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1999]

THE LIMITED VISION OF THE FAMILY AND MEDICAL LEAVE ACT*

MICHAEL SELMI**

I. INTRODUCTION

THIS Symposium reflects how much things have, or have not, changed for working women in the last twenty years. In preparing for this Symposium, I came across the following passage, which nicely captures the current state of affairs for working women:

Despite the recent advances women have made in the labor market, the earnings gap between the sexes has [remained largely stagnant in the last ten years] Today, the average woman working full-time earns only [72%] as much as the average male worker. In addition, women continue to have fewer occupational choices than men; they remain heavily concentrated in a small number of occupations, many of which are routine, low-skilled and poorly paid. Moreover, within individual occupations, women are still clustered in lower job levels. In addition to the lower status accorded women workers, women have a substantially higher rate of unemployment than men. Although the labor market gap between the sexes can be attributed in part to overt discrimination against women, full and equal achievement in the work force is still beyond many women because the structure of the labor market makes participation extremely difficult for individuals with major child care responsibilities.¹

That paragraph is the first paragraph of an article authored by Mary Joe Frug twenty years ago, in which I have changed approximately ten words.²

Despite the lack of transformative change in the last two decades, there is still enough interpretative space on the issue of workplace equality for an optimist or pessimist to fill the proverbial glass with as much, or as little, water as he or she desires. Rising numbers of women are entering

* This Article was first presented as a speech on November 7, 1998 at the Thirty-Third Annual *Villanova Law Review* Symposium honoring the late Mary Joe Frug, entitled *Still Hostile After All These Years? Gender, Work & Family Revisited*.

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1. Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. Rev. 55, 55 (1979) (footnotes omitted).

2. *See id.* In the original article, Professor Frug noted that "the earnings gap between the sexes has grown larger during the past twenty years," which I altered to read "has remained largely stagnant in the last ten years." *Id.* Similarly, she indicated that the average woman earned 57% as much as the average male worker, which I have altered to 72%. *See id.*

the workforce in varied occupations at starting salaries largely commensurate with their male counterparts.³ Women are also breaking a large number of workplace barriers so that, for example, two women now sit on the Supreme Court, there is a female Attorney General and Secretary of State, and the states of California and Maine both have two female senators. Yet, as reflected above, we still talk too frequently about “firsts,” and it still remains almost inconceivable that there soon will be a female president, even though many of our global allies pierced that barrier long ago. Similarly, a persistent pay gap remains between men and women and a glass ceiling remains firmly in place in most sectors of our economy.

This half-full or half-empty phenomenon applies equally to issues surrounding family leave. In 1993, Congress passed the Family and Medical Leave Act⁴ (“FMLA”) to great acclaim; indeed, it was the first bill signed into law by President Clinton in a symbolic gesture to signal his support for easing the burden of working women.⁵ At the same time, as emphasized in this essay, the FMLA was primarily a symbolic act, which afforded no significant assistance to working women, or men, and has perhaps retarded progress on the family leave front more than it has plausibly helped. As detailed below, the FMLA essentially replicated what the market was already providing—unpaid leave for large employers. Further, based on the available data, the only tangible benefit the FMLA has provided is the largely unintended consequence of additional sick leave for the serious health problems of employees.⁶

There are a variety of reasons for this impact, which will be discussed in more detail shortly, but one important limitation pertains to the premise or foundation of the FMLA. With respect to family leave, it is possible to view the issue through two very different prisms. On the one hand, family leave may facilitate, or accommodate, the ability of women to balance work and family life—a vision that largely informs the current legislation. A different perspective might view family leave as a way of reducing or combating workplace discrimination—a vision that is perhaps reflected in the gender-neutral nature of the FMLA, but is otherwise absent from the legislation. It may be that these two viewpoints are related because both might foster greater workplace equality. Treating family leave as an issue of accommodation for women has the potential, however, to reinforce existing stereotypes and patterns of gendered parenting, which in combination will likely limit the effectiveness of the legislation—at least with respect to reducing workplace inequality.

3. See generally CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN, 10-57 (1990) (noting that number of adult women in workforce is drastically rising).

4. 29 U.S.C. §§ 2601-54 (1994).

5. For a discussion of the symbolic nature of the FMLA, see *infra* notes 44-70 and accompanying text.

6. For a discussion of the issues presented by the FMLA, see *infra* notes 5-36 and accompanying text.

This essay argues that the FMLA achieves neither of the above objectives and, in fact, most likely exacerbates, rather than remedies, existing inequalities. One reason for this theory has already been noted—the FMLA largely replicated leave that was already being offered, which creates the possibility that it will ultimately impede efforts to broaden family leave if the FMLA becomes the ceiling of offered benefits among employers. Equally important, the FMLA did little to attack the continuing dual labor market that still defines the workplace in relation to gender equity. Despite the more than thirty years of litigation involving Title VII of the Civil Rights Act of 1964⁷ and the Equal Pay Act,⁸ our society continues to perpetuate gender divisions by defining jobs in gendered ways. Borrowing from the dual labor market theory developed in a different context, male jobs remain the most valued by the market and society, which consequently creates higher salaries, more generous benefits and greater opportunities for advancement for men.⁹ In contrast, women's jobs are generally less valued by the market, are paid less and offer fewer benefits.

One advancement made in the last decade is the movement of women into traditionally male jobs provided, of course, women abide by the terms of those jobs, which typically means working long hours and embracing a general willingness to subordinate family concerns to work issues. By the same measure, men can generally opt for women's jobs, although a relatively insignificant number actually do. The FMLA has plainly not alleviated this gendered division of the labor market and because FMLA leave is unpaid, the act does little more than recreate the preexisting market incentives that apply to questions of childrearing. As a result, based on the existing data, more women than men take FMLA child-care related leave, and as I will discuss further, very few workers, men or women, actually utilize FMLA leave for childbearing purposes.

Rather than entrenching this division by trying to improve the quality of "female" jobs, I will suggest that a combination of the current tracks is necessary to create a new model where men begin to act more like women in the workplace. This requires finding ways to induce men to take more family-related leave and shoulder more of the burden for family issues, which may help break down some of the existing patterns and stereotypes.¹⁰ In this way, family leave would become akin to health and safety concerns—something employers are expected to consider and which is regulated as a social good in the labor market.

7. 42 U.S.C. § 2000a (1994).

8. 29 U.S.C. § 206 (1994).

9. *See, e.g.*, PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 170-83 (1971) (discussing gender inequality in labor markets).

10. *See* SUSAN CHIRA, A MOTHER'S PLACE 279 (1998) (cautioning, however, that these are not new calls, as "[f]or more than twenty years, women have been asking for higher-quality, more affordable child care, more participation from fathers, and more generous family leaves.").

Let me offer one example. It is well known that women earn about three quarters of what men earn.¹¹ If we eliminated that pay gap, it seems generally assumed that women's pay would rise to the level of men. More likely, women's salaries would be raised to the midway point between men and women, while men's salaries would be lowered to that same level because it seems quite likely that men are currently overpaid in the labor market, assuming that some of the gap is a result of discrimination. This essay seeks to find that median.

II. CONTINUING LABOR MARKET DISCRIMINATION

This essay is part of a larger work that assesses the FMLA's effect on the gender pay gap.¹² In this essay, I focus on the FMLA as a means to understand how the gender pay gap may be reduced even further. As a result, a brief analysis of the gender pay gap will be necessary.

As is well known, the gender pay gap diminished substantially in the 1980s, although further reductions have largely stagnated during the 1990s.¹³ According to the Bureau of Labor Statistics, women earn on average approximately 75% of what men earn; the actual difference, however, depends substantially on the age of the cohort being studied.¹⁴ Increasingly, younger women, when compared to older women, enter the workforce in greater salary parity with men, and pay differences are often tied to the particular segment of the workforce that is being studied.¹⁵

Numerous explanations for the persistence of the wage gap abound, and the most prevalent will be touched on here. It should be noted, however, both economics and sociology have provided endless study on the gender wage gap, and the two disciplines approach the problem quite differently. Within the economics literature, from which most of the data I discuss are drawn, economists are highly reluctant to view discrimination as a substantial component of the labor market, largely based on Gary Becker's elegant argument some forty years ago that discriminatory behavior should not survive in a competitive market.¹⁶ Consequently, economic

11. For a comparison of discrepancies of women's and men's wages, see *supra* note 9 and accompanying text.

12. See MICHAEL SELMI, FAMILY LEAVE AND THE GENDER PAY GAP (unpublished manuscript, on file with author).

13. See FRANCINE D. BLAU ET AL., THE ECONOMICS OF WOMEN, MEN AND WORK 136 (3d ed. 1998) (detailing gender pay gap).

14. See *id.* at 134-43 (setting forth female-to-male earnings ratios over past forty years). In 1995, the female-to-male ratio for full-time workers measured by weekly wages was 75.5%; when the measure is full-time annual earnings, the gap increases to 71.4%. See *id.*

15. See Margaret Mooney Marini & Pi-Ling Fan, *The Gender Gap in Earnings at Career Entry*, 62 AM. SOC. REV. 588, 597 (1997) (discussing how women in sample earned 84% of what men earned at career entry).

16. See generally GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 126-29 (1959) (analyzing effect of discrimination under market theory); see also GARY S. BECKER, A TREATISE ON THE FAMILY 53-79 (1991) (discussing role of gender in labor market); Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J.

approaches are exceedingly hesitant to conclude that discrimination affects labor market outcomes and instead tend to focus on how much of a particular model can explain existing conditions. In contrast, sociologists focus on the segregated nature of the workforce and view discrimination as a structural component of the labor market.¹⁷ These diverse approaches clearly influence the interpretation and presentation of the data in the various works. Therefore, it is often necessary to keep in mind the methodological bias in reviewing material.

A. *The Human Capital Explanation*

The pay differentials between men and women are most commonly attributed to differences in human capital investments—differences, in other words, between education and experience that create value on the labor market.¹⁸ The argument is premised on the notion that women invest less in education, training and work experience than their male counterparts, and it is generally thought that the lower levels of investment arise because of the likelihood that women will later leave the workforce, either permanently or temporarily, to have and to raise children. Numerous empirical studies firmly establish, however, that the human capital theory only partially explains the gender wage gap, accounting for somewhere between one-third to one-half of the pay differential between men and women.¹⁹

One reason the theory provides only limited insight into the differentials is that in the last two decades women have sharply narrowed the gaps in education and experience; more importantly, women have narrowed the human capital gap to a far greater extent than reflected in the wage gap.²⁰ This is particularly true with respect to education, where by the

LAB. ECON. S33, S55-56 (1985) (predicting decline of discrimination in competitive markets).

17. See, e.g., William P. Bridges, *The Sexual Segregation of Occupations: Theories of Labor Stratification in Industry*, 88 AM. J. SOC. 270, 270-72 (1982) (defining existence of organizational and structural discrimination against women in labor market); 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, 690-92 (1994) (analyzing sociological approaches to labor markets); see also Kenneth G. Dau-Schmidt, *Economics & Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 392-94 (1997) (discussing economic and sociological approaches to market discrimination).

18. See, e.g., Solomon William Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 REV. ECON. & STAT. 60, 65-69 (1981) (analyzing relationship between human capital investments and wage differences between men and women).

19. See GOLDIN, *supra* note 3, at 105 (canvassing studies with results ranging from 44% to 74%); Marini & Fan, *supra* note 15, at 590 (“In 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.”).

20. See William T. Bielby & Denise D. Bielby, *Cumulative Versus Continuous Disadvantage in an Unstructured Labor Market*, in GENDER INEQUALITY AT WORK 209, 223-

1980s, women matched men's college attendance rates, and by 1990, women constituted 54% of the college student body.²¹ Women also substantially narrowed the gap in fields of studies long thought to account for much of the earnings inequality.²² In the last two decades, women have likewise reduced existing disparities in experience, especially among more recent entrants to the workforce.²³ These data suggest that something other than human capital factors underlie the pay gap, although it is also important to emphasize that differences in human capital explain a significant portion of the gap.

In addition to education and experience, two related factors also help to explain the persistent wage gap. These factors are marriage and the presence of children, the combination of which offers about as much explanatory power as the traditional human capital factors. Men generally receive a wage premium for being married, while for women marriage has either a neutral or modestly negative effect on wages.²⁴ Having children, on the other hand, is generally a negative factor in the labor market for women, though neutral for men.²⁵

25 (Jerry A. Jacobs ed., 1995) (finding wage gap of 25% for female television writers 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) (noting "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").

21. See DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* 59 (1996) (comparing statistical college attendance rates between males and females). It is worth noting that some of the changes result from women's greater attendance at community colleges along with substantial numbers of older women returning to school, both of which are likely to offer relatively lower payoffs in the market place. See *id.*

22. See *id.* at 63. There were significant improvements at the graduate levels: women received 51.0% of Master's degrees and 35.4% of Doctorates in biology, and 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.*

23. See Francine D. Blau, *Trends in the Well-Being of American Women, 1970-95*, 36 J. ECON. LITERATURE 112, 119 (1998) ("[A]mong full-time workers, the gender difference in full-time experience declined from 7.5 years in 1979 to 4.6 years in 1988 . . ."); Allison J. Wellington, *Changes in The Male/Female Wage Gap, 1976-85*, 28 J. HUM. RESOURCES 383, 392-96 (1993) (concluding that changes in market experience for women explained significant portion of reduction in wage gap).

24. See, e.g., Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 J. HUM. RESOURCES 566, 566-67 (1996) (surveying literature on 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 or Changing Selection?*, 32 J. HUM. RESOURCES 481, 491 (1997) (finding that "the return to marriage for men fell by 45% over the 1980s").

25. See Sanders Korenman & David Neumark, *Marriage, Motherhood & Wages*, 27 J. HUM. RESOURCES 233, 236 (1992) (finding that marriage did not affect wage rates for women but presence of children did); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 147 (1998)

An interesting question is whether these factors should be treated as related to workplace productivity, and thus of particular interest to employers, or whether they reflect other concerns, such as the perception that women are likely to leave the workforce after they have children, or a perspective on the proper role of women. Some have argued, for example, that marriage makes men more productive employees, though the rationale behind this argument often proves elusive.²⁶ Indeed, recent evidence suggests that marriage is not a good proxy for productivity.²⁷ Additionally, in studying the wage gap, researchers rarely cite any evidence relating to actual measures of productivity and merely assume that employers' wage setting function is tied to productivity without sufficiently exploring that issue. As a result, all that is really known is that marriage and having children generally have a negative impact on women's wages and a more positive impact on men's wages.

One reason why marriage and having children may impact differentially on men and women is the gendered nature of housework and childcare. Indeed, the data suggest that women experience greater absences than men in the workplace when they have young children.²⁸ A recent study indicated that each additional child under six years old increased the probability of absence from work for women by more than 25%, while there was no substantial increase of missing work for men.²⁹ The amount of time spent on housework can also negatively affect wages, and as is well known, women perform about two to three times as much housework as men.³⁰ In a recent study, Professors Joni Hersch and Leslie Stratton docu-

(noting that "[h]aving children had positive or no effects for men, but very strongly negative effects for women . . .").

26. See, e.g., Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive*, 26 J. HUM. RESOURCES 282, 303-04 (1991) (suggesting marriage does increase productivity for men).

27. See Loh, *supra* note 24, at 572-74 (finding married men earned less money and worked fewer hours).

28. It is important to emphasize that the wage differentials are not entirely steeped in actual characteristics that seem relevant in the labor force. Sociologist Jane Waldfogel's recent comprehensive study on the effect of children on women's wages concluded: "[e]ven after controlling for human capital, unobserved heterogeneity, and part-time job status . . . [there is still] a 4 percent penalty for one child and a 12 percent penalty for two or more children." Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 216 (1997).

29. See Jessica Primoff Vistnes, *Gender Differences in Days Lost from Work Due to Illness*, 50 INDUS. & LAB. REL. REV. 304, 319 (1997) (discussing how number of young children affects women's likelihood of work absence); see also J.P. Leigh, *Sex Differences in Absenteeism*, 22 INDUS. REL. 349 (1983) (finding that presence of children under six increased absences for women but not for men).

30. See KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND* 62 (1995) (noting that men perform approximately 20% of household tasks); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996) (canvassing studies and concluding that women tend to perform about three times as much housework as men).

mented that, for women, time spent on housework negatively effects wages and explains as much as 10% of the gender wage gap.³¹

Another reason why men might be paid more than women is that men work in different kinds of jobs. Perhaps the most salient feature of the labor force is its continued gender segregation, as it is still rare that men and women work in the same job.³² Although it is true that men typically work in jobs with higher pay than women, there is less of a consensus that the pay differential is related to valuable job skills. At one time, it was commonly argued that men were paid more because they occupied more dangerous jobs than women or because they were trading higher wages for lower benefits.³³ Both of these theories, however, have been rather strongly refuted—the compensating differential theory seems devoid of empirical support and some of the recent evidence suggests that dangerous jobs pay unusually low wages.³⁴ Similarly, men generally work in jobs that have greater benefit packages than women, again indicating that women are not necessarily foregoing wages for other benefits.³⁵

These issues are more complicated and involved, however, than presented here; developing them fully would require more time and space than allotted and would go in a direction less related to the theory I wish to develop. This essay hopes to convey the idea that the persistent pay gap can be attributed to factors other than productivity, choices or preferences. Raising the issue of preference undoubtedly opens up a hugely controversial area, one that should be closed quickly, as at this stage of the debate, it is most likely not resolvable. There is no question that many women choose lower paying jobs or particular careers for a variety of com-

31. See Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects and Wages of Married Women*, 32 J. HUM. RESOURCES 285, 300-01 (1997) (discussing importance of gendered differences in housework time to gender wage gap). This study was based on a sample of more than 3500 individuals over a period ranging from 1979-87. See *id.* at 288. Though less substantial, the effect on men's wages was likewise statistically significant. See *id.* at 301.

32. See, e.g., 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 (1997) (finding that broad occupational categories underestimate 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 (1995) (finding that based upon data from 1970s and early 1980s, occupational segregation explained more than 80% of wage gap); Donald Tomakovic-Devey, *Sex Composition and Gendered Earnings Inequality*, in GENDER INEQUALITY AT WORK, *supra* note 20, at 38 (concluding that gender job segregation explains twice as much of wage gap than occupational segregation).

33. See Jerry A. Jacobs & Ronnie Steinberg, *Further Evidence on Compensating Differentials and the Gender Gap in Wages*, in GENDER INEQUALITY AT WORK, *supra* note 20, at 113-14 (discussing compensating wage theory); Kilbourne et al., *supra* note 17, at 704 (finding no support for notion that men are in less desirable or more dangerous jobs as explanation for wage gap).

34. See Jacobs & Steinberg, *supra* note 33, at 114 (finding that "workers suffer a wage penalty for working in unattractive jobs").

35. See JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* 55 (1994) (noting that women generally have fewer fringe benefits than men).

plicated reasons, some of which may stem entirely from personal preference—and even preference that is free of cultural influence. It seems far more likely, however, that choices are shaped, often in undefinable ways, by social influences making it ultimately too difficult to know whether someone chose a particular career because that was her true preference or because that choice seemed the best among the available opportunities. Suffice it to say, little compelling evidence exists that preferences, even if seen as autonomous, explain the persistent wage gap.

B. *Statistical Discrimination*

The human capital explanation feeds into a theory that is generally known as “statistical discrimination.” This is the notion that employers often rely on group information to make employment decisions due to the difficulty of acquiring accurate individual information.³⁶ In the context of gender, this theory often plays itself out through the notion that women will be more likely than men to leave the workforce to raise children. Assuming that such a labor market exit has costs, an employer may treat women differently based on the statistical likelihood that they may impose costs that men would not.

This form of discrimination is generally impermissible under the prevailing interpretation of Title VII, though it is also extremely difficult to prove.³⁷ Nevertheless, rather than concentrating on the lawfulness of statistical discrimination, the rationality of the practice will be discussed. In general, statistical discrimination is considered a rational employment practice and is often referred to as rational discrimination.³⁸ There are

36. See generally Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175 (1977) (stating that employers pay workers according to productivity predictions that are based on observed qualifications and employer’s prior beliefs; thus, groups whose performance is less reliably predicted or for which employer has negative prior beliefs will receive lower pay); Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340, 344 (1983) (noting how statistical discrimination leads employers to have presumptions about certain groups and that these presumptions will be used as basis of employment decision-making, which limits opportunities for members of affected groups, suppresses their wages and rebuts presumption that equality enhancing measures generally cause efficiency losses); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972) (discussing theory of statistical discrimination); Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 229, 232-33 (1986) (discussing conditions under which statistical discrimination is efficient).

37. See *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718 (1978) (invalidating city’s requirement that female employees make larger contributions to its pension fund than their male counterparts).

38. See EDMUND PHELPS, *REWARDING WORK* 61 (1997) (identifying “statistical discrimination” as “rational discrimination”); see also EDWARD MCCAFFERY, *TAXING WOMEN* 243 (1997) (“From the employer’s point of view, statistical discrimination is ‘rational’ or efficient and profit-maximizing.”); James Albrecht & Susan Vroman, *The Gender Gap in Compensation: 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

several facets to this argument. First, there is the old law and economics sawhorse that if it were not rational, the practice would ultimately be driven out of the market by competitive forces. This article brackets that discussion and simply states the now general consensus that discrimination persists even in those markets typically defined as competitive.³⁹ Relatedly, it is also assumed that the practice is rational because women remain the primary caretakers and, thus, an employer would be wise to take that fact into account.

That is not necessarily the case, however, and on this point, I want to enter a dissenting voice. Indeed, before we can determine whether a practice is properly viewed as rational, more must be known about the particular practice at issue. For example, the duration of most childbirth-related leave is short. Following childbirth, the majority of women return to work within six months and between 40% and 50% return within three months.⁴⁰ Moreover, most women ultimately return to work; as of 1992, 78% of women with school age children were working,⁴¹ and women with children were actually somewhat more likely to be in the workforce than those without.⁴² It is also the case, not surprisingly, that the best predictor of post-childbirth labor market attachment is the labor market pattern prior to giving birth.⁴³ In other words, those who had a consistent labor force attachment before the birth will likely return to work thereafter.

These facts alone cast doubt on the issue of efficiency. If most women return to work after six months, it makes little sense for an employer to assume that women are likely to leave the workforce permanently. It still remains true that women are more likely than men to leave the workforce

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.”).

39. See, e.g., Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1280-83 (1995) (discussing reasons discrimination persists despite competition); see also William A. Darity & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63, 67-69 (1998) (reviewing theories comprehensively).

40. See 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, 558 (1991) (“About 43 percent 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.”); Jacob A. 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.”).

41. See generally Howard Hayghe & Suzanne Bianchi, *Married Mothers Work Patterns: The Job-Family Compromise*, 117 MONTHLY LAB. REV. 24 (1994) (reporting Bureau of Labor Statistics).

42. See JULIA KIRK BLACKWELDER, *NOW HIRING: THE FEMINIZATION OF WORK IN THE UNITED STATES, 1900-95* (1997) (indicating that as of 1989, 58.4% of women with children under 6 were in workforce, 73.2% of women with children between 6-18 and 50.5% of women without children).

43. See Rebecca M. Blank, *Labor Market Dynamics and Part-Time Work*, in RESEARCH IN LABOR ECONOMICS 23 (Solomon W. Polacheck ed., 1998).

for child-related reasons, but men are more likely than women to leave for military service, workplace injuries and for other employment opportunities. Again, before it can be determined whether an employer is rationally discriminating against women because of the greater probability that they would leave the workforce after having children, the costs and gender division of other workplace exits should be factored in to determine whether child-related exits are substantially more costly than other exits.

Regardless of the particular approach or analysis, it seems clear that women continue to be disadvantaged in the workplace as a result of their greater likelihood of leaving the workforce to have and to rear children. This disadvantage has to do both with the actual labor market effects as reflected in human capital investments as well as employer perceptions. Addressing these issues requires breaking free from the pervasive gender stereotypes that continue to characterize our labor markets. It seems unlikely that greater progress will be made toward workplace equality until some of the existing gendered patterns of behavior that fuel perceptions and actions are dismantled or substantially disrupted.

In concrete terms, this will require, at a minimum, more men to take leave related to the birth of their child and to become more involved with childrearing. It will also require government intervention in the area of family leave, because the social costs of our current policies likely outweigh the private costs, thus limiting the incentive for employers to implement measures that correct the wage gap. For example, women's lower investments in human capital can be seen as socially wasteful because they are underutilizing their talent base. That underinvestment, however, is not likely to be felt, or alleviated, by a particular employer but rather will be spread more generally through society. Similarly, to the extent that our current policies adversely affect children, that too is likely to be better addressed through governmental rather than private action. In the next section, I will discuss how the FMLA might be amended to address these persistent disparities.

III. THE FAMILY AND MEDICAL LEAVE ACT

The FMLA was intended to alleviate some of the difficulties parents encounter in balancing work and family commitments.⁴⁴ This section explores the effects of the FMLA through an analysis of recent data relating to its use, to determine what difference the FMLA has actually made. Thereafter, I will suggest how the FMLA might be improved to address issues of gender inequality in the workplace.

44. *See* H.R. REP. NO. 103-1, at 7 (1993) (stating that purpose of FMLA is "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families").

A. *The Family and Medical Leave Act*

The FMLA provides up to twelve weeks of unpaid leave to certain employees working for employers having fifty or more employees.⁴⁵ In order to be eligible for the leave, the employee must have worked for the employer for at least one year and worked for that employer at least 1,250 hours during the previous twelve months.⁴⁶ Despite these restrictions, it is estimated that the FMLA covers approximately 60% of the nation's private sector workforce, and of these workers, approximately 46.5% are eligible to take leave.⁴⁷ Under the FMLA, an employee can take leave to care for a newborn, newly-adopted or foster child, for one's own serious illness, as well as to care for a seriously ill spouse, parent or child.⁴⁸ The Act also provides for job-protection in the form of a guarantee that ensures that at the end of the leave the employee will return to the same or substantially equivalent position, with some limited exceptions.⁴⁹

As previously noted, FMLA leave is unpaid, and the employer can require that an employee utilize her accumulated vacation or sick leave prior to taking leave to care for a new child that has been brought into the family.⁵⁰ 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 he or she fail to return to work from the leave.⁵¹

45. See 29 U.S.C. §§ 2611(2)(A)(i), 2611(B)(ii) (1994) (listing requirements for determining employee's eligibility for FMLA leave).

46. See 29 U.S.C. § 2611(2)(A)(i) (setting forth hour requirements that employees must meet to obtain leave).

47. See COMMISSION ON FAMILY AND MEDIAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE PRACTICES at 58-61 (1997) [hereinafter A WORKABLE BALANCE].

48. See 29 U.S.C. § 2612(a)(1)(1994) (listing length of time and reasons employee may leave work).

49. See 29 U.S.C. § 2614(a)(1)(1994) (discussing positions of employment available to eligible employees upon return to work at end of FMLA-protected leave). The statute exempts from this requirement those who are paid among the top ten percent of the workforce if restoring them would cause "substantial and grievous economic harm." 29 U.S.C. § 2614 (b) (listing certain exemptions concerning restoration of positions for highly compensated employees). 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 generally *Hubbard v. Blue Cross Blue Shield Ass'n*, 1 F. Supp. 2d 867 (N.D. Ill. 1998) (holding that employee had no greater right of reinstatement than if she had remained at work during period of leave and finding that if employee had remained at work, employer would have fired her).

50. See 29 U.S.C. § 2612(d)(2)(A) (specifying that "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave . . . for any part of the 12-week period").

51. See 29 U.S.C. § 2614(c)(1) (noting "employer shall maintain coverage under any 'group health plan' . . . for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment"). Subsection (c)(2) sets forth the criteria by which an

To understand the FMLA's effects, it is important to consider the type of leave available prior to the passage of the Act. The federal government periodically surveys employers to determine the kind and form of benefits they provide to employees. These estimates suggested that a majority of large employers, those employing more than one hundred employees, provided some form of leave that would enable women, but not necessarily men, to take time off around the birth of a child. In this regard, paid sick leave was the most common form of leave, although unpaid maternity leave was also provided by a substantial number of employers.⁵² Moreover, nearly 90% of full-time employees of firms employing more than one hundred employees were offered disability plans that included coverage for pregnancy related leaves.⁵³ 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 clerical employees.⁵⁴

In addition to the availability of employer-provided leave, at the time the FMLA was enacted, thirty-four states, as well as Puerto Rico and Washington, D.C., had some type of leave legislation in place.⁵⁵ The state statutes varied in their provisions—some offering 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.⁵⁶

Recent data confirm that the FMLA provided employees with little more than was previously available, with the largely unintended exception of providing some additional unpaid sick leave to employees. Although the statute is still young, the Commission on Family and Medical Leave commissioned two comprehensive studies to determine the use and cost of

employer may recover the premiums paid for maintaining coverage. See 29 U.S.C. § 2614(c)(2).

52. See Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments*, in *A WORKABLE BALANCE*, *supra* note 47, at 36 (noting that Employee Benefits Survey demonstrated that 56% of all employees had access to paid sick leave, while 37% of all employees had access to unpaid maternity leave and only 28% had access to paternity leave).

53. See 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* 94 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) (comparing effects of maternity leave under Pregnancy Discrimination Act of 1978 with leave under current statutory scheme).

54. See *A WORKABLE BALANCE*, *supra* note 47, at 37 (finding that "professional and technical workers in medium and large establishments had slightly higher level of access to unpaid parental leave . . . than clerical and sales workers . . . or blue-collar and service workers . . .").

55. See *id.* at 45 ("By the time of the enactment of the FMLA, thirty-four states, Puerto Rico and Washington, D.C., had enacted some type of maternity/family leave law.").

56. See *id.* at 44-49 (citing *Women's Legal Defense Fund, State Law and Regulations Guaranteeing Employees Their Jobs After Family and Medical Leaves* (1993), *U.S. Department of Labor, State Maternity/Family Leave Law* (1993)) (examining differences among state statutes and FMLA provisions).

the FMLA, and those studies offer important and revealing insights into the Act.⁵⁷

Both surveys found relatively low utilization rates under the FMLA—the employer survey indicated that 3.6 out of every one hundred employees at private-sector worksites took FMLA leave, while the employee survey found a utilization rate of just 2%.⁵⁸ These numbers represent those who took leave under the FMLA, a far larger number of employees took leave for a reason covered by the FMLA but only a small fraction (7% in the employee survey) took formal FMLA leave.⁵⁹

The surveys also collected data on who took leave and for what reason. Women took significantly more leave than men (58.2% compared to 41.8%), and the largest group of leave takers fell into the age group between thirty-five and forty-nine years old, suggesting that much of the leave was unlikely related to the birth or adoption of a child.⁶⁰ Indeed, 59% of those who took leave did so for their own health-related problem, and only 17.1% took leave for reasons related to the birth or adoption of a child.⁶¹

57. *See id.* at 21 (noting appropriation of Congressional funding to Commission for two major studies on employers and employees). 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. *See id.* at 23 (citing Employer Survey, conducted by Westat, which sampled random group of employers and interviewed respondents from 1,206 worksites). The Employee Survey, conducted by the University of Michigan Survey Research Center, targeted employees ages eighteen and over who lived in the United States, and who had been employed for pay any time within the last eighteen months between January 1, 1994 to the Summer of 1995 when the survey was conducted. *See id.* at 23-24 (noting methodological design of this incomparable survey of employees). The surveys sought to determine how employers and employees had responded to the FMLA's passage, the accompanying costs and FMLA's measurable benefits. *See id.* at 21 (explaining purpose of commissioned studies to "provide data on how employer policies were changing as a result of the new law; the relative costs and benefits to employers of providing family and medical leave; how employees were faring under the new law; and the nature of leave-taking for employees in both covered and non-covered firms").

58. *See id.* at 83 (detailing similar findings of utilization between studies). There is some indication that employer compliance with the FMLA was limited immediately following its passage which could suppress the number of individuals who took leave. *See Sue Shellenbarger, Many Employers Flout Family & 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 required leave). The utilization rates found by the surveys, however, largely replicated the studies of utilization rates that were done prior to the FMLA's enactment, and thus appear representative. *See generally* A WORKABLE BALANCE, *supra* note 47, at 36, 83 (discussing leave utilization before and after FMLA).

59. *See* A WORKABLE BALANCE, *supra* note 47, at 84 (describing results of studies). 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 id.* at 84 (detailing leave utilization).

60. *See id.* at 92.

61. *See id.* at 94 (documenting utilization of FMLA leave by employees for their own serious health conditions). Somewhat ironically, the employee survey

The median length of leave was ten days, and 75% of those who took leave returned within thirty-five days.⁶² A significant portion of FMLA leave to care for newborns lasted less than one week, though leave defined as “maternity-leave” tended to last substantially longer.⁶³ Finally, the costs of the FMLA to employers appear to be quite modest. More than two-thirds of employers covered the employee out on leave with other employees, and those who were replaced by a permanent hire tended to fall within the lowest income category.⁶⁴ Interestingly, more employers indicated that the benefits in terms of increased productivity outweighed whatever costs they incurred.⁶⁵

Based on this early survey data, it appears that the FMLA has had its greatest affect by allowing employees to take unpaid sick leave for a limited time—leave that may not have been available without the new legislation. Certainly there is no indication that the FMLA has greatly facilitated the balancing of work and family commitments, nor is there any evidence that it has induced men to play a greater role in the birth or adoption of a child, given how very short the leaves tend to be. It also appears that most people who are taking substantial amounts of leave are doing so under non-FMLA provided policies.⁶⁶ These non-FMLA policies were presuma-

found a higher level of leave related to child birth or adoption in worksites that were not covered by the FMLA, which accounted for approximately 21% of the FMLA related leave. *See id.* (noting that 3.8% of employees in covered agencies used leave for maternity whereas 6.9% of employees in non-covered agencies took such leave). Additionally, 13.3% of employees in covered agencies took leave for adoption, whereas 14.7% of employees in non-covered agencies took such leave. *See id.* (discussing data for those who took leave under FMLA).

62. *See id.* at 97 (stating that mean length of leave was 37 days, median was 10 days and 75% were off job for fewer than 35 days). The vast majority of employees returned to work following their leave, with only approximately 5.6% of all leave-takers failing to return. *See id.* at 113.

63. *See id.* at 97 (describing patterns in maternity-disability leave and that 37% of those who took leave to care for newborns returned to work within seven days). In contrast, 42.4% of maternity-disability leave lasted at least 12 weeks. *See id.* at 269, Tbl. 5.D. 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 four percent of the surveyed employees indicated that they needed leave but did not take it, with nearly two-thirds of these employees stating that they could not afford to take the leave. *See id.* at 98-99. Less than 10% of the needed but not taken leave 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 one's own health. *See id.* at 99 (providing data on those who were unable to take leave).

64. *See id.* at 102-03 (observing that assigning tasks to co-workers was most common method of covering work for employees out on leave). Workers in the lowest income bracket were the most likely, however, to be replaced by permanent hires, reflecting the probability that low income employees work in low skill level jobs that are less costly to replace. *See id.*

65. *See id.* at 131, Fig. 6.4 (noting that vast majority of covered work sites cite no noticeable effect on productivity).

66. *See id.* at 107. Perhaps the strongest indication of the relative unimportance of the FMLA is that 46.7% of employees reported receiving full wage replace-

bly in place prior to the passage of the FMLA, although it is also possible that some employers modified their plans in anticipation of its passage.

The fact that the FMLA largely replicates what employers were already providing raises the question why the legislation was seen as so important and why its advocates were willing to settle for such a weak form of parental leave. Certainly, one can argue for the importance of having federal legislation as a means of advancing the issue or as a first step in trying to bring family leave into the workplace. Yet, at the same time, the FMLA might also have significant negative effects so that, on balance, it may hurt more than it might help. One potential negative effect is that the FMLA may become the ceiling of offered benefits, thus, interfering with the market development as twelve weeks of unpaid leave becomes the industry standard. In all, the FMLA clearly has not offered much help in enabling working women to gain some balance between work and family life. Further, and to a large extent, family leave remains a women's issue, one for which all women are likely to continue to be penalized in the labor market.

B. *Rethinking Family Leave*

As noted earlier, improving the labor market condition of women will likely require involving men more with parental leave issues. How to accomplish that, however, is a far more difficult question. One apparent fix, though one that turns out to be politically impractical and less helpful than it might appear, is to offer paid leave. Evidence from countries that offer paid leave, however, is not particularly encouraging on its potential transformative effects.⁶⁷ In most countries, men are reluctant to take leave even when that leave is paid, and income disparities persist, though they are narrowed, in most countries with generous family leave policies.⁶⁸ Equally important, women have failed to advance on the promotional scale in a manner commensurate with the narrowing of the wage gap despite generous leave legislation.

As a result, offering paid leave will only be a partial fix, though an important one for most workers. There are, however, several other means to break the gender patterns that currently surround family leave. One option might be to force men to take a certain amount of leave, perhaps

ment for the leave, while another 19.6% indicated receiving partial pay—neither of which is required by the FMLA. *See id.*

67. *See, e.g.,* Joseph P. Allen, *European Infant Care Leaves: Foreign Perspectives on the Integration of Work and Family Roles*, in *THE PARENTAL LEAVE CRISIS* 263-64 (Edward F. Zigler & Meryl Frank eds., 1988) (noting that despite explicitly gender-neutral leave policies in Sweden, few tangible effects on sex-role distribution of child-rearing have manifested themselves).

68. *See, e.g.,* Linda Haas, *Nurturing Fathers & Working Mothers: Changing Gender Roles in Sweden*, in *MEN, WORK, & FAMILY* 258 (Jane C. Hood ed., 1993) (concluding that although Sweden is unparalleled in advances toward gender equality, further progress is needed as “[m]ost Swedish mothers work part-time in a narrow range of jobs with modest pay.”).

six weeks. This idea has certain advantages, primarily that it is likely to work, and it might force employers to assess the true costs of parental leave, rather than basing their decision on existing assumptions regarding the cost of such leave. Yet, the downsides probably outweigh its advantages—in particular, legal challenges (although an argument could be made to withstand a constitutional challenge); administrative difficulties such as determining whether the act would apply only to married men, or to all men, including those who are not in contact with their children; and various political challenges.

Accordingly, I suggest that we focus on creating incentives that might induce more men to take leave. Those incentives can be focused either on men or on their employers. If paid leave were a feasible option, one suggestion would be to amend the FMLA to provide at least six weeks of paid leave to men and women following the birth of the child and that the leave would have to be taken in its entirety or not at all. In other words, a parent would have to take the full six weeks of paid leave in order to receive any. Consistent with the existing legislation, six additional weeks of unpaid leave should also be made available to parents.

Providing six weeks of paid leave should induce some fathers to take parental leave, though it is difficult to know exactly how many. Although surveys continually indicate that men want to take leave, they so rarely do that we can only speculate about the likely effects of offering paid leave, especially since many men currently have access to some forms of paid leave.⁶⁹ If nothing else, offering six weeks of paid leave may help settle the question of whether men actually want to be involved in primary parenting because their excuses for not taking leave would be substantially reduced.⁷⁰ Indeed, men's work situation would be much like that currently confronted by women—although they may suffer adverse consequences for taking leave, they would have recourse to legal action.

As noted earlier, however, it is quite likely that substantial numbers of men will not take the guaranteed leave, even if it were paid, particularly if they have accrued vacation time available that would satisfy their preference for a short leave. In that case, it would be necessary to take stronger measures to induce greater levels of leave taking, which may include re-

69. See, e.g., Ellen Galinsky et al., *The Role of Employers in Addressing the Needs of Employed Parents*, 52 J. SOC. ISSUES 111, 116-18 (1996) (finding both men and women would prefer to work less, and both equally likely to trade salary for greater child assistance benefits). One recent poll indicates that men and women supported (by substantial margins) expanding the FMLA to small employers and supported providing 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 (1998) (noting support for expanded forms of family leave through expansion of unemployment or disability insurance).

70. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1089-93 (1994) (discussing reasons men do not take leave). This, of course, depends on one's perspective. Professor Malin has made the rather incredible suggestion that men may need to avail themselves of sexual harassment doctrine to counter the hostile work environments that confront men who try to take leave. See *id.*

quiring men to take six weeks of leave, as suggested earlier, although creating additional incentives to get men to take leave could perhaps be accomplished through other means as well. For example, one method could involve tying federal contracts to employers' records regarding the utilization rates of their parental leave policies—creating, in other words, a set aside program based on gender equity in the workplace. Employers who have a strong record of men taking leave that exceeds comparable employers might be eligible for a designated percentage of federal contracts akin to the existing programs for disadvantaged businesses. Shifting the incentive to employers would also help alleviate concern that those taking leave will likely suffer some penalty, as the employer would directly benefit by having its employees take leave.

To meet any objections relating to a gender specific program, there is a readily available gender neutral program that would serve the purpose of rewarding employers for enticing their male employees to take leave. Participation in the program could be triggered when at least 30% of their male and female employees have availed themselves of the paid leave. Because women at almost any level are likely to meet the requirement for paid leave, the gender neutral standard would be triggered by the participation of the male employees.

To be sure, this kind of a program would carry substantial costs, particularly if paid leave is part of the leave package. Yet, the fact that there would be some financial costs should not sound the death knell of the legislation. The reality is that mandated benefits are most likely to be passed on to employees in the form of lower wages, a cost that may be as inevitable as it is regrettable and which should be seen as a trade-off we are willing to make in order to reduce gender inequality and perhaps improve care of infants.⁷¹ These costs may fall disproportionately on lower-income workers, as do the trade-offs we currently make for any form of mandated benefits such as workers compensation or health and safety regulations. It is also true, however, that lower-income workers currently benefit the least from the FMLA because they are the ones who can least afford to avail themselves of the unpaid leave. Thus, they will essentially be paying a small cost for an important, and currently unavailable, benefit.

It is imperative that family leave become an integral part of the standard package of worker benefits, as is currently true for worker's compensation and disability benefits. In 1991, workers' compensation benefits totaled \$42 billion dollars, an amount representing two percent of employ-

71. See Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 630-33 (1994) (finding costs of state mandates largely passed onto workers); see also Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 369 (1991) (discussing effects of mandatory product warranties for consumers); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1480 (1998) (relying on endowment effect to explain ability to pass costs on to employees).

ers' payrolls.⁷² Yet, no cries are heard to repeal worker's compensation laws, as society has determined that those costs are worth the protection workers obtain from having some well defined scheme to recover for workplace injuries. Ultimately, the same determination must be made with respect to family leave legislation, and the costs should not stand in the way of revising the legislation.

Finally, it should be noted that inducing substantial numbers of men to take parental leave would have two important effects. First, it would inject noise into the signal employers currently use to discriminate against women based on their projected labor force attachment, and thereby render the signal less accurate and less valuable for employers. Second, and equally important, the 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 more like men as a means of moving toward equality, the idea advanced here requires men to act like women.

IV. CONCLUSION

This is a brief look at a difficult but critical problem, one that we have made, in my judgment, too little progress on in the last twenty years. Whether substantial progress will be made in the near future will depend on whether we can revision the workplace so that being a parent, having and taking care of children, is valued in practice as much as we say it is in theory. To that end, we must make family leave part of the standard benefits package offered to workers, and to avoid the problems we currently face we also need to find ways to induce men to take more leave. We need to think of creative ways to do so, realizing that our current legislation falls far short of moving us forward on the important scale of gender equity in the workplace.

72. See Jack Schmulowitz, *Workers' Compensation: Coverage, Benefits and Costs*, 1992-93, SOC. SEC. BULL., June 1, 1995.

