a public expenditure financed by general tax revenues. Behavioral distortions, i.e., changes in the behavior of taxpayers who alter their choices in response to the taxation of a particular activity, are a type of inefficiency. For example, if the income tax (the largest source of general revenues)<sup>245</sup> is increased to help finance a new benefit, there may be some workers currently on the margin between work and leisure who inefficiently exit (or enter) the workforce. But general revenue financing does not lead to distortions in the activity supported by any particular program. It does not give employers an incentive to avoid hiring or to reduce the wages of workers who would receive benefits under the program.<sup>246</sup> As such, it avoids the potential problem, identified by those who have studied the distributive effects of mandated employment benefits, of hurting those it is designed to help.

Let me briefly highlight the contrast between the cost-shifting analysis I have just reviewed for an employer-paid mandated benefit and what we would expect with a scheme that is financed using general tax revenues. Suppose that employers were reimbursed by the government out of general revenues for the full costs of providing a mandated benefit. An individual employer's demand for labor in such case would be unaffected by the mandate (the demand curve in Figure 1 would remain fixed at  $D_0$ ). Therefore, although the supply curve would shift depending on how much workers valued the benefit, there would be no countervailing pressure on demand as a result of the cost to the employer of providing it.<sup>247</sup> Wages would not fall to the same extent as they would if employers had to provide the benefit using firm revenues.<sup>248</sup> General revenue financing would have the advantage of maximizing the base of taxpayers who share in the costs of bringing about a more equitable distribution of men's and women's participation in market and family labor.

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<sup>245</sup> Approximately 58% of general revenues come from income taxes. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2003, at 410 tbl.S-11 (2003), available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/budget.pdf> (last visited Nov. 18, 2004).

<sup>246</sup> The income tax does have some distortionary effects. Any increase in the income tax will affect the work-leisure tradeoff for some individuals. But this is not the same as a tax that dampens the specific activity one is seeking to encourage.

<sup>247</sup> Note also that under general revenue financing it becomes more difficult to determine whether the mandate is efficient. With an employer funded mandate, all that must be assessed is whether the equilibrium quantity of labor rises or falls. Here, it will rise regardless of whether the mandate is efficient. It will increase further, however, if the mandate is efficiency enhancing.

<sup>248</sup> Relative elasticities of supply and demand would also affect wages, although this phenomenon would not depend on the source of revenue financing. Thus, if supply increased but demand did not, wages would fall under any scheme.

### 3. Empirical Evidence of Cost-Shifting Effects of Paid Leave Policies on Women's Wages

I have discussed two factors related to paid leave policies that may exert opposite effects on women's wages. First, if paid leave policies reduce the number of workers who quit and increase the likelihood of leavetakers returning to their previous employer, we would expect wages to increase relative to a no-leave or unpaid leave policy. At the same time, if the costs of leave-taking are shifted from employers to workers, we might expect to see them manifested in the form of reduced female wages.

Some researchers have studied whether having access to maternity leave benefits affects mothers' wages. Professor Jane Waldfogel, analyzing the labor market outcomes of two cohorts of young American women observed in 1980 and 1991, found that women covered by paid or unpaid maternity leave policies (the study did not try to distinguish between them) who returned to their pre-birth employer had higher pay, all else equal, than other mothers who worked prior to giving birth but did not have such coverage.<sup>249</sup> Later studies found similar results for women in Britain and Japan (both of which have paid maternity leave statutes).<sup>250</sup> Waldfogel and her coauthors controlled for observable differences between the groups with and without maternity leave (women with coverage had higher levels of education and pay and worked for larger and unionized firms), and although there may be unobserved differences between the groups, the authors claimed that the wage difference reflected the increased likelihood that women with coverage would return to work for their previous employer after childbirth.<sup>251</sup>

Other researchers have tried to measure the overall wage effects of maternity leave legislation. Professor Jonathan Gruber studied the effects of state laws prohibiting health insurers that provided hospital and medical benefits from excluding maternity-related expenses.<sup>252</sup> For employers, this added between \$750 and \$1,000 (in 1990 dollars) to the cost of providing health insurance to married employees in their childbearing years.<sup>253</sup> Gruber found that married women of childbearing age paid for most of the costs of these mandates in the form of lowered wages.<sup>254</sup> Note that the

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<sup>249</sup> Jane Waldfogel, *Working Mothers Then and Now: A Cross-Cohort Analysis of the Effects of Maternity Leave on Women's Pay*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 92, 115–23, 116 tbl.4.6 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997).

<sup>250</sup> See generally Waldfogel, *The Family Gap in the U.S. and Britain*, *supra* note 89; Waldfogel et al., *U.S., Britain and Japan*, *supra* note 150, at 531, 541 (finding that the availability of family leave increases the likelihood that a mother will return to her pre-birth employer and noting that this job retention may promote higher wages).

<sup>251</sup> Waldfogel, *Understanding the Family Gap*, *supra* note 87, at 150–51.

<sup>252</sup> Gruber, *Maternity Benefits*, *supra* note 232.

<sup>253</sup> *Id.* at 626 tbl.1.

<sup>254</sup> *Id.* at 630–32, 632 tbl.3 (finding a 5.4% decrease in the relative wages of twenty- to forty-year-old married women in states in which such laws were implemented as compared with changes in this cohort's wages in states that had not passed such laws).

tax on employers in this case varied directly with benefit usage rather than being a general tax on payroll. As such, it acted as a surcharge on hiring workers likely to use benefits.

Studies of the wage effects of the unpaid leave mandate under the FMLA are more equivocal. Professors Sandra Hofferth and Sally Curtin found that for American mothers who worked during the final three months of their pregnancy and returned to the workforce within two years post-birth, living in a state that had a maternity leave policy at the time of child-birth had a significant negative effect on earnings.<sup>255</sup> The same study found that passage of the FMLA also negatively affected the change in pre-birth to post-birth earnings.<sup>256</sup> Another study that analyzed the effects of the FMLA on the relative wages of full-time working mothers and full-time working women without children in their childbearing years found no significant wage effects.<sup>257</sup> Both FMLA studies looked only at wage effects in the first two years after passage of the FMLA, thus leaving unresolved the question of the longer-run wage effects of the FMLA's mandate. Hofferth and Curtin were surprised by the negative wage effects they observed and predicted a longer-run reversal given their other findings (discussed earlier) that the FMLA hastened mothers' return to work and increased their likelihood of returning to the same employer.<sup>258</sup>

Ruhm's twenty-four-year survey of paid parental leave mandates in Europe, discussed earlier, also examined wage effects.<sup>259</sup> Recall that in the period analyzed, entitlements tripled in generosity.<sup>260</sup> The overall average wage replacement rate by the end of the period analyzed was about 80%.<sup>261</sup> Paid, job-protected leaves of relatively short duration (ten weeks) had little consequence for women's wages (not just mothers), although leaves of longer duration (twenty to forty weeks) were associated with a 2%–3% wage reduction.<sup>262</sup> Ruhm's study suggests that paid leave policies, at least those that permit shorter-duration leaves (somewhere between ten and twenty weeks), can increase women's workforce participation without significantly reducing their wages.<sup>263</sup> The absence of a wage effect suggests that either the costs to employers of short leaves are trivial, or that for shorter duration leaves, the positive wage effects of increased

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<sup>255</sup> HOFFERTH & CURTIN, *supra* note 148, at 18, 19 tbl.4 (multivariate analysis in which the dependent variable was the gain in hourly earnings between birth and two years post-birth).

<sup>256</sup> *Id.*

<sup>257</sup> Waldfogel, *Impact of the FMLA*, *supra* note 149, at 296–99, 197 tbl.6 (comparison groups were men from 19 to 45 years old and women from 46 to 60 years old).

<sup>258</sup> HOFFERTH & CURTIN, *supra* note 148, at 20.

<sup>259</sup> See Ruhm, *Economic Consequences of Parental Leave*, *supra* note 160.

<sup>260</sup> *Id.* at 295.

<sup>261</sup> *Id.* at 307. In most programs, wage replacement starts out at or around 100% and levels off to a lower percentage in later weeks.

<sup>262</sup> *Id.* at 303–07, 304 tbl.4, 306 tbl.5.

<sup>263</sup> See *supra* notes 160–165 and accompanying text.



workforce attachment—and the employee’s attachment to a particular employer—may offset any costs shifted to female workers.

An important feature of European policies is that general revenue financing covers most of the cost of wage replacement benefits. Ruhm suggests that in the countries he studied, the main costs employers seek to shift are the non-wage “disruption costs” of leave.<sup>264</sup> Thus, in theory, parents would enjoy the benefits of paid leave policies but risk employer cost-shifting for only a relatively minor portion of the full costs of the benefit.<sup>265</sup>

A shortcoming of available studies is the lack of any systematic effort to analyze the influence of different paid leave financing mechanisms on wages and workforce participation. The studies reviewed above focus on a range of financing mechanisms for legislated programs, including paid benefit mandates on employers, unpaid leave mandates, and government programs in which the cost of wage replacement is substantially paid for by the state. I found no study that tests theoretical predictions about differential labor market effects depending on method of financing. Also unexamined in the empirical literature is the prediction that paid leaves of very lengthy duration might lead to a loss of work experience and depreciation of human capital akin to what we see with workers who quit work and subsequently reenter, with the effect of depressing wages.<sup>266</sup> It would be useful if researchers could try to assess whether there is a “tipping point” beyond which further increasing the duration of available leave ceases to enhance attachment and instead undermines it, and whether wage depression follows from that.

In summary, paid leave policies may result in wage costs to workers most likely to take leave—women in their childbearing years. This is not necessarily bad for women. If women want paid leave benefits, but the market does not provide them, they may be more willing to work, even at a reduced wage, in a regime that mandates these benefits. In that case, the beneficiaries of the program would essentially internalize its costs.<sup>267</sup> Still, there is a strong normative claim that the costs of paid leave benefits should be more widely spread. Future empirical research should tackle more directly and precisely two important predictions of the theoretical literature: that leaves of very long duration, as well as financing that requires users of benefits to internalize their costs, may eliminate or reduce

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<sup>264</sup> Ruhm, *Economic Consequences of Parental Leave*, *supra* note 160, at 289–90, 314.

<sup>265</sup> Ruhm also suggests that while maternity policies increase the supply of female labor, demand for female labor might be relatively inelastic, resulting in a decrease in women’s wages. *Id.* at 314; *see also* Mitchell, *supra* note 240, at 312–13 (speculating that downward wage pressure might result from the increase in labor supplied by women in response to the (then merely proposed) FMLA).

<sup>266</sup> *See supra* notes 170–172 and accompanying text.

<sup>267</sup> Although if the cost were shifted in the form of a reduction of all women’s wages, women without family caregiving needs would be subsidizing leave-takers.

the potential for paid family leave policies to increase women's workforce attachment.

## VII. IMPLEMENTING PAID FAMILY LEAVE

Given the Bush administration's repeal of the BAA-UC, legislation providing for paid family leave is most likely to happen at the state level. It is plausible that programs could take a variety of forms, some incorporated into existing state benefit programs, some created anew. For this reason, rather than craft a detailed proposal for a particular paid family leave program, it seems most helpful to suggest several core features that a paid leave program, in whatever form, ought to have. In this final part of the Article, I will describe some examples of models for implementing a program of paid leave. Then I will discuss five basic features I believe are most important.

### A. *Models for Implementation*

A number of models have been proposed for implementing a paid family leave program. These include expanding existing state UI programs, expanding existing state TDI programs and creating new ones, creating separate family leave insurance programs, providing incentives for employers to expand sick leave policies, and reimbursing employers who voluntarily create paid leave programs.<sup>268</sup>

It is possible to create a paid family leave program that is independent of existing social insurance programs. The benefit of doing so is that it would not require modifying an existing program's benefit triggering events and eligibility requirements. A new program might also be able to depart more freely from undesirable but institutionally ingrained features of existing programs, some of which I will discuss below.<sup>269</sup> At the same time, expanding existing programs is more practical for a variety of reasons. Building on to an existing administrative infrastructure is likely to be more efficient than starting a program from the ground up. In addition, it may be more politically tractable to introduce legislation that expands an established program. An expansion appears to make only an incremental change along a spectrum of benefits that have already met with public approval rather than create a new social welfare benefit. Perhaps for these reasons, most of the attention has been focused on the first two alterna-

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<sup>268</sup> See NAT'L P'SHIP FOR WOMEN AND FAMILIES, FAMILY LEAVE BENEFITS: A MENU OF POLICY MODELS FOR STATE AND LOCAL LEADERS (2001) (describing various alternatives), [http://paidleave.org/docs/759\\_PolicyModels.pdf](http://paidleave.org/docs/759_PolicyModels.pdf) (last visited Nov. 18, 2004).

<sup>269</sup> An example is the low minimum taxable wage base in UI. See *infra* notes 272-274 and accompanying text.

tives listed: expanding UI programs and expanding or creating TDI programs to encompass paid family leave.<sup>270</sup>

### 1. Unemployment Insurance

Although BAA-UC was recently repealed, UI has been thought of as a vehicle for funding paid leaves for many years, and may come back on the federal legislative agenda in the future. Given that every state currently has an administrative apparatus for assessing and disbursing UI wage replacement benefits, this existing framework provides a promising infrastructure on which to graft a family leave program.

UI provides partial, temporary wage replacement for workers who become involuntarily unemployed. It is jointly administered by the federal and state governments. Each state has created its own UI program within the guidelines of federal law.<sup>271</sup> Federal law requires states to tax employers on the first \$7,000 of each worker's earnings per year and deposit the revenues into a trust fund reserved exclusively for paying unemployment benefits.<sup>272</sup> Although many states have elected to set their taxable wage base at a higher level, many also remained at or near the federal minimum in 2002, including the populous states of California, Florida, and New York.<sup>273</sup> A base of \$7,000 is very modest compared with other major social insurance programs such as Social Security, which has a taxable wage base more than twelve times that amount.<sup>274</sup> The upshot is that most state unemployment insurance taxes tend to be quite regressive, with lower-income employees paying a significantly higher proportion of their wages in UI taxes than high-income employees. Ideally, the taxable wage base in a paid leave program financed through payroll taxes would

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<sup>270</sup> The Right Start Act of 2001 proposed to fund state efforts to develop programs for family leave paid through UI, TDI, or other mechanisms. H.R. 265, 107th Cong. §§ 501–533 (2001); S. 18, 107th Cong. §§ 501–533 (2001). Although the bill died in both the House and Senate, it reflected a common view about the most promising potential institutional vehicles for funding parental leave. Recent bills in twenty-one states have proposed to expand UI. *See supra* note 9 and accompanying text. Recent bills in Hawaii, Maine, New Jersey, and Washington would either expand TDI or establish new, similar insurance schemes for family leaves. *See bills cited supra* note 10.

<sup>271</sup> The Social Security Act of 1935, 42 U.S.C. §§ 501–504, 1101–1108 (1994 & Supp. V 1999), authorizes the allocation of funds to states that comply with federal requirements and establishes the Employment Security Administration Account.

<sup>272</sup> Federal Unemployment Tax Act, 26 U.S.C. §§ 3306(b)(1)–(f) (2000).

<sup>273</sup> California and Florida remain at \$7,000, while New York has increased the wage base to \$8,500. Although only twelve states remain at the minimum, most states still hover just slightly above the minimum: in 2002, the median taxable wage base was \$9,000 (the average was roughly \$12,400). *See* EMPLOYMENT TRAINING AND ADMIN., U.S. DEP'T OF LABOR, 2002 STATE TAXABLE WAGE BASE AND TAX RATES, <http://www.workforcsecurity.doleta.gov/unemploy/statetax.asp> (last visited Nov. 18, 2004).

<sup>274</sup> The maximum taxable wage bases for Social Security in 2005 will be \$90,000. Cost-of-Living Increase and Other Determinations for 2005, 69 Fed. Reg. 62,497 (2004).

be much higher than the \$7,000 minimum required by UI—preferably closer to the \$87,900 taxable wage base of Social Security.

On the benefit side of the equation, employees receive wage replacement as a proportion (usually about half) of their pre-layoff earnings, with floors and ceilings on benefits that tend to limit benefits to within the average earnings range. The average weekly benefit in 1998, for example, was nearly \$200.<sup>275</sup> The maximum duration of benefits is typically twenty-six weeks, but whether an employee is eligible to collect benefits for the maximum duration depends, in almost all jurisdictions, on that employee's work history. In 1998, the average duration was 13.8 weeks.<sup>276</sup>

Federal law also provides incentives for states to use experience rating in their programs, and all fifty states have done so.<sup>277</sup> Experience rating varies the tax on each employer according to the costs it imposes on the insurance pool.<sup>278</sup> This encourages employers to self-regulate: if they internalize some of the costs, they will be more reluctant to lay off workers. The linkage of tax liability with benefit use, however, could create a significant cost-shifting problem of the sort discussed in Part III. If an employee's characteristics lead an employer to predict that she will present a higher risk of becoming unemployed and collecting benefits, the employer will have an incentive to avoid hiring that worker or reduce the worker's wages as a compensatory measure. This might have a very salient effect on women's employment and wage levels. For this reason, BAA-UC sensibly permitted states to devise programs that would exempt employers from experience rating in the case of benefits for birth and adoption leaves. Any future reprise of a regulation like BAA-UC must also incorporate this exception to prevent targeted cost-shifting.

UI is partially designed to stabilize the economy in the face of sectoral shifts and possible mass dislocations of workers. It is also designed to optimize the use of human capital, with compensation intended as a tool to help unemployed workers engage in a more sustained search than they

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<sup>275</sup> The average replacement rate in 2003 was 43% of wages. See EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE CHARTBOOK, at chart A.13 (2003), available at <http://www.ows.doleta.gov/unemploy/content/chartbook/descript.asp> (last visited Nov. 18, 2004); EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, HANDBOOK No. 394, UNEMPLOYMENT INSURANCE FINANCIAL DATA HANDBOOK [hereinafter HANDBOOK] (reporting 1998 statistics), available at [http://ows.doleta.gov/unemploy/content/hdbk394\\_99/lnk98.html](http://ows.doleta.gov/unemploy/content/hdbk394_99/lnk98.html) (last visited Nov. 18, 2004).

<sup>276</sup> See HANDBOOK, *supra* note 275.

<sup>277</sup> See 26 U.S.C. § 3302(b) (allowing an employer a credit against its federal tax in an amount equal to the amount by which its taxes were discounted pursuant to a system of experience rating). See generally WAYNE VROMAN, EXPERIENCE RATING IN UNEMPLOYMENT INSURANCE: SOME CURRENT ISSUES 9–20 (Unemployment Ins. Occasional Paper No. 89-6, 1989) (explaining how experience rating works).

<sup>278</sup> Experience rating is imperfect, meaning that the heaviest users do not fully compensate the pool for the disproportionate costs they impose on the pool; in general, however, there is a correspondence between level of usage and level of tax. Elsewhere, I discuss both methods for experience rating and their imperfections. See Lester, *Wealth Redistribution*, *supra* note 56, at 344 & n.32, 345 & n.33.

could if forced to rely on their own savings. Eligibility rules reflect the philosophy that UI is a program of wage replacement insurance for stably employed workers whose job loss is anomalous rather than characteristic, whose unemployment is involuntary, and who are actively seeking reemployment.

Thus, although most workers are covered by UI, the major limitation on the allocation of benefits is whether eligibility rules are met.<sup>279</sup> First, UI is targeted at workers with a history of relatively stable workforce attachment. To be eligible for benefits, a worker must meet minimum hours or earnings requirements during the previous year.<sup>280</sup> Such requirements average in the range of about \$1,760 (about eight-and-a-half weeks of work at the minimum wage).<sup>281</sup> The worker must also have spread that work out over the course of the year to some minimal degree, rather than having worked in just one quarter of the year. The effect of these rules is to screen out workers with very low or irregular hours or earnings, especially low-hours part-time, part-year, or temporary workers.<sup>282</sup> Second, UI is targeted at the worker who is involuntarily laid off and then immediately begins searching for a new job. A claimant will ordinarily be disqualified if the reason for unemployment is that she quit her job without “good cause” or was dismissed by the employer for misconduct.<sup>283</sup> She must also be “able and available” for reemployment. To continue to collect benefits, a recipient must register with an unemployment office and provide ongoing verification of an active job search.<sup>284</sup>

Both the reason for employment interruption and the short-term goals of the unemployed worker are very different when family caregiving is involved. Although employers may rehire workers after a layoff triggering UI benefits, eligibility formally hinges on job separation—layoff or quit—rather than on leave explicitly understood as temporary. In addition, the decision to conceive or adopt a child is usually voluntary, and a worker who has separated from work to care for a child is not “able and available” for work. Thus compensating a worker for work interruptions

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<sup>279</sup> As of 1995, more than 90% of civilian employment was covered. ADVISORY COUNCIL ON UNEMPLOYMENT COMP., UNEMPLOYMENT INSURANCE IN THE U.S.: BENEFITS, FINANCING AND COVERAGE 163 (1995). However, certain groups of workers are excluded. *Id.* For example, coverage of agricultural and household workers is limited, and self-employed workers are excluded. *Id.* In addition, certain state and local government employers and some nonprofit employers are exempt. *Id.*

<sup>280</sup> ECON. POLICY INST., UNEMPLOYMENT INSURANCE: FACTS AT A GLANCE (2004), at [http://www.epinet.org/content.cfm/issueguides\\_unemployment\\_facts](http://www.epinet.org/content.cfm/issueguides_unemployment_facts) (last visited Nov. 18, 2004).

<sup>281</sup> These are my calculations based on U.S. Department of Labor data. See EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS 3-5 to 3-6 (2003), available at [http://www.ows.doleta.gov/unemploy/uilawcompar/2003/monetary\\_entit.pdf](http://www.ows.doleta.gov/unemploy/uilawcompar/2003/monetary_entit.pdf) (last visited Nov. 18, 2004).

<sup>282</sup> See Lester, *Wealth Redistribution*, *supra* note 56, at 347–55, for a more detailed discussion.

<sup>283</sup> *Id.* at 350.

<sup>284</sup> *Id.* at 352–53.

caused by childcare demands would require relaxing two of the three traditional eligibility criteria—the “able and available” requirement and the involuntariness requirement.<sup>285</sup> For reasons discussed above, we would also need to suspend experience rating for separations due to family leave. A minority of states already treats workers who leave employment by reason of pregnancy or work-family conflict as having “good cause” for quitting and thus not disqualified from collecting UI benefits.<sup>286</sup> Despite the fact that some of the changes necessary to cover family leave under a UI scheme are feasible, the conceptual fit between UI and family leave wage replacement program designed to encourage leave-takers to return to their former employer remains quite imperfect.<sup>287</sup>

## 2. *Temporary Disability Insurance*

TDI provides partial wage replacement for workers who find themselves unable to work due to a temporary nonwork-related illness or injury. Five states—California, Hawaii, New Jersey, New York, and Rhode Island—plus Puerto Rico currently have TDI programs. Each program includes pregnancy- and childbirth-related temporary absences as insured events, but with the recent exception of California, does not currently include absences for infant care beyond the immediate period of physical recovery from birth. Each state funds its program through a payroll tax, in some cases on both workers and employers, and in others on workers alone.<sup>288</sup> Four of the five states (all but Rhode Island) have a “pay-or-play” method that allows employers to satisfy the statutory requirements through self-insurance. In these instances, however, employers are prohibited from requiring employees to make contributions that exceed what they would be required to contribute under the state plan, and benefits must not fall short of what would be available under the state plan.

The taxable wage base in TDI programs tends to be higher than for UI: the median taxable wage base across the five states with TDI programs in 2002 was \$35,495 (compared with \$9,000 for UI).<sup>289</sup> Benefits

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<sup>285</sup> BAA-UC permitted modification of the “able and available” requirement. See 20 C.F.R. pt. 604 (2000). The involuntariness requirement has always been a creature of state law.

<sup>286</sup> See sources cited *supra* note 34.

<sup>287</sup> See Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 114 (2000) (noting that the inconsistency between the involuntary unemployment premise of UI and the fact that most maternity leave is voluntary poses a philosophical problem for proposals to use UI to fund family leave); Drew, *supra* note 1, at 383–84 (raising a similar criticism); Ulrich, *supra* note 1, at 39–40 (echoing this concern).

<sup>288</sup> All five existing state programs allow mandatory contributions from employees. All but California and Rhode Island also require contributions from employers. See OFFICE OF RESEARCH, EVALUATION AND STATISTICS, SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS IN THE U.S. 48 (1997); STEVEN K. WISENSALE, FAMILY LEAVE POLICY 120–21 tbl.5.1 (Daniel J.B. Mitchell ed., 2001).

<sup>289</sup> Author’s calculations are based on examination of current statutes in TDI states

vary across states, but as with UI, benefit amounts and duration vary according to an employee's prior earnings history. Also like UI, the replacement rate is about half of an employee's weekly wages, with specified floors and ceilings similar to those for UI.<sup>290</sup> The average weekly benefits for the five states with TDI programs range from \$143 to \$351.<sup>291</sup> The maximum duration of benefits ranges from twenty-six to fifty-two weeks,<sup>292</sup> but in 1997, the average duration of leave actually taken was about eight weeks.<sup>293</sup> The taxable wage base for TDI programs is significantly higher than for UI, while the wage replacement rates are roughly comparable, suggesting that TDI programs are more progressive than UI.

As with UI, coverage is very broad, making the eligibility determination the major screening device. Here, too, workers must satisfy a minimum past earnings or hours requirement to qualify for benefits.<sup>294</sup> In contrast to UI, continued eligibility hinges on the continuation of the disabling condition, rather than ability and availability for work.

Disability insurance exists to provide financial relief to a worker who is physically incapacitated from work for a temporary period due to illness or injury. Like UI, the program generally contemplates a worker who did not choose to interrupt employment—a condition that the worker who decides to conceive or adopt a child would not clearly satisfy—although existing programs have been required to cover pregnancy-related incapacitation since the late 1970s.<sup>295</sup> Still, parental leave extending beyond the period of pregnancy-related incapacitation, as well as family illness leave, would both involve decisions that turn on needs external to the worker's own physical capacity, such as a decision to care personally for an ailing parent or a newborn infant rather than contract with a professional care-

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(California \$46,327, Hawaii \$35,495, New Jersey \$23,500, New York \$6,000, Rhode Island \$45,300). The average taxable wage base for TDI programs in 2002 was \$31,324.

<sup>290</sup> The floors range from \$14 (Hawaii) to \$68 (New Jersey), and the ceilings range from \$170 (New York) to \$504 (Rhode Island). TEMPORARY DISABILITY, *supra* note 31, at 8-5 to 8-6.

<sup>291</sup> SOC. SEC. ADMIN., SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 312 tbl.9.C (2000) (relying on 1997 statistics), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2000/9c.pdf> (last visited Nov. 18, 2004).

<sup>292</sup> TEMPORARY DISABILITY, *supra* note 31, at 8-5 to 8-6.

<sup>293</sup> SOC. SEC. ADMIN., *supra* note 291. Data for New Jersey were unavailable and thus not included in this calculation.

<sup>294</sup> For details, see TEMPORARY DISABILITY, *supra* note 31, at 8-4 to 8-5.

<sup>295</sup> The Pregnancy Discrimination Act of 1978 ("PDA") requires that workers affected by "pregnancy, childbirth, or related medical conditions" be treated "the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)) (amending Title VII, which applies only to employers with fifteen or more employees). The passage of the PDA was in response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Court rejected a claim that an employer's disability insurance plan discriminated on the basis of sex when it excluded pregnancy and related conditions from otherwise comprehensive coverage.

giver.<sup>296</sup> So, as with unemployment compensation, there are some inconsistencies between the typical disability leave and the coverage contemplated under paid family leave. The fit between parental leave and a disability leave program nevertheless seems more comfortable than the fit with unemployment compensation because both parental leave and TDI programs aim to accommodate employees who are temporarily not seeking reemployment and will likely return to their former employers.

Note that whether grafted onto a UI or TDI program, introduction of family leave benefits would create a covered event for which there is significantly higher moral hazard than for the risks currently covered. Given a subsidy, some individuals will take leaves who would not otherwise have done so, and some will take longer leaves. Indeed, this is one of the intended goals of adding a wage replacement component to family leave. There is no reason to believe that one program is more vulnerable to these types of moral hazard problems than the other.

In terms of both conceptual fit and practical design features, then, the TDI model seems more adaptable than the UI model to the aims of a paid family leave program. In general, TDI programs tend to have a higher taxable wage base than UI programs (meaning there is greater progressivity of the tax and benefit schedule), and would require less dramatic modifications of the basic features of the program than if UI were adapted to accommodate family leaves (e.g., there is no experience rating and no "able and available" requirement in TDI programs). The "pay or play" concept in several of the TDI schemes is particularly attractive in its capacity to give employers the opportunity to experiment with private plans, possibly offering greater incentives for some employers to set an example by offering programs that exceed the minimum. Only five states currently have TDI programs, but several administer them through the state UI infrastructure. Thus it would be possible to create a paid family leave insurance program that tapped state UI administrative infrastructure without being subject to the constraints of the UI program itself.

As an example, consider the new California Family Temporary Disability Insurance ("FTDI"), which adds family illness and nonmaternity parental benefits to the existing State Disability Insurance ("SDI") benefits of personal illness and maternity leave.<sup>297</sup> The SDI program, although conceptually distinct from UI, is operated through the state's UI administrative apparatus. The new benefits are financed with a fairly low tax on employees' wages. In 2004 and 2005, it will be .08% of their wages up to the taxable wage limit of \$68,829 in 2004 and \$79,418 in 2005; it is subject to further increase in later years, up to a maximum of 1.5%.<sup>298</sup> This is

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<sup>296</sup> See *supra* Part II.B.

<sup>297</sup> CAL. UNEMP. INS. CODE §§ 3300–3306 (Deering 2004).

<sup>298</sup> *Id.* § 984(a)(2)(B); CA. EMPLOYMENT DEV. DEP'T, PAID FAMILY LEAVE INSURANCE: FREQUENTLY ASKED QUESTIONS [hereinafter FREQUENTLY ASKED QUESTIONS], at <http://www.edd.ca.gov/direp/pfffaq2.asp> (last visited Nov. 18, 2004).



an average of about \$70 per employee per year.<sup>299</sup> The program covers about 70% of California's workforce,<sup>300</sup> with eligibility requiring wage earnings of at least \$300 in a twelve-month base period prior to application for benefits.<sup>301</sup> It provides wage replacement at approximately 55% for up to six weeks,<sup>302</sup> with weekly benefits in 2004 ranging from a minimum of \$50 to a maximum of \$728.<sup>303</sup> Personal illness and maternity leave benefits in California's preexisting state disability insurance program provide up to fifty-two weeks' wage replacement (on the same terms as above).<sup>304</sup>

### B. Financing

I have argued that there are both practical and ethical reasons to spread the costs of paid family leave beyond leave-takers themselves. Both across-the-board payroll taxes (i.e., taxes based on some percentage of all workers' wages rather than benefit usage levels) and general revenue financing are able to do this. As explained, payroll taxes spread costs across a smaller base, workers, than general revenue financing. However, most major social insurance programs in the United States, including all of the TDI programs, are financed through payroll taxes, perhaps reflecting greater political acceptability of this route as compared to general revenue financing. Furthermore, during periods of fiscal retrenchment, programs funded through general revenues tend to be cut before programs funded through payroll taxes.

If financed through a payroll tax, there is a question of whether the nominal tax should fall on employers, workers, or both. I mentioned that although in theory a nominal tax on employers will be passed fully to workers, in practice, employers may find it difficult to pass the tax fully to workers. This leads to fuller cost-sharing, at least in the short run, than if the tax is imposed entirely on workers. At the same time, imposing the nominal tax at least partly on workers may have stronger political appeal and facilitate buy-in by the public and pro-business legislators.<sup>305</sup> As I have

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<sup>299</sup> Workers currently pay a tax of 0.9% of their income, or up to \$417 per year, to cover state disability insurance taxes. See FREQUENTLY ASKED QUESTIONS, *supra* note 298.

<sup>300</sup> This figure was derived from calculations using data from CA. EMPLOYMENT DEV. DEP'T, QUICK STATISTICS, at <http://www.edd.ca.gov/eddquickstats.asp> (last visited Nov. 18, 2004), and CA. EMPLOYMENT DEV. DEP'T, FACT SHEET: DISABILITY INSURANCE PROGRAM 1 (2003) [hereinafter FACT SHEET], at <http://www.edd.ca.gov/direp/de8714c.pdf> (last visited Nov. 18, 2004).

<sup>301</sup> TEMPORARY DISABILITY, *supra* note 31, at 8-5.

<sup>302</sup> FREQUENTLY ASKED QUESTIONS, *supra* note 298.

<sup>303</sup> CAL. UNEMP. INS. CODE §§ 2652-2653, 2655, 3301 (Deering 2004); FACT SHEET, *supra* note 300 (2003).

<sup>304</sup> §§ 2626, 2653, 2655.

<sup>305</sup> See Broder, *supra* note 224 (noting that shared payroll taxes were a sticking point in the California FTDI, and limiting the tax to workers was one of the compromises that led to its passage).

argued, cost internalization by the class of individuals covered by the benefit may be acceptable, and perhaps appropriate, as long as the degree of cost-shifting to leave-takers is not so great as to undermine the work incentive effects that I argue are so central to the value of paid leave. An across-the-board payroll tax, by tolling workers while at the same time spreading costs beyond the subclass of workers most likely to take leaves, may strike a reasonable balance in this regard. There should also be a relatively high ceiling on the taxable wage base, closer to what we see for Social Security than for UI, to avoid regressivity.<sup>306</sup>

I have also argued that at least some degree of general revenue financing is ethically justified. States may be open to funding paid leave at least partly through general funds: in the wake of BAA-UC, several states considered bills for paid family leave that would be financed in part through direct general fund allocations<sup>307</sup> or state tax credits.<sup>308</sup> Thus general revenue financing may be more politically plausible than some commentators have suggested.<sup>309</sup> One appealing suggestion is to use a general fund allocation to reimburse employers based on how many workers actually take leaves, and in doing so, reduce the likelihood of employers shifting “disruption costs” to leave-takers in the form of targeted wage or employment reductions.<sup>310</sup>

A program of paid family leave insurance, then, could be funded by a payroll tax on employers, workers, or both. The resulting trust fund could also be augmented with general tax revenues, although it seems unrealistic and perhaps imprudent to advocate for a system funded entirely through general funds.

### C. Wage Replacement

Recall that financial constraints prevent some workers from taking leaves, and workers who do take leaves tend to have higher incomes and salaries than those who do not.<sup>311</sup> Consistent with this, we might expect

<sup>306</sup> See *supra* notes 271–274 and accompanying text.

<sup>307</sup> See LEAVE INITIATIVES, *supra* note 9 (Illinois, Massachusetts, Minnesota, and Vermont).

<sup>308</sup> See *id.* (Colorado, Hawaii, Massachusetts, and Missouri).

<sup>309</sup> See, e.g., Issacharoff & Rosenblum, *supra* note 1, at 2215 (concluding, in regard to the use of general revenues to pay for family leave, that “there is little purpose in suggesting benefits approaches whose political viability approaches absolute zero”); Glavinovich, *supra* note 1, at 172–73 (citing Dan Cordtz, *Hire Me, Hire my Family*, FIN. WORLD, Sept. 18, 1990, at 79 (stating a similarly skeptical viewpoint)); Grill, *supra* note 1, at 391 (criticizing general revenue financing because it would lead employees to feel entitled to benefits rather than having earned them); Jolls, *supra* note 229, at 280–81 (noting that subsidizing employers for the cost of providing the accommodation may be stigmatizing and lack political durability).

<sup>310</sup> Issacharoff & Rosenblum, *supra* note 1, at 2218–21 (suggesting this as part of a proposal to expand UI to paid maternity leave); see also Ulrich, *supra* note 1, at 52–53 (offering a similar proposal).

<sup>311</sup> See *supra* note 7 and accompanying text.

the relative opportunity costs of paid work versus staying home to be a closer draw for middle- and lower-middle-income caregivers.<sup>312</sup> Although lower-income workers may be more likely to feel that they have to work, paid leave may affect the relative opportunity costs of paid employment versus welfare.<sup>313</sup> Furthermore, salaried, higher-income, and more-educated workers are currently more likely to receive wage replacement during family leaves than nonsalaried, lower-income, and less-educated workers.<sup>314</sup> The gap appears to be widening.<sup>315</sup> For these reasons, we might want a paid leave program designed more assuredly to reach workers of middle and lower incomes.

There are a number of ways to structure benefits aimed at progressivity while also satisfying competing concerns. I recommend benefits paid as a percentage of pre-leave earnings with a floor and ceiling imposed, rather than flat rate payments based on average wages, as some have proposed.<sup>316</sup> Because they are less likely to under- or overcompensate workers whose wages deviate from the average, wage-proportional benefits are better suited than flat benefits to sustaining workers' standard of living and avoiding the necessity of major structural changes to the family economy during leave.<sup>317</sup> For this to hold true, the percentage of wage replacement should be fairly generous, perhaps 70% of pre-leave earnings. Less than full wage replacement is also classic check against moral hazard; a slight but not excessive drop in earnings allows workers to avoid major shocks to their standard of living while also minimizing frivolous leave-taking and maintaining work incentives. One risk of providing only partial wage replacement is that lower-earning workers will receive benefits that are too

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<sup>312</sup> For a discussion of the comparative opportunity costs of working versus full-time caregiving, see Part IV.A, *supra*.

<sup>313</sup> Recall that almost 9% of leave-takers in 2000 financed such leaves through public assistance. See *supra* note 8.

<sup>314</sup> BALANCING THE NEEDS, *supra* note 5, at tbl.A2-4.1 (according to a 2000 survey, 87.6% of salaried workers who chose to take leave for family or medical reasons received wage replacement compared to 54% of those who were paid hourly; 80.9% of leave-takers with a college education received some wage replacement compared to 39.8% of those with less than a high school education; 81.2% of leave-takers with incomes between \$75,000 and \$100,000 received some wage replacement compared to 26.2% of those with incomes less than \$20,000).

<sup>315</sup> Brooks Pierce, *Compensation Inequality*, 116 Q. J. ECON. 1493 (2001) (noting that employer expenditures on paid leave declined for low-wage labor and increased for high-wage labor between 1981 and 1997, and that this widening nonwage compensation gap exceeded the wage compensation gap during the same period).

<sup>316</sup> The Washington state family disability insurance bill set flat rate benefits at \$250 per week. H.B. 2399 § 7(1), 2004 Leg., 58th Sess. (Wash. 2004.); S.B. 6272 § 7(1), 2004 Leg., 58th Sess. (Wash. 2004); see also MAHONY, *supra* note 107, at 250 n.3 (describing paid leave benefits that depend on pay as regressive and unfair).

<sup>317</sup> See Kamerman & Kahn, *supra* note 17, at 210 (describing earnings-related benefits as more closely linked to an expectation of continued wage work); Lundberg & Rose, *supra* note 89; *supra* text accompanying note 143 (discussing the gender equity importance of reducing the need for structural change to the family economy as an adjustment to non-supported leave).

low to enable them to take leave, and that the benefit may therefore be skewed toward middle- and upper-income workers. A floor and ceiling on benefits ensures provision that is both sufficient at the low end and simultaneously limited at the high end where workers are most likely to have an adequate personal safety net or private employer benefits. In addition, exempting lower-income workers from the payroll tax would help avoid the potential for regressivity in the program.<sup>318</sup>

#### D. Eligibility

The goal of UI is to encourage more stable employment. Consistent with this, UI eligibility requires substantial workforce attachment, typically measured by a worker's hours or earnings during a base period prior to unemployment. These eligibility requirements provide incentives for stable employment and prevent workers with relatively low workforce attachment from using UI to subsidize intermittent workforce participation. TDI, by contrast, may be available to workers who have relatively minimal work hours in the preceding period. This makes sense in light of TDI's mission of providing income security in the event of disability-related work interruption.

The eligibility requirements that are most appropriate for a paid family leave program turn on how the goals of the program—increasing women's workforce attachment and the likelihood that a worker who takes leave will return to her former employer—can best be achieved. Increased workforce participation might take a variety of forms: it might mean more women with any type of job, be it full-time or part-time, or with single or multiple employers. The sociological literature reviewed in Part III contains some evidence that full-time work has a stronger correlation than part-time work with well-being in women who combine work and caregiving.<sup>319</sup> The value of job continuity with one employer, as opposed to just full-time work, is more central in the economics literature, which finds a link between continuous attachment to one employer and greater career advancement, wages, and skill utilization.<sup>320</sup>

Taken together, the evidence suggests that although the best scenario for maximizing advancement and wages is full-time, stable attachment to a single employer, higher work hours per se are preferable to low or no work hours. Consequently, strict work requirements, in terms of either work hours, job stability, or both, may be more appropriate than relaxed work requirements. However, strict work requirements may be in tension with the progressivity goals discussed in the previous section on wage replace-

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<sup>318</sup> See, e.g., Ulrich, *supra* note 1, at 52 (recommending this kind of exemption for a program of paid family leave insurance).

<sup>319</sup> See *supra* Part III.C.2.

<sup>320</sup> See *supra* notes 154, 159 and accompanying text.

ment. The poorest workers are also the most likely to occupy temporary and part-time jobs, move between employers, and have low work hours. Reconciling this tension is a central challenge in thinking about how to design eligibility and wage replacement rules for a paid leave program.

California's FTDI program, as we have seen, has very relaxed eligibility rules. Workers with earnings as low as \$300 during the twelve-month base period are eligible for benefits.<sup>321</sup> At the state minimum wage, this is equivalent to forty-four hours, or about one week, of work in the space of a year. Such relaxed eligibility rules may increase women's incentives to shift to or remain in part-time rather than full-time employment. This in turn might undermine, rather than advance, the career-building and gender equity goals that paid leave programs have the potential to facilitate.

At the other end of the spectrum, the FMLA restricts eligibility to workers who have at least one year of service with a single employer of fifty or more employees, and whose work hours for that employer averaged twenty-four hours or more per week (which is about 60% full time) in the year preceding leave.<sup>322</sup> This strict requirement of stable attachment to one employer protects employers against the costs of guaranteeing job security for very recently hired leave-takers. At the same time, it excludes many other stable workers who would benefit from job-protected leave, such as the significant number who work for firms with fewer than fifty employees which, on the whole, have lower wages and less generous family leave benefits than larger establishments.<sup>323</sup> Moreover, the requirement of stable attachment to one employer, while perhaps reasonable in the context of mandating job guarantees, may be less important for purposes of mandating wage replacement financed by an across-the-board payroll tax.

Recognizing the special advantage of job continuity with one employer, but also recognizing the value of increasing work hours per se, eligibility requirements for paid family leave insurance should fall somewhere between the two extremes of FTDI and FMLA just presented. While we should be wary of extending benefits to part-time workers with very

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<sup>321</sup> TEMPORARY DISABILITY, *supra* note 31, at 8-5.

<sup>322</sup> Recall that the eligibility requirements for the unpaid leaves available under the FMLA are one year of service, 1250 hours worked in the year preceding leave, and an employer with fifty or more employees working within seventy-five miles of the jobsite.

<sup>323</sup> Eliminating the small employer exemption has allowed FTDI to cover almost one half of those workers who are not covered under the FMLA. Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1079, 1084 (2003). The wages of employees steadily climb as establishment size increases, with the difference between the extremes—average weekly wages in private establishments of fewer than five employees (\$644) as compared to establishments of one thousand or more employees (\$1,154)—being nearly two-fold. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (author's calculations using 2004 data in this interface), at <http://data.bls.gov/labjava/outside.jsp?survey=en> (last visited Nov. 18, 2004). A 2004 survey of California establishments found that establishments with 200 or more employees were 2.1 times more likely than smaller establishments to provide family and medical leave benefits beyond those required by law. See MILKMAN & APPELBAUM, *supra* note 49, at 6.

low hours of work, this does not mean that only workers with full-time hours should be eligible. Part-time work may be the gateway to fuller work-force participation, and inclusion of higher hours part-time workers may be a good way to facilitate this “foot-in-the-door” potential. In addition, eligibility of higher-hours part-time workers might encourage men, over time, to reduce their own work hours to play a more active role in family caregiving. What minimum requirement will optimize the balance between reducing incentives for low-hours part-time employment while opening the possibility for “foot-in-the-door” part-time employment is somewhat conjectural. Both the FMLA and UI work tests include part-time workers, although the FMLA minimum (an average of twenty-four hours per week) seems a preferable screen for higher-hours part-time workers than the requirement of state UI systems, whose median is about seven weeks of employment per year.<sup>324</sup>

At the same time, the FMLA’s requirement of stable attachment to one employer is unduly restrictive. Recall that UI requires *employment* rather than *employer* stability by mandating a combination of minimum hours or earnings and some minimum degree of work-spreading through the year. Paid family leave insurance should include workers whose work hours are substantial and whose attachment to the workforce is stable, even if they fail to meet the work-hours test for any single employer. Including workers who piece together full or substantial work hours with multiple employers seems unlikely to create significant incentives for workers to become “trapped” in such arrangements because these workers likely prefer more stable employment and will continue to seek such opportunities. Furthermore, paid leave may facilitate the move toward more stable workforce attachment in these workers if it helps them avoid downward mobility and family restructuring in the event of work interruption. Therefore, eligibility requirements for paid leave should permit the aggregation of hours worked across employers.

Finally, small employers should not be exempted from the requirement, as they are the employers most likely to lack voluntary paid leave programs. Furthermore, the scope of caregiving needs that trigger eligibility for benefits should be wider than under the FMLA. For reasons discussed earlier, care needs of an unmarried domestic partner should be included, rather than limiting the triggering events to the care needs of spouses, children and parents.

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<sup>324</sup> These are the author’s calculations based on number of weeks a full-time worker earning the minimum wage would need to work to meet the median monetary eligibility requirement under state UI laws. See Lester, *Wealth Redistribution*, *supra* note 56, at 347.

*E. Incentives for Men To Take Leaves*

Among workers who have young children, women are significantly more likely than men to take leaves for an FMLA-covered reason.<sup>325</sup> Furthermore, the average length of leave taken by fathers for a birth or adoption is only five days.<sup>326</sup> Even if paid leave policies have the potential to increase women's workforce attachment—and perhaps over time alter the balance of women's and men's relative contributions to work and family—we cannot assume that women's increased involvement in paid work, on its own, will significantly alter men's behavior.<sup>327</sup> Successful achievement of this goal requires correlative, active efforts to increase men's involvement in family care.<sup>328</sup>

The importance of this point can scarcely be overstated. If we are to break down sex-role stereotypes about the social division of labor, increasing men's involvement in caregiving is the necessary corollary to increasing women's workforce participation. Absent efforts to boost men's participation, increasing the generosity of family leave policies could potentially *reinforce* rather than reduce the gendered division of family versus market work. I discussed earlier how the economics of the gender wage gap skews the family allocation of market versus home work so that women are less likely to engage in market work.<sup>329</sup> Traditional social pressures and corporate culture also discourage men from taking time away from work to assume the role of a family caregiver.<sup>330</sup> In addition,

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<sup>325</sup> BALANCING THE NEEDS, *supra* note 5, at tbl.4.17 (reporting that 75.8% of women with young children and 45.1% of men with young children took a leave for a covered reason in 2000). Note that among all workers with young children, men were about as likely as women to take some leave to care for a newborn or newly adopted child (34.1% men versus 35.8% women), but this figure alone may be misleading because another 32.4% of women took a leave classified in the separate category of "maternity-disability." *Id.* at tbl.4.19.

<sup>326</sup> Pleck, *supra* note 78, at 93–94; Selmi, *supra* note 1, at 755–56 (discussing the same issue).

<sup>327</sup> See, e.g., Silbaugh, *Turning Labor into Love*, *supra* note 198, at 8–9 (arguing that changes in the division of household labor as women have increased workforce participation reflect a reduction in time women devote to housework rather than any increase in the time men devote to housework).

<sup>328</sup> Professor Selmi puts this point more strongly: "Increasing workplace equality will require persuading men to behave more like women, rather than trying to induce women to behave more like men." Selmi, *supra* note 1, at 708.

<sup>329</sup> See *supra* notes 84–85 and accompanying text.

<sup>330</sup> Bornstein, *supra* note 287, at 116–17 (arguing that both workplace culture and peer pressure discourage men's leave-taking); MINDY FRIED, TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE 91–96 (1998) (noting that information provided by companies, as well as attitudes of managers and workers, reflect and reinforce gendered leave-taking arrangements); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994) [hereinafter Malin, *Fathers*] (citing employer hostility and peer pressure as factors that discourage men's leave-taking); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39–42 (1998) (arguing that men have good reason to fear that seeking family accommodations will harm their careers and are therefore secretive when they take leave for family reasons); Pleck, *supra* note 78, at 90

under the FMLA, the “key employee” exemption, under which workers whose earnings are in the top 10% of a covered employer may be excluded from the job security guarantee,<sup>331</sup> tends to exclude more men than women from eligibility given men’s higher representation among top earners.<sup>332</sup> If uptake of paid leave benefits is understood by employers to be a characteristic of female workers only, rational employers may assign to young women flatter career profiles with less job training, fewer promotions, and lower wages.<sup>333</sup> I explained earlier how corrosive the cost-shifting dynamic might be to the goal of increasing women’s workforce participation. To the extent that employers might bear at least some nominal fixed costs of providing the unpaid job-protection component of the benefit, increasing men’s uptake of benefits is a crucial step toward countering the cost-shifting phenomenon: the less family leave is identifiable as a “women’s benefit,” the less rational it will be for employers to shift the cost of provision to women.

The European experience suggests that progress in increasing men’s leave-taking, although not trivial, is slow.<sup>334</sup> Most analysts agree that adding a wage replacement component to existing unpaid leave programs will increase the willingness of men to take leave because in addition to reducing the opportunity cost of leave-taking generally, it will reduce the opportunity cost differential between mothers and fathers.<sup>335</sup> Some European countries have had success with more aggressive policies, such as establishing “daddy quotas,” benefits offered to fathers on a “use-it-or-lose-it” basis.<sup>336</sup> These policies condition receipt of some portion of a fam-

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(involved fathers may encounter hostility from acquaintances, relatives, and workmates); Rhode, *supra* note 109, at 843 (reviewing surveys of attitudes about male leaves for births and adoptions); Selmi, *supra* note 1, at 758–59 (commenting that the notion of men taking leave for childcare purposes may violate existing gender roles).

<sup>331</sup> 29 U.S.C. § 2614(b) (2000).

<sup>332</sup> See Amy Olsen, Comment, *Family Leave Legislation: Ensuring Both Job Security and Family Values*, 35 SANTA CLARA L. REV. 983, 1017 (1995).

<sup>333</sup> Nabanita Datta Gupta & Nina Smith, CHILDREN AND CAREER INTERRUPTIONS: THE FAMILY GAP IN DENMARK 4 (Inst. for Study of Labor, Discussion Paper No. 263, 2001); Malin, *Fathers*, *supra* note 330, at 1062–63.

<sup>334</sup> See, e.g., Heather Joshi, *The Opportunity Costs of Childbearing: More than Mothers’ Business*, 11 J. POPUL. ECON. 161, 176–77 (1998) (citing British surveys for proposition that attitudes about appropriate gender roles often change more slowly than practice); Peter Moss & Fred Deven, *Parental Leave in Context*, in PARENTAL LEAVE: PROGRESS OR PITFALL?, *supra* note 171, at 1, 13–14 (describing the challenge of encouraging fathers’ participation in paid parental leave programs in various European countries); EUROPEAN OPINION RESEARCH GROUP, EUROPEANS’ ATTITUDES TO PARENTAL LEAVE (European Comm’n, Special Eurobarometer No. 189/Wave 59.1, 2004).

<sup>335</sup> Bornstein, *supra* note 287, at 116 (citing Littleton, *supra* note 84, at 36); Littleton, *supra* note 84, at 35–36; Selmi, *supra* note 1, at 770–71. Cf. Malin, *Fathers*, *supra* note 330, at 1081–89 (arguing for an interpretation of existing law that would allow fathers to combine sick leave with FMLA leave to care for mothers during postpartum recovery).

<sup>336</sup> See, e.g., Linda Haas & Philip Hwang, *Parental Leave in Sweden*, in PARENTAL LEAVE: PROGRESS OR PITFALL? *supra* note 171, at 46, 49 (describing Sweden’s policy of making some portion of family leave available at 80% wage replacement to fathers on a nontransferable basis); Arnlaug Leira, *Cash-For-Child Care and Daddy Leave*, in PAREN-



ily's paid leave allocation on the requirement that the father be the primary caregiver for that period of time. These "use-it-or-lose-it" schemes operate against the backdrop of paid family leave being a *family*, rather than an individual benefit, i.e., each family with a child gets a certain allocation of paid job leave time. The unpaid leave available under the FMLA, by contrast, is an individual benefit, and thus is essentially already offered on a use-it-or-lose it basis.<sup>337</sup> The effect of wage replacement on a paid family leave program built from this model would be to increase the sense that the father who declines to take leave is in fact "losing" something, namely, a financial benefit. However, the proportion of wage replacement will have an important influence on the power of this incentive. In Scandinavia, wage replacement is nearly full, making the risk of "loss" very high for fathers who decline to take leave.

Professor Michael Selmi has advocated making the stakes still higher, with a proposal to provide six weeks' paid leave to both men and women that can be claimed only on an all-or-nothing basis by each parent.<sup>338</sup> In other words, each parent would lose her entitlement unless she took the full six weeks' leave. Presumably, a crucial assumption of Professor Selmi's proposal is that paid leave alone is not sufficient encouragement for men to take leave, and that absent an all-or-nothing stipulation, men who take leave will on average take fewer than six weeks. This is probably correct, although Professor Selmi's plan may sacrifice the participation of some fathers who would take a leave only if they could limit it to a shorter period, perhaps two weeks or one month. An open question is which alternative—more men taking relatively shorter leaves (although doubtless longer than we see in the current unpaid scheme) or fewer men taking longer leaves—would do more to cultivate a norm of meaningful male participation in carework over time. It might be sensible, at least initially, to determine the effect of adding a pay component without an all-or-nothing stipulation on both the number and duration of leaves by men. If deemed inadequate, experimentation with all-or-nothing entitlements would seem a promising next step. Other proposals include mandating that men take leave following the birth or adoption of a child,<sup>339</sup> linking federal contract eligibility to family leave uptake rates by male employees,<sup>340</sup> marshalling antidiscrimination law to challenge workplace hostility to men's leave taking,<sup>341</sup> and public education for both men and women.<sup>342</sup> Although each of

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TAL LEAVE: PROGRESS OR PITFALL?, *supra* note 171, at 275–76 (describing Norway's policy of earmarking four weeks of state-provided family leave for exclusive use of fathers).

<sup>337</sup> Note that where spouses work for the same employer, the employer may limit their total permissible leave to care for a child after birth, adoption, or foster care to twelve weeks combined. 29 U.S.C. § 2612(f) (2000).

<sup>338</sup> See Selmi, *supra* note 1, at 770–71.

<sup>339</sup> *Id.* at 773–75.

<sup>340</sup> *Id.* at 775–79.

<sup>341</sup> Malin, *Fathers*, *supra* note 330, at 1089–94.

<sup>342</sup> Bornstein, *supra* note 287, at 122–23; Haas & Hwang, *supra* note 336, at 50 (de-

these ideas merits deeper exploration, I would recommend focusing at the very least on public awareness campaigns and further study of the likely impact on male participation in all-or-nothing entitlements.

#### *F. Duration of Benefits*

I have argued that benefits of excessive duration may undermine the goal of increasing women's workforce attachment. Examples from the European literature of excessively generous benefits may be found in the three-year paid programs offered in France and Germany.<sup>343</sup> While some speculation is required, three to four months' wage replacement per year for all covered work interruptions seems more sensible. The California program, which offers six weeks' compensation, may reflect a more realistic picture of what is politically possible.

### VIII. CONCLUSION

In this Article, I make the case for publicly mandated paid family leave financed in a manner that spreads its costs beyond those most likely, at least in the short run, to take leaves (e.g., women, particularly those in their childbearing years). Although this would mean that some citizens who have no family caregiving needs will subsidize others who do, I believe such redistribution is justified. Publicly provided paid family leave has the potential to increase women's workforce attachment. Historically and currently, women perform a disproportionate share of unpaid household labor, which hinders their participation in the paid workforce. Greater involvement in the paid market labor has the potential to increase women's self-esteem, economic power, and sense of personal control, as well as advance social equality between men and women.

In making this claim, I challenge two lines of argument that reject targeted accommodation of the work-family conflict: those who argue that on fairness grounds all caregiving labor, whether by workers or by stay-at-home caregivers, should be equally compensated, and those who argue that we must externalize the caregiving infrastructure to avoid reinforcing gender segregation in the workplace. I contend that we must shift the financial incentives of caregiving labor to make continuous attachment to paid work more attractive to caregivers than unpaid homemaking. Simultaneously I argue that a fully externalized caregiving policy would ignore the specific demand by many workers to be able to give hands-on, personal care to members of their family.

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scribing Sweden's public information campaigns directed at encouraging fathers to take family leaves). Note that women may also resist an increased paternal role in caregiving, perceiving it as a threat to their own arena of dominance in the family sphere. See Cahn, *supra* note 107; Malin, *Fathers*, *supra* note 330, at 1068.

<sup>343</sup> See sources cited *supra* note 171.

Some limitations on the design of paid leave policies are necessary for them to achieve the goals I espouse. Although there is still a need for further research, both theory and existing empirical work suggest that the effectiveness of paid leave policies in increasing women's workforce attachment may require limiting the duration of leaves and financing benefits in a way that avoids shifting excessive costs of the program to women. The argument for spreading the costs of leave policies is driven in part by the practical observation that the very incentive to enter into or remain attached to the workforce may be thwarted if the full cost of caregiving accommodations is borne by women workers. However, the argument for cost spreading also has an ethical element: increasing women's workforce participation will advance the broader social project of reducing gender inequality in paid employment.

