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A Defense of Paid Family Leave[†]

Excerpt from:

Gillian Lester*

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.

Introduction

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.¹ The additional contribution 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.² Coverage limitations mean that only about half of all workers, and less than one-third of steadily employed new mothers, receive these protections.³ 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.⁴

For workers who need to take time off to address family or medical needs, financial worries loom largest among their anxieties about taking leave.⁵ The hardship of lost wages leads some workers to foreshorten their time away from work⁶ or simply forgo a needed leave.⁷ A sizeable percentage of workers who lack access to paid benefits resort to public assistance for support during family leaves.⁸ 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.⁹ In addition, several states are considering bills that would expand existing temporary disability insurance ("TDI") programs or create new public insurance schemes to provide paid parental or family illness leave.¹⁰ 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.¹¹ 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.¹² Effective antidiscrimination laws,¹³ income tax policies that do not penalize dual-income married couples,¹⁴ and a shorter workweek¹⁵ 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].¹⁶ 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...

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.

...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.¹⁷ 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.¹⁸

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.¹⁹ 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.

The Effect of Paid Family Leave on Women's Workforce Participation

the theoretical impact of family leave policies on women's workforce attachment

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 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 forgone opportunity of having a parent provide care *personally* as being psychologically costly.²⁰ 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...

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.²¹ 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-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.²²

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.²³ 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, suggests that on balance, paid leave policies may enhance, rather than erode, 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.²⁴ They found these laws had positive but insignificant effects on new mothers' labor market behavior.²⁵ An analogous study based on a more recent population sample found that the passage of the FMLA had similarly

Empirical Findings on the Relationship Between Family Leave and Women's Labor Market Outcomes

modest effects.²⁶ The authors of these studies concluded that in the absence of wage replacement, parental leave laws may do little to alter the status quo.²⁷

*the effect of
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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.²⁸ Another study found that the FMLA increased employment of women with children under the age of one.²⁹ Taken as a whole, studies of 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.³⁰

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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.³¹ However, mothers with paid leave worked longer into their pregnancy and returned to work sooner once their infant was one month old.³² 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.³³ 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.³⁴

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.³⁵ In a sample of women between 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%).³⁶ 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%).³⁷ Only 12% of "switchers" had done so following a paid leave from their pre-birth employer.³⁸ 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.³⁹

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 1993.⁴⁰ During that time, government-mandated leave entitlements roughly tripled in generosity.⁴¹ Ruhm found these changes associated with a 3-4% increase in women's employment levels.⁴² 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,⁴³ and the likelihood that some women, while on parental leave, are counted as "employed" though they are physically absent from work.⁴⁴ 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.⁴⁵ 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.⁴⁶

A recent OECD analysis also concluded that paid family leave policies increase workforce participation for women in their thirties.⁴⁷ 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.⁴⁸ 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 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.⁴⁹

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.⁵⁰ Leaves of very lengthy duration might lead to a loss of work experience and depreciation of human capital.⁵¹ 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.⁵²

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.

Conclusion

Let me address some objections that will help situate my contribution within the existing feminist academic discourse on work/family conflict. First, I propose to direct resources to workers in particular, with no offsetting increase in subsidies to stay-at-home caregivers. One may question whether my scheme would be fair to stay-at-home caregivers. Some might go so far as to say that my position implicitly denigrates women's powerful contribution to the economy through the domestic sphere. My response is that I do not denigrate the value of family caregiving. I do, however, wish to expose the practical reality that different forms of contribution command different kinds of social and economic rewards. Facially neutral provision of subsidies would itself represent a choice that implicitly defends the status quo. Others might object in a similar vein that I fetishize work over other conceptions of the good life. In truth, however, I am less interested in advocating self-fulfillment from paid employment than I am in advocating women's economic independence, or more particularly, their practical access to work as a lever of economic independence.

Another objection could come from scholars at the other end of the spectrum who strongly advocate women's workforce participation, but believe that workplace accommodations such as paid leave will actually undermine labor market equality. Their argument is that by making it easier for women to move in and out of the workforce, paid leave may reinforce stereotypes about women's lack of commitment to paid employment. Instead of paid leave, these scholars emphasize policies such as high quality publicly provided daycare, or increased

subsidies for hiring professional caregivers in the home. Let me be clear: I strongly support the improvement of external institutions, like childcare, for facilitating work-family balance. Paid leave cannot do the work of changing the status quo without significant help from other policy reforms, such as childcare, tax reform, and vigorous enforcement of antidiscrimination laws. At the same time, I do not think that something like childcare can fully substitute for paid leave. A significant group of workers has an inflexible demand to be able to give at least some care personally, especially in those acute moments of having a new infant, or a seriously ill child or spouse. Externally-available care is a necessary complement, but not a substitute, to the particular need that paid leave satisfies.

I do, however, take very seriously concerns about the hazards that paid leave could deepen gendered segmentation of labor markets, and I try to address these concerns in the details of program design. More specifically, these concerns push me towards advocating (1) financing benefits in a way that spreads the costs of provision beyond women, e.g., through across-the-board payroll taxes; (2) reasonably strict eligibility rules (several months of work in the previous year, and at least 60% full-time hours), (3) benefits that are not overly generous (70% of earnings, with a floor and ceiling to avoid severe regressivity), and (4) a serious effort to build in incentives for men to take leave. ❖

[†] Excerpt from the full article "A Defense of Paid Family Leave," 28 HARVARD JOURNAL OF LAW & GENDER 1 (2005).

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¹ 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).

² 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.

³ 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 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).

⁴ Ruhm, *supra* note 3, at 176.

⁵ 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).

⁶ *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).

⁷ 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.

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

⁹ 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/paideleave/stateroundup2004.pdf> (last visited Nov. 18, 2004).

¹⁰ 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).

¹¹ 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).

¹² 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).

¹³ 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).

¹⁴ 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, and other areas of the tax code).

¹⁵ 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).

¹⁶ [I discuss incentives for men to take leaves in more detail in Part VII, *infra*.] A lengthier discussion that appears in the article on creating incentives for men to take leaves has been excluded from this excerpt.

¹⁷ See Charles L. Baum, *The Effect of Work Interruptions on Women's Wages*, 16 *LAB. 1*, 18 tbl.4 (2002) 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; See Vicki Schultz, *Life's Work*, 100 *COLUM. L. REV.* 1881, 1956-57 (2000) 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); 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). Jacob Alex Klerman & Arleen Leibowitz, *Job Continuity Among New Mothers*, 36 DEMOGRAPHY 145, 146 (1999) [hereinafter Klerman & Leibowitz, *Job Continuity*] (discussing the labor market choices a new mother confronts with respect to maternity leave).

18. Employers may also decline to invest in women's skills because they fear that they will not recoup their investment. See *Baum supra* note 17 and accompanying text.

19. 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).

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

21. See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 543-44 (1982).

22. 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.*

23. 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).

24. 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*].

25. *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).

26. Han & Waldfogel, *supra* note 22, 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.

27. *Id.* at 198; see also Klerman & Leibowitz, *STATE MATERNITY LEAVE, supra* note 24, at 66.

28. 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.*

29. 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).

30. 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.*

31. Joesch, *supra* note 20, at 1016-17.

32. *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.

33. *Id.* at 1018-19.

34. See Baum, *supra* note 17, at 25.

35. 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).

36. *Id.* fig.6.

37. *Id.*

38. *Id.*

39. *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 28, 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).

40. 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*].

41. *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).

42. *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.

43. *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.

44. *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).

45. *Id.* at 310 tbl.VII, 311.

46. See Winegarden & 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) 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.

47. Organisation for Economic Co-Operation and Development, *OECD Employment Outlook 137*, 140 tbl.4.5 (2001) at 153.

48. *Id.*

49. *Id.*

50. Joesch, *supra* note 20, at 1017.

51. Ruhm, *Economic Consequences of Parental Leave*, *supra* note 40, 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); See Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. (1998) 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).

⁵² 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.