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Family Leave and the Gender Wage Gap

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FAMILY LEAVE AND THE GENDER WAGE GAP

MICHAEL SELMI*

In this Article, Professor Selmi argues that the key to achieving greater gender equality in the workplace is finding a way to change the behavior of men so that their labor force patterns become more similar to women's. Professor Selmi begins the Article by analyzing the latest data and concludes that the gender pay gap reflects women's actual labor market behavior as well as employers' exaggerated responses to the expectation that women will leave the labor force to have and to raise children. Breaking up these patterns, he contends, will require developing better, and different, family leave legislation. Through an analysis of the existing legislation, Professor Selmi demonstrates that the Family and Medical Leave Act falls far short of providing the kind of relief that might improve gender inequality. He concludes the Article by proposing that the leave law be amended with an eye on equality, specifically by creating a contract set-aside program to reward employers for establishing generous leave policies that succeed in getting men to take more parental leave.

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INTRODUCTION

The patterns tied to both the reality and the assumptions regarding women's behavior in the labor force suggest that if there is to be greater equality for women in the workplace, it will be necessary for men to change their behavior, both in and out of the workplace, before employers will begin to change theirs. Despite improvements over the last two decades, gender inequality continues to pervade, and in many ways define, the American workplace. In large measure, the problem persists because men have not yet changed their employment-related behavior, and employers exact penalties on women not only because of their actual behavior, which differs from men's, but also because of the presumption that women will leave the workforce when they have children. Thus, increasing workplace equality will require persuading men to behave more like women, rather than trying to induce women to behave more like men. Achieving this objective would create a new workplace norm where all employees would be expected to have and spend time with their children, and employers would adapt to that reality.

These changes are needed more urgently than ever because workplace inequality has the potential to impact more women than

ever before. Approximately 75% of women between the ages of twenty and fifty-four now work,¹ including nearly 65% percent of women with children under age six.² Yet, women on average still earn between 70% and 75% of what men earn.³ Working women also continue to perform between two to three times as much housework as men, remain overwhelmingly responsible for child rearing, and occupy different jobs than men.⁴

Despite dramatic changes in women's work patterns in the last two decades, American society has failed to make more progress on issues of gender equity in part because we remain conflicted about the role that women should play both in the workplace and the home.⁵ Although the United States has one of the highest female labor force participation rates among industrialized countries, it also has done the least to assist those women with the demands of work and family.⁶ The United States was one of the last of the industrialized countries to adopt a family leave law and even today offers the least generous family leave benefits of any such country.⁷

1. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Jan. 1999, at 175, tbl.8 (Sup. Docs. No. L 2.41/2-2:4611).

2. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 1998 tbl.4 (1999) (Sup. Docs. No. L 2.118/2:998) (reporting the labor force participation of women with children). The majority of women who work, even those with children, work full-time, which is typically measured as 35 or more hours a week. See *id.* at tbl.5 (reporting that only 26.2% of women with children worked part-time). For a discussion of part-time work, see *infra* notes 93-99.

3. For a discussion of the wage gap, see *infra* Part I.

4. These issues are discussed in greater detail *infra* notes 73-77 (discussing housework), 108-10 (describing occupational segregation) and accompanying text. For a recent informative discussion on housework, 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, 38 (1999), and for a recent discussion of the question of occupational segregation, see Francine D. Blau et al., *Continuing Progress? Trends in Occupational Segregation in the United States Over the 1970s and 1980s*, 4 FEMINIST ECON. 29 (1998).

5. For example, a 1998 poll found that 40% of the respondents would like to return to the gender roles of the 1950s. See Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat*, WASH. POST, Mar. 22, 1998, at A1 (reporting that "4 in 10 of those surveyed said, it would be better to return to the gender roles of the 1950s").

6. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 49-52 (2000) (discussing leave and child care policies of other countries). Based on data from the early 1990s, the United States had a higher female labor force participation rate than all European countries other than Sweden and also had a considerably higher rate than Australia. See Francine D. Blau & Lawrence M. Kahn, *The Gender Earnings Gap: Some International Evidence*, in DIFFERENCES AND CHANGES IN WAGE STRUCTURE 105, 122 tbl.3.4 (Richard B. Freeman & Lawrence F. Katz eds., 1995).

7. Sociologist Jane Waldfogel recently summarized the legislation:

Until the passage of the Family and Medical Leave Act in 1993, the United States

The weakness of our commitment to facilitating work and family issues can be further highlighted by examining our expenditures on other workplace benefits. As a society, we spend more than \$60 billion annually on workers' compensation, with another \$20 billion devoted to unemployment benefits.⁸ In addition to these workplace benefits, we also subsidize health insurance and pensions, as well as non-workplace items such as home mortgages—all of which cost billions of dollars annually. Nevertheless, when it comes to facilitating family leave as a way of providing some balance between work and family, we spend practically nothing on the federal level, primarily because we are concerned about the effects the costs might have on employers and wages.

Increasing our societal commitment to family leave issues is critically important for at least two closely related reasons. First, if we are to make greater progress on gender equality in the workplace—progress that I will demonstrate is still much needed—we must challenge the existing stereotypes surrounding family leave, which invariably impact women negatively. As we will see, employers generally assume that women's work in the home will adversely affect their performance in the workplace and make employment decisions accordingly. To close the gender gap further, we need to take steps to disrupt both the reality and the expectations of how women's relation to their children affects their labor market behavior. Second, creating a workplace where it is expected that workers will have, and take care of, children is essential to furthering our societal interest in the family.

had no national maternity leave policy, and even now, it is tied with Switzerland in offering the shortest period of leave—a maximum of twelve weeks. Moreover, the United States is the only country of [the 15 industrial countries surveyed] that does not offer some degree of paid leave.

Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, J. ECON. PERSP., Winter 1998, at 137, 140–41. For a comprehensive review of European and Canadian leave policies, see KIRSTEN S. WEVER, *THE FAMILY AND MEDICAL LEAVE ACT: ASSESSING TEMPORARY WAGE REPLACEMENT FOR FAMILY AND MEDICAL LEAVE 7–11* (Radcliffe Pub. Policy Inst., Changing Work in America Series 1996). Wever notes that, as of 1989, "[s]ixteen European countries and Canada mandate[d] an average of 33 weeks of paid maternity/parental leave." *Id.* at 8.

8. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 829 (4th ed. 1998); Daniel McMurrer & Amy B. Chasanov, *Trends in Unemployment Benefits*, MONTHLY LAB. REV., Sept. 1995, at 30, 30 ("In 1993, more than \$22 billion was paid in [unemployment] benefits."). Legally mandated benefits now account for nearly 10% of payroll costs. See William J. Wiatrowski, *Tracking Changes in Benefit Costs, COMPENSATION AND WORKING CONDITIONS*, Spring 1999, at 32, 33–34 (noting that legally required costs accounted for 9.6% of payroll costs in 1998, compared to 4.1% in 1959).

The Family and Medical Leave Act (FMLA or “the Act”)⁹ is the only federal effort to date to provide some relief to working parents. Because the Act offers such limited benefits—unpaid leave for up to twelve weeks following the birth or adoption of a child—it has failed to ease the burden on women, and indeed I shall argue that the Act’s effects likely have been more negative than positive. For example, the passage of the FMLA in 1993 appears to have curtailed a trend at the state level toward implementing family leave policies that were often more generous than the FMLA.¹⁰ In addition, recent data indicate that very few workers utilize the federal legislation, and women are considerably more likely than men to take advantage of the law.¹¹ Accordingly, at least in the eyes of employers, family leave remains a woman’s issue, one for which all women are being penalized in the marketplace.

This latter point relates to the persistence of the gender wage gap, a central focus of this Article. Contributing to, indeed perhaps explaining, the bulk of workplace disparities based on gender, is a fact that stubbornly resists change: women overwhelmingly continue to be primarily responsible for child care and child rearing. Despite the passage of the FMLA and despite frequent claims by men that they would like to be more involved with their families,¹² strikingly few men take any significant paternity leave or assume equal

9. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654 (1994)).

10. See *infra* notes 217–20 and accompanying text.

11. The federal government commissioned two studies to assess the impact of the FMLA; these studies are summarized in COMMITTEE ON FAMILY & MED. LEAVE, U.S. DEP’T OF LABOR, *A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES* (1996) (Sup. Docs. No. Y 3.2:F21/W89) [hereinafter *A WORKABLE BALANCE*]. I discuss this report *infra* Part II.B.

12. Nearly every poll suggests that men would like to take more family leave and would be willing to trade some income for more time with their families. See, e.g., ALAN WOLFE, *ONE NATION AFTER ALL* 244 (1998) (noting that many of the respondents “believed companies that turn employees into workaholics violated the moral principle of balance, as do people who neglect their family ties for higher income and occupational prestige”); Ellen Galinsky et al., *The Role of Employers in Addressing the Needs of Employed Parents*, 52 J. SOC. ISSUES 111, 116–18 (1996) (reporting survey results indicating that both men and women would prefer to work less and that both are equally likely to trade salary for greater child assistance benefits); Lisa Belkin, *Old Barriers to Sexual Equality Seen as Eroding, but Slowly*, N.Y. TIMES, Aug. 20, 1989, at A1 (reporting that 40% of men surveyed said they would like to quit their jobs to spend more time with their children). A recent poll also indicated that men and women strongly support expanding the Family and Medical Leave Act to cover small employers and to provide some form of insurance to cover family leave. See National Partnership for Women and Families, *Family Matters: A National Survey of Women and Men*, tbl.7 (visited Jan. 17, 2000) <<http://www.nationalpartnership.org/survey/survey.htm>>.

responsibility for child rearing. As a result, things have continued for the most part as they were: women have less of an attachment to the labor force than men (though the differences are narrowing), miss more work than men, take more time off when they have children, and generally work fewer hours. All of these factors contribute to a cumulative workplace disadvantage that exacts a heavy price in terms of salary, promotions, and responsibility.¹³ Economist Claudia Goldin recently estimated that only about 13% of college educated women successfully attained both family and career by midlife.¹⁴

Even those women who do not have children, or who exit the labor market only for a very brief period when they do have children, are affected adversely by what often is labeled statistical discrimination—the use of group statistics as a proxy for information, in this instance the likelihood that more women than men will leave the workforce to have children with the further assumption that the accompanying labor force disruption will negatively impact productivity.¹⁵

If we are to progress further toward workplace equality, it will be necessary for men to change their behavior in the labor market by, at a minimum, taking more leave around the birth or adoption of their children. Yet, history suggests that accomplishing this change will be no easy feat.¹⁶ Exhorting men to become more involved in their family lives or touting the importance of families seems unlikely to ease the burden on women to any significant extent. To address this dilemma, I propose that the FMLA be amended so as to create greater incentives for men to take leave around the birth or adoption of a child. My proposed amendments vary from forcing men to take six weeks of paid leave to the less drastic measure of creating a governmental contract set-aside program aimed at rewarding employers who succeed in encouraging their employees to take family

13. For an excellent recent discussion of the cumulative disadvantage women experience in the workplace, see VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* 125–44 (1997).

14. See Claudia Goldin, *Career and Family: College Women Look to the Past*, in *GENDER AND FAMILY ISSUES IN THE WORKPLACE* 20, 45–48 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997).

15. See *infra* Part I.C.

16. Since at least the 1960s, women as a group have altered their labor market behavior substantially, whereas the change in male behavior has been marginal at best. See, e.g., JOYCE GELB & MARIAN LIEF PALLEY, *WOMEN AND PUBLIC POLICIES: REASSESSING GENDER POLITICS* 211 (1996) (noting that “despite increased social acceptance of work for women, the role of women in home and family has remained much the same”); JOAN K. PETERS, *WHEN MOTHERS WORK* 10 (1997) (“Most women make more than the necessary changes when they have children; most men make none.”).

leave.¹⁷ To justify these proposals, I will demonstrate that outside of Sweden, where success is higher than anywhere else, though lower than is often assumed, men have never voluntarily taken significant amounts of child-related leave and that the disproportionate burden of child rearing that falls on women explains a substantial portion of their labor market inequality. Indeed, I will suggest that little short of forcing men to take leave or creating strong incentives aimed at employers will suffice to alter workplace patterns in a way that will enable women to make greater progress.

Equally important, creating ways for men to become more involved in child rearing could help transform the workplace so that the female model of the worker, rather than the male model, becomes the norm. If men begin to act more like women in terms of their responsibilities toward their children, employers may come to expect that all of their employees will take part in child rearing and may become more willing to accommodate that responsibility. Employers might then begin to view family leave benefits as part of the standard package of employee benefits, something akin to workers' compensation or to health and safety regulations, which today are seen as an integral part of doing business despite their costs.

It is surely possible to address the topic of family leave and workplace inequality from a number of perspectives. In this Article, I will concentrate on childbearing leave and will say little directly about child rearing. I focus on childbearing for two primary reasons, but there is also a third subsidiary reason that supports my choice. First, leave following the birth of a child is already part of the policy agenda as a result of the passage of the FMLA and therefore is currently involved in the debate over balancing work and family.¹⁸ At this time, it would be far more difficult to create a workable plan relating to child rearing, given that raising a child is an ongoing process and less predictable than childbearing. Second, available data indicate that much of the inequity that continues to affect women in the workplace revolves around childbearing rather than child rearing. Most economic explanations and assumptions regarding why women receive lower wages are tied to the likelihood that a woman will leave the workforce after having a child. This is true with respect to the human capital explanation involving investments in education, experience, and training, as well as theories of statistical

17. See *infra* Part III.B.

18. The FMLA was passed in 1993 and is now part of the legal landscape. The FMLA is discussed *infra* Part II.

discrimination, both of which will be discussed in detail shortly. In contrast, child rearing appears to play a lesser role in explaining the source of workplace inequality. That said, the two concepts are not unrelated, and here I turn to the third reason: if we succeed in breaking up leave patterns surrounding childbirth, it seems likely that we will make inroads into the patterns of child rearing as well.

As may be clear already, I intend to focus largely, though not exclusively, on empirical work originating in economics and sociology. The gender wage gap has been studied extensively, and, although the two disciplines approach the issue with different emphases, both have moved increasingly toward empirical analyses involving a bounty of available data sources. I concentrate on the data concerning women in the workplace because it is so rich and informative, yet too often ignored in legal discussions relating to gender inequality. A close examination of the data may help liberate us from some of the reigning myths regarding women's workforce behavior because women's behavior deviates substantially from what much of neoclassical economic theory predicts. I also want to emphasize, however, that the persistence of gender inequality is about more than economic interests, and necessarily implicates broader issues of gender roles and power in our society. Improving on the current conditions will thus, as Nancy Fraser has argued, require "changing both political economy and culture, so as to undo the vicious circle of economic and cultural subordination."¹⁹

This Article will proceed in three Parts. Part I seeks to understand the nature and persistence of the gender wage gap by exploring the data and the various theories that help to explain the gap. Part II analyzes the effects of the FMLA, including two recent surveys commissioned by the federal government that provide some insight into just how little relief the Act actually provides. Part III discusses various ways in which Congress might amend the Act to further the goal of reducing workplace inequality.

I. UNDERSTANDING THE GENDER WAGE GAP

The most common measure of gender inequality in the workplace is the ratio of women's wages to men's wages—what is often referred to as the "gender wage gap." In 1997, women's salaries averaged between 70% and 76% of men's salaries, depending on the

19. NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 28 (1997).

particular measure used.²⁰ These figures represent a substantial improvement from the level of inequality that persisted through much of the 1970s, when the wage gap hovered around 60%. Most of this improvement occurred during the 1980s, however, and the pay gap has largely stagnated during the last decade.²¹

Although the earnings ratio is a wildly popular measure, the average figures can be somewhat misleading in that they mask women's increasing heterogeneity and overlook some structural features of the labor market that may explain the decline in the wage gap more than does the actual progress of women.²² For example, in today's labor market, older women suffer far greater wage disparity than younger women; indeed, women entering the labor market today often begin their careers in salary parity with men, or with minor wage differentials, and wage disparities tend to arise over time.²³ It is also worth noting that much of the decrease in the wage

20. See Women's Bureau, U.S. Dep't of Labor, *Women's Earnings as Percent of Men's, 1979-1998* (visited Jan. 17, 2000) <<http://www.dol.gov/dol/wb/public/stats/main.htm>>. To provide an example of how the disparity varies depending on the measure used, in 1998 the female-to-male ratio for full-time workers measured by hourly wage was 73.2%, the percentage for weekly wages was 76.3%, and the annual ratio was 81.8%. See *id.* For a detailed discussion of the gender wage gap, see FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* 134-43 (3d ed. 1998).

21. See BLAU ET AL., *supra* note 20, at 136 (noting that the earnings ratio measured by annual earnings "did not increase between 1990 and 1995," while the weekly earnings ratio has declined since 1993).

22. A number of other interpretive difficulties can arise. For example, focusing on wage distribution instead of median wages indicates that greater numbers of women are found at the lowest wage level, while men dominate at the top of the wage scale. See, e.g., Annette Bernhardt et al., *Women's Gains or Men's Losses? A Closer Look at the Shrinking Gender Gap in Earnings*, 101 AM. J. SOC. 302, 306-18 (1995) (analyzing relative wage distributions as opposed to median earnings). The averages also underreport or do not measure the full inequalities that are caused by racial disparities in the incomes of men. As a whole, black men earn considerably less than white men, and wage differences between black men and black women are smaller than among whites. See DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* 131-32 (1996) (discussing racial disparities in income). Thus, including blacks within the averages can actually mask the extent of the advantage white men have in the labor market. See *id.* at 135; David A. Cotter et al., *Occupational Gender Segregation and the Earnings Gap: Changes in the 1980s*, 24 SOC. SCI. RES. 439, 441 (1995) ("For minorities, gender differentials in earnings . . . are smaller than for whites . . . ; however, this is because of the disadvantaged position of minority men and not because of any special privileges for minority women."). Moreover, the average figures typically include only full-time employees, thus excluding the disproportionately female-dominated and lower-paid, part-time workforce.

23. For example, in 1995 the earnings ratio for workers aged 25-34 was 77.8%, whereas the ratio for those aged 45-54 was 58.1%. See BLAU ET AL., *supra* note 20, at 137; see also CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 59 (1990) (noting a discrepancy between the experiences of younger and older women); Margaret Mooney Marini & Pi-Ling Fan, *The*

gap during the last decade resulted from factors that were only tangentially related to the improving labor market position of women. During the 1980s, for instance, the wages of lower-income men concentrated in manufacturing jobs fell sharply, particularly when compared to women in service jobs, whose salaries improved modestly.²⁴ At the same time wages grew significantly among college-educated workers, and large numbers of college-educated women entered the workforce during the 1980s.²⁵ All of these factors contributed to the decreasing gender wage gap, and a significant portion of the decrease resulted at least as much from the receding position of men as from improvements in the labor market conditions of women.

Despite its limitations, the gender wage gap provides a useful means of understanding current labor market inequalities, as well as explaining how the condition of women has improved, or failed to improve, over time. As impressive as the decrease in wage disparity may be, a substantial gap between the earnings of men and women remains—at least 25%, or a quarter of one's salary—and it is important to try to understand the source of the wage inequalities in order to understand the role that the law might play in reducing the disparity further.

Economists tend to view the wage gap as a product of choices that women make regarding their commitment to the labor market.²⁶

Gender Gap in Earnings at Career Entry, 62 AM. SOC. REV. 588, 597 (1997) (reporting that women in a study sample earned 84% of men at career entry).

24. See SPAIN & BIANCHI, *supra* note 22, at 108–10 (discussing the effect of men's declining wages on the gender gap).

25. See *id.* at 116–17 (noting that “women were poised by the 1980s to advance in the labor force and the decade turned out to be a phenomenal one in terms of earnings improvement for the well educated”); Chinhui Juhn & Kevin M. Murphy, *Wage Inequality and Family Labor Supply*, 15 J. LAB. ECON. 72, 78–80 (1997) (documenting that women's wages increased most dramatically at upper-income levels).

26. See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* 41–42 (1991) (“Wage rates are lower for women at least partly because they invest less than men in market human capital, while the productivity of household time is presumably greater for women partly because they invest more than men in household capital.”); Solomon William Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 REV. ECON. & STAT. 60, 65–68 (1981) (arguing that women self-select into occupations that match their preferences). Among many legal analysts, this theory sometimes is accepted as true without argument or empirical support. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 210 (1992) (asserting that labor market disparities are the product of “differences in job preferences between males and females”); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1315 (1989) (assuming for the purposes of analysis that women invest less in human capital because they will likely take time out from the labor market).

Many women leave the labor market for a period of time to have and to raise children, and this withdrawal from the paid labor force can adversely affect a woman's career because her skills may deteriorate with time spent away from work or fail to improve as they would have if she had stayed in the labor force. The likelihood that a woman may leave the labor force to have and to care for children may affect her career decisions in other ways as well. Women may, for example, choose occupations in which continuous experience is less important or in which the benefits offered may compensate for lower salaries.²⁷ These career choices may also influence educational choices—the pursuit of a course of study tailored for a particular career path may lead to lower salaries, less flexibility, and fewer opportunities for career progression. These choices, the argument goes, may help explain the severe segregation that exists in the U.S. labor market, where it remains rare for a woman to work in a job that is integrated on the basis of gender.²⁸

As we will see shortly, the economists' preferred explanations, which are sketched out briefly above, provide more theoretical than empirical insight. The extraordinary volume of empirical studies on the gender wage gap demonstrates that women's choices about careers, education, and work histories offer limited insight into the persistent gender differentials that characterize the labor market. One important reason is that women, as a group, demonstrate great variability in their work patterns. Although women on average leave the labor force to bear and care for children more frequently than their male counterparts, many women do not take such leave. Furthermore, for the majority of women who do take child-related leave, their absence from the workplace is typically quite short—too short, as it turns out, to explain the wage and career penalties that are being exacted by employers.²⁹ Rather than women's actual labor market experiences, employers' perceptions of women's attachment to the labor force appears to offer a better explanation for the continuing disparities. This expectation or perception is generally referred to as rational or statistical discrimination, but I hope to demonstrate that it is a form of discrimination that is not nearly as rational or efficient as is often assumed. These issues will be discussed in more detail below.

27. See *infra* notes 78–79 and accompanying text.

28. The issue of occupational segregation is discussed in more detail *infra* Part I.B.

29. See *infra* notes 88–92 and accompanying text.

A. *The Human Capital Explanation*

The significant decrease in the wage gap that occurred in the 1980s is often attributed to improvement in women's education, experience, and training—what are defined as human capital factors—as well as to a reduction in levels of discrimination.³⁰ Human capital explanations suggest that gender differences in job placement and advancement arise from differences in productivity acquired through education, labor force experience, and training.³¹ This theory, despite its now well-documented empirical shortcomings,³² has had an unusually powerful explanatory force within the law, in large measure because it seems to accord with common sense.³³ After all, the importance of education is impressed upon us from a young age, and training and work experience are generally relevant to an employer's labor market decisions, in particular to their wage-setting functions.³⁴ Accordingly, investing in education and experience are two ways in which workers seek to enhance their value in the labor market.

30. See Francine D. Blau & Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Wage Differential in the 1980s*, 15 J. LAB. ECON. 1, 30–31 (1997) (finding that an increase in skills, experience, and occupational status explained a large portion of the decrease in the gender gap); Linda Datcher Loury, *The Gender Earnings Gap Among College-Educated Workers*, 50 INDUS. & LAB. REL. REV. 580, 590–91 (1997) (finding an increase in the market price of women's skills and concluding that it reflects a decrease in discrimination); Kevin M. Murphy & Finis Welch, *Industrial Change and the Rising Importance of Skill*, in *UNEVEN TIDES: RISING INEQUALITY IN AMERICA* 101, 101–32 (Sheldon Danziger & Peter Gottschalk eds., 1993) (finding that growth in the market price of women's skills explained the decrease in the wage gap).

31. For the classic articulation of this theory, see GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* 15–44 (2d ed. 1975).

32. See *infra* notes 35–51 and accompanying text.

33. See, e.g., Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 978 (1995) (discussing the biological basis for the gender wage gap); Posner, *supra* note 26, at 1315 (assuming “that even if there is no discrimination . . . women will, on average, invest less than men in human capital”); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 758–60 (1991) (suggesting that women generally invest less in human capital); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 546–48, 602–11 (1998) (discussing the division of labor within the household).

34. Of course, our common sense also tells us that the quality of the investments matters tremendously, hence the importance placed on grades. See McKinley L. Blackburn & David Neumark, *Omitted-Ability Bias and the Increase in the Return to Schooling*, 11 J. LAB. ECON. 521, 528 (1993) (demonstrating that returns on schooling are significant primarily for those who obtain relatively high levels of academic achievement). These qualitative issues are very difficult to measure, however, because the necessary data are often lacking.

1. Education, Experience, and Training

Despite the common-sense appeal of this approach, an impressive array of empirical studies has established firmly that the human capital theory offers but a partial explanation for the gender wage gap. Indeed, the general consensus is that human capital factors explain about one-third to one-half of the pay differentials between men and women—not an insubstantial amount, but far from a complete explanation either.³⁵ Two reasons are typically advanced to explain the theory's limited explanatory power.

First, women have narrowed the gaps in education and experience to a far greater extent than is reflected in the wage ratio.³⁶ This fact is particularly true with respect to education, where women matched men in terms of college attendance rates in the 1980s and constituted a majority of college students by 1990.³⁷ Women also substantially narrowed differences in fields of study, a factor that had long been thought to account for much of their earnings inequality.³⁸ By 1990, women accounted for 50% of college biology majors and

35. See BLAU ET AL., *supra* note 20, at 189–90 (finding that education and experience explain only one-third of the wage gap excluding the occupational component); GOLDIN, *supra* note 23, at 114–17 (canvassing studies concluding that human capital theories explain 44% to 74% of the wage gap); Marini & Fan, *supra* note 23, at 590 (noting that “[i]n studies based on samples of individuals of diverse ages, at most about half of the gender gap in wages is associated with mean differences in human capital between the sexes—and in some studies it is considerably less”); Paul L. Schumann et al., *The Effects of Human Capital and Job Characteristics on Pay*, 29 J. HUM. RESOURCES 481, 499 (1994) (finding that human capital and job characteristics together explained 50% of the wage gap in a surveyed sample).

36. See William T. Bielby & Denise D. Bielby, *Cumulative Versus Continuous Disadvantage in an Unstructured Labor Market*, in GENDER INEQUALITY AT WORK 209, 223–25 (Jerry A. Jacobs ed., 1995) (finding a wage gap of 25% for female television writers after holding human capital factors constant); June O’Neill & Solomon Polachek, *Why the Gender Gap in Wages Narrowed in the 1980s*, 11 J. LAB. ECON. 205, 209 (1993) (concluding that “the narrowing in the gender gap in earnings in the 1980s to a large extent was caused by a narrowing in the gender gap in experience”).

37. See SPAIN & BIANCHI, *supra* note 22, at 59. In 1998, 29% of women aged 25 to 29 had completed college, compared to 26% of men. See JENNIFER C. DAY & ANDREA E. CURRY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: MARCH 1998, at tbl.3 (1998) (Sup. Docs. No. C 3.186:P-20/513). Some of the changes in women’s educational attainment, however, are the result of women’s greater attendance at community colleges and of substantial numbers of older women returning to school, both of which are likely to offer relatively lower payoffs in the marketplace. See SPAIN & BIANCHI, *supra* note 22, at 61.

38. Barry Gerhart has documented the role that college majors play in explaining the wage gap, although in his study two engineering majors (mechanical and electrical) accounted for a large portion of the explanation. See Barry Gerhart, *Gender Differences in Current and Starting Salaries: The Role of Performance, College Major, and Job Title*, 43 INDUS. & LAB. REL. REV. 418, 426 (1990).

46.2% of mathematics majors.³⁹ Nevertheless, a survey of 1985 graduates found that even after controlling for major, grades, and quality of education, recent female college graduates still experienced a 10% to 15% wage disadvantage compared to similarly situated male graduates.⁴⁰

In the last two decades, women likewise have reduced the disparities in work experience, especially among more recent entrants to the workforce. For example, in 1998, men aged twenty-five to thirty-four had a median tenure of 2.8 years with their current employer, whereas for women in the same age group the median was 2.5 years.⁴¹ Indeed, a significant portion of the decline in the wage gap appears to be attributable to the narrowing of differences in work experience.⁴²

39. See SPAIN & BIANCHI, *supra* note 22, at 63. These numbers represent sharp gains from the 1970s, when women received 27.8% of biology and 37.4% of mathematics degrees. See *id.* There were also significant improvements at the graduate levels: women received 51.0% of master's degrees and 35.4% of doctorates in biology, as well as 40.1% of the master's degrees and 17.8% of the doctorates in mathematics. See *id.* As the authors explain: "In 1964, approximately one-half of women college students would have had to change majors to achieve the distribution of men's majors. By 1984, only one-third of women would have had to change majors to match men's majors." *Id.* Despite the advances noted above, it appears that the trend toward greater integration of majors may have stalled recently. See Jerry A. Jacobs, *Gender and Academic Specialties: Trends Among Recipients of College Degrees in the 1980s*, 68 SOC. OF EDUC. 81, 86 (1995) (noting that "the trend toward lower levels of segregation across majors that was evident in the early 1980s slowed or reversed direction in the late 1980s").

40. See Catherine J. Weinberger, *Race and Gender Wage Gaps in the Market for Recent College Graduates*, 37 INDUS. REL. 67, 82 (1998) ("The analysis shows clearly that among recent college graduates, white women[,] . . . black women[,] . . . and Asian women all face the same 10 to 15 percent wage disadvantage relative to white men with the same type and quality of college education."). Although field of study is often thought to provide substantial explanation, the primary effect of a college major is to determine the general industry in which the person is likely to work. Therefore, it is often difficult to know whether the major is tied to wages or whether the observed wages are a product of the particular industry. See Charles Brown & Mary Corcoran, *Sex-Based Differences in School Content and the Male-Female Wage Gap*, 15 J. LAB. ECON. 431, 460 (1997). In this way, field of study is closely related to the issue of occupational segregation and choice. See *infra* notes 108–11 and accompanying text.

41. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure in 1998*, tbl.1 (visited Jan. 17, 2000) <<http://stats.bls.gov/news.release/tenure.toc.htm>>. The differences were greater with older workers: men aged 45 to 54 had a median tenure of 9.4 years compared to women's median of 7.2 years. See *id.*; see also Francine D. Blau, *Trends in Well-Being of American Women, 1970–1995*, 36 J. ECON. LIT. 112, 119 (1998) (noting that "among full-time workers, the gender difference in full-time experience declined from 7.5 years in 1979 to 4.6 years in 1988").

42. See Allison J. Wellington, *Changes in the Male/Female Wage Gap, 1976–85*, 28 J. HUM. RESOURCES 383, 395 (1993) (concluding that changes in women's market experience explained a significant portion of the reduction in the wage gap). There is also evidence that early experience in the labor market is only mildly significant to later wages,

Like education and experience, job training can also enhance a person's value in the labor market, especially job training that is general rather than specific to a particular firm or industry. Human capital theorists often suggest that women are likely to invest less in job training because such training has a lower value for women given the likelihood that they may spend significant time out of the labor market.⁴³ Evidence suggests that women receive less on-the-job training than men, but the evidence is not overwhelming and is often difficult to interpret.⁴⁴ For example, the standard neoclassical argument that the difference in training reflects women's lower investments in job training should have little force when the employers provide the training unless women are opting out of the training on a voluntary basis or employers are discriminating against women when making the training opportunities available to their workers.⁴⁵ It also has been suggested that the difference in training is

as many young employees explore various jobs in their early careers. See Rosella Gardecki & David Neumark, *Order from Chaos? The Effects of Early Labor Market Experiences on Adult Labor Market Outcomes*, 51 *INDUS. & LAB. REL. REV.* 299, 318-19 (1998). The importance of early job attachment appears somewhat more important for women, however, who generally have a greater need than men to signal their workplace commitment to employers. See *id.* at 319.

43. See Anne Beeson Royalty, *The Effects of Job Turnover on the Training of Men and Women*, 49 *INDUS. & LAB. REL. REV.* 513, 520 (1996) (finding that job turnover rates may account for as much as 25% of the training differential). Even these results, however, leave three-quarters of the training differential unexplained.

44. A 1995 survey conducted by the Bureau of Labor Statistics, for example, found that men averaged 48 hours of training during the six months of the survey period, while women averaged 42 hours. See Harley Frazis et al., *Results from the 1995 Survey of Employer-Provided Training*, *MONTHLY LAB. REV.*, June 1998, at 3, 10. The report, however, concluded that this difference was too small to be statistically significant. See *id.*; see also Reed Neil Olsen & Edwin A. Sexton, *Gender Differences in the Returns to and the Acquisition of On-the-Job Training*, 35 *INDUS. REL.* 59, 68-70 (1996) (discussing the impact of training rates on female wages); Jonathan R. Veum, *Training Among Young Adults: Who, What Kind, and for How Long?*, *MONTHLY LAB. REV.*, Aug. 1993, at 27, 28-30 (discussing lower training rates among women). Other surveys indicate that women's investments in training are comparable to men's, although the duration of their training appears to be shorter. See Mark A. Loewenstein & James R. Spletzer, *Delayed Formal On-the-Job Training*, 51 *INDUS. & LAB. REL. REV.* 82, 95 n.20 (1997).

45. See RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 308 (6th ed. 1997) (suggesting that employers might provide less training to women due to the perception that women are likely to leave the workforce for family reasons). A study involving Canadian women provides some indirect evidence to refute the notion that women accumulate less firm-specific human capital than men: in the study, women tended to suffer greater wage loss following job displacement than men. See Thomas F. Crossley et al., *Gender Differences in Displacement Cost: Evidence and Implications*, 29 *J. HUM. RESOURCES* 461, 474-77 (1994). This finding is inconsistent with the human capital story, which suggests that women invest less in training so that they will not suffer as much of a penalty when they leave a job. Another fact that conflicts with the human capital explanation is that one would expect women to receive higher wages early

primarily due to the kinds of jobs women occupy, which tend to offer fewer training opportunities than the jobs of their male counterparts.⁴⁶ As such, it is difficult to know how to interpret the differential training data, other than perhaps to suggest that it does not offer a compelling explanation. In fact, after reviewing the evidence relating to human capital investments, two economists have concluded that "it is clear that closing the human capital gap between men and women, with regard to skill acquisition, training, and particularly work experience . . . will not by itself close the gender wage gap."⁴⁷

In addition to the limited empirical support that underlie the human capital explanations, substantial documentation suggests that human capital factors do not fully explain employers' wage-setting processes and therefore do not account for significant portions of wage functions.⁴⁸ Some of the lack of explanatory power is due to the sheer difficulty of measuring individual productivity, for which education, experience, and training are generally used as rough proxies,⁴⁹ while still other measurement issues arise due to

in their careers when men are devoting more time, and presumably receiving lower wages, in training. See BLAU ET AL., *supra* note 20, at 181-83. There is, however, no evidence to support this notion. See *id.*

46. See John M. Barron et al., *Gender Differences in Training, Capital and Wages*, 28 J. HUM. RESOURCES 343, 361 (1993). Interestingly, firm-specific training tends to improve women's job tenure in their first jobs much more significantly than it does for men. See Lisa M. Lynch, *The Role of Off-the-Job vs. On-the-Job Training for the Mobility of Women Workers*, 81 AM. ECON. REV. PAPERS & PROC. 151, 155 (1991).

47. Judith Fields & Edward N. Wolff, *Interindustry Wage Differentials and the Gender Wage Gap*, 49 INDUS. & LAB. REL. REV. 105, 118-19 (1995). The authors of the study found that women were concentrated in lower-paying industries and that this distribution explained about one-third of the wage gap. See *id.* at 116-18.

48. See, e.g., Barbara Stanek Kilbourne et al., *Returns to Skill, Compensating Differentials, and Gender Bias: Effects of Occupational Characteristics on the Wages of White Women and Men*, 100 AM. J. SOC. 689, 705 (1994) (finding that experience explained a significant portion of the wage gap, but that education did not); James L. Medoff & Katherine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. HUM. RESOURCES 186, 215 (1981) (concluding that only "a small fraction of experience-earnings differentials can be explained by experience-productivity differentials"); Linda K. Stroh et al., *All the Right Stuff: A Comparison of Female and Male Managers' Career Progression*, 77 J. APPLIED PSYCHOL. 251, 255 (1992) ("Education was the only human capital variable that predicted salary progression."); Andrew Weiss, *Human Capital vs. Signalling Explanations of Wages*, J. ECON. PERSP., Fall 1995, at 133, 141 (finding that "test scores[] and measurable learning in secondary school can explain at most one-quarter of the increased earning associated with high school, and probably substantially less").

49. For discussions relating to the difficulty of measuring productivity, see generally EHRENBERG & SMITH, *supra* note 45, at 382-83 (discussing the difficulty of measuring many qualitative aspects of performance); Hae-shin Hwang et al., *Compensating Wage Differentials and Unobserved Productivity*, 100 J. POL. ECON. 835, 843 (1992) ("[W]e

peculiarities of the labor market that are still not well understood.⁵⁰ The few studies that have been able to measure productivity directly generally have concluded that the wage gap cannot be attributed to productivity differences between men and women.⁵¹

2. The Question of Hours

Education, experience, and training are the characteristics typically considered in human capital explanations for the pay differential between men and women. Another possible explanation for why men are paid more than women, even for similar jobs, may be tied to men's ability to work longer hours, an ability that may relate to the fact that women are still largely responsible for child rearing. This theory suggests that women may not be able to work as many hours, put in necessary overtime, or pay as much attention at work due to concerns about their children and that these differences may then be reflected in lower wages.⁵² This is a complicated and controversial issue on which the data are not likely to provide a convincing explanation because effort levels and employee dedication are the kind of workplace intangibles that are difficult to quantify

suggest that 30–50 percent of total worker productivity variance remains uncaptured by the usual set of labor market productivity variables—variables such as age, labor market experience, and formal schooling.”).

50. For example, contrary to what might be expected under neoclassical models, studies indicate that employers are reluctant to lower wages when faced with slack demand and instead prefer to lay workers off. Additionally, it often appears that employers pay more than is necessary to attract qualified employees. For discussions of these and other issues relating to the particularities of the labor market, see generally ROBERT M. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* (1990); Jeremy I. Bulow & Lawrence H. Summers, *A Theory of Dual Labor Markets with Application to Industrial Policy, Discrimination, and Keynesian Unemployment*, 4 J. LAB. ECON. 376 (1986); Weiss, *supra* note 48; Janet L. Yellen, *Efficiency Wage Models of Unemployment*, 74 AM. ECON. REV. 200 (1984). It is also well-established that large employers tend to pay higher wages than smaller employers. See Walter Y. Oi, *Employment Relations in Dual Labor Markets (“It’s Nice Work if You Can Get It”)*, 8 J. LAB. ECON. S124, S125 (1990) (discussing the effect of employer size on wages).

51. An important recent study found that women were somewhat less productive than men but that “women’s wages fall short of men by considerably more than can be explained by their lower marginal productivity.” Judith K. Hellerstein et al., *Wages, Productivity, and Worker Characteristics: Evidence from Plant-Level Production Functions and Wage Equations*, 17 J. LAB. ECON. 409, 433 (1999) (using data from 1989). An earlier study that also utilized direct measures of productivity found that women had “comparable productivity,” but “much lower wages” than men. Harry J. Holzer, *The Determinants of Employee Productivity and Earnings*, 29 INDUS. REL. 403, 415 (1990).

52. See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1780–82 (1986) (arguing that the difference in hours worked between men and women provides an explanation for differential wages).

and, therefore, difficult to assess other than through speculation.⁵³ The available data suggest, however, that the number of hours worked fails to demonstrate that the pay differentials relate to productivity differences.

One potential measure of effort or dedication might be hours worked, based on the notion that the more dedicated employees work longer hours. This measure is, of course, imperfect because the most dedicated employees may be the most efficient, thus saving employers in hourly compensation.⁵⁴ To the extent hours matter, men do spend more time in the labor market than women, but the differences are not particularly significant. Recent data from the Current Population Survey indicate that in 1997 30% of men and 15% of women usually worked more than forty-four hours in a week, while only one in ten men and one in thirty women worked more than fifty-four hours a week.⁵⁵ Excessive hours were considerably more likely at the executive and managerial level than in nonsupervisory positions,⁵⁶ and on average men worked forty-four hours per week while women worked forty-one hours.⁵⁷ The wage premium paid for working extended hours was marginally higher for women than men,⁵⁸ and the data also suggest that women have increased their work hours in recent years more than their male counterparts.⁵⁹ Moreover, women

53. For an argument that unobserved characteristics, such as motivation, explain a substantial portion of the wage gap, see Moon-Kak Kim & Solomon W. Polachek, *Panel Estimates of Male-Female Earnings Functions*, 29 J. HUM. RESOURCES 406, 407-08 (1994). As noted in the text, however, these characteristics are difficult to measure or model by their very nature. Thus, it is not easy to assign them any causal role without a substantial element of speculation.

54. It is not clear that a willingness to work longer hours ought to result in higher hourly wages, especially when a significant wage gap exists. See *supra* note 20 and accompanying text. There are, however, a variety of reasons that an employer may be willing to pay higher hourly wages to those employees who are willing to take on longer hours, including the perception that these employees are harder workers.

55. See Daniel Hecker, *How Hours of Work Affect Occupational Earnings*, MONTHLY LAB. REV., Oct. 1998, at 8, 9.

56. At the executive and managerial levels, 50% of men and 30% of women worked more than 44 hours in a week. See *id.*

57. See *id.* at 10. It is easy for lawyers, who work unusually long hours, to overemphasize the importance of long hours, and indeed lawyers have been quick to suggest to me that a disparity in hours probably offers a significant explanation. Interestingly, among lawyers, the average hours worked for men and women were roughly the same, although a larger percentage of men (25% compared to 18% of women) worked more than 55 hours a week. See *id.* at 11-12 tbl.2.

58. See *id.* at 13-16 tbl.3.

59. Relying on data from the Panel Study of Income Dynamics for the period 1979 to 1989, Barry Bluestone and Stephen Rose concluded that "[a]s a general rule, . . . there has been a slight reduction in men's work hours and a large increase in women's hours." Barry Bluestone & Stephen Rose, *Overworked and Underemployed*, AM. PROSPECT,

generally spend more time than men on combined market and nonmarket work.⁶⁰ This finding suggests that women may have more overall effort to expend than men do, so that, even if women have more duties outside the workplace, there is no particular reason to believe that women are unable to devote sufficient time or energy to their jobs.

3. Marriage, Children, and Housework

The above discussion demonstrates that the traditional human capital story falls short as a means of explaining the persistence of the wage gap. Although employers generally take education, experience, and training into account when making hiring decisions and determining pay scales, they seem to take other factors into account as well.⁶¹ Two such factors that appear to be considered by

Mar.–Apr. 1997, at 58, 64. Women also constitute the majority of employees who have taken on second jobs during the last decade. *See id.* at 59 (noting that the percentage of the workforce that reported working second jobs rose from 4.9% in 1979 to 6.4% in 1995 and that “[v]irtually all of this increase has occurred among women, who now represent nearly half of all multiple job holders”). The issues of whether hours are increasing for workers and of the importance of working longer hours are controversial and hotly debated. The common perception is that people are working longer hours either to get ahead or to stay even. *See, e.g.*, JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991); Louis Uchitelle, *At the Desk, off the Clock and Below Statistical Radar*, N.Y. TIMES, July 18, 1999, at 4. Detailed time-use studies conducted at the University of Maryland, however, indicate that people are working less than they once did and actually have more free time than they generally believe. *See* JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 78–80* (1997). As a result, probably all that we can say is that the data compiled by the government indicate that hours have remained stable during the last decade, and there is as yet no conclusive evidence that men are working more than women at a rate that might explain the pay gap.

60. *See, e.g.*, FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS 6* (1999) (noting that, in three-fourths of the families interviewed in which the husband engaged in more paid labor than the wife, the wife actually worked more hours “when paid work and household work were considered together”); Joni Hersch, *Economics of Housework*, in *WOMEN AND WORK: A HANDBOOK* 83, 85 (Paula J. Dubeck & Kathryn Borman eds., 1996) (“Although men average more hours than women in paid employment, full-time employed women spend more total time on housework and market work than do men.”). A study of dual-earner families based on a 1986–1987 national sample found that women worked a total of 68.8 hours a week compared to 63.4 hours for men. *See* Harriet B. Presser, *Employment Schedules Among Dual-Earner Spouses and the Division of Household Labor by Gender*, 59 AM. SOC. REV. 348, 353 (1994). These figures did not include child care and therefore almost certainly underestimate of women’s hours. *See id.*

61. It is also worth noting that employers occasionally set policies with little concern for their rationality. For example, a study of a large insurance company found that receiving an outstanding performance rating actually had a negative effect on promotion. *See* Heidi I. Hartmann, *Internal Labor Markets and Gender: A Case Study of Promotion*, in *GENDER IN THE WORKPLACE* 59, 80 (Clair Brown & Joseph A. Pechman eds., 1987).

employers, and valued differentially for men and women, are marriage and children. As has been well documented, for men, marriage is typically rewarded with a wage premium, while for women, marriage has either a neutral or modestly negative effect on their wages.⁶² Having children, on the other hand, is generally a negative factor in the labor market for women, though neutral for men. In her review of the data, Jane Waldfogel reported that “[e]ven after controlling for differences in characteristics such as education and work experience, researchers typically find a family penalty of 10–15 percent for women with children as compared to women without children.”⁶³

These factors—marriage and children—might be related to an employee’s productivity, as the difference being married makes to wages could be explained by the contributions a marriage might offer toward the wage earning potential of men and women. Indeed, a number of commentators have suggested that marriage makes men more productive in the workplace, although even among those who

Similarly, in invalidating a program that denied women their accrued seniority while on leave, the Supreme Court, in an opinion written by then-Justice Rehnquist, noted that the policy at issue appeared economically unwise in that “inexperienced employees are favored over experienced employees.” *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 n.5 (1977).

62. See, e.g., Marcia L. Bellas, *The Effects of Marital Status and Wives’ Employment on the Salaries of Faculty Men: The (House)Wife Bonus*, 6 GENDER & SOC’Y 609, 612–18 (1992) (discussing marital bonuses for male faculty members); Joni Hersch, *Male-Female Differences in Hourly Wages: The Role of Human Capital, Working Conditions, and Housework*, 44 INDUS. & LAB. REL. REV. 746, 752 (1991) (“Consistent with other studies, being married is positively related to men’s earnings and not significant for women.”); Martha S. Hill, *The Wage Effects of Marital Status and Children*, 14 J. HUM. RESOURCES 579, 592 (1979) (“[T]he data . . . indicate . . . a strong positive wage effect of marriage among men, an effect that is independent of numerous controls for worker qualifications.”); Jerry A. Jacobs, *Women’s Entry into Management: Trends in Earnings, Authority, and Values Among Salaried Managers*, 37 ADMIN. SCI. Q. 282, 296 (1992) (finding that marital status had a negative effect on the wages of female managers, but a positive effect for male managers); Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 J. HUM. RESOURCES 566, 567–71 (1996) (surveying literature on the male wage premium). One recent study suggests that the male wage premium declined significantly in the 1980s. See Jeffrey S. Gray, *The Fall in Men’s Return to Marriage: Declining Productivity Effects or Changing Selection?*, 32 J. HUM. RESOURCES 481, 491 (1997) (finding evidence that “the return to marriage for men fell by 45 percent over the 1980s”).

63. Waldfogel, *supra* note 7, at 143. In contrast, Waldfogel noted that married men, including those with children, tend to earn more than single men. See *id.*; see also Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 L. & SOC’Y REV. 381, 392 (1995) (finding that for male New York lawyers being a parent increased income); Sanders Korenman & David Neumark, *Marriage, Motherhood, and Wages*, 27 J. HUM. RESOURCES 233, 251–54 (1992) (finding that marriage did not affect wage rates for women but that the presence of children did).

adopt this position it is often unclear exactly how marriage might increase productivity.⁶⁴ One explanation suggests that after marrying, men tend to settle down and become more serious about their work life or to devote less time to housework, changes that may increase their productivity in the workplace. It is also possible that marriage may be seen as a proxy for some other desirable characteristic among men, such as loyalty or commitment.⁶⁵

Even a cursory evaluation exposes the flaws in these arguments. The idea that marriage is a helpful proxy for labor market success ignores the high number of marriages that fail, and it would surely be fanciful to think that employers can foresee which marriages are most likely to last. If employers in fact could determine the characteristics that lead to successful marriages, they would use those characteristics rather than marriage as a proxy for employee productivity. Conceivably, the simple fact of marriage, not the success of that marriage, provides an important signal regarding future labor market success, but if this were so, "marriage" would then be a proxy for some productivity component, and it is difficult to understand exactly how the act of marrying in and of itself provides significant evidence to an employer, particularly independent of the success of that marriage. On the contrary, several recent studies suggest that in many ways, marriage may lead to lower productivity for men.⁶⁶ For example, married self-employed men earn less than single self-employed men, and married men actually perform slightly more

64. See Lawrence W. Kenny, *The Accumulation of Human Capital During Marriage by Males*, 21 *ECON. INQUIRY* 223, 230 (1983) (suggesting that marriage contributes to men's human capital); Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 *J. HUM. RESOURCES* 282, 303-04 (1991) (suggesting that marriage increases productivity for men).

65. This explanation also may apply to women, and one recent study found a marriage wage premium related to productivity differences for both men and women. See Hellerstein et al., *supra* note 51, at 443 ("Workers who have ever been married are paid more than never-married workers, and the wage premium they receive reflects a corresponding productivity premium."). It is also possible that the desirable male workers are marrying women who are more likely to help out at home than to devote themselves to the workforce, but this possibility is an empirical question on which I have seen no data. Given that highly educated men tend to marry highly educated women, this conclusion appears unlikely. See JERRY A. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 44 (1989) ("[O]n average, highly educated men marry women who themselves are well educated.").

66. See Loh, *supra* note 62, at 571-72 (demonstrating that the wage premium is not reflected among self-employed men); see also McKinley Blackburn & Sanders Korenman, *The Declining Marital-Status Earnings Differential*, 7 *J. POPULATION ECON.* 247, 249 (1994) (documenting a decrease in returns to marriage as the number of years married increases); Gray, *supra* note 62, at 491-95 (finding that marriage decreases productivity for men).

housework than single men.⁶⁷

Nevertheless, while the rationale may not be fully understood or supported by the data, marriage clearly is treated as a positive factor for men in the workplace, whereas for women it proves considerably more ambiguous and is more likely than not seen as a negative attribute.⁶⁸ As discussed in more detail in Section B, the reason marriage often carries negative connotations for women has to do with an employer's expectation that, following marriage, women are likely to leave the workforce for some period of time to have and to care for children. Indeed, as noted, the presence of children also produces disparate effects on the salaries of men and women, depressing those for women while generally not affecting them for men.⁶⁹ Here, the salary differentials seem to be based largely, though not entirely, on the actual experiences of men and women, at least with respect to group averages, as women tend to experience greater absences from work than men when they have young children.⁷⁰ One recent study estimated that for women each additional child under six years of age increased the probability of absence from work by more than 25% percent, although the actual amount of time lost at work remained relatively low.⁷¹ In contrast, having children at home tends

67. See Bird, *supra* note 4, at 37-38; David H. Demo & Alan C. Acocck, *Family Diversity and the Division of Domestic Labor*, 42 FAM. REL. 323, 330 (1993).

68. There is some evidence that marriage is treated more positively for black women than for white women. See Barbara Kilbourne et al., *Effects of Individual, Occupational, and Industrial Characteristics on Earnings: Intersections of Race and Gender*, 72 SOC. FORCES 1149, 1165 (1994) ("In contrast to the nonsignificant effect of marital status for white women ... black women's earnings significantly increase by about 3% upon marriage."). The wage premium that black women receive upon marriage, however, falls far short of that received by black and white men. See *id.* (finding a wage premium of 13% for white men and 9% for black men).

69. See *supra* note 63 and accompanying text.

70. It is important to emphasize that the wage differentials do not appear to be fully explained by characteristics that are relevant to the workplace. Jane Waldfogel's recent comprehensive study on the effect of children on women's wages concluded: "Even after controlling for human capital, unobserved heterogeneity, and part-time job status . . . , there is still a 4 percent penalty for having one child and nearly a 12 percent penalty for having two or more children." Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 215 (1997).

71. See Jessica Primoff Vistnes, *Gender Differences in Days Lost from Work Due to Illness*, 50 INDUS. & LAB. REL. REV. 304, 319 (1997); see also J. Paul Leigh, *Sex Differences in Absenteeism*, 22 INDUS. REL. 349, 360 (1983) (reporting that the presence of children under six increased absences for women, but not for men). Recent data from the Bureau of Labor Statistics indicate that women aged 16 and over missed work at a rate that was nearly twice as high as men, though they missed less than 3.0% of their work time on average. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Jan. 1998, at 219 tbl.44 (Sup. Docs. No. L 2.41/2:4511) (reporting that women had a lost worktime rate of 2.8% compared to the male rate of 1.5%). The Bureau of

not to affect men's absences.⁷²

Likewise, time spent on housework significantly depresses wages. Professors Joni Hersch and Leslie Stratton recently documented that, for women, time spent on housework has a strong negative effect on wages and may explain as much as 10% of the gender wage gap.⁷³ Though less substantial, the effect of time spent on housework on men's wages was likewise statistically significant.⁷⁴ Interestingly, the authors found no significant effect on the wages of women who performed ten hours or less of housework a week, an amount that is generally on par with the level of most men.⁷⁵ Not surprisingly, women in the study did approximately three times as much housework as men, an estimate that is generally consistent with most previous studies.⁷⁶ The disparities in housework persist even in dual-earner couples, as working women still perform approximately twice as much housework as their spouses.⁷⁷ Thus, it seems clear that

Labor Statistics measured lost work for the following reasons: own illness, injury, or medical problems; maternity or paternity leave; child care problems; civic or military duty; and other family or personal obligations. *See id.* at n.1.

72. *See Vistnes, supra* note 71, at 314. The number of missed days from work for men with children in day care did increase by a statistically significant amount, which was presumably a sign that those men's wives worked and were less able to devote time to caring for the children. *See id.* at 318.

73. *See* Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects and Wages of Married Women*, 32 J. HUM. RESOURCES 285, 300-01 (1997). This study was based on a sample of more than 3500 individuals over a period ranging from 1979 to 1987. *See id.* at 288-90.

74. *See id.* at 301. The authors were puzzled by the gender-specific wage penalty for housework and suggested that the disparity may be a sign that employers discriminate against women, but not men who devote substantial time to housework. *See id.* at 304. This observation supports the role of statistical discrimination discussed more fully *infra* at notes 132-36 and accompanying text.

75. *See* Hersch & Stratton, *supra* note 73, at 294.

76. *See id.* at 289-90. In the sample, women averaged 19.2 hours of housework a week while men averaged 6.8 hours. *See id.* In contrast to these figures, Kathleen Hall Jamieson cites numerous studies indicating that men perform on average about 20% of household tasks and devote on average less than one-third the time to caring for their children than their spouses. *See* KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND* 62 (1995); *see also* Demo & Acock, *supra* note 67, at 329 (finding that mothers spend between 40-44 hours per week on household labor, while husbands or partners spent on average 13). For a discussion of the studies on housework, *see* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996). There is some evidence that the gap in hours is decreasing, primarily as a result of women decreasing the number of hours they devote to housework. *See* Blau, *supra* note 41, at 151. The disparities also vary some by race, as black men tend to have more egalitarian views regarding gender norms and housework. *See* Terri L. Orbuch & Sandra L. Eyster, *Division of Household Labor Among Black Couples and White Couples*, 76 SOC. FORCES 301, 325 (1997).

77. *See* Sampson Lee Blair & Michael P. Johnson, *Wives' Perceptions of the Fairness of the Division of Household Labor: The Intersection of Housework and Ideology*, 54 J.

marriage and children negatively affect women's wages and career paths and help explain the persistence of the wage gap.

4. Women's Labor Force Attachment

As just noted, the greater time that women spend on their children and on housework explains a portion of the gender wage gap. Yet, just as was true with the traditional human capital factors, the observed differences do not fully explain the gap, and something else appears to be responsible for the persistence of gender labor market inequalities. That missing factor, which may also be implicit in the marriage and child penalties, is generally thought to be women's labor force attachment. In particular, women's supposed tendency to exit the labor market for periods of time to have and to care for children, as well as their choices about careers, are said to explain generally why women often end up in different jobs than men or are paid significantly less than their male counterparts in the same occupation. For example, given their disproportionate responsibility for child rearing, women may choose jobs that offer greater flexibility or that require comparatively less work effort.⁷⁸ Similarly, women may be trading lower wages for higher workplace benefits because they may have more to gain from generous health insurance or leave policies.⁷⁹

Again, like the closely related human capital theory, these ideas offer more intuitive than explanatory power. A number of recent studies have demonstrated that women do not appear to be choosing jobs or occupations that necessarily facilitate more flexible work schedules.⁸⁰ If this theory were true—if, for example, women were

MARRIAGE & FAM. 570, 575 (1992) (finding that nonemployed wives performed four times as much housework as their employed spouses, while employed women did twice as much housework); Presser, *supra* note 60, at 353 (finding that women in a sample of dual-earner families worked twice as many hours in the home as men).

78. See BECKER, *supra* note 31, at 74; Gary Becker, *A Theory of the Allocation of Time*, 75 ECON. J. 493, 517 (1965). Becker sets forth his argument succinctly in Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33 (1985). For additional discussions along these lines, see Polachek, *supra* note 26, at 68 (suggesting that women's labor force attachment accounts for occupational differences); Posner, *supra* note 26, at 1330 (assuming that women are attracted to jobs requiring less human capital).

79. See, e.g., Randall K. Filer, *Male-Female Wage Differences: The Importance of Compensating Differentials*, 38 INDUS. & LAB. REL. REV. 426, 427 (1985) (hypothesizing that women trade benefits for other desirable workplace characteristics); Weiler, *supra* note 52, at 1782–83 (arguing that working conditions can help explain the wage gap).

80. See, e.g., Sonalde Desai & Linda J. Waite, *Women's Employment During Pregnancy and After the First Birth: Occupational Characteristics and Work Commitment*, 56 AM. SOC. REV. 551, 563 (1991) (“[W]e find no effect of the sex composition of the

choosing jobs that facilitated child rearing—one would expect to find women concentrated in occupations that require less effort or for which on-the-job training is comparatively less important, both of which would allow women to spend more time on their home life and make it somewhat less costly for them to move in and out of the workforce. However, based on his exhaustive analysis of data from North Carolina, Donald Tomaskovic-Devey recently concluded that “[i]t is striking that neither being married and having young children nor working part-time affects whether women or men choose sex-segregated employment.”⁸¹ Mary Becker likewise observed some years ago that “[w]omen with less continuous employment experience are about as likely to be in male fields as women with more continuous employment experience, and the depreciation rates [for skills] associated with temporary withdrawal from the wage-labor market are not significantly higher for male jobs than for female jobs.”⁸²

Similarly, women tend to rank income as high in importance among job characteristics as men do,⁸³ and the current data do not support the theory that women are trading lower wages for higher benefits.⁸⁴ As a group, women hold jobs that offer less generous

occupation, which could . . . signify that the sex composition of the occupation has no influence on the employment of pregnant women and new mothers.”).

81. DONALD TOMASKOVIC-DEVEY, *GENDER & RACIAL INEQUALITY AT WORK* 50 (1993).

82. Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934, 934-35 (1986); see also Paula England, *The Failure of Human Capital Theory to Explain Occupational Sex Segregation*, 17 J. HUM. RESOURCES 358, 369 (1982) (documenting that “women with more continuous employment histories are no less apt than other women to be in predominantly female occupations”).

83. See Jerry A. Jacobs & Ronnie Steinberg, *Further Evidence on Compensating Differentials and the Gender Gap in Wages*, in *GENDER INEQUALITY AT WORK*, *supra* note 36, at 93, 102 (“Survey data suggest that working women rank income as high as men do on a list of factors for choosing a job.”); Margaret Mooney Marini et al., *Gender and Job Values*, 69 SOC. OF EDUC. 49, 62-63 (1996) (finding that young men and women valued rewards of work similarly). A study involving business majors at the University of Illinois found that although men and women both valued salary highly, men placed more weight on salary, while for women career advancement was slightly more important. See Francine D. Blau & Marianne A. Ferber, *Career Plans and Expectations of Young Women and Men: The Earnings Gap and Labor Force Participation*, 26 J. HUM. RESOURCES 581, 590 (1991) (“The same three characteristics are rated highest by both groups[:] . . . salary, opportunity for advancement, and intellectual challenge, though men do opt more often for the first two, women for the third.”).

84. See TOMASKOVIC-DEVEY, *supra* note 81, at 51 (“Women are not selecting typically female jobs to trade higher starting wages for lower wage depreciation when they leave the labor force to have and care for children.”); Sarah Beth Estes & Jennifer L. Glass, *Job Changes Following Childbirth: Are Women Trading Compensation for Family-*

benefits than those held by men.⁸⁵ Nor does it appear that the wage gap can be explained by the fact that women choose less strenuous or dangerous jobs or that they demonstrate a preference for easier jobs.⁸⁶ Although women tend to work in jobs that have better safety records than jobs held by men, increasingly the data demonstrate that there is no wage premium for dangerous or undesirable jobs.⁸⁷

Although some of these findings may seem counterintuitive, they appear more sensible when we look closely at women's actual labor force behavior, which tends to be far more consistent than is often assumed. For women, the most common reason to leave the

Responsive Work Conditions?, 23 WORK & OCCUPATIONS 405, 424 (1996) ("[T]he quantitative analysis yields little evidence that accommodations are being substituted for compensation in the job mobility of new mothers."); Hersch, *supra* note 62, at 757 (rejecting the theory that women are choosing lower-paying jobs on the basis of compensating factors because, "[i]f women choose lower-paying jobs because such jobs provide non-wage compensation, such as pleasant working conditions, we would expect to explain more of the wage gap by controlling for attributes of jobs"); Joni Hersch & Shelley White-Means, *Employer-Sponsored Health and Pension Benefits and the Gender/Race Wage Gap*, 74 SOC. SCI. Q. 851, 864-65 (1993) (finding that increased benefits do not explain the gender wage gap as women "still face a large compensation disadvantage relative to white men").

85. See JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* 50 (2d ed. 1998) ("It is clear from surveys that women generally have fewer fringe benefits . . . available to them in terms of total monetary value, partly because more women work part-time and partly because the value of some fringe benefits is directly tied to earnings."); William E. Even & David A. Macpherson, *Gender Differences in Pensions*, 29 J. HUM. RESOURCES 555, 555-56 (1994) ("In the United States, 55 percent of male employees were enrolled in a private pension plan in 1988, while only 45 percent of female employees were."); Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 24-25 (1991) (discussing the disparity of benefits between men and women).

86. A comprehensive study involving New York state data found that although men worked in jobs with more extreme working conditions, those conditions did not explain the gender wage gap. See Jacobs & Steinberg, *supra* note 83, at 113-14. In fact the opposite was true as "workers suffer a wage penalty for working in unattractive jobs." *Id.*; see also Kilbourne et al., *supra* note 48, at 708 (finding "little support" for the notion that the wage gap can be explained by the fact that men hold less desirable or more dangerous jobs and positing "gender bias in wage setting that devalues female occupations" as a contributing factor).

87. Two facts illustrate this point: union members receive higher wages and experience lower fatality rates than nonunion members, and wages tend to increase with education, while injury rates decrease. For a comprehensive recent discussion of the issue, see generally Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 INDUS. & LAB. REL. REV. 116 (1998). One of the complexities of measuring wage premiums for dangerous work is that it is extremely difficult to capture the full costs that employees face, including the psychic costs such as pain and suffering that they may experience by working in dangerous jobs. See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION* 19 (1993). Because of this difficulty, studies tend to underestimate the costs of the jobs and, therefore, to overstate the extent that wages may compensate employees for dangerous work conditions.

workforce is to have a child.⁸⁸ Yet, following childbirth, the majority of women return to work within six months, and between 40% and 65% return within three months.⁸⁹ After reviewing the data from the 1990 Child Care Survey, Sandra Hofferth found that 83% of those mothers who worked during pregnancy returned to work within one year.⁹⁰ In general, most women return to work in some fashion—as of 1992, nearly 80% of women with school-age children were working.⁹¹ Even women with very young children have high participation rates; more than 60% of women with children under two are working.⁹²

The figures discussed above include women working part-time, a category that is typically defined as those working fewer than thirty-five hours per week.⁹³ Approximately one-quarter of working women with children work part-time,⁹⁴ and the numbers tend to be lower for women without children.⁹⁵ Perhaps more significantly, those who

88. See Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV., Sept. 1995, at 14, 16 (noting that 85% of sampled women who left the labor force did so for family reasons); Audrey Light & Manuelita Ureta, *Early-Career Work Experience and Gender Wage Differentials*, 13 J. LAB. ECON. 121, 142 (1995) (pointing out that the largest group of women left for personal reasons).

89. See Desai & Waite, *supra* note 80, at 558 (“About 43% of the new mothers in our sample had returned to work within three months of the birth of their first child, and 69% had returned to work within 12 months.”); Jutta M. Joesch, *Children and the Timing of Women's Paid Work After Childbirth: A Further Specification of the Relationship*, 56 J. MARRIAGE & FAM. 429, 437 (1994) (finding that of the women surveyed 20% were out of work for one month or less and 53% returned within six months); Jacob Alex Klerman & Arleen Leibowitz, *The Work-Employment Distinction Among New Mothers*, 29 J. HUM. RESOURCES 277, 296 (1994) (“Today, about half of all women are back at work by the time their child is four months old.”).

90. See Sandra L. Hofferth, *Effects of Public and Private Policies on Working After Childbirth*, 23 WORK & OCCUPATIONS 378, 388 (1996).

91. These figures are from the Bureau of Labor Statistics and are reported in Howard V. Hayghe & Suzanne M. Bianchi, *Married Mothers' Work Patterns: The Job-Family Compromise*, MONTHLY LAB. REV., June 1994, at 24, 25 (reporting that 78% of women with school-age children were working in 1992).

92. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Characteristics of Families* tbl.6 (visited Jan. 17, 2000) <<http://www.bls.gov/news.release/famee.toc.htm>>. By all accounts, women as a group have greatly increased their attachment to the labor force. Kathryn Shaw, for example, notes that the percentage of female workers defined as having a persistent labor force attachment nearly doubled between the 1970s and the late 1980s. See Kathryn Shaw, *The Persistence of Female Labor Supply*, 29 J. HUM. RESOURCES 348, 360 (1994).

93. For a discussion of part-time work as it affects women, see generally Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799 (1995).

94. In 1998, 26.2% of women with children who worked were working part-time, as measured by fewer than 35 hours per week. See BUREAU OF LABOR STATISTICS, *supra* note 2, at tbl.5.

95. For example, in 1997 62.2% of single women without children worked full-time

worked full-time prior to having a child tended to return to full-time work after their leave; indeed, it appears relatively rare that women (or men) move from full- to part-time work. In a recent comprehensive survey of full-time and part-time workers, Rebecca Blank found that 86% of women who worked full-time in one year worked full-time the following year.⁹⁶ Part-time workers were less stable, as 20% moved to full-time work and 14% left the labor force altogether.⁹⁷ These figures suggest that it is far more common for women to move from part-time to full-time work than vice versa and that past labor market experience is critically important to determining current labor market location.⁹⁸ In other words, women with a continuous labor force attachment prior to childbirth tend to return to that pattern within six months of the birth of the child.⁹⁹

Even though women tend to return to work more quickly than is generally assumed, the timing of their workforce disruption can play an important role on their wages. As the authors of a recent study on leave patterns explain, "The general pattern . . . is that the gender wage gap increases with experience over the first 10 years or so of the

compared to 49.6% of single women with children. See Linda J. Waite & Mark R. Nielsen, *The Rise of the Dual-Career Family: 1963-1997*, at 16 tbl.2 (Sloan Working Families Ctr. at the Univ. of Chi. Working Paper No. 99-01, 1999). Approximately 54% of married women without children worked full-time compared to 42.2% of married women with children. See *id.* A survey of young workers based on 1993 data found that 16% of female workers, and 4% of male workers worked fewer than 35 hours a week. See Marianne A. Ferber & Jane Waldfogel, *The Long-Term Consequences of Nontraditional Employment*, MONTHLY LAB. REV., May 1998, at 3, 5. Blau and her co-authors, however, suggest that as many as 27% of employed women worked less than 35 hours per week in 1995. See BLAU ET AL., *supra* note 20, at 319.

96. See Rebecca M. Blank, *Labor Market Dynamics and Part-Time Work*, in 17 RESEARCH IN LABOR ECONOMICS 57, 65 (Solomon W. Polachek ed., 1998). Blank's study, one of the most comprehensive to date on part-time work, analyzed 14 years of data for men and women employed between 1976 and 1989.

97. See *id.* at 66.

98. See *id.* at 88 (noting that "past labor market histories are very important in predicting future labor market choices" for adult women). It appears that part-time work experience provides little predictability, however, because part-time work can be a transitional stage to full-time work or to leaving the labor market. See *id.* at 89.

99. See GOLDIN, *supra* note 23, at 32 ("Women who are in the labor force tend to remain in for long periods of time, while those out of the labor force tend to remain out."); Hofferth, *supra* note 90, at 391 ("Working during pregnancy is highly related to working soon after birth."); Joesch, *supra* note 89, at 436 (finding that the strongest indicator of future work is salary prior to birth); David Shapiro & Frank L. Mott, *Long-Term Employment and Earnings of Women in Relation to Employment Behavior Surrounding the First Birth*, 29 J. HUM. RESOURCES, 248, 272 (1994) ("This paper has shown that among the [sample] women, employment behavior surrounding the first birth tends to be a significant independent predictor of lifetime work experience.").

career and then narrows appreciably."¹⁰⁰ Women who are able to delay childbirth for the first part of their careers are likely to be sufficiently well established so as not to pay such a high penalty when they do have children; however, that delay may increase the chances of not having children at all and reflects one of the many disadvantages women continue to face in the workplace.

Yet, based on the data reviewed above, it would be a mistake for an employer to assume that women are likely to exit the labor force for significant periods of time after they have a child, where significant is defined as more than three to six months.¹⁰¹ At the same time, it is true that the patterns for women differ significantly from those of men, and employers may be taking these differences into account in their employment decisions. These differences, moreover, likely contribute to (but do not fully explain) the persistence of the wage gap.¹⁰² For example, two-thirds of those who work part-time are women,¹⁰³ and for men, the most common reason for leaving work for a sustained period of time tends to be to return to school, while for women the most common reason has been "personal," a term that includes leaving the workforce to have children.¹⁰⁴

100. Light & Ureta, *supra* note 88, at 142. There are obviously exceptions to this general pattern. For example, a study of lawyers found that among men and women who graduated from the same law school at the same time women earned about 7% less than men initially, but after 15 years they earned 40% less. See Robert G. Wood et al., *Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries*, 11 J. LAB. ECON. 417, 422-23 (1993).

101. This finding is particularly true among more recent entrants into the workforce. Based on a comprehensive analysis of longitudinal surveys, two economists have concluded: "Assuming that the trends revealed here have been sustained, we can conclude that employers would be completely unjustified in statistically discriminating against young women because of a belief that they are more prone to job separation than their male counterparts." Audrey Light & Manuelita Ureta, *Panel Estimates of Male and Female Job Turnover Behavior: Can Female Nonquitters Be Identified?*, 10 J. LAB. ECON. 156, 179 (1992).

102. See GOLDIN, *supra* note 23, at 213 ("As long as women bear a disproportionate burden in raising children, the labor market will reflect these differences.").

103. See Blank, *supra* note 96, at 58 and fig. 2; Bureau of Labor Statistics, *supra* note 1, at 175, tbl.8 (reporting that women constitute 67.7% of part-time workers).

104. See Light & Ureta, *supra* note 88, at 128-29 (reporting that 42% of men who left the workforce explained that they did so to return to school, while 37% of women indicated that they left for personal reasons). One study found that women were considerably more likely than men to change jobs for family related reasons. See Kristen Keith & Abigail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 INDUS. & LAB. REL. REV. 460, 465 (1999) (finding that approximately 8.4% of women in the sample quit their jobs for family related reasons compared to 3.8% of men). There are, however, studies suggesting vastly different explanations for why women quit their jobs. For example, Joyce Jacobsen discusses a survey which found that 73% of the women surveyed quit to work for other companies, and only 7% quit to care for their children

The more difficult question, one I discuss below, is whether these group averages provide a reasonable basis for an employer's decisions, particularly when we consider that the women who are penalized the most by the use of group averages are those women who do not follow the expected pattern—either those women who return to work earlier than expected or those who do not have children but are nevertheless disadvantaged because it is presumed that at some point in their careers they will.¹⁰⁵ It may also be the case that women are simply choosing different jobs based on their own preferences, which may differ from men's, an issue discussed in the next Section.

B. *The Issue of Choice*

As just discussed, the human capital theory explains a portion of the wage gap, which means that women still trail men to some degree in their investments in education, work experience, and training. We also saw that women tend to work fewer hours and miss more work than men, both of which likely contribute to lower wages, though neither factor adequately explains the wage inequality that women face.¹⁰⁶ In addition to these facts, the most marked characteristic of the labor market is the extreme sex segregation across occupations and jobs, a fact that likewise appears to explain a significant portion of the pay gap, although how much, and how the data ought to be interpreted, remain hotly contested issues.¹⁰⁷

full-time. See JACOBSEN, *supra* note 85, at 135. Moreover, a woman's decision to leave the workforce when she has children is strongly influenced by both gender norms and the effect of discrimination on opportunities and work experiences. See *infra* Part I.B.

105. A study tracing managers who had been relocated as part of promotional opportunities found that wage differentials persisted even when the male and female managers were situated nearly identically. The authors concluded:

[W]ith a sample such as the present one, it is legitimate to question why there should be any sex differences in career progression at all. The female managers in this study had followed the traditional male model of career advancement. They had achieved high levels of education and had stayed in the work force. Many of them were less encumbered by family than were the men. Those with families were often the primary wage earners, had relocated their families for their careers, and had not withdrawn from opportunities to relocate. Yet, doing all this had not been enough. Following the traditional male career model had not entirely eliminated the discrimination against them.

Stroh et al., *supra* note 48, at 257; see also *infra* notes 132–34 (discussing statistical discrimination).

106. It is also worth noting that there is no indication that the lost work time, which totals less than 3% of hours worked, is significant enough to adversely affect workers' productivity to the extent employers might be warranted in taking it into account. See *supra* notes 13–14 and accompanying text.

107. See, e.g., BLAU ET AL., *supra* note 20, at 196 (noting that occupational categories

Based on a common index of segregation, as of 1990, about half of the women in the labor force would have to switch occupations to achieve equal representation among occupations.¹⁰⁸ Focusing on occupations, however, likely understates the prevailing level of segregation because there is strong evidence that segregation is even more extreme at the job, rather than occupation, level, and it is still relatively rare for men and women to work in gender-integrated jobs.¹⁰⁹ It also has been widely documented that female-dominated jobs pay substantially less than those occupied principally by men,¹¹⁰

account for about 8% of the pay gap, with more detailed occupational categories raising the level to 14% to 23%); William J. Carrington & Kenneth R. Troske, *Gender Segregation in Small Firms*, 30 J. HUM. RESOURCES 503, 523 (1995) (finding significant gender segregation across small firms); Michael P. Kidd & Michael Shannon, *Does the Level of Occupational Aggregation Affect Estimates of the Gender Wage Gap?*, 49 INDUS. & LAB. REL. REV. 317, 326 (1996) (finding that calculations based on broad occupational categories underestimate the gender wage differential); Trond Peterson & Laurie A. Morgan, *Separate and Unequal: Occupation-Establishment Sex Segregation and the Gender Wage Gap*, 101 AM. J. SOC. 329, 344-45 (1995) (finding, based on data from the 1970s and early 1980s, that occupational segregation explains more than 80% of the wage gap).

108. See SPAIN & BIANCHI, *supra* note 22, at 94; Blau, *supra* note 41, at 132 (finding that 53% of women would have had to switch jobs in 1990); Cotter et al., *supra* note 22, at 445 (stating that "over half of women would have to change their jobs before their occupational distribution would match men's").

109. See Erica L. Groshen, *The Structure of the Female/Male Wage Differential: Is It Who You Are, What You Do, or Where You Work?*, 26 J. HUM. RESOURCES 457, 462 (1991) (noting that working in an integrated job is far more unusual than working in an integrated occupation); Paul L. Schumann et al., *The Effects of Human Capital and Job Characteristics on Pay*, 29 J. HUM. RESOURCES 481, 498 (1994) (finding that women were assigned to lower-graded jobs than men and that gender played a significant role in assignments); Donald Tomakovic-Devey, *Sex Composition and Gendered Earnings Inequality, in GENDER INEQUALITY AT WORK*, *supra* note 36, at 23, 38 (concluding that job segregation by gender explains twice as much of the wage gap than does occupational segregation). Segregation at the job level can be seen on law faculties where there exists a high degree of sex segregation in teaching assignments. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 267 (1997) (noting that "[m]en and women teach on the same law faculties today, but they are often hired to teach different courses").

110. See SPAIN & BIANCHI, *supra* note 22, at 123 (noting that "[o]n average . . . female-dominated occupations pay less well than male-dominated ones"); Blau, *supra* note 41, at 127 ("Considerable research suggests that predominantly female occupations pay less, even controlling for measured personal characteristics of workers and a variety of characteristics of occupations and industries."); Paula England et al., *The Effect of the Sex Composition of Jobs on Starting Wages in an Organization: Findings from the NLSY*, 33 DEMOGRAPHY 511, 520 (1996) ("These findings add to the cumulating evidence that those who work in female-dominated jobs pay a wage penalty—that employers assign them lower wages than if the job had a larger proportion of men working in it."); Fields & Wolff, *supra* note 47, at 118 (finding that women's concentration in lower-paying industries explains about one-third of the wage gap). A recent study seeking to determine whether there were differences between black and white women in the structure of gender

and as discussed in more detail below, women take longer leave at the birth of their children than do men and suffer financially because of their leaves.¹¹¹ As such, the data indicate that men and women tend to perform different jobs both in and out of the workplace.

Given these facts, a question naturally arises as to how we should interpret this part of the story. On the one hand, the observed differences between men and women might be viewed as the product of social forces, including discrimination, that limit the opportunities of women in a number of complicated ways. Alternatively, the results might be explained as the product of personal choices, a view that is common within economic models¹¹² and increasingly common among some female legal scholars.¹¹³ Within this perspective, the fact that women occupy different jobs is due primarily to personal preferences and, therefore, is generally not considered a cause for societal concern. In my judgment, this view offers a highly problematic way of looking at the world, one that is far too simplistic to capture the complexities and nuances of choice and preference, complexities that confound easy attribution and that all too many economic models fail to acknowledge.¹¹⁴ Thus, I will argue that it is highly naive to treat the

equality found no clear pattern. See Barbara Kilbourne at al., *Effects of Individual, Occupational and Industrial Characteristics on Earnings: Intersections of Race and Gender*, 72 SOC. FORCES 1149 (1994). Black and white women both suffered similar sharp wage penalties when the occupation was dominated by women, but black women received a small wage premium for being married, while white women did not. See *id.* at 1159, 1165.

111. The issue of leave is discussed *infra* Part I.D.

112. See *supra* notes 78–79.

113. See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 768–70 (1990) (critiquing what the author defines as ideological determination arguments); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 6–7 (1994) (criticizing the premise behind the battered woman syndrome defense, namely that women lack the psychological capacity to make rational choices); Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1123–34 (1994) (arguing that the feminist treatment of all women as sexual victims denies women the capacity to choose and control their own sexual encounters); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 725–26 (1995) (arguing that the sexual harassment doctrine relating to sexual expression resurrects traditional stereotypes and can disempower women).

114. Susan Moller Okin characterizes the matter this way:

The basic problem with the human capital approach is that, like much of neoclassical economic theory, it pays too little attention to the multiple constraints placed on people's choices. It pays too little attention to differentials of power between the sexes both in the workplace and in the family. It thus ignores the fact that women's commitment and attachment to the workplace are strongly influenced by a number of factors that are largely beyond their control.

SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 148 (1989).

labor market as an unadulterated product of rational utility maximizing, at least in a manner that ought to be seen as unproblematic.

Economic models typically consider observed labor market characteristics as resulting from individual preferences—preferences that are treated as exogenous.¹¹⁵ While the data provide only modest support for the notion that the existing conditions are the product of preferences at all, the underlying assumption of autonomous preferences has been severely criticized from many different perspectives. One analytical problem with the emphasis on preferences is that it is difficult to know whether women's occupational choices, or their human capital investments, are products of actual preferences or responses to labor market opportunities—what has been aptly labeled the “chicken-or-egg” problem.¹¹⁶ In many instances, it would seem rational for women to reduce their investments to the extent those investments fail to yield returns comparable to those of men who make similar labor-force investments. Facing reduced opportunities for promotion as well as lower wages, and likely having to confront at some point in one's career a decision regarding how best to balance work and family, women may decide that it is not worth pursuing extra degrees, experience, or training when the investment offers a diminished rate of return. As Vicki Schultz explains, “Like all workers, women adapt their work aspirations and orientations rationally and purposefully, but always within and in response to the constraints of organizational arrangements not of their own making.”¹¹⁷

This adaptation is one way that the “choices” women make can

115. One commentator recently observed that among economists “the axiom of exogenous preferences is as old as liberal political philosophy itself.” Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LIT. 75, 75 (1998).

116. See Reuben Gronau, *Sex-Related Wage Differentials and Women's Interrupted Labor Careers—The Chicken or the Egg*, 6 J. LAB. ECON. 277, 285–86 (1988) (noting that employer expectations may reduce opportunities for training and promotion). For additional discussions, see CYNTHIA B. LLOYD & BETH T. NIEMI, *THE ECONOMICS OF SEX DIFFERENTIALS* 313 (1979) (observing that fewer job opportunities may reduce incentives for investment); Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, J. ECON. PERSP., Spring 1998, at 117, 123–24 (explaining how perceptions can become self-fulfilling prophecies in the context of racial discrimination); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, SOC. PHIL. & POL'Y, Spring 1991, at 22, 29 (discussing the dynamic effects that the labor market can have on human capital investments).

117. 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. 1750, 1815–16 (1990).

be influenced dramatically by the labor market. Another and perhaps more significant way in which women's choices may be shaped is through social conditioning that affects all of us, male and female alike.¹¹⁸ There is a great volume of literature on the role that social conditioning plays in creating our gendered world and in particular in producing our segregated labor market, which I will only touch upon here.¹¹⁹ Just as it is difficult to contest the importance of education and training for obtaining a desirable job, it is equally difficult to dispute that many of our life decisions are significantly influenced by social forces or that those forces tend to operate on a distinctly gendered basis. These forces range from the way boys and girls are treated during infancy to differential treatment in schools regarding subjects, sports, leadership positions, and other facets of school life, to the images provided in the media.¹²⁰ As noted earlier, the empirical data suggest that women are not choosing jobs that make it easier for them to accommodate their nonmarket activities; a more convincing explanation appears to be that women are channeled, or crowded, into certain professions and jobs, even though it may appear that this pattern is the product of individual choice.¹²¹ Indeed, survey data indicate that "[w]omen consistently aspire to more male dominated pursuits than those in which they are

118. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 836 (1989) (challenging the choices currently available in the labor market and arguing for restructurization that accounts for society's reproductive needs).

119. For an excellent overview of the literature, see generally VALIAN, *supra* note 13, at 104-23 (discussing the sexual division of labor). For additional useful discussions on the theme of social construction of gender, see, e.g., SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 133-75 (1993); BARBARA BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 40-62 (1986); CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 80-126 (1988); JUDITH LORBER, *PARADOXES OF GENDER* 144-93 (1994); ROBERTA S. SIGEL, *AMBITION & ACCOMMODATION: HOW WOMEN VIEW GENDER RELATIONS* 9-23 (1996).

120. This socialization, sometimes called the social-control theory, continues throughout our lives. See Jerry A. Jacobs, *Gender and Academic Specialties: Trends Among Recipients of College Degrees in the 1980s*, 68 SOC. OF EDUC. 81, 96 (1995) ("Social control is not simply a matter of early life socialization that determines all adult behavior; rather, continuing social constraints are required to keep women and men in their sex-appropriate domains.").

121. See BERGMANN, *supra* note 119, at 87-114 (discussing ways in which jobs become gendered); BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* 10-64 (1990) (discussing how jobs can be transformed from male to female jobs). In her very interesting study of female marines and male nurses, Christine Williams demonstrates how gender roles persist even for those who choose nontraditional occupations. See generally CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN & MEN IN NONTRADITIONAL OCCUPATIONS* (1989).

employed,"¹²² suggesting that many women would prefer to be in occupations different from the ones they currently hold.

Identifying the causal connection is the very point at which the issue of social conditioning versus autonomy becomes especially complicated for purposes of interpretation, and by using the term "channeling," I am revealing my own biases—biases that admittedly cannot be fully supported by data.¹²³ Indeed, in deciding between choice or social construction, no data can provide a conclusive explanation because even the best data likely would be tainted by structural issues affected by discrimination.¹²⁴ This problem certainly affects the question posed earlier concerning whether women are expressing preferences or responding to opportunities because, even during interviews, we would not necessarily expect women to state that they chose their jobs because social forces had limited their opportunities or structured their decisions.¹²⁵ Rather, any explanation would likely involve numerous reasons and motivations, all of which were influenced by a complex array of forces, some known and some

122. JACOBS, *supra* note 65, at 75. Jacobs observes that approximately 50% of women aspire to a male-dominated occupation at some point in their careers. *See id.* at 103.

123. There are also those who believe that our gendered choices are the product of biology, a movement that seems to be gaining some influence in the form of sociobiology. For a popular account, see ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* 19–151 (1994). For a contrary view, namely that biology determines virtually none of our behaviors, see JOHN DUPRE, *THE DISORDER OF THINGS: METAPHYSICAL FOUNDATIONS OF THE DISUNITY OF SCIENCE* (1993). This issue engenders strong disagreement premised in substantial part on profound ideological interests tied to the various interpretations. As one commentator has aptly noted: "The debate over nature looks depressingly insoluble. Both sides can recognize the biological evidence, for what it is worth; but they give it different significance." Julia Annas, *Women and the Quality of Life: Two Norms or One?*, in *THE QUALITY OF LIFE* 279, 293 (Martha Nussbaum & Amartya Sen eds., 1993). For a recent attempt to find some middle ground, see Melvin Konner, *Darwin's Truth, Jefferson's Vision*, *AM. PROSPECT*, July–Aug. 1999, at 30.

124. *See* Michael Selmi, *Proving Intentional Discrimination: The Realty of Supreme Court Rhetoric*, 86 *GEO. L.J.* 279, 280–81 (1997) (discussing how discrimination makes it difficult for us to evaluate causal effects).

125. Elizabeth Anderson makes the interesting suggestion that we should look at people's attitudes about their choices rather than their revealed preferences to better understand the choices people make. *See* ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 202 (1993). "Individuals have positive or negative attitudes toward their choices," she argues, "which reveal how well their choices reflect the valuations they have of themselves and others." *Id.* Although people's attitudes may provide more reliable information than their actual choices, attitudes are also strongly shaped by choices, because people seek to adapt to what is available to them. This insight animates much of what is now becoming known as behavioral law and economics. To my mind the best (and most entertaining) discussion of the issue remains JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983).

unknown.¹²⁶

Ultimately it is crucial to keep in mind the sheer multitude of forces that play a role in our decisionmaking, leading to what has been described, in a different context, as a state of relative autonomy.¹²⁷ To be sure, many individual women choose non-traditional jobs, and just as many women undoubtedly happily choose traditional female roles relatively free of social constraints. Likewise, it is true that many people are able to exercise more choice in their lives than others. At the same time, however, it is surely impossible to deny that substantial sex segregation continues to define the labor market and that segregation cannot be fully explained as the product of unconstrained choice. As Deborah Rhode argues, "[T]o an important extent, women's preferences are socially constructed and constrained. The state does not simply respond to expressed desires; it plays an active role in legitimating, suppressing, or redirecting them."¹²⁸ With this in mind, perhaps the best we can do at this point is to suggest that, until women are afforded the same opportunities as men and then choose differently from men, we should not blindly conclude that the observed disparities are the product of choice.

This is not to suggest that we take the male role in the labor market as the norm. On the contrary, I will argue that legislative solutions should effectively treat women as the norm in the workplace.¹²⁹ What I mean to suggest here is that women should not be penalized for their perceived or expected behavior and that equalizing choices between men and women may entail changing the choices currently available to both men and women.¹³⁰ But before

126. For a recent discussion involving the difficult issue of determining when we can say that our choices truly reflect personal inclinations, see LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* 101-32 (1998).

127. See WILLIAM C. DOWLING, JAMESON, ALTHUSSER, MARX: AN INTRODUCTION TO THE POLITICAL UNCONSCIOUS 70-71, 136-37 (1984) (discussing Louis Althusser's concept of relative autonomy).

128. Deborah L. Rhode, *Changing Images of the State: Feminism and the State*, 107 HARV. L. REV. 1181, 1189 (1994). Joan Williams has argued recently that "[s]ocial critique requires a language that keeps choice and constraint simultaneously in focus, and highlights the way social structures help create the lives they shape." WILLIAMS, *supra* note 6, at 38.

129. See *infra* Part III.B.

130. At this point, it may be helpful to make clear that I am not advocating that women be permitted to work part-time while maintaining full-time pay, benefits, and promotional opportunities, or that there be no penalty for lengthy absences from the labor market. Although it is difficult to dispute the attraction of part-time work at full-time pay, requiring employers to ignore hours and substantial absences from the labor market may impose a burden that would require overlooking real evidence regarding productivity. Increasing part-time work for women, with benefits, is the strategy present in many

discussing various strategies that might enable us to break up the prevailing patterns, it will be useful to first discuss another theory—statistical discrimination—that is often used to explain women's labor market status.

C. *The Role of Statistical Discrimination*

Thus far, I have reviewed two important explanations for the continued and persistent gender inequality in the workplace, namely differences in human capital investments and the role “choice” plays in perpetuating gender patterns. If neither of these theories explains the observed gender inequalities, then what does? A theory that is becoming increasingly prominent is known as statistical discrimination, a concept that has had its strongest influence within economics, although it is playing a growing role within law as well.¹³¹ The theory of statistical discrimination, discussed in detail below, is generally treated as a theory that is distinct from the human capital explanation of the wage gap, but the theories are closely related, as differences in human capital investments fully inform the concept of statistical discrimination. As will be discussed shortly, the primary difference between the two theories is that whereas the human capital theory is empirically based, statistical discrimination is an interpretive theory often used to fill in the gaps left by other economic explanations. In this Section, I will first discuss the theory of statistical discrimination and explain how it adversely affects women's

European countries. See Blau & Kahn, *supra* note 6, at 122 (noting that Scandinavian women are twice as likely as U.S. women to work part-time). In the United States, it seems highly unlikely that we will move towards non-marginalized part-time work—work that offers good wages and benefits, as well as opportunities for advancement. Therefore, creating more part-time work currently does not appear to be a viable means toward reducing existing labor market inequality.

131. See, e.g., Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972). For additional discussions of the statistical discrimination theory, see generally Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB REL. REV. 175 (1977); Kenneth J. Arrow, *Models of Job Discrimination*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 83 (Anthony H. Pascal ed., 1972); Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228 (1986). For helpful discussions within the law, most of which are critical of the theory, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 850–52 (1991); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 63–85 (1998); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 634–54 (1999); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622–23 (1991).

labor force opportunities. Next, contrary to the common consensus, I will argue that statistical discrimination should not be considered a rational employer response to women's labor force behavior, but instead is based largely on erroneous assumptions regarding women's commitment to the labor force that have persisted well after substantial changes in women's labor force patterns. Finally, I will offer some reasons why the practice persists despite its inadequate statistical underpinning.

1. The Theory of Statistical Discrimination

The general concept of statistical discrimination is relatively straightforward: when employers lack perfect information and when it would be too costly to collect such information, employers will resort to group averages to determine the potential productivity of individuals.¹³² In the context of this Article, this practice means that employers often will treat women differently from men because, on average, women are more likely to leave the workforce to have and to raise children, and these potential exits can be costly for employers.¹³³ With respect to prospective employees, relying on group averages can be particularly important because it is often difficult for an employer to obtain reliable information in advance as to the likelihood that any particular individual will later leave the workforce. Asking an applicant directly about present and future family obligations may raise concerns under antidiscrimination laws depending on how the question is framed and will rarely yield accurate information, as employees generally know the desired answer. Therefore, to the extent employers consider the information, it is often contended that they are left to rely on their group observations as the best available information.¹³⁴

As a concept, there is nothing particularly insidious about relying on statistical information to make judgments about individuals. After all, such judgments are an important component of law school admissions decisions,¹³⁵ and hardly a day goes by when we don't

132. See EHRENBERG & SMITH, *supra* note 45, at 440–43.

133. For discussions along these lines, see Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2168–69 (1994); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 609–12 (1993).

134. See, e.g., McCaffery, *supra* note 133, at 621.

135. Law schools typically place substantial weight on Law School Admissions Test (LSAT) scores, which offer group predictions about the likelihood of success during the first year. See Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions in Higher Education*, 68 U. COLO. L. REV. 1065, 1070–71 (1997)

resort to group averages as the basis for some sort of prediction or determination. Nevertheless, relying on group observations can also lead to unfair treatment, and in the workplace, statistical discrimination based on gender is generally unlawful—even when it might be efficient.¹³⁶ Thus, it is important to see just how inaccurate the use of statistical information can be and how it affects all women, even those who display persistent workforce attachment throughout their careers.

2. Is Statistical Discrimination Justified?

Earlier we saw just how inaccurate the theory of statistical discrimination is when applied to women's likely workforce behavior. After having children, most women return to work within three to six months, with most women returning to the kind of work and hours they had before giving birth.¹³⁷ These facts suggest that, on average, women who had a weak labor force commitment prior to having children will be the ones most likely not to return to work, or to quit their position after having returned for some period of time and finding the demands of work and family too taxing.¹³⁸ Yet, as previously noted, employers contend that because it is difficult to know who those employees will be—just as it is difficult to know in advance who the committed or superior employees will be—it is efficient for them to resort to a gender barometer, knowing that it remains more likely that women will leave the workforce than men. Employer reliance on gender data need not be explicit; it can play itself out in subtle ways, such as not giving women long-term assignments, not reaching out to mentor young female employees, or evaluating their work product differently based on a particular

(discussing the role of LSAT scores in admissions decisions). As is well known, these scores are quite inaccurate as to particular individuals but offer some prediction for the group as a whole, thereby capturing the essence of statistical discrimination.

136. See *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). In *Manhart*, the Supreme Court invalidated a state policy that required female employees to make higher pension contributions than men because women tend to live longer and thus, as a class, would likely receive greater pension benefits than men. See *id.* at 707–11. Although the parties, and the Court accepted as true the factual basis for the policy, the Court held that the practice was “in direct conflict with both the language and the policy of the Civil Rights Act.” *Id.* at 711; see also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1074 (1983) (*per curiam*) (invalidating the sex-based pension practice of paying out less money to women).

137. See *supra* notes 88–92 and accompanying text.

138. See *Light & Ureta, supra* note 101, at 179–80 (finding no evidence that it is more difficult to identify female nonquitters than male).

perception of women's commitment to the workforce.¹³⁹

The use of statistical information in this fashion is routinely treated as an efficient employment practice and is often referred to as rational discrimination.¹⁴⁰ Such treatment, however, embodies some of the sophistry that defines much of traditional law and economics, namely the notion that if it were not efficient, employers would not do it.¹⁴¹ There are by now well-developed explanations for why employers engage in practices that cannot be fully described as rational, which will be discussed in more detail below,¹⁴² but here I wish to explain as a theoretical matter why the assumption of

139. See VALIAN, *supra* note 13, at 217–49 (discussing ways that discrimination can adversely affect women's careers in academia); Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 587 (1996) (“[F]emale lawyers consistently report receiving fewer opportunities for mentoring, business development, and desirable assignments than their male colleagues.”). For a related discussion regarding how these issues arise in law firms with respect to racial stereotypes, see David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *CAL. L. REV.* 493 514–84 (1996). Although many of these practices would violate Title VII, they are notoriously difficult to prove. See Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 *IND. L.J.* 1234, 1241–43 (1999) (discussing the difficulty of proving subtle discrimination).

140. See EDWARD J. MCCAFFERY, *TAXING WOMEN* 243 (1997) (“From the employer’s point of view, statistical discrimination is ‘rational’ or efficient and profit-maximizing.”); EDMUND S. PHELPS, *REWARDING WORK* 114 (1997) (discussing rational discrimination); James Albrecht & Susan Vroman, *Evaluating Policies to Reduce the Gender Gap: An Economic Approach*, 82 *GEO. L.J.* 69, 72 (1993) (“It is rational for an employer with such beliefs to engage in statistical discrimination in the sense of requiring that female applicants for good jobs show more objective evidence of a long-term commitment to the workforce than must their male counterparts.”); Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 *GEO. L.J.* 237, 247 (1996) (“[T]he theory of statistical discrimination . . . posits that racial discrimination reflects rational predictions of the behavior of the group subject to discrimination.”); Susan Bisom Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 *UTAH L. REV.* 1029, 1089 (equating statistical discrimination with rational discrimination); Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2452 (1994) (“Insofar as statistical discrimination is outlawed, the government has singled out one form of rational categorization.”); Amy L. Wax, *Discrimination as Accident*, 74 *IND. L.J.* 1129, 1142 (1999) (identifying statistical discrimination as rational discrimination).

141. Robert Kuttner has recently offered a similar criticism:

Economists enamored of pure markets begin with the theory, and hang models on assumptions that cannot themselves be challenged. . . . [I]f wages for manual workers are declining, it *must* be that their economic value is declining. . . . If commercial advertising leads consumers to buy shoddy or harmful products, they must be ‘maximizing their utility’ How do we know that? Because to do anything else would be irrational. And how do we know that individuals always behave rationally? Because that is the premise from which we begin.

ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 9 (1996).

142. See *infra* notes 160–69 and accompanying text.

rationality that underlies statistical discrimination is unacceptably overbroad. Indeed, whether the practice of treating women differently because of their greater propensity to leave the workforce to care for children is truly efficient involves an empirical question that is very rarely tested and is generally context dependent.¹⁴³ At a minimum, determining the efficiency of relying on group averages would require knowing the actual costs of the labor market disruptions, as well as their expected probabilities, and then balancing those costs against the lost productivity that occurs through the differential treatment women receive—the costs of the lack of mentoring, the devaluation of women's work product, and the higher turnover that might result from this treatment.¹⁴⁴ Given these costs, it also would be important to know the cost of obtaining more individualized information, which in any calculus should be weighed against the costs of engaging in statistical discrimination.

Let me sketch an example. Suppose an employer believes there is a 30% chance a female employee will not return from work after having a child. In determining the cost of that disruption, an employer first would want to assess the cost of the potential turnover, which would take into account its normal turnover rate, as it would be highly unusual for an employer to have no turnover at all. It then would want to determine the marginal cost of the turnover associated with the potential that an employee will not return to work to care for a child. As discussed in the next Part, employers have had little trouble covering employees on temporary maternity leave, and in many jobs replacement costs associated with additional individuals are not particularly high because such costs are so routine.¹⁴⁵ In this respect, it is not the absolute cost of a replacement that matters but the marginal or relative cost that should concern an employer.

Balanced against those costs would be the costs of relying on group averages. Assuming an employer is considering not hiring or promoting women, or reducing its hiring or promotion of women, that employer would want to calculate the costs that might arise from foreclosing an entire group of qualified applicants, particularly when the firm's competitors may reap the benefits of that policy. A firm with a poor reputation for hiring or retaining women will likely suffer

143. See Light & Ureta, *supra* note 101, at 158 (noting that "any conclusion about whether statistical discrimination is 'justified' depends entirely on which birth cohorts are being examined").

144. See VALIAN, *supra* note 13, at 174–86 (discussing the effects of discrimination on women's careers).

145. See *infra* notes 213–14 and accompanying text.

some market disadvantage in hiring women, potentially leaving it with a lower-quality applicant pool. Similarly, if a firm chooses to pay women less or to invest in them less, there also might be a corresponding loss in productivity while the employee is on the job, and that loss may spill over to other employees. Male employees who know that their female counterparts are at a competitive disadvantage may reduce their own work effort in response to their competitive edge.¹⁴⁶

An important additional factor is the length of the expected labor force disruptions, as employers certainly would be unjustified in treating any leave as unduly costly or all leaves as equally costly. Although permanent exits may be costly (depending on the job and its natural turnover rate), the short labor force disruptions of most women should not create equivalent costs.¹⁴⁷ An employee's skills are unlikely to recede with a short time off from the labor market, although at a certain point, depending on the nature of the job, there is likely to be some significant loss of skills. For example, a lawyer taking six months off is likely to miss little that cannot be regained quickly, but taking two or three years off may lead to a significant depreciation, as new cases are decided and skills honed in the courtroom or elsewhere wane.

As a result, from the statistical discrimination perspective, an employer ought to be interested in determining the cost from a three or six-month leave that may occur once or twice in the course of a career, rather than assuming that women are likely to exit the labor market permanently.¹⁴⁸ Although productivity is notoriously difficult to measure, the cost of the workforce disruption caused by women's childbearing does not appear so daunting, especially when measured against other anticipated disruptions, such as sickness, vacation, illness, injury, or jury service. Indeed, to know whether employers are engaging in a form of statistical discrimination that ought to be

146. See Andrew Schotter & Keith Weigelt, *Asymmetric Tournaments, Equal Opportunity Laws, and Affirmative Action: Some Experimental Results*, 107 Q. J. ECON. 511, 538-39 (1992) (applying tournament theory to the workplace); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1304-05 (1995) (discussing ways in which employers create workplace competition to spur productivity).

147. This is also true with respect to turnovers that occur early in workers' careers because such turnovers are frequent among both men and women. See Light & Ureta, *supra* note 101, at 157 (noting the high propensity of "young workers . . . to quit their jobs regardless of gender").

148. As noted earlier, this is the average length of leave for childbearing. See *supra* notes 89-90 and accompanying text. Within the statistical discrimination model, the average is the appropriate figure to use. See EHRENBERG & SMITH, *supra* note 45, at 41.

defined as rational, as opposed to stereotypical or animus-based discrimination, it is important to know how employers weigh these other potential labor market disruptions for which individualized predictive information is difficult to obtain. Given that most leaves for childbirth are predictable, infrequent, and of short duration, it seems irrational for an employer to single out pregnancy-related leave for particular treatment among all the potential labor force disruptions.

Nevertheless, discussions concerning statistical discrimination and the gender gap often treat childbearing as if it were the only condition that employees bring to the labor market that may impose costs on employers. There are, however, numerous other conditions that may impose equal or higher costs, yet rarely seem to be taken into account. An employer concerned with potential lost productivity due to workplace disruptions might want to screen out those employees who are prone to alcoholism, illnesses, or injuries, all of which are more prominent among men. Recent statistics indicate that men are three times as likely as women to be binge drinkers and four times as likely to be heavy drinkers, with 23% of men defined as binge drinkers.¹⁴⁹ Similarly, "women incurred less than one-tenth of job-related fatal injuries and one-third of the non-fatal injuries and illnesses that required time off to recuperate."¹⁵⁰ In other words, there are many potentially costly behaviors employees bring to the workplace that correlate with gender, and it is difficult to imagine, and certainly wrong to assume, that the only differences that matter are the potential short-term exits of women to have children.

Finally, it would be most efficient for employers to use such knowledge or information in the hiring process, where it is often difficult to assess employees' future labor force behavior. Once an employee is on the job, however, the employer is in a position to collect reliable information unavailable at the time of hire, especially given that past employment behavior remains the best predictor of future workforce attachment for women after childbirth.¹⁵¹ Yet, there is substantial evidence that women are disadvantaged throughout

149. See The National Clearinghouse for Alcohol and Drug Information, *Preliminary Results from the 1997 Household Survey on Drug Abuse* tbls.15, 16 (visited Jan. 17, 2000) <<http://www.health.org/pubs/97hhs/htoc.htm>>.

150. Guy A. Toscano et al., *Work Injuries and Illnesses Occurring to Women*, COMPENSATION & WORKING CONDITIONS, Summer 1998, at 16, 16 (footnote omitted). As a way of reducing costs further, employers also may wish to screen out those most likely to engage in sexual harassment, which costs employers both in legal judgments and in the reduced productivity of both the harasser and the victim of the harassment.

151. See *supra* notes 96–99 and accompanying text.

their careers and considerable evidence to suggest that more discrimination occurs after, rather than at, the hiring stage, indicating that the practice is less national than is often assumed.¹⁵²

By questioning the efficiency of statistical discrimination, I do not mean to suggest that the theory fails to offer some explanatory power as to why women are paid less and offered fewer promotional opportunities than men. On the contrary, I believe the theory provides important insights into employers' practices, because when making employment decisions employers do seem to take into account women's greater likelihood of leaving the workforce to care for children. They do so, however, in an exaggerated way, and such practices are at best crude predictors and likely inefficient, or at least as likely to be inefficient as efficient. Certainly, statistical discrimination should not be tolerated to the extent it is based on inaccurate perceptions of women's labor market attachment, perceptions that might become self-fulfilling prophecies as women adapt to the lesser opportunities available to them.¹⁵³

3. The Need for Government Intervention

At this juncture, the economic model typically described in the law and economics literature likely would still reject the need for governmental intervention. To the extent employers continue to rely on inaccurate group averages, according to this model, the practice is unlikely to persist because competitive market pressures eventually would eliminate the use of these averages. Firms that rely on better information ultimately would obtain a more efficient workforce and thus drive out less efficient competitors.¹⁵⁴ This is a familiar but

152. See VALIAN, *supra* note 13, at 225 (observing that in academia "recent female graduates start out on an equal salary footing with males but lose that equality as early as three to eight years post-Ph.D."); Bielby & Bielby, *supra* note 36, at 223-25 (finding female television writers face continuous disadvantage throughout their careers); Jacobs, *supra* note 62, at 290 (documenting wage discrimination experienced by female managers); Janet Rosenberg et al., *Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers*, 7 GENDER & SOC'Y 415, 422 (1993) (finding that female attorneys perceive that more discrimination occurs on the job than in initial hiring decisions).

153. See *supra* notes 115-17 and accompanying text.

154. The classic elaboration of the theory, although developed in the context of animus rather than statistical discrimination, is GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 153-60 (2d ed. 1971). Although it has largely gone unnoticed, Becker has since claimed that his theory has been misunderstood because he originally argued that a variety of factors, including discrimination by employees and customers, could sustain discriminatory practices. See GARY S. BECKER, *ACCOUNTING FOR TASTES* 142 (1996).

rather tired argument that has lost most of its appeal outside of the law.¹⁵⁵ Within the economics and sociological literature, it is now widely acknowledged that competitive market pressures have not and will not eliminate broadscale discrimination in labor markets.¹⁵⁶

One reason discrimination persists in labor markets is that so many employees are ready substitutes for one another. Accordingly, an employer may not lose much by choosing a male over a female candidate for a particular position, even when there is no productivity-based reason to do so.¹⁵⁷ Additionally, discrimination may persist in labor markets, as John Donohue has argued, because employees often have restricted mobility and therefore are unable to gravitate to nondiscriminating employers. This characteristic distinguishes the labor market from, for example, the stock market, where true mobility exists.¹⁵⁸ As noted earlier, whether or not these facts make an employer's practices efficient is ultimately a difficult

155. For recent legal discussions, see Wayne R. Cohen, *An Economic Analysis of the Issues Surrounding AIDS in the Workplace: In the Long Run, the Path of Truth and Reason Cannot Be Diverted*, 41 AM. U. L. REV. 1199, 1226-27 (1992) (noting that firms are unlikely to maintain a discriminatory workplace); Roderick M. Hills, Jr., *Sex, You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1622 (1997) (arguing that employers will likely forego discrimination in competitive markets); Hylton & Rougeau, *supra* note 140, at 250-51 (suggesting that lending discrimination should not persist in a competitive market); Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 840 (1995) (same).

156. For an excellent discussion of the various economic theories of discrimination and their inability to explain the persistence of labor market discrimination, see Jeremiah Cotton, *Labor Markets and Racial Inequality*, in LABOR ECONOMICS: PROBLEMS IN ANALYZING LABOR MARKETS 183, 183-208 (William Darity, Jr. ed., 1993); see also Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, J. ECON. PERSP., Spring 1998, at 91, 91-100 (discussing ways in which race discrimination can survive even in competitive markets); William A. Darity, Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, J. ECON. PERSP., Spring 1998, 63, 82-87 (discussing the persistence of discrimination). For discussions relating to gender, see Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages*, 79 GEO. L.J. 1659, 1673 (1991) (arguing that it is unrealistic to expect the market to eliminate sex discrimination because women are undervalued and because segregation creates employment taboos); Paula England, *Wage Appreciation and Depreciation: A Test of Neoclassical Economic Explanations of Occupational Sex Segregation*, 62 SOC. FORCES 726, 741-42 (1984) (suggesting that the theory fails to explain sex segregation); Paul Milgrom & Sharon Oster, *Job Discrimination, Market Forces and the Invisibility Hypothesis*, 102 Q. J. ECON. 453, 456-58 (1987) (arguing that women and minorities remain invisible in the marketplace because their skills and abilities are undervalued).

157. See Charny & Gulati, *supra* note 131, at 76-77 (discussing the low cost of discrimination when employees are alike).

158. See John J. Donohue, III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2596-97 (1994).

empirical question, but we certainly know that discrimination has persisted to a far greater extent than neoclassical economic theory has predicted. Economist Barbara Bergmann commented some time ago that “[w]e see thousands of business failures every year in the United States, so firms do make fatal mistakes; but no one has ever reported seeing a firm that discriminated reduced to ruin by a less bigoted competitor.”¹⁵⁹ This statement still holds true today.

Another reason for the stubborn pace of change is that old habits die hard. Practices that may be inefficient in some sense can become an accepted part of a business practice and thus can be difficult to uproot. As Kenneth Arrow has noted, the network of personal interactions that form a business culture can “leave plenty of room for discriminatory beliefs and preferences to play a role, which would be much less likely in a market subject to competitive pressures.”¹⁶⁰ These interactions include word-of-mouth hiring and selection-process biases, which render decisionmakers prone to hiring applicants who are most like themselves.¹⁶¹

Individuals also tend to resist information that contradicts their existing beliefs or stereotypes, providing yet another reason why statistical discrimination may outlast its empirical foundation. It is well documented that individuals seek out information that will confirm their stereotypes, while ignoring or downplaying contrary information.¹⁶² Consistent information typically remains more salient, so that a woman who leaves the workforce after having a child is

159. BERGMANN, *supra* note 119, at 139.

160. Arrow, *supra* note 156, at 98. In the same article, Arrow acknowledges that there is evidence of racial discrimination in the economy today. *See id.* at 99.

161. *See id.* at 98 (noting that “[t]he network model seems most appropriate for the labor market”); *see also* Bradford Cornell & Ivo Welch, *Culture, Information and Screening Discrimination*, 104 J. POL. ECON. 542, 556–58 (1996) (arguing that individuals favor associating with people of their own type because they believe it is easier to judge their abilities); Cornell & Bratton, *supra* note 131, at 624–30 (explaining how English-only rules are often motivated by in-group bias).

162. *See* John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 AM. PSYCHOL. 867, 876 (1986) (noting that “[a] great deal of research suggests that ambiguous behaviors tend to be perceived in a biased manner”); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) (contending that in the face of ambiguous evidence, people emphasize confirmatory evidence while discounting nonconfirmatory information); Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 26 (1998) (“A range of research suggests that once forming strong hypotheses, people are often too inattentive to new information contradicting their hypotheses.”); David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 899 (1993) (concluding that people use biased strategies so that causal hypotheses are confirmed).

likely to be remembered whereas the women who return after a month or two of leave are not.¹⁶³

Finally, another important, and I believe a closely related, reason that such habits die hard is that those in power, in this instance men, are reluctant to relinquish that power and, thus, utilize a variety of often subtle strategies to preserve their privileged positions. They do not necessarily act out of animus, but more out of a desire to vindicate and preserve their places in society.¹⁶⁴ People naturally want to believe that their success results from just procedures and honest talent, even if we all know that this is not always the case given that so much of our society is rooted in illegitimate and discriminatory processes that have long coattails—processes that often were and are intended to subordinate women.¹⁶⁵ While the means of that subordination surely have lessened, they remain stubbornly in place and help explain why change has not occurred more quickly. Men have a great deal invested in preserving gender roles, both as a way of understanding their world and as a means of enhancing their individual economic well-being. Reducing gender

163. See VALIAN, *supra* note 13, at 168 (“We interpret the information we receive about women . . . in the light of our beliefs.”); Rabin, *supra* note 162, at 30 (“A pervasive fact about human judgment is that people disproportionately weight salient, memorable, or vivid evidence . . .”); Rhode, *supra* note 139, at 588 (noting that the confirmatory bias means that employers will remember the times mothers leave work early but not the times when they stay late). For an extended treatment of cognitive psychology and how it might inform our analysis of discrimination issues, see generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

164. See FAYE J. CROSBY, JUGGLING: THE UNEXPECTED ADVANTAGES OF BALANCING CAREER & HOME FOR WOMEN AND THEIR FAMILIES 159–77 (1991) (documenting subtle patterns of male resistance); LORBER, *supra* note 119, at 225–52 (describing ways in which men “guard the gates” and prevent women from achieving equality).

165. Susan Moller Okin argues that husbands often exert influence over their wives’ decisions not out of a “concern for the aggregate welfare of the household but . . . [out of] their desire to retain the authority and privilege that accrues to them by virtue of being the family’s breadwinner.” OKIN, *supra* note 114, at 147; see also Wax, *supra* note 33, at 668–72 (arguing that women’s lack of bargaining power in marriage restricts their labor market activities). Kathryn Abrams has also demonstrated how sexual harassment has been used as a means of establishing male control and masculine norms in the workplace. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205–17 (1998). Even Judge Posner has recently argued that men may want to expel women from the workplace as a way of preserving status. See Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1084–85 (1999). For an interesting discussion as to how this process of gender definition and subordination occurs, see Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC’Y 527 (1996).

inequality in the workplace may cause a reevaluation of “men’s” and “women’s” work and also may decrease the income and prestige of men, even though it may increase family income overall.¹⁶⁶ Changing existing roles also may send a signal of condemnation to previous generations, one that is sure to be resisted. Suggesting that men need to take time off to care for their children, for example, may imply that an earlier generation of men were not as good fathers as they should have been or believed they were, or that the old model has outlasted its utility.

This focus on preserving privilege may appear somewhat difficult to square with an economic focus, but it highlights why we must not make efficiency the touchstone of our legal structures and why we also should not assume that the market is a frictionless machine grinding its way toward maximizing social welfare. On the contrary, the use of statistical discrimination perpetuates gender stratification and inequality and, therefore, reduces our social welfare. Even if we treat the use of statistical information to disadvantage women as an efficient employment practice, there are social costs that need to be considered in determining the desirability of the practice. By definition, statistical discrimination is overbroad in its reach, which means that relying on group averages has its greatest adverse effect on those individuals who do not fit the average, or the assumed average—in this case, those women who do not leave, and do not intend to leave, the workforce for their family commitments.¹⁶⁷ The result of this overbroad judgment is that the employers will waste or underutilize talent and may find higher turnover among their female employees, all of which negatively affects our social welfare.¹⁶⁸

166. Christine Williams has argued that men benefit by preserving gender roles “because our society has traditionally rewarded masculine qualities more highly than feminine qualities. It avails men to monopolize masculine qualities, emphasize them in themselves, and enforce femininity on their female counterparts.” WILLIAMS, *supra* note 121, at 8–9. She concludes that “[m]en have historically used the occupational realm not only to secure economic advantages over women, but also to establish and affirm their essential difference from—and personal sense of superiority over—women.” *Id.* at 133; see also Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 105 (1995) (arguing that “[t]he introduction of women into male-dominated jobs poses a threat to the gender-identity based self-esteem of men in these jobs”).

167. See VALIAN, *supra* note 13, at 257 (discussing how statistical discrimination makes life difficult for all women).

168. See Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340, 342 (1983) (arguing that statistical discrimination can lead to “suboptimal levels of human capital”). The question of whether women have a higher turnover rate than men has generated considerable controversy. Both men and women tend to have unstable early careers as

In this respect, the social cost of statistical discrimination may be far greater than the private cost to firms, given that individual firms likely are not forfeiting significant profits through their policies but that we pay the cumulative cost socially. A society committed to providing equality of opportunity to women also should be committed to eradicating the structures that perpetuate inequality. As a result, we ought to find ways to preclude employers from making statistical judgments that greatly disadvantage women and at best provide minimal efficiency returns.

D. *Men and Family Leave*

One way of moving toward the goal of greater gender equality would be to find ways to encourage, or induce, men to take leave around the birth of their children and ultimately to spend more time caring for their children. All of the issues discussed so far indicate that the best means of eradicating persistent labor market inequalities would be to change the work patterns of men, rather than those of women—something that we as a society, to date, have focused all too little on. The cumulative disadvantages women face in the workplace are all directly tied to their greater devotion to their children, which helps explain their lower pay, extreme job segregation, poorer advancement, and greater likelihood to miss work or to drop out of the workforce to care for their children. Yet, despite frequent proclamations regarding their desire to spend more time with their families, men continue to work longer hours while maintaining their lower levels of housework and child care.¹⁶⁹ All the relevant studies

they search for better experience and job matches, and those experiences do not seem to affect labor patterns negatively. See Gardecki & Neumark, *supra* note 42, at 317 (finding “that adult labor outcomes (defined as of the late 20s or early to mid-30s) are for the most part unrelated to the stability of early labor market experiences”); Light & Ureta, *supra* note 88, at 157 (“While women are more prone than men to leave the labor force, the fact is that young workers are likely to quit their jobs regardless of gender.”). A recent study of a large insurance company found that while women had a higher quit rate early in their careers, after five years with the firms women were thereafter less likely than men to leave their employment. See Nachum Sicherman, *Gender Differences in Departures from a Large Firm*, 49 INDUS. & LAB. REL. REV. 484, 488–91 (1996). Women, however, do seem to suffer a greater penalty for early turnover, likely because of their stronger need to signal workplace commitment to employers. See Gardecki & Neumark, *supra* note 42, at 319. Women also tend to work in industries with higher turnover rates. See W. Kip Viscusi, *Sex Differences in Worker Quitting*, 62 REV. ECON. & STAT. 388, 397 (1980) (“Almost the entire predicted male-female quit difference and half of the actual difference can be explained by differences in their jobs and regional economic conditions.”).

169. A study conducted by the Families and Work Institute indicates that fathers were just as likely as mothers to express a willingness to trade salary for dependent assistance benefits. See Ellen Galinsky et al., *The Role of Employers in Addressing the Needs of*

indicate that few men avail themselves of family leave even when it is available, and the average length of the leave men take is about five days.¹⁷⁰

As the preceding discussion makes clear, if we can get men to shoulder more of the home burden, women's equality in the workplace likely will improve substantially.¹⁷¹ Getting men to take more leave around the birth of their children will be an important but difficult task, and in Part III, I will explore ways in which we might be able to create incentives for men to take such leave. Currently, men proffer a great many excuses for why they do not take more leave, even though for at least the last twenty years men have expressed an interest in equal parenting and a desire to take parental leave.¹⁷² Indeed, if there is anything universal in worldwide patterns relating to parental leave, it is that men proclaim a much greater desire for leave than they appear willing to take.¹⁷³

Employed Parents, 52 J. SOC. ISSUES 111, 119 (1996). Before the birth of a child, men and women generally express a commitment to shared child care and housework. See Diane N. Ruble et al., *Changes in the Marital Relationship During the Transition to First-Time Motherhood: Effects of Violated Expectations Concerning Division of Household Labor*, 55 J. PERSONALITY & SOC. PSYCHOL. 78, 80 (1988). Polls likewise demonstrate that women and men both feel they should spend more time with their children. See Morin & Rosenfeld, *supra* note 5, at A1 (noting that "equally large majorities of working men and women said they . . . wished they could devote more time to their families"); see also *supra* note 12 and accompanying text (citing representative studies).

170. See Janet Shibley Hyde et al., *Fathers and Parental Leave: Attitudes and Experiences*, 14 J. FAM. ISSUES 616, 629 (1993) (finding a mean leave time of five days among surveyed fathers); Janet Shibley Hyde, *Women and Maternity Leave: Empirical Data and Public Policy*, 19 PSYCHOL. WOMEN Q. 299, 307 (1995) (noting that the average leave for men is about five days); Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men?* in MEN, WORK, AND FAMILY 217, 228 (J.C. Hood ed., 1993) (finding through interviews that the average leave for men was 5.3 days).

171. See Jacobsen & Levin, *supra* note 88, at 18 (finding a persistent and significant wage loss caused by extended leaves); Juhn & Murphy, *supra* note 25, at 93 (noting the large negative effect the presence of children has on women's employment); Shapiro & Mott, *supra* note 99, at 272 (finding that a consistent labor force attachment of women following childbirth resulted in a wage premium of 19%); 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, *supra* note 14, at 92, 98 (finding that family status explained approximately 50% of the wage gap in 1991).

172. For example, in a 1978 poll, three quarters of the respondents, male and female alike, thought housework should be shared equally when both partners worked. See CROSBY, *supra* note 164, at 148. In 1986, *Working Woman* magazine reported that "[n]ine in ten Americans today agree that it is important for fathers to spend as much time with their children as mothers do." Basia Hellwig et al., *How Working Women Have Changed America*, WORKING WOMAN, Nov. 1986, at 129, 134.

173. In a survey of recent books, sociologist Michael Kimmel observed:

A 1989 *New York Times* article is typical of the many work-family surveys conducted in recent years: in it, two-fifths of the fathers interviewed said they would quit their jobs if they could spend more time with their children. But the

The most common reason that men offer for not taking more leave time is that it would be economically infeasible given that they tend to have higher incomes than their wives and therefore would have to sacrifice more income if they were to take leave.¹⁷⁴ But men's reluctance to take leave cannot be fully explained by their economic situation because men with working wives appear far more capable of altering their behavior than they have done so far. In fact, getting men to take more leave may lead to greater wealth for many men. The reason that it currently makes sense for women to sacrifice their incomes, to the extent it makes sense at all, is because they are paid less than men, but an important reason they are paid less than men is that they have the primary responsibility for child rearing.¹⁷⁵ If this pattern were broken, women's earnings would likely rise and—as long as men's income did not suffer a proportional decline—overall wealth would increase. Even if the change results in no increase in wealth, it surely can be no argument to prefer men's higher incomes at the expense of women's incomes. The only way this vicious cycle can be derailed is for something to give, and that must be men's current advantage.

That said, it is not at all clear that significant economic sacrifices would be necessary for more men to take longer leaves. Nearly one quarter of women now earn more than their husbands, reflecting a substantial increase during the last decade,¹⁷⁶ and approximately one-third of married women between the ages of twenty-five and thirty-four roughly have achieved wage parity with their husbands.¹⁷⁷ These two facts suggest that a substantial number of men could take family

desire to change is often more rhetorical than real; few men would actually switch places with their nonworking wives if given the opportunity.

Michael S. Kimmel, *What Do Men Want?*, HARV. BUS. REV., Nov.-Dec. 1993, at 50, 56 (footnote omitted).

174. See Janet Shibley Hyde et al., *supra* note 170, at 635 (identifying "economic necessity" as a reason why men do not take more leave); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1066 (1994) ("The father's primary role in providing economic security functions as a barrier to increased parental involvement in the family.").

175. See Becker, *supra* note 82, at 937 (noting the vicious circle that subordinates women by paying them less and thus increases the attractiveness of their nonmarket opportunities).

176. See Anne E. Winkler, *Earnings of Husbands and Wives in Dual-Earner Families*, 121 MONTHLY LAB. REV., Apr. 1998, at 42, 44 ("Data from the Current Population Survey (CPS) show that the proportion of dual-earner couples in which wives earned more than their husbands increased from 16 percent in 1981 to 23 percent in 1996.").

177. See Blau, *supra* note 41, at 149. As noted earlier with respect to the legal profession, wage disparities tend to increase over time and women tend to begin their careers at greater salary parity with men. See *supra* note 100 and accompanying text.

leave that approximates the leave of their wives without making economic sacrifices, and a quarter of married men should be taking longer leaves than their wives if economics were truly driving their decisions.¹⁷⁸ Although men often claim they do not have access to leave, studies indicate that parental leave is available to men at a far higher rate than their utilization would indicate. Between 18% and 36% of surveyed employers offered parental leave to men even before the FMLA was implemented.¹⁷⁹ Often the leave was unpaid, as was also true for much of the leave offered to women, but men also had access to their vacation and, in some instances, sick leave. Also, as many women do, they could store up their vacation in anticipation of the birth of a child.

Another reason men offer for their inability to take leave is that they fear they will suffer workplace repercussions from their employers.¹⁸⁰ This explanation may or may not be true, but should not be given undue weight.¹⁸¹ As discussed above, women currently face substantial penalties for taking leave, and again, it cannot be argued that men, but only men, should be spared workplace repercussions when they take leave. Given the existing workplace norms, there is some evidence that men suffer greater penalties for

178. One indication that economics is not the only factor at work is that very few families even consider the option of having the man stay home or alter his work hours after they have a child. In her study of equal parenting families, Francine Deutsch observed:

[A] taken-for-granted quality of inequality with respect to paid work is common among . . . families [with unequal parenting], even ones where the women had high-powered professions. When I asked why it was the mother who cut back to part-time paid work in many of these families, the question didn't seem to make sense to them. That the father could be the one to stay home had never been discussed or even given a moment's thought.

DEUTSCH, *supra* note 60, at 58.

179. See Malin, *supra* note 174, at 1072 (citing studies). Prior to the passage of the FMLA, a higher percentage of employers made leave available to their female employees than to their male employees, but the numbers were not drastically different. Citing a study by the Catalyst organization released in 1986, Malin reports that 37% of employers offered parental leave to fathers while 52% offered such leave to mothers. See *id.*

180. See Janet Shibley Hyde et al., *supra* note 170, at 629 (finding that 23% of surveyed men thought their supervisors would be supportive of leave, while 63% thought their supervisors would respond negatively); Marlin, *supra* note 174, at 1077-78 (discussing perceived employer hostility to men taking leave).

181. Given that so few men take leave, the evidence of actual retribution is largely speculative. A contrasting view was presented in a recent study of Norwegian fathers who took leave, one of the few studies of its kind. Although the study involved a limited sample, the authors found that the men who took leave were "admired both by their colleagues and their friends" and did not appear to experience adverse consequences from their employers. See Berit Brandth & Elin Kvande, *Masculinity and Child Care: The Reconstruction of Fathering*, 46 SOC. REV. 293, 308-09 (1998).

taking leave than women because their leave-taking violates the prevailing gender norms.¹⁸² Employers, however, are currently able to exact stiff penalties against men because so few men take leave. If a greater number of men were to take leave, it is unlikely that employers could persist in retaliating against these employees because the norm of leave-taking would shift to render those who take leave the norm rather than the exception. After all, employers cannot penalize all of their employees, and if they do so in the form of lower wages, then it would be appropriate to view that as a cost the employees are willing to pay, just as they now pay for other workplace benefits, rather than a penalty employers exact.

In addition to the economic considerations, gender norms certainly play a role in determining leave patterns because child rearing continues to be seen as women's work, and the notion of taking leave to care for a newborn may threaten the existing roles.¹⁸³ These issues will have to be challenged if we are to make greater progress toward workplace equality. As noted earlier, making more progress will require finding ways to get men to take more leave, although we should also realize that men are unlikely to do so voluntarily and will require greater incentives than currently exist to break up the existing patterns. In the next Part, I will discuss why the FMLA is unlikely to disrupt current gender roles and explore ways in which family leave might be altered so as to create the conditions for greater workplace equality.

II. THE FAMILY MEDICAL LEAVE ACT AND GENDER STEREOTYPES

The Family and Medical Leave Act was intended to ameliorate some of the difficulties that parents encounter in balancing work and family commitments. As discussed earlier, an effective family leave law, one that counteracts some of the gender norms that currently

182. See Alison M. Konrad & Kathy Cannings, *The Effects of Gender Role Congruence and Statistical Discrimination on Managerial Advancement*, 50 HUM. REL. 1305, 1318-19 (1997) (finding that men were rewarded more for long hours and penalized more than women for their attention to household duties). Men also appear to be penalized more than women for working part-time. See Ferber & Waldfogel, *supra* note 95, at 5.

183. Joseph Pleck argues: "For most men, taking . . . leave is not part of their conception of their role as father. Unlike mothers, fathers have not grown up believing there is a special bond between themselves and their child that requires their being home full-time during the first months of their child's life." Pleck, *supra* note 170, at 230. For women who breastfeed their children, it makes sense for women to take more leave than their husbands, assuming both are not able to be home together. Many women, however, continue to breastfeed after they return to work, and men may also be able to arrange for leave once the breastfeeding is completed.

surround the issue of who takes leave to care for children, will be critical to reducing workplace inequality further. In this Part, I will explore the effects that the FMLA has had to date and argue that the Act has made a minimal difference for working parents; indeed, I will suggest that to the extent it has made a difference, it has reinforced existing gender inequalities in the workplace. Given the experience of other countries and states that offer more generous leave, I also conclude that drastic measures will be necessary in order to prompt men actually to take family leave and that moving to a system of paid leave, by itself, would likely be a necessary but ultimately insufficient condition to achieve that goal.

A. *The Family Medical Leave Act*

1. A Statutory Overview

The FMLA was passed in 1993 to great fanfare.¹⁸⁴ The United States was one of the last industrialized nations to adopt a leave law, although, as discussed in more detail below, the American law is among the least generous of any of such legislation.¹⁸⁵ As a symbolic gesture, President Clinton signed the Act into law as his first official legislative act, marking the end of a five-year effort to implement a federal leave law, a process that included two vetoes by President George Bush.¹⁸⁶ I will contend, however, that despite the fanfare, the legislation has failed to rise beyond the symbolic level.

The FMLA provides twelve weeks of unpaid leave to employees working for employers having fifty or more employees.¹⁸⁷ In order to be eligible for the leave, the employee must have worked for the employer for at least one year and must have worked for that employer at least 1250 hours during the previous twelve months.¹⁸⁸ Despite these restrictions, it is estimated that the Act covers

184. Upon passage, the bill received wide acclaim. See, e.g., Editorial, *A Victory for Families*, ST. LOUIS POST-DISPATCH, Feb. 6, 1993, at 2B; Carl Leubsdorf, *Clinton Signs Bill for Family Leave in Jubilant Ceremony*, DALLAS MORNING NEWS, Feb. 6, 1993, at 3A; Elizabeth Neuffer, *Leave Bill OK'd: Clinton to Sign Today*, BOSTON GLOBE, Feb. 5, 1993, at 1; Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22; Janice Turner, *U.S. Family Leave Plan Wins Praise in Canada*, TORONTO STAR, Feb. 6, 1993, at A1.

185. See STEPHANIE COONTZ, *THE WAY WE REALLY ARE* 73 (1997) ("The United States shares with South Africa the distinction of being the only two developed economies without a national insurance program for families."); *supra* note 7.

186. For a thorough discussion of the road to passage, see RONALD D. ELVING, *CONFLICT & COMPROMISE: HOW CONGRESS MAKES THE LAW* (1995).

187. See 29 U.S.C. § 2612(a) (1994).

188. See *id.* § 2611(2)(A)(i).

approximately 60% of the nation's private-sector workforce, even though only about 11% of the nation's employers are covered.¹⁸⁹ Public employers are also bound by the statutory provisions, bringing the total number of covered employees to roughly 66% of the workforce, with approximately 55% of employees statutorily eligible to take leave.¹⁹⁰

Under the terms of the statute, leave is available to an employee to care for a newborn, for a newly adopted or foster child, and for one's own serious illness, as well as to care for a seriously ill spouse, parent, or child.¹⁹¹ The statute also provides for job protection in the form of a guarantee that, at the end of the leave, the employee will be returned to the same or to a substantially equivalent position, with some limited exceptions.¹⁹² Importantly, the leave is unpaid, and the employer can require that an employee utilize her accumulated vacation or sick leave prior to taking the statutory leave to care for a new child that has been brought into the family.¹⁹³

2. The Effect of the FMLA

In order to assess the effect and importance of the FMLA, it is necessary first to know what kind of leave was generally available before the Act was passed. This task is made somewhat difficult because, where provided, family leave was typically not offered through formal "maternity leave" policies, but instead was afforded in various other ways, such as through sick leave, disability policies, or informal leave, thus making it difficult to know who had access to what kind of leave.¹⁹⁴ The federal government, however, periodically

189. See A WORKABLE BALANCE, *supra* note 11, at 58–61. Of the covered private-sector employees, approximately 46.5% have met the statutory requirements rendering them eligible to take leave. See *id.* at 61.

190. See *id.*

191. See 29 U.S.C. § 2612(a)(1).

192. See *id.* § 2614(a)(1). The statute exempts from this requirement those who are paid among the top 10% of the workforce if restoring them would cause "substantial and grievous economic injury." *Id.* § 2614(b). It is also not necessary to restore a worker to a position that would have been eliminated if the person had not been on leave. See *id.* § 2614(a)(1).

193. See 29 U.S.C. § 2612(d)(2)(A). Another important aspect of the legislation is that an employer must continue to provide health benefits during the leave, which the employee can be required to repay should the employee fail to return to work from her leave. See *id.* § 2614(c).

194. For a discussion of the variety of plans, see Olivia S. Mitchell, *Work and Family Benefits, in GENDER AND FAMILY ISSUES IN THE WORKPLACE*, *supra* note 14, at 269, 270–71. Another reason that it was often difficult to assess the availability of leave is that many of the studies were conducted by advocacy groups intent on influencing the legislation. Not surprisingly, employer-sponsored studies tended to suggest inflated levels

surveys employers to determine the kinds and forms of benefits they provide to employees. These estimates suggest that a majority of large employers, defined as those having more than 100 employees, provided some form of leave before the passage of the FMLA to enable women, but not necessarily men, to take time off around the birth of a child. Paid sick leave was by far the most common form of leave available, and unpaid maternity leave was also provided by a substantial segment of employers.¹⁹⁵ Nearly 90% of full-time employees at large firms also had access to disability plans that included coverage for pregnancy,¹⁹⁶ as did 96% of state and local employees.¹⁹⁷ As the figures indicate, large employers were more likely to offer leave than smaller employers, and professional employees tended to have better access to leave than did clerical employees.¹⁹⁸ Those who had worked for medium to large-size employers for at least five years were estimated to have benefits that averaged about nine weeks of available leave at full pay.¹⁹⁹

of coverage and provided what have proved to be grossly inflated estimates of the cost of extending leave. Employee-sponsored studies, on the other hand, have indicated a paucity of benefits and typically have underestimated the costs of additional leave legislation. For example, in perhaps the most well-known study, the U.S. Chamber of Commerce estimated compliance with the FMLA would cost approximately \$13 billion a year. See Michelle Rose Marks, *Party Politics and Family Policy: The Case of the Family and Medical Leave Act*, 18 J. FAM. ISSUES 55, 59 (1997) (discussing the study and its influence). An employee-sponsored survey, by contrast, found that there would be no increase in cost for more than two-thirds of employers when it came to training, health insurance, or unemployment insurance, and no administrative costs for more than half of employers. See JOHN T. BOND ET AL., *BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES* at iii-iv (1991).

195. Some of the data are difficult to interpret because the study surveyed employers of all sizes. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2459, *EMPLOYEE BENEFITS SURVEY: A BLS READER 3* (1995) (Sup. Docs. No. L 2.3:2459).

196. See Waldfogel, *supra* note 171, at 94 (citing government statistics).

197. See Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, J. ECON. PERSP., Summer 1997, at 175, 182.

198. See Issacharoff & Rosenblum, *supra* note 133, at 2190 ("The smaller firms that are not covered by the [FMLA] are the ones that are least likely to offer such benefits currently."); Shelley M. MacDermid et al., *Organizational Size and Work-Family Issues*, in *THE EVOLVING WORLD OF WORK AND FAMILY: NEW STAKEHOLDERS, NEW VOICES* 111, 120 (Marcie Pitt-Catsouphes & Bradley K. Googins eds., 1999) (noting that large firms offer more benefits and are more willing to accommodate flexible work practices, particularly for professional employees).

199. See Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 J. MARRIAGE & FAM. 1008, 1009-10 (1997) (finding that 61 days of paid leave were available for those who had at least five years of tenure with their employer). For a discussion of the status of leave prior to the passage of the FMLA, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2363, *EMPLOYEE BENEFITS IN MEDIUM TO LARGE FIRMS*, 1989, at 1-3 (1990) (Sup. Docs. No. L 2.3/10:989).

In addition to the availability of employer-provided leave, before the FMLA was enacted, thirty-four states, Puerto Rico, and Washington, D.C., had some type of leave legislation in place. The state statutes varied in their provisions—some offered more generous protection than was ultimately enacted by the FMLA, while others offered less—and five states made some form of wage replacement available through temporary disability insurance laws.²⁰⁰ A number of studies sought to measure the extent to which the leave laws were utilized, and all of the studies indicated very low utilization rates—typically from 1% to 3% of employees used the leave annually.²⁰¹

B. *The FMLA in Action*

1. The Use of the FMLA

Analyzing the pre-existing law in this detail helps expose the limited benefits that the FMLA actually provides and places the law in proper perspective. Recent data confirm that the FMLA provides employees with little more than was previously available, with the largely unintended exception of providing some additional unpaid sick leave to employees.²⁰² Although the statute is still relatively new, the Commission on Family and Medical Leave commissioned two comprehensive studies to determine the use and cost of the FMLA, and those studies offer important and revealing insights into the Act.²⁰³ The surveys sought to determine how employers and

200. For a more detailed description of the law, see WOMEN'S BUREAU, U.S. DEPT OF LABOR, STATE MATERNITY/FAMILY LEAVE LAW *passim* (1993) (Sup. Docs. No. L 36.102:L 48), and A WORKABLE BALANCE, *supra* note 11, at 44–49.

201. See EILEEN TRZCINSKI & WILLIAM T. ALPERT, LEAVE POLICIES IN SMALL BUSINESS: FINDINGS FROM THE U.S. SMALL BUSINESS ADMINISTRATION EMPLOYEE LEAVE SURVEY 54–55 (1990); Eileen Trzcinski & Matia Finn-Stevenson, *A Response to Arguments Against Mandated Parental Leave: Findings from the Connecticut Survey of Parental Leave Policies*, 53 J. MARRIAGE & FAM. 445, 458 (1991).

202. See Suzanne M. Crampton & Jitendra M. Mishra, *Family and Medical Leave Legislation: Organizational Policies and Strategies*, 24 PUB. PERSONNEL MGMT. 271, 274–75 (1995) (noting that “the number of companies with some type of leave policy already in place prior to the passage of the FMLA has been estimated to be up to 89 percent”); Marks, *supra* note 194, at 65 (noting that “[t]he final bill demanded nothing more of most businesses . . . than what they provided already”).

203. One survey concentrated on a random sample of private employers, while the other sampled a random group of employees from both the public and private sector. The Employer Survey, conducted by Westat, sampled a national, random group of employers, interviewing respondents from 1206 worksites. See A WORKABLE BALANCE, *supra* note 11, at 22–23. The Employee Survey, conducted by the University of Michigan Survey Research Center, targeted employees aged 18 and over who lived in the United States and had been employed for pay any time within the 18 months between January 1994 and summer 1995, when the survey was conducted. See *id.* at 23–24.

employees had responded to the passage of the Act, as well as provide some measure as to its costs and benefits.

Both surveys found relatively low utilization rates of FMLA benefits, levels that were consistent with previous studies. The Employer Survey indicated that 3.6% of employees at covered private-sector worksites took some form of FMLA leave, while the Employee Survey found a utilization rate of 2%.²⁰⁴ These numbers represent those who took leave under the Act itself; a much larger group of employees took leave for a reason covered by the FMLA, but only a small fraction (7% in the Employee Survey) formally took leave under the FMLA, as most employees continued to rely on other forms of available leave, such as their sick leave or disability insurance policies.²⁰⁵

The surveys also collected data concerning who took leave for what reason. Women took significantly more leave than men (58.2% compared to 41.8%), and the largest group of people taking leave fell into the age group of thirty-five to forty-nine year olds.²⁰⁶ This latter fact suggests that much of the leave probably was not related to the birth or adoption of a child, a fact that was confirmed by the survey results. Nearly 60% of those who took leave did so for their own health-related problems, and only 17.1% of employees at covered worksites took leave for reasons related to the birth or adoption of a child.²⁰⁷

The studies found no significant difference between men and women in terms of the rate or length of parental leave,²⁰⁸ and the median length of leave for all people taking leave was ten days,²⁰⁹ although there was substantial variance among the leave takers. Approximately 75% of those who took leave returned within thirty-five days, and about 13% of employees at covered sites took more

204. *See id.* at 83. There is some indication that employer compliance with the FMLA was limited immediately following its passage, which could have suppressed the number of individuals who took leave. *See* Sue Shellenbarger, *Many Employers Flout Family and Medical Leave Law*, WALL ST. J., July 26, 1994, at B1 (reporting that one study found that up to 40% of employers failed to provide the required leave).

205. The Employee Survey found that 16.8% of employees surveyed took leave for a reason covered by the FMLA, but only 7% of that group took leave under the FMLA. *See* A WORKABLE BALANCE, *supra* note 11, at 84.

206. *See id.* at 92.

207. *See id.* at 94-95. Somewhat ironically, the Employee Survey found a higher level of leave related to childbirth or adoption in worksites that were not covered by the FMLA, which accounted for approximately 22% of the FMLA-related leave. *See id.*

208. *See id.* at 95-98.

209. *See id.* at 97.

than twelve weeks of leave.²¹⁰ Somewhat surprisingly, a significant portion of FMLA leave to care for newborns lasted less than one week, although leave defined as “maternity-leave” tended to last substantially longer.²¹¹ There was also a small group of individuals who indicated that they were unable to take FMLA leave despite their need for the leave. Just under 4% of the surveyed employees indicated that they needed leave but did not take it, with nearly two-thirds of those employees indicating that they did not take leave because they could not afford to do so.²¹²

Finally, the surveys suggested that the costs of the FMLA to employers appear to be quite modest. More than two-thirds of employers covered their employees out on leave with other employees, and the employees who were replaced by a permanent hire tended to fall into the lowest income category.²¹³ Significantly, more employers indicated that the benefits of the Act, in terms of increased productivity, outweighed whatever costs they incurred.²¹⁴

2. Evaluating the Effect of the Statute

Based on this early survey data, it appears that the FMLA has had its greatest impact by allowing employees to take unpaid sick leave for a limited time, leave that may not have been available without the legislation. In some ways, this finding should come as little surprise. As with respect to leave relating to the birth or adoption of a child, the Act largely replicated what the market was already providing—unpaid leave to those who worked for large employers.²¹⁵ Certainly there is no indication that the FMLA has

210. *See id.* The vast majority of employees returned to work following their leave, while approximately 5.6% of all leave-takers failed to return. *See id.* at 113, fig.5.13.

211. Thirty-seven percent of non-covered employees who took leave to care for a newborn returned to work within seven days. *See id.* at 97. In contrast, 42.4% of maternity-disability leave lasted more than twelve weeks. *See id.* It is likely that the short leaves were used in combination with other forms of available leave such as disability or sick leave, so that the total length of leave was longer than indicated.

212. *See id.* at 98–99. Significantly, less than 10% of the needed but untaken leave was related to the birth or adoption of a child, as most of the untaken leave was to care for a sick child or parent or for the respondent’s own health problem. *See id.* at 99, fig.5.4.

213. *See id.* at 102–03.

214. *See id.* at 131, fig.6.4. Somewhat paradoxically, given the exemption for employers with fewer than 50 employees, nearly twice as many larger employers reported moderate or large cost effects than smaller employers. *See id.* at 126.

215. *See Marks, supra* note 194, at 65 (noting that the bill offered little more than most businesses provided); Ruhm, *supra* note 197, at 177 (finding that the FMLA offers limited coverage). Ruth Colker recently lamented, that the “only solace [for low-income workers] is that, if they work for a large employer, they, at least, will have a job to which they can return after taking the most minimal possible medical leave.” Ruth Colker, *Pregnancy,*

greatly, or even mildly, facilitated the balancing of work and family commitments, nor is there any evidence that it has induced men to play a greater role at the birth or adoption of a child, especially given how very short their leaves tend to be. The surveys also suggest that most people who are taking substantial amounts of leave are doing so under non-FMLA provided policies: nearly 50% of employees reported receiving full wage replacement for the leave, while another 20% indicated receiving partial pay, neither of which is required by the Act.²¹⁶

Although the statute clearly has not improved the situation of working parents to any substantial degree, the statute did offer an important symbolic victory insofar as it represented the first federal legislation addressing family leave. But symbolic legislation garners little more than symbolic relief and may carry with it significant negative effects.

One of the dangers associated with passing such a weak bill is that once federal legislation is enacted, family leave legislation may be removed from the agenda for state legislatures and unions, either of which ultimately may have been more successful reformers. With federal legislation in place, state legislatures, and to a lesser extent unions, are likely to move on to other issues because interest group pressure for leave legislation will have diminished significantly while business opposition may have intensified. Indeed, this seems to have occurred. Since the passage of the FMLA, no significant state legislation has been enacted,²¹⁷ and the only federal efforts have been to expand the Act to include unpaid leave for such things as parent-teacher meetings and efforts to extend the Act to smaller employers.²¹⁸ These are both worthy goals, but surely are limited in their aspirations. To date, there has been no discussion of moving toward guaranteeing paid leave.²¹⁹

Parenting, and Capitalism, 58 OHIO ST. L.J. 61, 62 (1997).

216. See A WORKABLE BALANCE, *supra* note 11, at 107 (reporting that 46.7% of employees reported receiving full wage replacement and 19.6% received partial pay).

217. A review of the *Daily Labor Report's* annual listings of all significant state labor legislation enacted during the previous year indicates that there has been no significant new legislation since at least 1993. Several states have amended their leave legislation to permit parents to attend parent-teacher conferences, but even this rather limited legislation has failed to pass in some states. See Rick Valliere, *Maine Governor Vetoes Minimum Wage Hike, Expanded Family Leave, Higher Comp Levels*, *Daily Lab. Rpt. (BNA)*, June 17, 1999, at A-10 (describing the veto of legislation to allow parents 24 hours to care for children or to attend parent-teacher conferences).

218. See Anya Bernstein, *Inside or Outside? The Politics of Family and Medical Leave*, 25 POL'Y STUD. J. 87, 97 (1997) (describing the proposals).

219. The President recently has suggested that states should be allowed to use

The legislation may also have preempted the development of more friendly policies in the private sector. Prior to the passage of the FMLA, there appeared to be a modest trend by private employers to provide increasingly generous paid leave policies, a trend that now seems to have stalled as the federal legislation has become the ceiling of benefits.²²⁰ The only positive note in the aftermath of the legislation is that some unions appear to be seeking greater leave benefits in their collective bargaining agreements and publicizing their efforts as a way to attract new members.²²¹

The early experience with the FMLA, as well as the substantial limitations of the existing statute, shows that something more needs to be done. This is especially true if the goal is to encourage more men to take parental leave, a goal the current statute is inadequately structured to address. In the next Part, I will discuss several ways in which the statute might be amended in order to create more gender equality in the workplace, although it will be important first to discuss a proposal that has been offered to address the persistent inequities.

III. BRINGING EQUALITY TO THE WORKPLACE

Creating a successful national family leave policy remains the key to reducing workplace inequality for women. There are a number of ways in which the Act might be amended to break up the gendered divisions that continue to demarcate both work and home lives. Before discussing these proposals, however, I want to spend some time analyzing a recent tax reform proposal that is primarily intended to address the same problem I have been discussing in this Article—namely, the persistence of gender inequality in the

unemployment surpluses to subsidize family leave. See Diane E. Lewis, *Clinton Starts Program for Parental Paid Leave*, BOSTON GLOBE, Dec. 1, 1999, at A1. This idea would provide some wage replacement, though only at the levels currently available for the unemployed, and would likely provide some benefit to those who currently do not have access to paid leave. See *id.* The proposal was met with initial hostility by the business community, and it remains unclear whether the Department of Labor and the states will implement the proposal. See Julie Kosterlitz, *A Fistfight over Family Paid Leave*, 1999 NAT'L J., 3545, 3545.

220. It is easy to see how this preclusive effect can occur. Employers tend to offer generous benefits as a way of attracting employees and maintaining a competitive edge in the labor market. Once the law creates a federal right and employees grow to expect that right, employers may be less likely to use leave as a means to attract employees. Better data will be necessary, however, before we can determine whether this is what in fact has occurred.

221. The AFL-CIO, for example, includes a section on its web page announcing successes in bargaining for greater leave than required by federal law. See AFL-CIO, *Bargaining to Expand the Family and Medical Leave Act* (visited Jan. 17, 2000) <http://www.aflcio.org/women/f_fmla.htm>.

workplace.

A. *The Idea of Tax Reform*

It is often suggested that it is economically rational for women to leave the labor force when they have children and that economic considerations primarily determine that decision.²²² In his recent book, *Taxing Women*, Edward McCaffery argues that women leave the workforce because the tax system, along with their lower incomes relative to men's, compels them to forgo their market wage in order to care for their children.²²³ His primary concern is with the system of joint tax filing and its penalties on secondary income earners, a phenomenon that disproportionately affects women given that women still tend to earn less than their husbands.²²⁴ McCaffery therefore proposes that the tax system be restructured to tax married women at a lower rate in order to create sufficient incentives to encourage more women to enter, or remain in, the labor force.²²⁵

This restructuring is an intriguing idea, and McCaffery deserves much credit for having sparked a lively debate regarding the gendered nature of the tax system.²²⁶ It is uncertain, however, that his proposal would produce the results he suggests for at least two reasons. First, his theory is premised on a weak empirical foundation. The essence of McCaffery's argument is that women's labor force attachment is quite elastic relative to wages, whereas men's attachment is inelastic; however, he bases both of his assumptions on several older studies.²²⁷ More recent empirical work casts doubt on these critical assumptions, as it appears that the elasticity of women's labor force attachment is increasingly becoming more like men's.²²⁸

222. See *supra* notes 174–75 and accompanying text.

223. MCCAFFERY, *supra* note 140, at 148–49. McCaffery's book is primarily based on two articles that previously appeared in law reviews, McCaffery, *supra* note 133, and Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993).

224. See MCCAFFERY, *supra* note 140, at 137–60, 178–84.

225. See *id.* at 277–80.

226. For recent commentaries on McCaffery's argument, see Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2018–19, 2033–42 (1996); Lawrence Zelenak, *Tax and the Married Woman*, 70 S. CAL. L. REV. 1021 (1997) (reviewing *TAXING WOMEN*, *supra* note 140).

227. See MCCAFFERY, *supra* note 140, at 179–82. Most of the studies McCaffery relies on interpret data from the mid-1980s or earlier. See *id.*

228. For example, in their study of working women, Klerman and Leibowitz concluded that higher wages did not increase the number of women who returned to work. The authors concluded that “[t]here is little support for the hypothesis that higher wages induce women to return to work sooner after giving birth than do lower wages.” Klerman & Leibowitz, *supra* note 89, at 289. The authors did find that women earning higher wages

Recent data also indicate that women whose husbands have high incomes are entering the workforce at a faster rate than those with husbands at the bottom of the scale, a fact that is difficult to reconcile with McCaffery's theory.²²⁹

Second, McCaffery fails to provide supporting data for his argument that it is cost effective for women to stay at home to care for their children. Taxes unquestionably eat away at secondary incomes, but it would make financial sense for women to leave the workforce only if their net pay were so low that it either did not cover child care expenses or did not overcome the worker's preference for staying home. Neither assumption has been established empirically. Jane Waldfogel has calculated that childcare costs average approximately 22% of female earnings, leaving substantial income even after accounting for taxes.²³⁰ McCaffery likely would respond by suggesting that the elasticity of women's decisions to work means that the decisions are not entirely determined by the economic feasibility of staying home, but again, without more support for the underlying claim of elasticity, this response fails to overcome the empirical objections.

were more likely to be on leave, although that leave was also likely to be unpaid. *See id.* at 294. Another recent study found that the elasticity of women's workforce attachment is much lower than originally had been documented and depends greatly upon the presence and number of children as well as the education level of the woman. *See* Juhn & Murphy, *supra* note 25, at 86–92; *see also* Alstott, *supra* note 226, at 2018–19 (critiquing studies concluding that increased female labor supply is a response to increased wages).

229. *See* ROBERT MAX JACKSON, DESTINED FOR EQUALITY: THE INEVITABLE RISE OF WOMEN'S STATUS 97 (1998) ("The primary trend of wives joining the work force has been overwhelmingly independent of husband's economic status."); Maria Cancian et al., *Working Wives and Family Income Inequality Among Married Couples*, in UNEVEN TIDES: RISING INEQUALITY IN AMERICA, *supra* note 30, 198, 199 tbl.6.1 (noting that between 1968 and 1988 the largest group of white women entering the workforce were those married to high income men); Juhn & Murphy, *supra* note 25, at 85 (finding that women's employment increased most dramatically at upper income ranges). Relatedly, one study on the effects of child care costs found that higher costs actually decreased the chances a woman would quit her job because those who paid the most for child care had the best paying jobs. *See* Jennifer L. Glass & Sarah Beth Estes, *Workplace Support, Child Care, and Turnover Intentions Among Employed Mothers of Infants*, 17 J. FAM. ISSUES 317, 327 (1996).

230. *See* Waldfogel, *supra* note 7, at 141 tbl.2. Amy Christian has suggested that a woman earning \$30,000 likely would have a net loss of income when expenses are accounted for, suggesting that it is economically rational for most women to remain at home. *See* Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 291–93 (1997). Christian's costs estimates, however, appear to be grossly inflated calculations that she never actually seeks to document. More to the point, Christian's argument is plainly refuted by the presence of millions of working mothers who earn less than \$30,000, surely an indication that they are not losing money by working.

Additionally, embedded within McCaffery's analysis is the vice identified earlier, namely that the choice to sacrifice a woman's income is economically rational and should be treated as such. It is important to highlight again the circularity of this position: the primary reason a woman's income is lower than a man's is that she is expected to leave the workforce to care for children and fulfilling that expectation is the best way to ensure that gender income inequality persists. Even if the strategy makes sense on an individual family level, it may reduce our social welfare by suppressing the wages of women, which may provide a strong argument for governmental action to alter the existing patterns. Indeed, changing the work patterns of men would seem preferable to adopting the controversial, and constitutionally suspect,²³¹ change in the tax code, particularly given the empirical limitations of the theory.

B. Fixing the FMLA with an Eye on Equality

In this Section, I want to discuss several ways in which the FMLA might be altered so as to alleviate some of the workplace disadvantage women continue to experience and to help change the governing norms. Rather than provide detailed policy proposals, I want to treat this Section as more tentative and exploratory—as a way of beginning a conversation. This approach seems to make sense not only because some of the proposals have little chance of being adopted in the near future, but also because amending the FMLA should be seen as only one facet of a more comprehensive reform strategy. Surely at this stage of our experience, it would be foolish to think there is any single or easy fix to what is an enormously complicated and deep-seated problem. That said, concentrating on family leave seems to be the most promising current strategy.

1. The Need for Paid Leave

There are various ways in which a more equitable family leave system might be devised, all of which will require some form of paid leave. Ideally, the twelve weeks of currently mandated unpaid leave would be transformed into paid leave, but if that proves infeasible, at least in the short term, then a minimum of six weeks of paid leave for

231. It is somewhat surprising that neither McCaffery nor those who have commented on his proposal discuss its constitutionality. Creating an explicitly gendered tax system would certainly be subject to a constitutional challenge that would have to meet the intermediate level of scrutiny. As I discuss below, I believe an argument can be made supporting the constitutionality of a similar program, but it is not something that ought to be assumed. *See infra* notes 246–47.

men and women following the birth or adoption of the child should be made available. As a way of equalizing leave-taking to some degree, it should be mandated that the leave be taken in its entirety or not at all. In other words, a parent would have to take the full six weeks in order to receive any paid leave, and the leave would belong exclusively to one parent without the possibility of sharing the leave between parents.²³² If this policy were adopted, consistent with the existing 12-week mandate, an additional six weeks of unpaid leave also should be made available to parents.

Providing six weeks of paid leave should induce some fathers to take parental leave, perhaps as many as 20%.²³³ Additionally, and not insignificantly, it may help settle the question of whether men actually want to be involved more directly in child rearing by undercutting their current excuses for not taking leave.²³⁴ With paid leave in place, men's work situation would be much like that currently confronted by women. To the extent they suffer adverse effects, they would have recourse under the remedial provisions of the FMLA.²³⁵

Although providing paid leave for longer periods of time would certainly aid those women trying to balance work and family issues, there is little reason to believe such legislation by itself would reduce the inequality women face in the workplace.²³⁶ Even with paid leave legislation, it is unlikely that substantial numbers of men will take the

232. A number of countries have allowed parents to share a specified amount of leave, but when they do so mothers utilize the vast majority of the leave time. See SANDRA FRIEDMAN, *WOMEN AND THE LAW* 219–20 (1997) (discussing the disparity between the proportion of leave taken by mothers as compared to fathers).

233. This percentage seems to be an upward estimate based on experiences within Swedish and American companies where leave has been encouraged. Malin seems to suggest that the numbers could be even higher, though his rationalizations for why men do not currently take leave accumulate to a point beyond credulity. It seems incredible, for example, that men may need to avail themselves of sexual harassment doctrine, as Malin suggests, to counter the hostile work environments that confront men who try to take leave as. See Malin, *supra* note 174, at 1089–94 (arguing that sexual harassment law would provide a remedy for men who work in a “FMLA hostile environment”).

234. See *supra* notes 169–82 and accompanying text.

235. See 29 U.S.C. § 2617 (1994) (setting forth remedies for violation of the FMLA).

236. This pervasive inequality is one reason why the proposal by Samuel Issacharoff and Elyse Rosenblum to provide for a payroll tax to pay for family leave fails to go far enough. See Issacharoff & Rosenblum, *supra* note 133, at 2214–20. Their model for funding 12 weeks of pregnancy leave is based on the Canadian model and borrows substantially from unemployment insurance schemes. See *id.* at 2216–17. This model is likely to reduce the gender gap somewhat, however, by making it easier for women to return to work after having a child, thereby creating a more continuous work career. See *id.* at 2164 (emphasizing the importance of continuous labor force attachment); see also Waldfoegel, *supra* note 7, at 151–52 (arguing that providing leave coverage to women might reduce the pay gap associated with having children by 40%).

guaranteed level, particularly if they have accrued vacation time that would satisfy their apparent preference for a short leave time. Experiences from countries that offer more generous leave policies demonstrate that men remain reluctant to take leave even when the leave is paid. With the important, and partial, exception of Sweden, discussed below, men rarely avail themselves of leave,²³⁷ and even in Sweden the leave legislation has brought fewer benefits than is often assumed.

Sweden is widely cited as having a model leave law, and one that has achieved some success in getting men to take leave.²³⁸ Based on data from the late 1980s, approximately 44% of Swedish men take parental leave with the average leave lasting forty-five days.²³⁹ Although these figures are impressive relative to other nations, it is nevertheless important to place them in context. Nearly all Swedish women take leave, and their leave averages 260 days, nearly nine months, or six times as long as men's leave.²⁴⁰ In addition to the unequal lengths of leave, most Swedish mothers work part-time, at least on their initial return from work. Women with children in the United States are twice as likely to work full-time as similarly situated women in Sweden.²⁴¹ Women in Sweden also remain largely absent from managerial positions despite their family leave policies.²⁴²

237. As noted previously, men generally take about five days of leave, even though many men have access to some form of paid leave. See *supra* text accompanying note 170 and sources cited therein. Based upon a survey of leave patterns in the United States and Sweden, Joseph Pleck concludes: "[F]or whatever reason, it is clear that fathers will take advantage of infant care leave to a far lesser extent than mothers. Infant-care leave policies may be gender-neutral in principle but they will not work in a gender-neutral way in practice." Joseph H. Pleck, *Fathers and Infant Care Leave*, in *THE PARENTAL LEAVE CRISIS* 188 (Edward F. Zigler & Meryl Frank eds., 1988).

238. For discussions of Sweden's experience as a possible model for the United States, see Siv Gustafsson & Frank P. Stafford, *Three Regimes of Child Care: The United States, the Netherlands, and Sweden*, in *SOCIAL PROTECTION VERSUS ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF?* 333, 346-47 (Rebecca M. Blank ed., 1994); LINDA HAAS, *EQUAL PARENTHOOD & SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN* 187-215 (1992); Malin, *supra* note 174, at 1075-77; Arielle Horman Grill, Comment, *The Myth of Unpaid Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?* 17 *COMP. LAB. L.J.* 373, 374-80 (1996).

239. See Joseph P. Allen, *European Infant Care Leaves: Foreign Perspectives on the Integration of Work and Family Roles*, in *THE PARENTAL LEAVE CRISIS*, *supra* note 237, at 264; Linda Haas, *Nurturing Fathers and Working Mothers: Changing Gender Roles in Sweden*, in *MEN, WORK, AND FAMILY*, *supra* note 170, at 238, 248-49; Grill, *supra* note 238, at 377-78.

240. See Haas, *supra* note 239, at 249. The figures Haas cite are for children born in 1989.

241. See Gustafsson & Stafford, *supra* note 238, at 348.

242. See Dana Milbank, *Sweden: Laws Help Mom, but They Hurt Her Career*, *WALL ST. J.*, July 26, 1995, at B1 ("Women hold only 8% of private-sector managerial jobs, and

Sweden, however, remains an important case study, if for no other reason than the successful way in which the country has been able to incorporate family leave and child care into the typical employment package.²⁴³ Within Sweden, there is widespread political support for extended parental leave and publicly financed daycare facilities, both of which have been accepted as part of the comprehensive protection policies that characterize the Swedish social welfare system.²⁴⁴ The Swedish model may not translate directly to the United States, but it does seem clear that any successful family leave program will require broad-based political support, something that appears to exist in the United States, though the policies we have implemented fall short of creating an adequate policy.²⁴⁵

2. Requiring Men to Take Leave

Given the limited effect a paid leave policy probably would have on inducing men to take more leave, it will be necessary to take stronger measures, and I will discuss two such proposals here. One proposal would be to require men to take six weeks of leave, which could be done on a temporary basis—say for five years—as a means of changing the structured patterns that continue to replicate our gender inequalities through the preservation of gender norms. Although the notion of forced leave may sound rather extreme, the underlying premise of the idea is that currently women are effectively required to take leave, and this proposal simply would balance that socially imposed condition with one that was legally imposed.

There are two strong arguments in favor of a mandatory leave policy. First, if properly enforced, such a system in all likelihood would succeed and may strongly influence the prevailing norms

they are all but absent from top management.”).

243. For example, a Swedish banker commented that the leaves are “‘good for the fathers and mothers, and that *must* be good for the bank.’” Allen, *supra* note 239, at 255 (citation omitted).

244. See Gustafsson & Stafford, *supra* note 238, at 346.

245. It is an interesting question why our policies are so inadequate despite the broad-based political support for improving the lives of working families. I think the best explanation is one noted earlier, namely that as a society we remain largely ambivalent regarding women working outside of the home, so the political support may not be as great as indicated by the polls. See, e.g., *supra* note 5 (citing a poll showing that many Americans want to return to the gender roles of the 1950s). Additionally, providing a stronger family leave policy meets strong resistance from the business community, which opposes most government mandates. When these forces conflict, governmental bodies increasingly are deferring to the interests of the business community. For a discussion along these lines, see JOEL BLAU, *ILLUSIONS OF PROSPERITY* 1–21 (1999).

regarding working parents because both men and women would be expected to leave the workplace for a definite period of time following the birth or adoption of a child. This change should sharply reduce the incentives to engage in statistical discrimination and also may help reduce some of the human capital disparities that are tied to the expectations surrounding childbirth. Second, on a purely pragmatic level, it may be the only policy that effectively would encourage large numbers of men to take leave.

Despite its possible success, the objections to a mandatory paternity leave policy would almost certainly block its implementation. As a legal matter, questions would arise regarding the law's constitutionality on both due process and equal protection grounds. Although I believe that a well-developed program could survive constitutional scrutiny,²⁴⁶ a gender-neutral proposal would garner greater support with nearly identical results. Because most, if not all, women would take the available paid leave, requiring such leave of both men and women would ameliorate the constitutional concerns while affecting the choices of very few women.²⁴⁷ This kind

246. Without going into detail, I will sketch an argument that a gender-specific requirement that men take leave would be constitutional (which is, of course, quite different from saying that the Supreme Court would uphold such a policy). Gender-based restrictions need only satisfy the Court's intermediate scrutiny, which requires establishing that the program was designed to serve an important governmental objective and that the chosen means were substantially related to the achievement of that objective. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). In the area of gender classification, one of the Court's central concerns is that the legislation not perpetuate gender stereotypes. See *id.* at 725. Requiring men to take leave could run afoul of the Court's concern with gender stereotypes; however, in this instance the act is based on an empirical, and well-documented, reality rather than a stereotype, namely that men rarely take leave and that the gendered nature of leave-taking substantially contributes to labor market inequality. The harm that women suffer as a result of the existing patterns is also well documented, and both of these facts should lend credence to the government's claim that the legislation is aimed at advancing an important governmental interest—gender equality. Similarly, it should be possible to establish that mandatory leave is the only means possible to break up the patterns, and if the statute includes a defined time period, the Court should be even more receptive to upholding the provision as a temporary measure aimed at correcting a manifest imbalance in the workplace. Cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 640 (1987) (upholding a gender preference to remedy a manifest imbalance in the workplace). Let me reiterate that this footnote simply provides a brief and by no means conclusive or persuasive explication of what is a complicated and, by necessity, nuanced argument.

247. A gender-neutral policy still must satisfy the Court's rational basis scrutiny, but given that the policy would be intended to serve the important goal of reducing gender inequality, this level of scrutiny should not be a difficult standard to meet. Similarly, whatever liberty concerns might arise should be mitigated by the realization that large numbers of workers—truck drivers and airline pilots for example—are prevented from working for specific periods. See, e.g., 14 C.F.R. § 121.481(c) (1999) (mandating rest periods for pilots who fly more than eight hours in a 24-hour period); 49 C.F.R. § 395.3

of a gender-neutral proposal may, however, harken to the days when pregnant women were often required to leave the workplace both before and after giving birth²⁴⁸ and, for this reason, may prove politically undesirable. There are also important questions regarding the proposal's administrability, in particular whether the statute would apply to all fathers, to only those who are married to the mother, or to those who are living at home with the mother. For these reasons, a mandatory leave policy is unlikely to garner sufficient support, and it will be important to consider additional, less drastic means to get men to take more leave.

3. Creating a Set-Aside Program for Family Leave

I believe the most promising of the less drastic measures would be to tie federal contracts to employers' records regarding the utilization rates of their parental leave policies. Employers with a strong record of men taking leave, a record that exceeds industry standards, might be incorporated into the existing government programs for providing contracts to disadvantaged businesses.²⁴⁹ As noted earlier, any such program could be structured in a gender-neutral fashion so as to avoid some, but not all, legal challenges. Along these lines, participation in the set-aside program could be triggered when a specified percentage of male and female employees have availed themselves of the paid leave programs. An employer would be certified to participate in the program after 50% of its eligible male and female employees had taken at least six weeks of leave, and the employer's continued participation would be tied to maintaining a specified level of leave-taking.²⁵⁰ Again, because

(1998) (limiting the number of consecutive hours commercial motor vehicle drivers can work). If men were required to take leave, they could not be required to engage in any particular activities, such as child care, but would instead be free to do whatever they pleased other than work for their employers.

248. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 138-43 (1977) (striking down a requirement that women about to give birth take leaves of indeterminate lengths); *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632, 647-48 (1974) (striking down a requirement that women take leave five months before an expected birth and for at least three months after).

249. The federal government currently has a number of contract set-aside programs in place. The Small Business Administration administers the program known as Section 8(a), which promotes government contracting with minority businesses. See 15 U.S.C.A. § 644 (West 1999). For a comprehensive overview of federal affirmative action programs, including various set-aside programs, see GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., EXECUTIVE OFFICE OF THE PRESIDENT, AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT (1995) (Sup. Docs. No. PREX 1.2:98015717), available at <<http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html>>.

250. If this kind of program were implemented, an employer would submit

women are likely to satisfy the requirement for paid leave, the gender-neutral standard effectively would be triggered by the participation of the male employees.²⁵¹ To avoid crowding out minority and other contractors who currently participate in the contract programs, either a separate family leave set-aside could be created, or the goals that currently exist could be increased so as to accommodate the new bidders.

Rather than creating an explicit set-aside program, an alternative approach would be for the government to require employers to provide paid leave to their employees and ensure that a minimum of 50% of their eligible male and female employees take the leave in order to qualify for federal contracts of a certain size. This program would resemble the existing Executive Order program that requires government contractors who receive contracts in excess of \$50,000 to implement affirmative action programs.²⁵² Local and state governments could also tie their contracts to similar programs, as is occurring increasingly for a variety of causes ranging from domestic partner benefits to requirements that employers provide a so-called "living wage" to their employees.²⁵³

It is difficult to know just how much a set-aside program might work to reduce inequality and alter gender norms. Currently, the government awards billions of dollars annually to disadvantaged businesses through various contracting programs,²⁵⁴ and most studies

documentation showing what percentage of its employees were eligible for the leave, the number who took the leave, and the length of the leave. The employer would then have to submit annual reports indicating that it has maintained sufficient participation in its leave program. This requirement would be similar to the continuing certification requirements under the Small Business Administration programs.

251. A skeptical court might view such a program as a pretext for sex discrimination, in which case the program may have to be justified along the lines suggested in *supra* notes 246-47.

252. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted as amended in 42 U.S.C. § 2000e (1994) (providing that contractors with 50 or more employees and contracts of \$50,000 or more must implement affirmative action programs).

253. San Francisco requires its contractors to provide benefits to domestic partners. See Carla Marinucci, *S.F.'s New Partners Law Called Rousing Success*, S.F. CHRON. (Bay Area ed.), Jan. 7, 1998, at A13. In the last several years, a number of jurisdictions have required their contractors to provide a living wage; it is now estimated that two dozen cities have enacted such laws, with many more currently considering the idea. See, e.g., Ron DePasquale, *Council Unanimously Approves Living-Wage Measures*, BUFF. NEWS, July 28, 1999, at 5B; Sarah Fishman, *A Living Wage Takes Effect in Somerville*, BOSTON GLOBE, July 25, 1999, at 17; Nicholas Riccardi, *'Living Wage' Law OK'd by County Supervisors*, L.A. TIMES, June 16, 1999, at 1; Scott Wilson, *Compromise Living-Wage Bill Offered in Montgomery*, WASH. POST, July 21, 1999, at B4.

254. See Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1590-94 (1998). Under the Small

indicate that the existing programs have significantly increased opportunities for women and minority contractors.²⁵⁵ Perhaps of equal importance, these programs have become an integral part of the debate on racial and, to a lesser extent, gender equality and are now largely enmeshed as part of our government procurement process.²⁵⁶ Including family leave as part of that national dialogue would serve important political interests and might help us rethink existing policies that place the onus of child rearing on women.²⁵⁷ Another significant advantage of a set-aside program is that such a program places the incentive with employers to encourage their employees to take leave, rather than relying on employees to take action. As a result, employers would be far less likely to penalize their employees for taking leave because they will stand to benefit from the policy, and consequently men no longer would fear that they would be ostracized or penalized if they took their available leave.

With this in mind, inducing substantial numbers of men to take parental leave through a set-aside policy would have at least three important salutary effects. First, it would inject noise into the signal employers currently use to discriminate against women based on their

Business Administration's Section 8(a) Minority Enterprise Development Program, for example, more than \$6 billion is awarded annually to participating firms. See OFFICE OF MINORITY ENTER. DEV., U.S. SMALL BUS. ADMIN., REPORT TO CONGRESS ON MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT FOR FISCAL YEAR 1997, at 26 (1998).

255. See BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 59 (1998); Ayres & Vars, *supra* note 254, at 1592 (noting that "MBEs were actually 33 percent *more* likely to sell to the government than were nonminority firms"); John Lunn & Huey L. Perry, *Justifying Affirmative Action: Highway Construction in Louisiana*, 46 INDUS. & LAB. REL. REV. 464, 475 (1993) (finding that a federal requirement to include DBEs in highway construction contracts increased the number of minority and women-owned firms working on federally funded, as compared to state-funded, projects in Louisiana); Samuel L. Myers, Jr. & Tsze Chan, *Who Benefits from Minority Business Set-Asides? The Case of New Jersey*, 15 J. POL'Y ANALYSIS & MGMT. 202, 215 (1996) (finding that both the number of bids submitted and the contracts awarded increased significantly with set-asides but that success rates did not increase); William M. Rodgers III & William E. Spriggs, *The Effect of Federal Contractor Status on Racial Differences in Establishment-Level Employment Shares: 1979-1992*, 86 AM. ECON. REV. PAPERS & PROC. 290, 292 (1996) (finding that federal contractors increased hiring of African Americans).

256. Indeed, even though the set-aside programs have been under attack by a hostile Congress for a number of years, efforts to repeal the programs have been unsuccessful. See, e.g., James Dao, *Senate Stops Bid to End Road-Work Set-Asides*, N.Y. TIMES, Mar. 7, 1998, at A9 (noting that the "Senate strongly rejected an effort today to end a two-decade old program").

257. To some extent, family leave is already part of the national dialogue, and creating a set-aside program might add to its importance and relevance rather than introducing the issue into our national discourse.

projected labor force attachment, thereby making the signal even less accurate and presumably less valuable for employers. Once men begin to take leave, employers would no longer be able to assume that women would bring a disadvantage to the labor force that distinguishes them from men. This result is, in large measure, what occurred during the litigation over fetal protection policies in which companies sought to restrict their female, but not their male employees, from jobs where they would be exposed to high levels of lead, even though both men and women were being exposed to harmful levels in the workplace. When the Supreme Court struck down those policies as a form of gender discrimination, employers had a far stronger incentive to reduce lead levels for all of their employees because the relatively easy option of excluding women was no longer available.²⁵⁸ But such an effect can only occur if substantial, rather than token, numbers of men begin to take leave.

Relatedly, once more men begin to take leave, it may be possible to create a greater coalition for incorporating family leave into the workplace package of benefits. A primary reason that family leave remains a secondary, or tertiary, workplace benefit is that it generally concerns only women, and most employers do not feel a need to change their policies to attract more workers.²⁵⁹ If men began to take leave at levels that were commensurate with their stated interest, the issue would begin to affect all workers rather than just female workers, and then we might see family leave become part of the standard package of benefits, just like health insurance or workers' compensation. This is, in fact, the process that led to the adoption of workers' compensation legislation, which arose at the turn of the century as a result of the emergence of a broad confluence of interests between workers and employers.²⁶⁰ Incorporating family leave policies into the standard benefits package is likely to occur only when employers realize that the costs of allowing workers to take

258. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991). For a recent discussion of the case and the important role the union played, see DRUCILLA CORNELL, *AT THE HEART OF FREEDOM: FEMINISM, SEX, AND EQUALITY* 71-81 (1998).

259. See Rhode, *supra* note 139, at 592 ("As long as work and family conflicts remain primarily 'women's' issues, they are unlikely to receive adequate attention in decisionmaking structures dominated by men."); see also WILLIAMS, *supra* note 6, at 73-75 (discussing employers' resistance to adopting family friendly policies).

260. See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 330 (1998) (arguing that workers' compensation legislation succeeded where other progressive legislation failed because it received support from a broad range of interest groups).

leave are not as high as perceived and offer significant returns in loyalty and productivity.²⁶¹ This information, however, can be provided only through experimentation, which will require broader use of leave by both men and women.

Finally, and in some ways most importantly, the set-aside proposal effectively treats women, or more accurately the taking of leave at the time of the birth of a child, as the norm. Rather than requiring women to act like men as a means of moving toward equality, the idea advanced here requires men to act more like women and thereby seeks to alter our workplace expectations so that employers will expect their employees to take significant leave following the birth or adoption of a child. Taking this step forward may go a long way toward dissecting our existing gender norms and reducing some of the inequality that currently results from perceptions that are not supported by the data.²⁶² Along the same lines, changing the norms should help us move to a day when we no longer talk about female and male employees or their distinct work patterns, but instead can move to a less gendered work sphere.

Requiring employers to provide six weeks of paid leave likely would be met by vigorous opposition by employers and their representative groups, who would object to the potential costs of such a mandate.²⁶³ The costs of the proposal should not be ruinous, however, and quite possibly would not be even all that substantial. Currently, many employers provide forms of paid leave through other existing policies, such as sick leave and vacation time, and most

261. Although the data on the productivity gains from paid family leave policies are limited, many have argued that such policies will ultimately enhance worker productivity. *See, e.g.,* WEVER, *supra* note 7, at 18 (arguing that paid leave reduces "employee turnover and absenteeism rates"); WILLIAMS, *supra* note 6, at 92-94 (suggesting flexible work practices will increase productivity). The inertia described earlier coupled with the lack of good information currently may prevent more employers from adopting policies, and mandating the leave may expedite the development of efficient policies. *Cf.* John J. Donohue, III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1427 (1986) (arguing that antidiscrimination laws decrease profits of discriminators faster than the market).

262. Nancy Fraser has sought to create a similar model that combines the best features of the competing equality and difference models. Fraser concludes: "The key to achieving gender equity in a postindustrial welfare state . . . is to make women's current life-patterns the norm for everyone." FRASER, *supra* note 19, at 61. For a similar argument regarding the development of sexual harassment law, see generally Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

263. The early versions of what ultimately became the FMLA contained provisions for wage replacement, but these provisions quickly were dropped in the face of strong business opposition. *See* Marks, *supra* note 194, at 59-60 (discussing the early history of the FMLA and its opposition by business leaders).

women take advantage of whatever leave is available to them. For these employers, a mandated paid leave provision simply would shift women's leave-taking from one category to another, with the additional costs arising from the increased numbers of men who would take leave.²⁶⁴ It has been estimated that California's mandate to fund pregnancy leave through its disability insurance program added about 20% to the costs of that system.²⁶⁵ Even assuming a higher cost, say doubling the cost of disability insurance, the burden would still fall below that currently required by workers' compensation, as disability insurance is currently one of the lowest cost benefits offered by employers.²⁶⁶

Some portion of the costs of implementing paid leave arguably would be passed onto employees in the form of lower wages.²⁶⁷ Although this cost shifting may appear to be a significant disadvantage to the proposal, this effect is not unique to family leave but is equally true for other workplace benefits, such as workers' compensation or health insurance.²⁶⁸ A significant advantage of a set-

264. Any legitimate concern about increased costs could be met by amending the FMLA so that sick leave could be used on a discretionary basis for the six weeks of paid leave. Even under the existing law, employers have flexibility to require their employees to take various forms of leave before they utilize the unpaid leave provided by the FMLA. See 29 U.S.C. § 2612(d) (1994).

265. See WEVER, *supra* note 7, at 14.

266. The United States Department of Labor reports that in 1996 short-term and long-term disability combined accounted for approximately .3% of compensation costs. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION, 1986-98, at 9 tbl.1 (1998) (Sup. Docs. No. L 2.120/2-13). In contrast, health benefits accounted for 5.8% of compensation, and vacation pay totaled 3.0% of compensation. See *id.*

267. This was the finding of Jonathan Gruber's study of the effects of state mandates requiring the coverage of childbirth expenses in employer-provided insurance. See Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 639 (1994). Others estimate that there only will be a small effect on wages as a result of family leave mandates. See Waldfoegel, *supra* note 7, at 152 & n.17 (discussing studies). For additional discussions, see Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 389 (1991) (discussing the effects of mandatory product warranties for consumers); Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance*, in TAX POLICY AND THE ECONOMY 111, 112 (David Bradford ed., 1991) (concluding that employers shift workers' compensation costs to employees through lower wages, but that the costs only negligibly affect employment rates); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1492 (1998) (relying on the endowment effect to explain the ability to pass the costs onto employees); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. PAPERS & PROC. 177, 180-81 (1989) (concluding that mandated benefits should be valued as the difference between the employer's cost of furnishing the benefit and the value of the benefit to the employee).

268. Gruber and Krueger estimate that 85% of the cost of workers' compensation

aside program is that the costs are likely to be absorbed primarily by the government and, thus, shared more broadly by its citizens.

But given that there is nothing unique about the costs of family leave, the proper question is whether these costs are a tradeoff we are willing to make in order to reduce gender inequality in the workplace. As previously noted, the survey data suggest that workers strongly support paid leave provisions.²⁶⁹ Even if that were not the case, as a society we need to make a judgment regarding the importance of incorporating family leave into the standard package of benefits offered to employees.²⁷⁰ After all, many employees likely would express a willingness to work in hazardous conditions for greater pay, yet the workplace is closely regulated to reduce those hazards despite the effect the regulations have on labor demand. Accordingly, we need to get beyond the notion that only costless programs are politically feasible; as we saw in the discussion of the FMLA, costless programs generally provide commensurate benefits. If we are interested in improving the equality of women in the workplace, then the costs of a set-aside program or of requiring men to take leave will be well worth the costs and in the long run will offer far more in return.

CONCLUSION

At some point, something is going to have to give: either women are going to have to give up the hope of true workplace equality and relegate themselves to the position of secondary status within the workplace, or we will need to develop policies that relieve the existing penalty imposed on women in connection with having children. Improving women's human capital or trying to change women's employment behavior in other ways is unlikely to lead to greater progress; something more is needed. In this Article, I have argued

insurance was borne by workers and that the cost borne by employers likely reduced employment by .11%, or a little more than 100,000 jobs for the 90 million workers covered. See Gruber & Krueger, *supra* note 267, at 134. A recent study of Hawaii's legislation mandating that employers provide health insurance found that much of the cost of the program was passed on to workers in the form of lower wages, but that there was no apparent suppression of labor demand. See Norman K. Thurston, *Labor Market Effects of Hawaii's Mandatory Employer-Provided Health Insurance*, 51 INDUS. & LAB. REL. REV. 117, 130 (1997).

269. See National Partnership for Women and Families, *supra* note 12, at tbl.7.

270. This phenomenon appears to have occurred in other countries. For example, when asked about the costs of the extended leave mandated in Germany, one employer noted: "[W]e don't think about it[;] your question is like asking how we feel about workers receiving Sunday as a day off." Allen, *supra* note 239, at 257.

that we should find ways to encourage men to take leave surrounding the birth of a child and that we should do so by providing a minimum of six weeks of paid leave and by creating a contract set-aside program that would reward employers for encouraging their employees to take family leave. Making these changes would be only a start on the road to greater equality, but it would be an important step—indeed I believe the most important step—we could make toward greater workplace equality. This proposal would be well worth the costs, particularly given that the costs of our current system—in reduced opportunities and persistent gender inequality—remain all too high.