

1-20-2007

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Laura T. Kessler

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### Recommended Citation

Laura T. Kessler *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 Pepp. L. Rev. 2 (2007)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol34/iss2/10>

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# Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict

Laura T. Kessler\*

- I. INTRODUCTION: THE INTERACTION OF GENDER BIAS AND WORK/FAMILY CONFLICT
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“Everything should be made as simple as possible, but not simpler.”  
—Albert Einstein<sup>1</sup>

## I. INTRODUCTION: THE INTERACTION OF GENDER BIAS AND WORK/FAMILY CONFLICT

A number of frameworks can help us think about work/family conflict. In the short space I have here, I will focus on framing the problem of work/family conflict as a form of sex discrimination. This may seem obvious, given that conflicts between work and family take their greatest toll on women and gender-nonconforming men.<sup>2</sup> Yet in employment discrimination disputes, legal scholarship, and political discourse more

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\* Associate Professor of Law, University of Utah. Many thanks to Kathy Baker, Richard Block, Martha Ertman, Carrie Menkel-Meadow, Janelle Shubert, Peggie Smith, and Matthew Weinstein for their helpful comments; to the *Pepperdine Law Review* for inviting me to participate in this symposium; to Kathy Abrams, Martha Fineman, Vicki Schultz, Susan Sturm, Virginia Valian, and Joan Williams for their foundational theoretical contributions to this work; and to the S. J. Quinney College of Law summer research program for financial support. All rights reserved December 15, 2006.

1. This quote, or something to similar effect, is widely attributed to Albert Einstein. See N. DAVID MERMIN, *IT'S ABOUT TIME: UNDERSTANDING EINSTEIN'S RELATIVITY* xiv (2005).

2. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 3 (2000); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386-89 (2001); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 *passim* (1994).

generally, it is actually an open question whether work/family conflict is a discrimination problem, at least one for which employers should be held responsible. Therefore, it is important when having a conversation about the topic of work/family conflict to get back to basics. Toward that end, I will focus on demonstrating that many of the theories commonly used to illustrate an absence of employment discrimination in the context of work/family conflict actually fit quite nicely within the discrimination box.

The other thing I wish to do here is to contextualize the problem of work/family conflict within the larger issue of gender bias in the workplace. In many academic conversations about sex-discrimination in the workplace, gender bias and work/family conflict are conceptualized as separate problems. According to this approach, each has distinct causes, constituencies, and (sometimes conflicting) solutions.<sup>3</sup> With a few exceptions,<sup>4</sup> gender bias in these conversations is constructed as a type of stereotyping that *people do*, whereas work/family conflict is largely regarded as a form of structural discrimination arising from the organization of work itself. However, recent and more sophisticated research on employment discrimination has shown that what formerly was understood as “first generation” animus or stereotyping claims are often a function of unconscious behavior, subtle interactions among workers, and workplace structures that reinforce discriminatory behavior by individual actors.<sup>5</sup> At the same time, other research has shown how work/family conflict may interact with, and actually amplify, gender bias at work.<sup>6</sup> Thus, as we gain a better understanding from social scientists about how discrimination actually works, the separation of gender bias and work/family conflict into separate categories becomes increasingly inadequate when trying to analyze and ameliorate inequality in the workplace.

With this in mind, this symposium contribution moves beyond the specific issue of work/family conflict and discusses gender discrimination within the workplace more generally, describing how each contributes to and works together to produce inequality for women in the workplace. Because I have just completed a study of family leave policies and practices in American law schools,<sup>7</sup> I will illustrate my points in this essay with

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3. See, e.g., Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); Kessler, *supra* note 2; Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994); Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

4. See WILLIAMS, *supra* note 2; Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

5. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-74 (2001).

6. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90-102 (2003).

7. Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661 (2006).

examples from law school workplaces, but they apply equally to other professional settings.

The most striking thing about legal academia is the existence of a glass ceiling for women law professors. If one looks at the top of the legal academy, it is nothing like 50-50. It looks nothing like the beginning of the pipeline, despite the fact that women have been graduating from law schools in equal proportion to men for some time.<sup>8</sup> For example, in 2005, just 19% of law school deans were women.<sup>9</sup> As one goes down the pyramid, one can see the classic glass ceiling pattern: women constitute 25% of tenured full professors,<sup>10</sup> 45% of associate professors,<sup>11</sup> and 46% of assistant tenured or tenure-track professors.<sup>12</sup> This glass ceiling pattern is most striking at the most highly ranked law schools, which exhibit an even steeper pyramid.<sup>13</sup> In addition, job segregation by sex is pervasive in law schools. Women disproportionately hold lower-status, lower-paying, non-tenure-track jobs.<sup>14</sup> There truly is a pink ghetto<sup>15</sup> inside law schools, and it reaches well beyond

8. See, e.g., RICHARD A. WHITE, ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 36 tbl.5A (2005), available at [http://www.aals.org/documents/statistics/Report\\_tables\\_0405.pdf](http://www.aals.org/documents/statistics/Report_tables_0405.pdf).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419 (2004). Specifically, in 2003-04, all but two of the thirteen highly-ranked "producer" law schools fell below the national percentage of female tenured and tenure-track faculty, which was 28.3% in 2003-04. *Id.* at 439 tbl.12. Eight fell substantially below the national percentage, with women tenured and tenure-track professors making up just 16% to 21% of their faculties. *Id.* Five of the thirteen producer schools identified had the same or *smaller* percentage of female tenured and tenure-track faculty in 2003-04 than they did in 1996-99. *Id.* at 439-40. The thirteen producer law schools and their corresponding female faculty percentages in 2003-04 were: NYU (33%), Georgetown (32%), Stanford (28%), Chicago (27%), Michigan (25%), Columbia (21%), Yale (20%), Virginia (20%), Duke (20%), Northwestern (20%), Harvard (19%), Berkeley (19%), and Pennsylvania (16%). *Id.* at 439 tbl.12.

14. See WHITE, *supra* note 8, at 3 tbl.1A. In 2004-05, women comprised approximately two-thirds of contract assistant (65.3%) and associate professors (62.2%), lecturers and instructors (66.3%), and assistant deans without the title professor (68.3%). *Id.* These figures have remained consistent for over a decade. *Id.* at 41-47 tbl.6C. For example, the percentage of women lecturers and instructors has hovered around 65-70% for fourteen years. *Id.* Along the same lines, in 2005, women comprised nearly two-thirds or more of all academic law librarians, except for library directors or computer librarians. See AM. ASS'N OF LAW LIBRARIES, THE AALL BIENNIAL SALARY SURVEY & ORGANIZATIONAL CHARACTERISTICS (2005) (showing that 67.9% of assistant library directors, 65.3% of supervisory librarians, 76.3% of acquisitions librarians, 67.9% of catalog librarians, 75% of circulation/interlibrary loan librarians, and 60.9% of reference librarians were women (calculated from statistical tables S-37, S-39, S-44, S-45, S-48, S-50)). *Id.* Along the same lines, 50.6% of law library directors, 41.7% of computer librarians, and 24.1% of computer technicians were women. *Id.* (calculated from statistical tables S-35, S-41, S-57).

15. The term "pink ghetto" is used to describe low-wage, low-status jobs traditionally filled by

the secretaries.<sup>16</sup> There is nothing unique about these patterns. We see them in law firms,<sup>17</sup> in medicine,<sup>18</sup> and in business.<sup>19</sup> What explains them?

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women.

16. See Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 1-15 (2000); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 575-76 (2000); Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 778-79 (2001); Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L.J. 1, 1-12 (2005); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3 *passim* (2001).

17. See AM. BAR ASS'N, *THE UNFINISHED AGENDA: A REPORT ON THE STATUS OF WOMEN IN THE LEGAL PROFESSION* (2001) (discussing studies on the secondary status of women in the legal profession); AM. BAR ASS'N, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* (2006) (finding that women of color are leaving law firms in droves because of discrimination); KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, *GENDER AND LAW* 198-99 (2002) (summarizing research on the glass ceiling in business and law); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *DIVERSITY IN LAW FIRMS* 5 (2003), available at <http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf> (citing evidence demonstrating that women have "fared poorly" in the "up and out" system of large national law firms); Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 302-303 (1995) (finding that women's progress in law firms fell far short of those of men); Wynn R. Huang, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J.L. & SOC. PROBS. 267, 268-69 (1997) (finding that female lawyers are less likely to obtain partnership status, receive significantly smaller income premiums when they do become partners, are more likely than men to be financially penalized for taking time out of the labor force, and suffer gender-based wage discrimination that cannot be attributed to human capital factors); Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 229, 250-53 (2000) (finding that women's overrepresentation in less prestigious and less remunerative settings and their underrepresentation in law firm partnerships is not fully explained by individual choices or differences in human capital).

18. See VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 208-09 (1998) (reviewing data showing that women are underrepresented in the most prestigious medical fields and that over time, women physician's salaries lag behind those of men); Arlene S. Ash et al., *Compensation and Advancement of Women in Academic Medicine: Is There Equity?*, 141 ANNALS INTERNAL MED. 205, 209 (2004) (finding that women in academic medicine have not reached senior academic ranks in proportion to their representation in medical school faculties and that they are significantly less likely to be full professors than comparably credentialed men); Sherrie H. Kaplan et al., *Sex Differences in Academic Achievement*, 335 NEW ENG. J. MED. 1282, 1283 (1996) (finding that at every rank, except that of instructor, there were proportionately more men than women in academic pediatric departments, that this disparity was most pronounced in the senior ranks, and that women were less likely to work in elite subspecialties); Lynn Nonnemaker, *Women Physicians in Academic Medicine*, 342 NEW ENG. J. MED. 399, 402, 404 (2000) (finding that the proportion of women who advanced to the senior ranks of academic medicine was lower than that of their male colleagues and that women were overrepresented in specialties such as pediatrics).

19. See BARTLETT ET AL., *supra* note 17, at 198 (summarizing research on the glass ceiling in business); CATALYST, *2005 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500*, at 17, 36 fig.14 (2005) [hereinafter 2005 CATALYST CENSUS] (documenting occupational segregation and the glass ceiling for women in business); CATALYST, *WOMEN IN BUSINESS: A SNAPSHOT I* (2004) (reporting that "[w]omen fill only 9.9% of the total line positions held by corporate officers compared to men who fill 90.1%"), available at <http://www.catalyst.org/files/fact/Snapshot%202004.pdf>; VALIAN, *supra* note 18, at 194-95 (finding that although the evidence is not "clear cut," women with master's degrees in business administration tend to be employed in staff (non-policy) positions in lower-paying sectors); Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3, 17-18 (2001) (finding that women top executives are more common at small rather than

First, a voluminous body of social science research demonstrates that unlawful gender discrimination persists inside the workplace. Although there is no question that old-fashioned overt hostility toward women employees still exists,<sup>20</sup> much of this contemporary discrimination is quite subtle. As Susan Sturm explains, “The glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.”<sup>21</sup> Studies demonstrate that this type of “second generation”<sup>22</sup> discrimination exists across various types of workplaces and professions.<sup>23</sup> Given my limited space here, I will provide some examples from legal and medical academia.

Women law faculty are less likely than their male colleagues to enjoy a presumption of competence,<sup>24</sup> may receive fewer opportunities for mentoring,<sup>25</sup> are disproportionately burdened with service obligations,<sup>26</sup> and often experience subtle “micro-aggressions.”<sup>27</sup> In all of these areas, women

large firms); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to their Advancement*, 65 MD. L. REV. 579, 580 (2006) (“[W]omen account for nearly half of the labor force, but only about thirteen percent of available board seats at Fortune 500 corporations. . . . despite the fact that women have accounted for an increasingly larger portion of the workforce for decades.”).

20. See, e.g., *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 845 (9th Cir. 2002) (“There were ‘so many’ incidents, it was difficult for her to recount them all.”); Michael L. Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1, 30 (2005).

21. See Sturm, *supra* note 5, at 469.

22. *Id.* at 458.

23. See VALIAN, *supra* note 18, at 126-44, 187-216.

24. See Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 344 (1996) (describing a student’s request that a grade given by his female professor be reviewed by a male colleague, and the colleague’s acquiescence without consulting the female professor). Along the same lines, on the first day of my civil procedure class, a first-year student once raised his hand and said, “This isn’t the way we are supposed to be learning law.”

25. See Catharine Pierce Wells, *The Perils of Race and Gender in a World of Legal Abstraction*, 34 U.S.F. L. REV. 523, 528 (2000) (describing the professional isolation of women and minority law professors).

26. See Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993, 997-1006 (1997); Celia Wells, *Women Law Professors-Negotiating and Transcending Gender Identities at Work*, 10 FEMINIST LEGAL STUD. 1, 16-18 (2002); cf. Devon W. Carbedo & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157 *passim* (2003) (discussing the disproportionate service obligations placed on untenured faculty of color).

27. See Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 687 (1985) (coining the term “micro-aggression”); see also Wells, *supra* note 25, at 528-30 (2000) (describing a student organization event meant to parody a student-sponsored symposium on women’s rights).

of color suffer the worst disadvantages.<sup>28</sup> Women faculty members in medicine also report a poorer quality of mentorship, less adequate institutional support for their research, and less overall career satisfaction than their male counterparts.<sup>29</sup>

Although work/family conflict is often conceptualized as a distinct problem from these types of gender bias, being pregnant, taking a family leave, or simply having children tends to amplify these “built-in headwinds.”<sup>30</sup> They do so in two ways: First, parenthood makes an employee’s gender more salient in the workplace, especially women’s.<sup>31</sup> Second, it can trigger an independent set of caregiver stereotypes.<sup>32</sup>

A description of a recent study of the “motherhood penalty” authored by sociologists Shelley Correll and Stephen Benard at Cornell University helps to illustrate this phenomenon.<sup>33</sup> Correll and Benard sought to address one of the significant limitations of earlier studies on the wage penalty for mothers.<sup>34</sup> Survey research finds that mothers suffer a substantial per-child wage penalty that is not explained by human capital or occupational factors.<sup>35</sup> Despite clear documentation of this pattern, the cause remains uncertain, because existing research has not been able to definitively distinguish between productivity and discrimination explanations for the motherhood wage penalty.<sup>36</sup>

Correll and Benard designed a study enabling them to control for productivity.<sup>37</sup> They conducted a laboratory experiment in which participants evaluated application materials for a pair of same race, same gender job applicants who were equally qualified but differed only on

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28. See Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 482 (2003). It should not be surprising, therefore, that women of color do significantly worse than non-minority women on virtually all of the AALS measures of status. See WHITE, *supra* note 8.

29. See Kaplan et al., *supra* note 18, at 1287.

30. *Griggs v. Duke Power Co.*, 91 S. Ct. 849, 854 (1971).

31. See Williams & Segal, *supra* note 6, at 90-102.

32. *Id.*

33. Shelley J. Correll & Stephen Benard, *Getting a Job: Is There a Motherhood Penalty?*, AM. J. SOC. (forthcoming 2007) (manuscript at <http://stuff.mit.edu/afs/athena/course/other/econsocseminar/www/Getting%20A%20Job.doc>).

34. See *id.* (manuscript at 3-5).

35. See Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUST. & LAB. REL. REV. 273, 273-76 (2003) (finding a wage penalty for motherhood of approximately five percent for one child and seven percent for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219-20 (2001) (finding a wage penalty for motherhood of approximately seven percent per child).

36. Cf. Anderson, Binder & Krause, *supra* note 35, at 290-92 (indirectly ruling out productivity explanations for the motherhood wage penalty from their unexpected finding that college-educated mothers, whose jobs likely required significantly more effort than less educated women’s jobs, suffered a lower wage penalty than mothers with only a high-school degree).

37. Correll & Benard, *supra* note 33, at 4-5.

parental status.<sup>38</sup> The results were striking: Mothers were rated as less competent; less committed; less suitable for hire, promotion, and management training; and deserving of lower salaries.<sup>39</sup> In a series of hypothetical questions about the applicant, mothers were also held to higher performance and punctuality standards.<sup>40</sup> Men were not penalized for being parents.<sup>41</sup> In fact, they appeared to benefit from having children on some measures.<sup>42</sup>

The discrimination suggested by Correll and Benard's findings might be rational from an economic standpoint if mothers, on average, are more costly to employ because they are less productive or take more time off from work than non-mothers. However, this theory is contested in the social science literature.<sup>43</sup> Moreover, even if rational, such discrimination would be illegal.<sup>44</sup> Accordingly, the Correll and Benard study strongly suggests the existence of illegal sex discrimination. Like the subtle processes described in Susan Sturm's research<sup>45</sup> discussed earlier, the discrimination observed in this study was likely not the product of conscious animus toward mothers. Indeed, research shows that most people exhibit a combination of positive and negative attitudes about working mothers, leading to complex patterns of "benevolent" discrimination involving both helping behaviors and passive harm such as social exclusion.<sup>46</sup> There is a robust debate as to whether employers should be held responsible for the subtle types of employment discrimination discussed in this section. I briefly review this debate in the next two parts.

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38. *Id.* at 14-22.

39. *Id.* at 22-23.

40. *Id.* at 23.

41. *Id.*

42. *Id.* Correll & Benard's findings are corroborated by other studies. See, e.g., Amy J. C. Cuddy et al., *When Professional Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

43. Compare Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. 33, 55 (1985), with Anderson, Binder & Krause, *supra* note 35 and Budig & England, *supra* note 35.

44. See, e.g., *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

45. See Sturm, *supra* note 5, *passim*.

46. See Cuddy et al., *supra* note 42, at 703-04, 705-06 (summarizing research finding that homemakers and mothers are often stereotyped as warm but incompetent and that they are often liked but disrespected); Williams & Segal, *supra* note 6, at 95 (reviewing studies on benevolent stereotyping).



## II. ACCIDENTS, OPT-OUTS, AND OTHER NON-STRUCTURAL EXPLANATIONS

Citing a host of factors allegedly outside the control of employers, scholars and the popular media have tended to downplay the role of discrimination in workplace inequality. For example, law professor Amy Wax has compared second generation employment discrimination to an “accident.”<sup>47</sup> She suggests that if subtle bias operates at an unconscious level, attaching liability to it will “do little to advance the cause of fair and accurate compensation for victims.”<sup>48</sup> This is because fact-finders will be prone to error in assessing its actual incidence, and because employers will not be able to internalize liability if they cannot control it.<sup>49</sup> One conclusion we could reach from the accident analogy is that an insurance system should be instituted to compensate victims of employment discrimination—perhaps a government system, as in the case of a mass disaster<sup>50</sup> or a public/private system like worker’s compensation and unemployment insurance.<sup>51</sup> But Wax endorses no such proposal, because such an insurance system could never be sufficiently accurate in her view.<sup>52</sup> In its absence, we are left with the simpler idea of “accident” as an employee’s personal tragedy, for which employers can not fairly be held responsible.

The idea that women are autonomous, unsituated actors fully responsible for their secondary position in the workforce has also received a great deal of recent attention in the media. Lisa Belkin reported in the *New York Times Magazine* in 2003 that highly educated women are part of an “Opt-Out Revolution”.<sup>53</sup> “Why don’t women run the world? . . . [B]ecause they don’t want to.”<sup>54</sup> According to the article, women’s relative absence in senior positions in corporations and law firms is explained by their preferences for motherhood and homemaking.<sup>55</sup> Similarly, in late 2005, a front-page *New York Times* story reported that sixty percent of female students at Yale planned to retreat from promising careers and become stay-at-home mothers once they had children.<sup>56</sup> Even former Harvard University

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47. See Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1145 (1999).

48. *Id.* at 1134.

49. *Id.* at 1130-34.

50. See Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC’Y REV. 257 *passim* (1999).

51. It may be argued that employment discrimination law is moving in that direction anyway, notwithstanding Wax’s opposition to an insurance system. See *Desert Palace, Inc. v Costa*, 539 U.S. 90, 99-100 (2003) (making the “mixed-motive” theory of discrimination available in all Title VII cases, which in practice makes it easier to prove discrimination while potentially severely limiting damages).

52. See Wax, *supra* note 47, at 1206-25.

53. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42.

54. *Id.* at 45.

55. *Id.*

56. See Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

President Lawrence Summers suggested last year that women prefer motherhood over the demands of “high-powered intense work.”<sup>57</sup> These popular depictions of women construct the glass ceiling and pink ghetto as the product of women’s personal choices.

To be sure, it could be that some very privileged women have enough economic clout to fashion a more balanced work and family life. However, national labor force data suggest we should be skeptical about claims of a revolution.<sup>58</sup> Approximately two-thirds of married mothers and three-quarters of unmarried mothers with children under eighteen years old participate in the labor force.<sup>59</sup> Both parents were employed in almost two-thirds of married-couple families with children in 2005.<sup>60</sup> And the average “off ramp” for professional women who become mothers is approximately one year or less; for a significant portion, it is just a few months.<sup>61</sup> In sum, there is no “opt-out revolution,” not even a mini one.

At the same time, one cannot deny that there is a labor force attachment gap between women and men, at least for short periods of time during peak childbearing years and especially for women with young children. In 2005, while 95.4% of men with children less than six years old participated in the labor force, just 62.8% of such women did.<sup>62</sup> Moreover, labor force participation rates merely indicate whether individuals are working.<sup>63</sup> They do not reveal the quality or extent of labor force participation, for example, whether it is full-time, part-time, permanent, or temporary.<sup>64</sup> If we look more closely at the quality of women’s employment, the existence of an attachment gap is further confirmed.<sup>65</sup> For example, in 2005, 25.2% of women worked part-time, compared with just 10.7% of men.<sup>66</sup> In addition,

57. See Lawrence H. Summers, *Remarks at NBER Conference on Diversifying the Science & Engineering Workforce*, Jan. 14, 2005, <http://www.president.harvard.edu/speeches/2005/nber.html>.

58. See Press Release, U.S. Dep’t of Labor, *Employment Characteristics of Families in 2005* (April 27, 2006), <http://www.bls.gov/news.release/pdf/famee.pdf> [hereinafter Press Release].

59. *Id.*

60. *Id.*

61. See Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV., Mar. 2005, at 46; Julia Overturf Johnson & Barbara Downs, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2000*, BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REP., P70-103, at 17 (2005), available at <http://www.census.gov/prod/2005pubs/p70-103.pdf> (reporting that more than sixty-five percent of women now return to work within a year of having babies and work later into their pregnancies, often until the last month).

62. See Press Release, *supra* note 58, at tbl.5.

63. Howard V. Hayghe & Suzanne M. Bianchi, *Married Mothers’ Work Patterns: The Job-Family Compromise*, MONTHLY LAB. REV., June 1994, at 24.

64. *Id.*

65. See Kessler, *supra* note 2, at 384-86.

66. See WOMEN’S BUREAU, U.S. DEP’T OF LABOR, EMPLOYMENT STATUS OF WOMEN AND MEN

approximately seventy percent of part-time workers and sixty percent of temporary agency workers are women.<sup>67</sup>

Do these concessions support the opt-out theory for women who do no wage work, work part-time, work in pink-collar jobs, or who do not advance to the top of traditionally male professions? If one starts with the assumption that individuals make decisions unaffected by the larger structures and institutions in society—for example, the family, the workplace, and the state—then perhaps one could conclude that women choose to serve as secondary workers. On the other hand, if one takes account of the significant research and theorizing on structural discrimination, then the accident and opt-out stories are much too simple.

### III. STRUCTURAL EXPLANATIONS

What we need is an approach recognizing the role of structural forces in producing workplace inequality. This section examines some of those forces, including workplace culture and discrimination, gender socialization within the educational system and families, wage discrimination within the labor market, employment discrimination law, welfare law, and tax law.

First, gender bias inside workplaces helps to explain women's apparent preference for lower-status, lower-paying jobs.<sup>68</sup> Women, like men, are influenced by the expectations of those around them, leading them to perform in ways that meet those expectations.<sup>69</sup> As Vicki Schultz explains, "[P]eople's work aspirations are shaped by their experiences in the work world . . . . [S]tructural features of work organizations reduce women's incentive to pursue nontraditional work and encourage them to display the very work attitudes and behaviors that come to be viewed as preexisting gender attributes."<sup>70</sup> These observations are supported by a significant body of social science research, from classic studies such as Rosabeth Moss Kanter's *Men and Women of the Corporation*,<sup>71</sup> to recent research on the downsizing of women's ambition, which shows that professional women

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IN 2005, <http://www.dol.gov/wb/factsheets/Qf-ESWM05.htm> (Oct. 14, 2006).

67. See U.S. GENERAL ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 46 app. II (June 2000), available at <http://www.gao.gov/new.items/he00076.pdf>.

68. See Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1023 (1992) (noting the importance of "a complex, variable pattern of interaction between . . . biological variables and other institutional or attitudinal influences"); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815-39 (1990).

69. See VALIAN, *supra* note 18, at 145-86 (summarizing research on women's internalization of low expectations).

70. See Schultz, *supra* note 68, at 1824-25.

71. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 3 (1977) (finding that the social and structural aspects of work organization affect how people behave inside organizations; "[T]he job makes the person.")

often exit high-profile jobs not because the work was too demanding, but because their accomplishments have not been appropriately recognized.<sup>72</sup>

Indeed, gender negatively impacts men and women's career ambitions long before they ever obtain their first "real" job. For example, as early as high school, and most clearly in college, young men and women choose courses and majors that differentiate along gender lines.<sup>73</sup> Parents' and educators' gendered expectations and assessments of children's abilities play an important role in this process.<sup>74</sup> Although contested in traditional economic accounts of women's labor market behavior, these studies simply affirm a foundational insight of sociology that culture—including the culture of gender—influences what individuals deem possible or appropriate.<sup>75</sup>

Wage discrimination in the labor market also inevitably leads women to marginalize their wage labor, especially women in dual-earner, heterosexual couple households. In study after study, human capital explanations simply do not explain the entire differential in pay between women and men in the same jobs.<sup>76</sup> That some relatively privileged women may decide, in the face of this persistent wage discrimination, to reduce their human capital investments in work should come as no surprise.<sup>77</sup> In sum, research shows that persistent patterns of discrimination in the workplace, educational system, and inside families lead to the very marginalization that is

72. See ANNA FELS, *NECESSARY DREAMS: AMBITION IN WOMEN'S CHANGING LIVES* 211-12 (2004).

73. See, e.g., Shelley J. Correll, *Constraints into Preferences: Gender, Status, and Emerging Career Aspirations*, 69 AM. SOC. REV. 93, 110-11 (2004) (finding that cultural beliefs about gender constrain the career aspirations of women college students); Shelley J. Correll, *Gender and the Career Choice Process: The Role of Biased Self-Assessments*, 106 AM. J. SOC. 1691, 1723-24 (2001) (finding that male high school students rated their own mathematical ability higher than female students did with the same grades and test scores in mathematics, and that this inflated self-assessment significantly contributed to males' greater enrollment in a high school calculus course and their decisions to major in science, math, or engineering in college).

74. See Jacquelynn S. Eccles, *Understanding Women's Educational and Occupational Choices: Applying the Eccles et al. Model of Achievement-Related Choices*, 18 PSYCHOL. WOMEN Q. 585, 604 (1994) (showing that gender role stereotypes, among other cultural factors, influences parents' expectations of their children's abilities, which ultimately influences children's self perceptions and their decision regarding college course selection).

75. See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 175 (Richard Nice trans., 1984) (describing how social class frames or constrains preferences and choices).

76. See BARTLETT ET AL., *supra* note 17, at 163-65 (2002) (summarizing studies on the gender wage gap among lawyers); VALIAN, *supra* note 18, at 194-97, 203-06, 208, 220-25 (reviewing studies finding a gender wage gap in business, law, medicine, and academia which cannot fully be explained by human capital or specialty differences); Huang, *supra* note 17, at 310 (finding that female lawyers suffer gender-based wage discrimination that cannot be attributed to human capital factors); *Women at Work: A Visual Essay*, MONTHLY LAB. REV., Oct. 2003, at 49 tbl.8 (reporting that "women continue to earn less than men in every major age group").

77. See Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN'S L.J. 1, 16-17 (2002).

commonly attributed to women's personal choices.

If we just stopped here, it would be hard to accept the accident and opt-out explanations for the glass ceiling, job segregation, and attachment gap. But there is more. Women make decisions about wage work within the context of our country's inadequate employment discrimination laws and family leave policies.<sup>78</sup> Title VII has prohibited employment discrimination on the basis of pregnancy since 1978,<sup>79</sup> when Congress passed the Pregnancy Discrimination Act ("PDA").<sup>80</sup> However, courts deciding Title VII cases have generally refused to interpret the law to cover employee's caregiving responsibilities beyond the immediate, physical events of pregnancy and childbirth.<sup>81</sup> For example, courts have uniformly held that women whose employers terminate, demote, or otherwise discipline them because of their need for time off to breastfeed, provide medical care to, adopt, or simply care for a newborn child are not protected by the PDA.<sup>82</sup> Perhaps this is the correct interpretation, at least with regard to requests for time off to care for a child. After all, the PDA only covers "pregnancy, childbirth, or related medical conditions."<sup>83</sup> However, one can make a colorable argument that breastfeeding is a medical condition related to pregnancy, especially when one considers that the Supreme Court has read other discrimination theories into Title VII without a clear textual basis in the law, such as disparate impact<sup>84</sup> and hostile work environment sexual harassment.<sup>85</sup>

Along the same lines, courts have refused to interpret discrimination on the basis of sex "plus" an employee's need to adjust her work schedule to care for a child as unlawful sex discrimination under Title VII's "sex-plus" theory.<sup>86</sup> And courts have rejected disparate impact claims challenging a host of policies that disproportionately and negatively affect women workers, including long work hours, rigid work schedules, limited personal leave, strict limits on absenteeism, prolonged probation or evaluation periods, frequent or extended travel requirements, and the second-class treatment of part-time workers.<sup>87</sup> The passage of the Family and Medical

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78. See Kessler, *supra* note 2.

79. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to e-16 (2000).

80. 42 U.S.C. § 2000e(k) (2000) (amending Title VII to include pregnancy-based discrimination as a prohibited form of sex discrimination).

81. See Kessler, *supra* note 2, at 391-419.

82. *Id.* at 394-400.

83. 42 U.S.C. § 2000e(k).

84. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

85. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

86. See Kessler, *supra* note 2, at 400-12. Under the sex-plus theory, employers may not treat female employees differently than their male coworkers on the basis of their sex "plus" some facially neutral characteristic. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

87. See Kessler, *supra* note 2, at 413-14.

Leave Act of 1993 (“FMLA”)<sup>88</sup> seemed to alter this state of affairs. However, a close examination of the FMLA reveals that it does little more than provide job security to some employees in the case of childbirth.<sup>89</sup> In sum, neither Title VII nor the FMLA, which constitute the bulk of the United States’ maternity and parental leave policies, provides for the most common employment leave needs of caregivers, who by all measures are disproportionately women.<sup>90</sup>

Thanks to the herculean efforts of feminist theorists and lawyers such as Joan Williams and her Center for WorkLife Law, there has been recent progress in the courts for caregivers who experience “maternal wall”<sup>91</sup> discrimination at work.<sup>92</sup> This is very promising. Given our country’s present strong political commitment to neoliberalism, an incremental

88. 29 U.S.C. §§ 2601–2654 (2000). The FMLA requires covered employers to provide up to twelve weeks of unpaid leave during a twelve-month period to any eligible employee who needs the time off (1) for a serious health condition of the employee that prevents him/her from performing the essential functions of his/her job; (2) to care for the employee’s spouse, son, daughter, or parent where that family member has a serious health condition; (3) for the birth of a child of the employee, in order to care for the child; and (4) for the placement of an adopted or foster child with the employee. 29 U.S.C. § 2612(a)(1).

89. See Kessler, *supra* note 2, at 419-26.

90. See Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191, 196 (2000) (reviewing sociological literature over the past twenty years which show that women invest significantly more hours in household labor than do men despite some narrowing of gender differences in recent years); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208 (2000) (reviewing more than 200 scholarly articles and books on household labor showing that women still do at least twice as much housework as men); Laura Sanchez & Elizabeth Thomson, *Becoming Mothers and Fathers: Parenthood, Gender, and the Division of Labor*, 11 GENDER & SOC’Y 747, 765 tbl.4 (1997) (showing that when housework, childcare, and wage work are all considered, women with young children work twenty more hours a week than men on average); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996) (reviewing sociological studies showing that, by all measures, women perform substantially more housework than men, regardless of their employment status); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 520 n.18, 522 n.21 (1998) (collecting sociological studies showing that the work-leisure gap always favors the husband).

91. According to Williams, two key features of maternal wall discrimination are unthinking stereotypes about working mothers and the organization of market work around the ideal of a worker who works full-time and overtime and takes little or no time off for childbearing and childrearing. See Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1 *passim* (2003).

92. See Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities* (Center for WorkLife Law), July 6, 2006, at 2, available at [http://www.uchastings.edu/site\\_files/WLL/FRDreport.pdf](http://www.uchastings.edu/site_files/WLL/FRDreport.pdf) (reporting that in the last decade the number of “family responsibilities discrimination” cases filed grew nearly 400% and that plaintiffs are more likely to win these lawsuits than other types of employment discrimination cases); see also Williams & Segal, *supra* note 6, at 121-61.

litigation strategy may be the most realistic way of making the structure of work more compatible with family responsibilities.

At the same time, as Richard Block's presentation at this symposium illustrates, presently the United States falls behind Canada and every European country in the statutory provision of paid family leave.<sup>93</sup> This lack of pay during family leave discourages some workers from taking family leave, pressures other workers to cut their leaves short, and reduces men's use of family leave. For example, a national study of family leave use commissioned by the Department of Labor found that only about one-fifth of eligible employees covered by the FMLA even take family leave because it is unpaid, and few take leave for more than a couple of weeks.<sup>94</sup> Of those employees who need family or medical leave and do not take it, more than three-quarters cite being unable to afford it as the primary reason.<sup>95</sup> Moreover, because men still generally earn more than women, unpaid leave entitlements such as the FMLA do not provide a sufficient incentive for men in dual-earner, heterosexual couple households to take family leave.<sup>96</sup> The relatively short twelve-week maximum duration of family leave in the United States also has negative effects. For example, some employees may leave their jobs in favor of a longer family leave and then return to an alternative job, often at a lower status or salary.

Family leave is only one element that provides the context in which caregivers make career decisions. Unlike other Western industrialized countries, mandatory overtime is largely unregulated in the United States and few provisions exist for flexible work arrangements or the right to a "good" part-time job.<sup>97</sup> Publicly supported child care in the United States is provided only to the poorest families and the demand far exceeds the supply.<sup>98</sup> Our income tax system favors single earner couples who conform

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93. See Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333; see also JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 319 tbl.C.2 (2003); INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2006, at 54 tbl.1 (Peter Moss & Margaret O'Brien eds., 2006), available at <http://www.dti.gov.uk/files/file31948.pdf>; Erin L. Kelly, *Work-Family Policies: The United States in International Perspective*, in THE WORK AND FAMILY HANDBOOK 99, 103 tbl.5.1 (Marcie Pitt-Catsouphes, Ellen Ernst Kossek & Stephen Sweet eds., 2006); Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 FUTURE OF CHILDREN 99 (2001). Some relatively elite, professional employers are an exception. See Kessler, *supra* note 7. For example, my recent study of law school family leave policies and practices found that over two-thirds of surveyed law schools offer a separate category of paid family leave benefits to their law faculties, at least informally. *Id.* However, less than half of the surveyed schools provided leave pursuant to a formal policy. *Id.*

94. See DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE § 2.1.2, at 2-7, § 3.5.1, at 3-13 (2000).

95. *Id.* § 2.2.4, at 2-15 to 2-16.

96. See Kelly, *supra* note 93, at 101.

97. *Id.* at 109-12.

98. *Id.* at 105. Higher-income families receive somewhat limited public support for child-care expenses through the tax system. *Id.* at 106-07.

to the male breadwinner/female homemaker ideal and penalizes secondary wage earners in dual income married families—typically women.<sup>99</sup> At the same time, the Temporary Assistance for Needy Families (TANF) welfare program<sup>100</sup> and the Earned Income Tax Credit<sup>101</sup> push unmarried, low-income women with children into the workforce,<sup>102</sup> often into low-paid, pink-collar, service-sector jobs.<sup>103</sup>

Do the judicial decisions and state policies discussed here contribute to the glass ceiling, job segregation, and the attachment gap? While there is no clear answer to this question, studies suggest that this is the case. For example, although somewhat counterintuitive, having access to parental leave is associated with taking shorter leaves,<sup>104</sup> returning to full-time work sooner after a birth,<sup>105</sup> and continuous labor force attachment.<sup>106</sup> Although a right to an extended family leave (over a year) may discourage women's employment, women in countries with paid family leave generally have higher rates of employment.<sup>107</sup> Similarly, large cross-national studies show that generous public child care benefits increase women's labor force

99. See CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX xv-xvi (1997); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 314, 326 (2003).

100. 42 U.S.C. § 601-619 (2000). TANF replaced Aid to Families with Dependent Children. *Id.* § 601. It is a time-limited, work-focused welfare program aimed at increasing wage work and marriage among poor women. *See id.*

101. 26 U.S.C. § 32 (2000).

102. See ADAM LOONEY, FEDERAL RESERVE BOARD, THE EFFECTS OF WELFARE REFORM AND RELATED POLICIES ON SINGLE MOTHERS' WELFARE USE AND EMPLOYMENT (2005), available at <http://www.federalreserve.gov/Pubs/Feds/2005/200545/200545pap.pdf>; Nada Eissa & Hilary W. Hoynes, *Behavioral Responses to Taxes: Lessons from the EITC and Labor Supply* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 11729, 2005), available at [http://www.econ.ucdavis.edu/faculty/hoynes/publications/TaxPolicyEconomy\\_FinalDraft.pdf#search=%22nada%20eissa%20behavioral%20response%20to%20taxes%22](http://www.econ.ucdavis.edu/faculty/hoynes/publications/TaxPolicyEconomy_FinalDraft.pdf#search=%22nada%20eissa%20behavioral%20response%20to%20taxes%22); Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1141-42 (2006).

103. See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252-54 (1983) (arguing that the "work" typically pushed on women who receive welfare is low-paid, sex-segregated work consistent with stereotypical gender roles); Rebekah J. Smith et al., *The Miseducation of Welfare Reform: Denying the Promise of Postsecondary Education*, 55 ME. L. REV. 211, 219-23 (2003) (critiquing TANF's exclusion of non-vocational postsecondary education from eligible work activities); Zatz, *supra* note 102, at 1151 (describing restrictive "work-first" programs in many states, implemented pursuant to TANF, which prioritize immediate labor force attachment over long-term employability enhancement for welfare recipients).

104. See Sandra L. Hofferth & Sally C. Curtin, *Parental Leave Statutes and Maternal Return to Work After Childbirth in the United States*, 33 WORK AND OCCUPATIONS 73, 100 (2006).

105. *Id.*

106. See Kelly, *supra* note 93, at 116.

107. *Id.* Note that other variables may be driving the negative association of family leaves over a year and women's labor force participation. *See id.*



participation.<sup>108</sup> Finally, many empirical studies of labor market behavior have found that workers respond to changes in their after-tax wage rates, choosing to work less when their take-home wage rate falls.<sup>109</sup> American tax and welfare policy explicitly rely on this rational economic behavior to discourage privileged married women from working and to push low-income unmarried women into the labor force, often into low-paid, pink-collar jobs. Again, it is hard to square private, individualized accident and opt-out explanations for women's secondary status in the workforce with these larger state-sponsored pressures that influence women's decisions about family and work.

I am not suggesting here that women have no agency with regard to their decisions about wage work. Legal feminism has taught us in the past decade that we should resist theories that rest on an assumption of false consciousness.<sup>110</sup> There are myriad and complex ways women exercise their agency, however limited or distorted by gender subordination.<sup>111</sup> Indeed, as I have explored elsewhere, upon recognition that women have complex, intersecting identities, behaviors or practices that previously appeared to be primarily the product of gender subordination may actually represent political resistance to other axes of oppression.<sup>112</sup> For example, some black women's decisions to spend more time with their families may be understood, at least in part, as a form of resistance to racism as much as acquiescence to traditional gender norms.<sup>113</sup> The state has heavily regulated black women's sexuality, reproduction, family caregiving work, and wage work from slavery to the present.<sup>114</sup> Black women have resisted and sought refuge from this discrimination in part through family and community relationships.<sup>115</sup> Does this mean women of color are "opting out" of the workforce? Or are they simply responding to discrimination in both their work and family lives in ways that preserve their dignity and communities?<sup>116</sup> Again, the accident and opt-out constructs appear

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108. *Id.* at 116.

109. See, e.g., Nada Eissa, *Taxation and Labor Supply of Married Women: The Tax Reform Act of 1986 As a Natural Experiment* (Nat'l Bureau of Econ. Research, Working Paper No. 5023, 1995) (finding evidence that the labor supply of wives in upper-income families is highly sensitive to after-tax wages); Siv Gustafsson, *Separate Taxation and Married Women's Labor Supply: A Comparison of West Germany and Sweden*, 5 J. POP. ECON. 61, 82 (1992) (finding, in an international comparison of the labor supply of wives under joint and individual taxation, that joint taxation reduces the participation of women in the labor force).

110. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 637-38 n.5 (1983) (arguing that women's subjective experience is part of the epistemological dilemma posed by male dominance).

111. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 *passim* (1995).

112. See Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 2-7 (2005).

113. *Id.* at 12-26.

114. *Id.*

115. *Id.* at 12.

116. *Id.* at 21-22, 25-27.

incoherent once we take account of larger structural factors that influence individual decisions, such as discrimination. Falling somewhere between the totalizing theories of false consciousness and unfettered choice, these more complex understandings of women's choices simply recognize that we all exercise our agency under conditions of constraint.<sup>117</sup>

A final common explanation for women's secondary status in the workforce is the "time lag" theory. Here is an example from legal academia: Assistant professors make up only 11% of all tenure-track or tenured law teachers and associate professors only 17%.<sup>118</sup> Given the small size of this pool, even if we assume that all women presently in the pipeline will receive tenure, the percentage of female full professors would increase from 25% to only 31%.<sup>119</sup> At this rate, assuming a five-year tenure track, the percentage of women full professors would not reflect their relative presence among law school graduates nationally until the year 2024<sup>120</sup> and their relative presence in the student bodies of "producer schools"<sup>121</sup> until 2023.<sup>122</sup> Similar projections exist for medicine, business, and law firms.<sup>123</sup>

One way of conceptualizing time-lag is as a problem exogenous to the workplace. Why should law schools, or employers more generally, be responsible for the effects of past discrimination? This question forms the basis for many of the Supreme Court's decisions on affirmative action and

117. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* *passim* (2004); Abrams, *supra* note 111, *passim*.

118. See WHITE, *supra* note 8, at 3 tbl.1A (showing 4,535 full professors, 1,096 associate professors, and 659 assistant professors in 2004-05).

119. See *id.* at 3 tbl.1A, 6 tbl.2A. These percentages were calculated by dividing the total number of tenured or tenure-track professors at the full, associate, and assistant professor levels in 2004-05 reported in table 1A (6,290) by the total number of female full professors that would exist if all of the female assistant and associate professors in 2004-05 reported in table 2A (794) were promoted to full professor (1,927). *Id.* A similar analysis by Richard Neumann using 2002-03 AALS data corroborates these findings. See Neumann, *supra* note 13, at 427 (showing an increase in female full professors from 23% to only 29% if all the associate and assistant professors in 2002-03 were promoted to full professor).

120. See ABA Section on Legal Education and Admission, *Degrees Awarded 1981-2004*, <http://www.abanet.org/legaled/statistics/degrees.html> (showing that from 2000 to 2004, women earned 48.2% of the J.D. degrees awarded).

121. Producer schools are schools whose graduates historically have made up a large proportion of law faculties. See Neumann, *supra* note 13, at 436.

122. See LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, *ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS* ch. 12 (2001-2005) (showing that women constituted 47.2% of enrolled students at the producer schools from 2000 to 2004). This percentage was calculated by averaging the relevant data for the producer schools in the 2001, 2002, 2003, 2004, and 2005 editions. *Id.* This number may overstate the percentage of women law graduates at the producer schools, because enrollment statistics do not account for differential attrition rates between male and female law students. Graduation statistics broken down by sex are not readily available on a school-by-school basis.

123. See, e.g., 2005 CATALYST CENSUS, *supra* note 19, at 6; VALIAN, *supra* note 18, at 186-216.

disparate impact in the employment context since the 1980s.<sup>124</sup> We also see it in much law and economic scholarship about the workplace.<sup>125</sup> There are two reasons to be suspicious of this way of thinking about the problem. First, cohort studies demonstrate that the pipeline is leaky. That is, time does not fully explain the underrepresentation of equally qualified women in jobs with the highest status, reward, and influence.<sup>126</sup> Therefore, some part of the glass ceiling is likely the product of *ongoing, present* discrimination. Second, even if women's underrepresentation at the top of virtually every profession is partly a product of their relatively recent entrance, those at the top of the workplace are the beneficiaries of a past system of *de jure* discrimination.<sup>127</sup> As such, they should take some responsibility for reversing its effects. This will require not just non-discrimination at the entry level, which appears to be occurring for the most part in many professions,<sup>128</sup> but a serious commitment to affirmative action. Without that commitment, progress toward a truly inclusive workplace is likely to remain slow. Furthermore, a failure of commitment in this area is itself a form of discrimination. In sum, advocates and theorists committed to workplace equality must contest the myth that those who hold positions of greatest reward, status, and influence in the workplace got there by merit alone.

#### IV. CONCLUSION

It is not my intention to deny the agency of individual women and men. We all make decisions for complex reasons, and every decision can fairly be understood as personal. Similarly, all workers are not equally qualified or

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124. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (requiring a highly-focused showing that particular employment practices caused disparate impact under Title VII and finding that evidence of severe racial segregation inside an employer's workforce was not enough to make out a prima facie case); *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616, 640-42 (1987) (requiring, *inter alia*, evidence of a significantly imbalanced workforce before a private employer may adopt an affirmative action plan). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing diversity as a constitutional justification for affirmative action in the public educational setting).

125. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 273 (1992); Becker, *supra* note 43, at 55; Wax, *supra* note 47.

126. See VALIAN, *supra* note 18, at 200-03 (reviewing studies showing that women lawyers' youth does not fully account for their significantly lower promotion rates to partner); Ash et al., *supra* note 18, at 209 ("Although ample numbers of women have entered academic medicine for at least the past 2 decades, the representation of women among full professors was only slightly higher in 1998 than in 1978 . . . ."); Fairfax, *supra* note 19, at 580 (reporting that women hold only about thirteen percent of available board seats at Fortune 500 corporations despite the fact that they have made up an increasingly larger portion of the workforce for decades); Kaplan et al., *supra* note 18, at 1282 (reporting that the proportion of women in the senior ranks of academic medicine has remained relatively constant over the past decade, despite an increase in the proportion of applicants to medical school who are women and an increase in the representation of women among entry-level faculty over the same period).

127. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223-27 (1991).

128. See VALIAN, *supra* note 18, at 187-216.

motivated to serve at the top of their profession. My main point is that discrimination is a significant contributing factor to women's secondary status in the workplace. The methodology I have used to arrive at this conclusion falls squarely within our legal tradition. There are many open-ended tests within law. For example, family law courts use the "totality of the circumstances" test to determine children's best interests. In civil litigation, fact-finders determine liability based on the "preponderance of the evidence." But this requires us to step back and look at all of the evidence.

The accident, opt-out, and time-lag theories are not neutral, empirical descriptions of the world. They are stories that incorporate political and moral judgments about the proper relationship of individuals to the larger society. They fundamentally embrace the liberal and neoliberal assumption that individuals are independent, autonomous, unencumbered beings who are owed little from employers or the state. These stories hide the significant role of powerful institutions such as employers, the state, and the family in women's secondary status at work.<sup>129</sup>

The discrimination story I have sought to tell here is somewhat more complex than the simple story of personal choice, for it relies on recent, sophisticated research on how structural features of workplaces and governments produce gender inequality in the labor force. The discrimination story I have presented here is also more complex than the accident and opt-out accounts of women's secondary status at work, because it takes account of how traditional gender bias interacts with and reinforces work/family conflict. These more subtle understandings of workplace inequality should not deter us from keeping discrimination theory front and center in the discourse over sex discrimination, including the discourse over work/family conflict. If we are to make any headway in achieving a more egalitarian workplace, we need to move away from conceptualizations of the glass ceiling, pink ghetto, and attachment gap as the personal problems of individual employees toward seeing them as structural discrimination problems of employers and society.

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129. Social psychologists studying discrimination call this system justification. "[S]ystem justification theory describes how people create beliefs (i.e., stereotypes) that support the status quo, which allows them to see the social system in which they live as fair and legitimate." Cuddy et al., *supra* note 42, at 706. See generally THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS (John T. Jost & Brenda Major eds., 2001).

