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THE MYTHS OF MARKET FORCES, MOTHERS AND PRIVATE EMPLOYMENT: THE PARENTAL LEAVE VETO

Maria L. Ontiveros[†]

INTRODUCTION

"I am returning herewith without my approval the
'Family and Medical Leave Act of 1990.'"¹

On June 29, 1990, President Bush vetoed the Family and Medical Leave Act of 1990.² The Act would have provided job-protected leave from work of up to twelve weeks under certain conditions, including parental leave.³ The veto message relied on two main justifications for opposing the legislation. The President worried that the costs associated with mandatory leave would impair the ability of American companies to compete in the marketplace and to create jobs. He also stated that he strongly objected to "mandating" leave policies, preferring to let normal market forces, including negotiation and collective bargaining, fashion innovative, flexible approaches to the needs of employees.⁴

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¹ Message to the House of Representatives Returning Without Approval the Family and Medical Leave Act of 1990 (June 29, 1990), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 890 (1991) [hereinafter Veto Message].

² H.R. 770, 101st Cong., 1st Sess. (1989). Both the House and Senate have passed similar bills this session. H.R. 2, 102nd Cong., 1st Sess. (1991), S. 5, 102nd Cong., 2nd Sess. (1991). The President is again expected to veto the bill. Clifford Krauss, *House Backs Bill for Family Leave of up to 90 Days*, N.Y. TIMES, Nov. 14, 1991, at A1.

³ The Act also would have provided leaves to care for a seriously ill spouse, parent or child or for the employee's own serious illness. This article focuses only on the parental leave aspect of the bill.

⁴ Veto Message, *supra* note 1, at 890-891.

These arguments are superficially appealing because they incorporate the popular myths of "market forces" and "private employment." In reality, however, these myths do not accurately capture the dynamics of the employment relationship and the role of working mothers in America. Even though the costs are low, the "free market" will not provide parental leave because market failures allow employers to discriminate against women and mothers, who are not considered appropriate workers. Furthermore, our society has made a conscious decision to utilize the workplace to deliver social welfare benefits, transforming the employment relationship into something more than wages for work. This article probes for the truth behind these three myths in the Presidential veto. First, it examines the costs of parental leave and concludes that they are low. The second section explains why normal market forces will not solve the problem, necessitating appropriate legislation. The final section examines America's policy of using private employers to provide social welfare benefits.

The overwhelming need for parental leave⁵ has been analyzed in detail. Although these reasons are not the focus of this article, a brief summary provides useful background for understanding the current issues in the parental leave debate. The starting point in understanding the need is an acknowledgment that women, and especially women with children, have become an integral part of the labor force.⁶ For all of these

⁵ "Parental leave" is analytically and practically distinct from "maternity leave." The latter is available solely to women who have given birth and is akin to a disability or medical leave. It covers the period of time which a woman needs to physically recover from giving birth. The former is the time which any parent takes, following birth or adoption, to bond with and parent the child. For a discussion of the legal and analytical significance of the distinction between the two leaves, see generally, Pamela Parker Knight, Note, *California Fair Employment and Housing Act Section 12945(b)(2): Equal Opportunity Child Care*, 17 SW. U. L. REV. 409 (1987).

⁶ Over half of all women with children under the age of six were in the labor force in 1986, and three-fourths of all working women of child-bearing age will become pregnant during their career. SHEILA KAMERMAN AND ALFRED KAHN, *THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE* 12 (1987), cited in Jennifer G. Gimler, Note, *Mandated Parental Leave and the Small Business: A Cause for Alarm?*, 93 DICK. L. REV. 599 (1989). See also Gwen G. Morgan, *Parental Leave and Other Child Care Issues*, in GOVERNMENT MANDATING OF EMPLOYEE BENEFITS 279, 283-284 (Employee Benefit Research Institute, 1987); Amy K. Berman, Note, *HR 4300, The Family and Medical Leave Act of 1986: Congress' Response to the Changing American Family*, 35 CLEV. ST. L. REV. 455, 456-460 (1987); Gimler, *supra*,

women, the threat that parenthood poses to their work lives affects the joys of pregnancy, childbirth, and parenting.⁷ Many women who have children without job-protected leave, and lose their jobs, must rely on income assistance before they return to work.⁸ Once these women do return to work, their income decreases due to lower wages and fewer hours.⁹ Other detrimental effects on a woman's career include loss of seniority, pension, and contacts.¹⁰ Indeed, a woman's entire opportunity to advance in a career is put at risk when she decides to spend time on parental leave.¹¹

If a woman chooses to return to work without taking a parental leave, however, the negative effects on her child can also be very real. The lack of an initial period of nurturing and bonding may pose a serious threat to the child's future emotional stability.¹² Without provision of parental leave, parents may

at 602. Additionally, women are no longer in careers which assume a secondary role to family responsibility. David E. Bergquist, *Who's Bringing Up Baby: The Need for a National Uniform Parental Leave Policy*, 5 LAW & INEQ. J. 227, 230-231 (1987).

⁷ A 1991 survey of sex discrimination claims found that employers routinely discharged women from their jobs for being pregnant or taking pregnancy disability leave, even when the Pregnancy Disability Act protects such leave. *Caution: Maternity Leave Taken at One's Own Risk*, WALL ST. J., Nov. 13, 1991, at B1. See also *infra* note 59 and accompanying text.

⁸ This leads to \$108 million more in public assistance expenditures per year for these women than for new mothers with leave. ROBERTA M. SPALTER-ROTH & HEIDI I. HARTMANN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE 26 (1990).

⁹ *Id.* at 17, 20-21.

¹⁰ David K. Haase, *Evaluating the Desirability of Federally Mandated Parental Leave*, 22 FAM. L. Q. 341, 356-357 (1988).

¹¹ Richard Delgado & Helen Leskovac, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031, 1032 (1988); Catherine P. Colvin, *New Perspectives in Parental Leave: The Family and Medical Leave Act of 1987*, 12 EMPLOYEE REL. L. J. 546, 565 (1987).

¹² At the hearings on parental leave legislation, two of the most prominent pediatricians in the country, Dr. T. Berry Brazelton and Dr. Armand Nicholi, testified that an initial four-month period is critical because, during that time, the parent-child attachment process is solidified and stabilized. They testified that the lack of this attachment can lead to retardation of the child's mental development and predispose children to a variety of emotional disorders. Testimony cited in James Carr, Comment, *Bringing Up Baby: The Case for a Federal Parental Leave Act*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 857, 863-865 (1987). See also STEVE KOPPMAN, CALIFORNIA SENATE OFFICE OF RE-

have to choose between providing the basic emotional framework which their children need and the ability to retain their jobs, support their families, and advance their careers. Because this choice is so undesirable, the call for some form of parental leave is almost universal.¹³ Disagreement remains, however, on the form that parental leave should take.

A statute mandating job-protected parental leave has several design options. Most statutes contain an exemption for "small" companies, which employ fewer than a certain number of employees. In addition, the length of leave and the terms of benefit continuation during the leave may vary. Statutes may specify the length of employment with a company before employees become eligible and define the events for which there is guaranteed job-protected leave (i.e. birth, adoption, illness). Every statute, however, must provide that leave is available to both sexes and must guarantee the same or a comparable job upon return to work. The legislation which the President vetoed would have required businesses with 50 or more workers to provide one period of up to twelve weeks a year to care for a

SEARCH, TIME OFF FOR PARENTS: THE BENEFITS, COSTS, AND OPTIONS OF PARENTAL LEAVE 7-9 (1987).

¹³ Even President Bush stated "I want to emphasize my belief that time off for a child's birth or adoption . . . is an important benefit for employers to offer employees." Veto Message, *supra* note 1, at 890. Some commentators, however, have argued that mandatory leave will actually harm women because employers will hire men instead of women, to avoid paying the increased costs associated with leave taking. See, e.g., Maria O'Brien Hylton, "Parental" Leaves and Poor Women: Paying the Price for Time Off, 52 U. PITT. L. REV. 475, 476 (1991). The basis for this theory of discrimination is the false assumption, addressed below, that leaves are costly. *Id.* at 482. Additionally, there were similar arguments made prior to the passage of laws prohibiting discrimination based on pregnancy; yet, since passage of those laws, women have become the fastest growing segment of the labor force. Berman, *supra* note 6, at 482. A related indictment of leave legislation calls such programs "classist" because it is assumed that low income women cannot afford to take leave. Although low income women do take shorter leaves than higher income women, one way to address the class differences is through the structure of the leave statute. Although mandatory parental leave legislation did not increase the average length of leaves taken by new mothers, it did result in a decline in the number of women who took less than the medically recommended six weeks of leave following childbirth. JAMES T. BOND ET AL., FAMILIES AND WORK INST., BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES 65-66 (1991). The number of low income women who took longer leaves (and leaves of at least six weeks) rose dramatically when they were provided with partial wage replacement through temporary disability insurance. *Id.* at vi, 75-76.

newborn or newly adopted child, to care for a seriously ill family member, or for an employee's own serious illness. The President's opposition to this and any similar legislation relied on the three myths discussed below.

I. MYTH ONE: "WE MUST ENSURE THAT FEDERAL POLICIES DO NOT STIFLE THE CREATION OF NEW JOBS, NOR RESULT IN THE ELIMINATION OF EXISTING JOBS."¹⁴

President Bush's first indictment of mandatory parental leave was that the costs associated with it would drive companies out of business. Until May 1991, the costs that such a statute would impose on employers were mostly speculative. Then the Families and Work Institute published their final report of their State Parental Leave Study. This study looked empirically at the impact of parental leave on employers in states which had passed mandatory parental leave laws. The evidence showed that the majority of the respondents experienced neither serious increases in costs as a result of the statutes enacted in their states nor difficulty in administering and implementing the legislation.¹⁵ After briefly examining pre-1991 cost estimates, this section will examine the methodology and conclusions of the State Parental Leave Study. Finally, the reasons that costs are low will be examined.

A. THE LOW COST OF MANDATORY PARENTAL LEAVE

Cost estimates made before the State Parental Leave Study are important because they were utilized in Congressional hearings on the Family and Medical Leave Act and provided a basis for the Legislative passage and Executive veto of the Act. The General Accounting Office ("GAO") conducted a primary study used in the hearings. It concluded that the only costs to employers would be for carrying health insurance for employees on leave.¹⁶ The GAO reached this result based on the follow-

¹⁴ Veto Message, *supra* note 1, at 890.

¹⁵ BOND, *supra* note 13, at 65-66.

¹⁶ SPALTER-ROTH & HARTMANN, *supra* note 8, at 14. See also Haase, *supra* note 10, at 347; but see Gimler, *supra* note 6, at 619-620 (stating that the GAO study fails to account for costs resulting from decreases in employee productivity, litigation and penalties for violations, and increases in unemployment

ing assumptions: employers would replace one in three absent workers; the cost of replacement workers was less than the cost of regular workers; and no significant productivity loss would occur. Other attempts to estimate costs also concluded that payroll costs would be low.¹⁷ Advocates on each side of the issue justified their positions based on the cost effects of changes in productivity. Opponents of the bill stated that temporary replacements or employees bearing extra work would diminish productivity. Proponents of the legislation argued that employees would work harder out of loyalty and gratitude since their employer provided the benefit.¹⁸ On the whole, these estimates, while educated, were nonetheless guesses.

In contrast, the State Parental Leave Study examined the actual effect of mandatory leave legislation on employers in Oregon, Minnesota, Wisconsin and Rhode Island. The study selected state legislation which differed in length of leave permitted (ranging from six to thirteen weeks) and number of employees needed to qualify for coverage (ranging from twenty-one to fifty weeks).¹⁹ In each state, the governor or lieutenant governor sponsored the study. Representatives from business, labor, state legislatures and agencies, and women's and children's advocacy groups designed the study, with the assistance of a team of national leave experts representing both sides of the debate.²⁰ The board of experts also assisted in reviewing the study findings as analysis proceeded.

The first of the study's four major conclusions involved employer costs. The vast majority of employers did not experience increases in training, unemployment insurance, administrative and health benefit coverage costs. The study designers had expected that training costs might increase if employers needed to train temporary replacements for the person on leave. Instead, the study revealed that seventy-one percent of the

insurance).

¹⁷ Haase, *supra* note 10, at 348-349.

¹⁸ *Id.* at 349.

¹⁹ The statutes also varied on eligibility, continuation of benefits, and covered events. *Parental Leave Testimony Before the Subcomm. on Children, Fam., Drugs and Alcoholism of the Senate Comm. on Labor & Human Resources*, 102nd Cong., 1st Sess. 2-3 (1991) (statement of Ellen Galinsky, Co-President Families and Work Institute) (available from the *Cornell Journal of Law and Public Policy*).

²⁰ *Id.* at 3-4.

employers in the combined four state sample did not face increased training costs.²¹ This most likely resulted from the quality of temporary replacements and the use of internal employees.²² The study group had also suspected that unemployment costs might rise if employers were liable for the unemployment insurance of employees hired to cover leaves and then laid off when the original employee returned. Eighty-one percent did not see a rise in unemployment insurance costs²³, probably due to the use of internal employees, who were not discharged, and temporary agency employees, for which the agency, and not the company, was responsible.

The planning group had also anticipated that administrative costs might rise as companies developed leave policies and implemented procedures associated with them; yet fifty-five percent of the employers studied did not realize cost increases.²⁴ An explanation for this result may be that many companies already had policies and structures, which simply needed modifying.²⁵ Finally, the group had thought that health benefit costs might increase, from covering both the temporary employee and the employee on leave. However, seventy-three percent did not face increased health benefit costs as a result of the legislation.²⁶ Costs failed to increase because temporary employees generally do not receive benefits, and two of the state statutes required employees to pay premiums to continue their benefits while on leave. Thus, the areas which the group had identified as likely for cost increases were generally unaffected.²⁷

²¹ BOND, *supra* note 13, at 53. Unless specified otherwise, all figures refer to averages for the combined four state sample.

²² See *infra* notes 33-41 and accompanying text.

²³ BOND, *supra* note 13, at 53.

²⁴ *Id.*

²⁵ *Id.* at 36-37.

²⁶ *Id.* at 53.

²⁷ Only four percent reported significant cost increases in training, six percent reported such increases in administrative costs, and two percent in unemployment insurance. *Id.* Since the magnitude of cost increases was the same for employers covered by the legislation as those who were exempt, the researchers concluded that the reported cost increases may have resulted from inflation and other general factors, rather than from the implementation of the laws. *Id.* at 54.

The study's second major conclusion addressed the concern raised by opponents of parental leave legislation — the effect of mandatory leave on other benefits. The study had expected that, if employers must pay more to cover leaves, they will offset the costs by reducing other benefits. In fact, the study revealed that only about one in twenty employers provided fewer health benefits as a result of mandatory leave.²⁸ This appears to reflect the fact that few additional costs are associated with mandatory leave.

The study also investigated the ease or difficulty encountered by implementing the statute. Ninety-one percent of the employers did not have any difficulty in implementing the statute.²⁹ Thirty-three percent of employers found it "extremely easy" to implement; less than one in ten employers found it difficult to implement.³⁰

Finally, the study investigated the effects on companies of various sizes. The size of a company was not related to its difficulty in implementing the statute.³¹ Additionally, small companies were no more or less likely to experience increases in costs in the categories studied.³² Thus, the study did not support the assumption that the legislation would disproportionately affect small businesses.

Concrete evidence shows that Congress was correct in relying on the available cost estimates in passing the Family & Medical Leave Act. It also disproves the President's suggestion that the increased cost of mandatory leave would diminish the ability of American companies to compete and to create jobs. The availability of low cost ways to cover the leaves is probably the main reason that employers did not confront cost increases.

B. THE CHANGING COMPOSITION OF THE AMERICAN WORKFORCE

Employers cover leaves of absence at very low costs by redistributing work and hiring temporary employees. In a 1986

²⁸ Approximately six percent of the employers provided fewer benefits. *Id.* at 59-60.

²⁹ Nineteen percent found it "moderately easy" to implement, and thirty-nine percent found it "neither easy nor difficult." *Id.* at 57.

³⁰ *Id.*

³¹ *Id.* at iv.

³² *Id.*

Catalyst study of Fortune 1500 Companies, over eighty-five percent of the firms considered leave periods relatively easy to arrange. To cover the vacancy left by an employee on leave, these firms usually rerouted work to other employees.³³ The State Parental Leave Study found that sixty-seven percent of the employers assigned work temporarily to other employees.³⁴ Nearly one quarter of the employers in the State Parental Leave study stated that they most often hired outside temporary workers to handle the work.³⁵ In addition, the Catalyst Study also cited the use of temporary employees as a prominent strategy for covering leaves.³⁶

The use of temporary workers to cover leaves will probably continue to grow for many reasons.³⁷ First, temporary employees earn less than regular employees.³⁸ This conclusion holds even when occupation, industry, and individual variables are statistically controlled; the lower earnings are not due to the clustering of temporary employees in low-paying occupations or industries or the result of their age, sex, or race.³⁹ Also, contrary to dated stereotypes, temporary employees provide quality

³³ Berman, *supra* note 6, at 461 n.52. Eighty percent of the companies rerouted managerial work and seventy-four percent rerouted non-managerial work.

³⁴ BOND, *supra* note 13, at 50.

³⁵*Id.*

³⁶ Berman, *supra* note 6, at 461 n.52. See also Haase, *supra* note 10, at 348 (discussing the General Accounting Office study).

³⁷ This section argues that temporary employees are less costly to employ because they do not operate under the same terms and conditions of employment as regular employees. In demonstrating the reality of this situation, the author does not condone or advocate the exploitation of temporary employees. Rather, the reasons for delivering social welfare benefits through the workplace apply equally well to temporary employees. Additional work is necessary to determine how to regulate the terms and conditions of temporary employment to eliminate any exploitative aspects. One possible solution, however, is to have temporary employment agencies provide benefits for the employees they place. See *infra* note 166 and accompanying text.

³⁸ Janet Spitz & Jeffrey Pfeffer, *Wage Effects of Externalized Work: The Case of Temporary and Part-Time Employees 2*, 14 (Stanford University Graduate School of Business Research Paper Series no. 1052, 1987) (available at Stanford University Graduate School of Business Library). See also Harry B. Williams, *What Temporary Workers Earn: Findings from New BLS Survey*, MONTHLY LAB. REV., Mar. 1989, at 3.

³⁹ Spitz & Pfeffer, *supra* note 38, at 16.

labor.⁴⁰ In recent years temporary agencies have become a main supplier of technical and clerical training to the workforce.⁴¹ Accordingly, not only are temporary employees relatively inexpensive and highly qualified, but they are also readily available.

Currently, temporary employees compose at least five percent of the workforce⁴² and are the fastest growing sector of the labor force. The Bureau of Labor Statistics estimates that between 1984 and 1995 temporary employment will grow 5% annually, compared to a 1.3% growth rate for overall U.S. employment.⁴³ Surprisingly, temporary employees also serve a range of occupations and industries that is fairly representative of the labor force as a whole.⁴⁴ Employers hire temporary employees not only as secretaries and assemblers, but also as engineers, craftspeople and managers.

The prevalence and growth of temporary employees comes from both managerial and legal factors. Employers owe different obligations to temporary employees and can treat them differently than permanent or regular employees. In addition to the lower wages described above, other costs associated with employment are lower for temporary workers. Most temporary employees do not receive fringe benefits.⁴⁵ Employers also do not have to pay statutorily required benefits (social security,

⁴⁰ R.B. Moberly, *The United States, in 1 TEMPORARY WORK IN MODERN SOCIETY: A COMPARATIVE STUDY OF THE INT'L INST. FOR TEMPORARY WORK* 379, 383 (W. Albeda et al. eds., 1978).

⁴¹ See RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* 31-34 (1989).

⁴² See Spitz & Pfeffer, *supra* note 38, at 13. Belous reports that there are 1.1 million temporary workers, out of a total U.S. labor force of 121.7 million or 0.9%; however, the basis for his figures are solely temporary employees who receive paychecks through temporary employment agencies. BELOUS, *supra* note 41, at 27. Spitz & Pfeffer found that such workers account for less than one fifteenth of all temporary employees. Spitz & Pfeffer, *supra* note 38, at 13. Therefore, temporary employees could conceivably account for 13.5% of the labor force.

⁴³ BELOUS, *supra* note 41, at 26.

⁴⁴ See BELOUS, *supra* note 41, at 28; Spitz & Pfeffer, *supra* note 38, at 13-14. See also Williams, *supra* note 38, at 4.

⁴⁵ Paul A. Joray & Charles L. Hulin, *A Survey of the Socio-Economic Aspects of Temporary Work in the United States, in 2 TEMPORARY WORK IN A MODERN SOCIETY* 247, *supra* note 40, at 262; Moberly, *supra* note 40, at 383; Anne E. Polivka & Thomas Nardone, *On the Definition of "Contingent Work," MONTHLY LAB. REV.*, Dec. 1989, at 12.

unemployment insurance, disability, etc.) to employees hired through a temporary agency because the agency, as the worker's employer, pays these expenses.⁴⁶ Employers also treat temporary employees as more flexible and expendable, more like variable costs. Employers consider these employees easier to terminate⁴⁷ and use them to cover uncertain demand and peak periods.⁴⁸

In these ways, temporary employees increasingly complement a core, permanent workforce. They enable employers to refrain from hiring permanent workers until they are certain they will need them. Additionally, permanent hires are not made until an employer is willing to provide them with the protection and benefits required by law and managerial policy.

Temporary employees are, in essence, outside the construct of the typical employment relationship. They are significant to this article's conclusions for two reasons. First, they are useful as a contrast to the typical employment relationship. The typical construct involves employment beyond the coverage of short-term work needs and an employer obligation and responsibility to provide resources above simple payment of wages for work.⁴⁹ Additionally, the growth of the temporary employee workforce is a projection of the desire of many employers to form an employment relationship outside of the typical construct.⁵⁰ These ideas help explain why the "free market" will not necessarily provide parental leave and why the employment relationship is the proper place to realize any costs associated with leaves.

⁴⁶ Joray & Hulin, *supra* note 45, at 262.

⁴⁷ Moberly, *supra* note 40, at 383.

⁴⁸ Polivka & Nardone, *supra* note 45, at 12.

⁴⁹ See generally Beth Stevens, COMPLEMENTING THE WELFARE STATE: THE DEVELOPMENT OF PRIVATE PENSION, HEALTH INSURANCE AND OTHER EMPLOYEE BENEFITS IN THE UNITED STATES 35-40, 61-64 (1986); see also *infra* notes 124-127, 139-147 and accompanying text.

⁵⁰ See generally BELOUS, *supra* notes 41, 46-49 and accompanying text.

II. MYTH TWO: "I HAVE A GREAT FAITH THAT COLLECTIVE BARGAINING AND MARKET FORCES MOVE TOWARDS PROGRESS."⁵¹

Since parental leave is not costly to employers, neoclassical economic theory would suggest, as President Bush argued in his veto message, that normal market forces would move employers to provide leave.⁵² Employers could offer an attractive benefit for little or no cost, thus attracting the best workers and driving those who do not offer the benefit out of business.⁵³ This section will examine why current market forces will not lead to universal parental leave. First this section will examine the empirical evidence of the dearth of parental leave. Then, this section will present reasons, discriminatory and nondiscriminatory, which explain this result.

A. THE LACK OF COMPANY-PROVIDED PARENTAL LEAVE

Currently, much less than half of all workers have a right to parental leave. In 1989, unpaid parental leave was available to 37% of full-time working women and only 18% of full-time working men in the private sector.⁵⁴ Only 2% of employees

⁵¹ The President's News Conference in Huntsville, Alabama (June 20, 1991), *reprinted in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 842, 846 (1991) [hereinafter "Press Conference"].

⁵² Due to the principle of adverse selection, the costs of universal parental leave may not be comparable to those of voluntarily providing leave. With mandatory leave, the parents seeking leave are evenly distributed among all employers. However, when only some employers offer leave, people who may need leave are more likely to seek employment with those firms. As a result, the costs of providing leave significantly increase for the few firms who provide it and may become prohibitive. *Cf.* David I. Levine & Laura D'Andrea Tyson, *Participation, Productivity, and the Firm's Environment*, in *PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE* 183, 219 (Alan S. Blinder ed., 1990) (Adverse selection leads to large screening costs for the few employers who have a formal, publicized just cause dismissal standard). Thus, employers may not voluntarily move toward providing parental leave because of the costs.

⁵³ *Cf.* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 616 (3d ed. 1986) (Market forces tend to minimize discrimination because the least prejudiced sellers do not forgo as many transactions as their more prejudiced competitors, thus the costs are lower and their market share is greater.); Mark S. Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 *NOTRE DAME L. REV.* 318, 321 (1987) (Nondiscrimination laws would appear to be self-enforcing).

⁵⁴ Stephanie L. Hyland, *Helping Employees with Family Care*, *MONTHLY*

work for companies which provide paid maternity leave, and only 1% provide for paid paternity leave.⁵⁵ Public employees fare better, with more than 50% of female and 33% of male workers covered by leaves.⁵⁶ Smaller employers and those with the highest proportion of female employees are, however, even less likely to offer parental leave.⁵⁷ Thus, negotiation, collective bargaining and other traditional market means have not led to the implementation of parental leave⁵⁸ for the majority of workers.

Nor is it likely that these strategies will succeed in the future. In the past, employers have responded only to legislation. For example, in order to comply with the Pregnancy Disability Act, employers must provide the same disability leave benefits to pregnant women and new mothers who are physically unable to work that they provide to disabled employees.⁵⁹

LAB. REV., Sept. 1990, at 25. These conclusions are consistent with the BNA 1988 Employee Benefits Survey which found that 36% of women and 17% of men employed in medium and large private firms (100 or more employees) were eligible for parental leave. Joseph R. Meisenheimer II, *Employer Provisions for Parental Leave*, MONTHLY LAB. REV., Oct. 1989, at 20-21. The State Parental Leave Study found that, in the states studied, only 14% of the employers had pre-statute policies and practices that would meet the requirements of the proposed federal leave legislation. BOND, *supra* note 13, at vii-viii.

⁵⁵ Payment ranged from one to three days' pay. Meisenheimer, *supra* note 54, at 21-22.

⁵⁶ *Id.* at 22.

⁵⁷ See Colvin, *supra* note 11, at 553-554 (testimony of Wendy Williams). Forty percent of women in professional and administrative jobs are eligible for parental leave, compared to thirty-three percent in production and service jobs. Meisenheimer, *supra* note 54, at 22. The Families and Work Institute State Parental Leave Study also found that employers with less than 50 employees statewide were less likely to have formal, written policies governing leaves, and companies with fewer than 21 employees were less likely to allow unpaid disability leave time. BOND, *supra* note 13, at 33-34.

⁵⁸ The studies cited here refer only to parental leave as defined in this article. Other studies showing more widespread availability of parental leave often do not limit the definition of leave, counting any time off for maternity including disability leaves, informal practices, and even "leaves" with no guarantee of job security.

⁵⁹ 42 U.S.C. § 2000e-K (Supp. 1991). The disability leave required by the Pregnancy Disability Act does not address the reasons that parental leave is necessary because it does not provide time for parent-child bonding, it is not available to both sexes (and so affects women's equality in the workplace), and only requires job-protected leave if the employer provides such leave for

In a 1986 Catlayst Survey, eighty-seven percent of the employers cited the statute as the primary reason for providing even this minimum level of job protection.⁶⁰ In addition, those arguing that employers are increasingly adopting family responsive policies rely on questionable study findings to support their position.⁶¹ Thus, without legislation, many employees will remain without the option of parental leave. Although this conclusion appears to conflict with economic theory, several reasons explain the current situation.

B. THE BEHAVIOR OF FIRMS EMPLOYING PRIMARILY WOMEN

Using economic theory, some commentators have argued that a profit-maximizing employer would naturally offer parental leave to attract better employees at no additional cost. However, more than one set of management strategies provide the flexibility needed for profitability in today's international business environment.⁶² One management style, sometimes called the "share" strategy, would likely provide parental leave. This style views employees as an integral and valuable part of the enterprise.⁶³ The work of these employees does not consist of separate, distinct tasks, which management decides to assign to them. Rather, their jobs include a wide variety of roles with the goal of helping the entire enterprise prosper. These employees have a strong affiliation and identification with the enterprise. They have a long-term relationship with the firm and are motivated by compensation made up of hourly wage, profit sharing, bonuses, job security, etc. This strategy is profitable because these employees are productive and are *flexible*, willing,

disabled employees. *See also infra* notes 98-99 and accompanying text.

⁶⁰ Twenty percent of employers attributed the change to competition for employees with other firms and 12.9% named employee demand. Berquist, *supra* note 6, at 255 n.193.

⁶¹ Paul W. Kingston, *Illusions and Ignorance about the Family-Responsive Workplace*, 11 J. OF FAM. ISSUES 438, 442-445 (1990). Unfortunately, no reliable trend evidence exists because studies, over time, have used inconsistent and incorrect definitions of "parental leave."

⁶² MARTIN L. WEITZMAN, *THE SHARE ECONOMY: CONQUERING STAGFLATION* 32-33 (1984). *Cf.* Levine & Tyson, *supra* note 52, at 217 (there can be two stable, economy-wide equilibriums: one in which firms motivate workers with fear of dismissal and high unemployment exists or one in which firms motivate with participation and there is a low unemployment rate).

⁶³ *See generally* BELOUS, *supra* note 41, at x-xi; Weitzman, *supra* note 62.

and expecting redeployment and retraining as necessary.⁶⁴ The affiliation which the employees feel with their employer promotes their flexibility. Additionally, lower long-term costs, stemming primarily from a lower turnover rate, outweigh any short-term increase in costs.⁶⁵

The share strategy is distinct from the "contingent" strategy, which also provides flexibility and oftentimes profitability.⁶⁶ The contingent strategy, however, makes different management choices to reach these goals. It treats employees as commodities and analyzes them as short-term, variable costs. Employees do not identify with the employer and are primarily compensated by an hourly wage. The contingent strategy relies heavily on the construct of the employment relationship used for temporary employees. Employees do not receive benefits, are paid less, work for a short time, and are considered easily expendable.⁶⁷ These characteristics make employees flexible. Employers utilizing this management strategy are not likely to offer parental leave. Not surprisingly, this management philosophy characterizes employers who currently do not provide parental leave.⁶⁸

These two management philosophies, share and contingent, are equally profitable alternatives with different societal effects.⁶⁹ If more employers choose to use a contingent workforce, the "free market" would not necessarily provide parental leave. Current evidence indicates that the trend is indeed in this direction. American employers are slashing the size of their share workforces and are increasing their use of contingent workers.⁷⁰ Employers are moving towards a combi-

⁶⁴ BELOUS, *supra* note 41, at x-xi.

⁶⁵ See Arthur E. Blakemore et al., *Employment Bonuses and Labor Turnover*, 5 J. OF LAB. ECON. S124, S133-S134 (1987); Daniel M. G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?*, 5 J. OF LAB. ECON. S57, S82-S83 (1987).

⁶⁶ Raff & Summers, *supra* note 65, at S57-S58.

⁶⁷ See *supra* notes 45-48 and accompanying text.

⁶⁸ See *infra* notes 153-156 and accompanying text.

⁶⁹ BELOUS, *supra* note 41, at x-xi. The share alternative is clearly preferable from a human relations perspective. MICHAEL BEER ET AL., *MANAGING HUMAN ASSETS* 113-115 (1984). Weitzman argues that the two policies are not equally efficient; that the share approach is actually superior from an economic perspective. WEITZMAN, *supra* note 62, at 2-3.

⁷⁰ Richard S. Belous, *How Human Resource Systems Adjust to the Shift toward Contingent Workers*, *Monthly Lab. Rev.*, Mar. 1989, at 7, 9.

nation workforce, where they have a relatively small core of permanent workers and an increasing pool of contingent workers. This structure enables employers to reap the advantages of both types of workforces, leaving an increasing number of contingent workers without benefits. Although various methods for measuring the contingent workforce exist, all of them show an increase. An averaging of the various methods estimates that one-quarter of all American workers are properly classified as contingent workers.⁷¹ This move to the contingent model is especially noticeable in those industries which employ primarily women.⁷² Thus, the "free market" is driving these employers to a management system that does not include the provision of parental leave.

C. THE BEHAVIOR OF FIRMS WHO EXCLUDE FEMALE WORKERS

Another main reason employers have failed to implement family-oriented policies is that they primarily benefit women; a strong bias against women workers still exists.⁷³ This dynamic characterizes industries which exclude female workers. Society traditionally views women as performing solely, or at least primarily, domestic work, considering this work separate and distinct from marketplace work.⁷⁴ Even though women are an enormous presence in the paid workforce,⁷⁵ this stereotype is so pervasive that society views raising children and working outside of the home as incompatible for women.⁷⁶ Because of

⁷¹ BELOUS, *supra* note 41, at viii. *But see generally* Polivka & Nardone, *supra* note 45 (the operational definition of contingent employment may misrepresent the status of a significant number of part time workers).

⁷² *See infra* notes 153-156 and accompanying text.

⁷³ Joan Aldous, *Specification and Speculation Concerning the Politics of Workplace Family Policies*, 11 J. OF FAM. ISSUES 355, 358 (1990). Although parental leave policies are facially neutral, they are most often used by women. *See infra* note 78. Thus, employers who do not want to attract or employ women would not offer parental leave.

⁷⁴ Berquist, *supra* note 6, at 231-232. This stereotype perpetuates economic and social disparity between men and women. *Id.*

⁷⁵ *See supra* note 6 and accompanying text. In addition to being a large presence, women are also responsible for the traditional male role of financially supporting children. Howard V. Hayghe, *Family Members in the Work Force*, MONTHLY LAB. REV., Mar. 1990, at 14, 15.

⁷⁶ Knight, *supra* note 5, at 409. This same incompatibility is not seen to exist for men. *Id.*

this stereotype, women in the workplace are still viewed primarily as wives and mothers, not workers.⁷⁷ This view leads to both intentional and unconscious bias against women, and especially mothers, in the workforce.⁷⁸

Many different types of evidence show discrimination against women workers. Survey data, for example, indicates that only forty-seven percent of male business executives stated that they would feel comfortable working for a woman.⁷⁹ Additionally, women earn substantially less than men and predominantly work in low-paid, low-status, "female occupations."⁸⁰ In August 1991, the Labor Department released its "Glass Ceiling Report" which found that various practices exist at most companies that create a certain level of advancement which women simply can not exceed.⁸¹ A contemporaneous survey found that women hold only 2.6% of the executive positions at Fortune 500 companies.⁸² Women's choice of jobs or lack of credentials is not a cause of the situation; women with similar education,

⁷⁷ CAROLE PATEMAN, *THE DISORDER OF WOMEN* 179, 190 (1989); Colvin, *supra* note 11, at 559 (components of the spousal unities doctrine still exist as some employers presume that all mothers receive economic support from a husband and withdraw from the workforce).

⁷⁸ This bias creates a complementary stereotype for male workers who are assumed to have primarily money earning duties, to the exclusion of household responsibilities. As a result, men are not offered parental leave as frequently as women. *Supra* notes 54-56 and accompanying text. In addition, far fewer men than women actually take a lengthy leave. BOND, *supra* note 13, at 76-78 (the average leave taken by fathers was one work week); Hylton, *supra* note 13, at 476 n.6. For a discussion of how a father's participation in parental leave can affect his involvement in childcare after the leave is over, see Linda Haas, *Gender Equality and Social Policy: Implications of a Study of Parental Leave in Sweden*, 11 J. OF FAM. L. ISSUES 401 (1990).

⁷⁹ Other survey evidence indicates that 74% of whites (87% of blacks) believe that sex discrimination is still a major problem for women in the labor market. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1340 (1989). Donohue concludes that since women are able workers, "it is difficult to attribute these findings to anything but misogyny." *Id.*

⁸⁰ DEBORAH L. RHODE, *JUSTICE AND GENDER* 162-164 (1989).

⁸¹ These practices groom and promote white men, albeit in less visible and sometimes unconscious ways, for those job tracks which lead to executive positions. Beth Hawkins, *Career-Limiting Bias Found at Low Job Levels*, L.A. TIMES, Aug. 9, 1991, at A1.

⁸² *Few Women in Top Jobs*, CHI. TRIB., Aug. 26, 1991, at A13.

experience and training still do not advance as far or as fast as men.⁸³

The strongest evidence of the existence of sex discrimination, however, may be the statutes and policies which, over time, have directly banned women from working. These statutes and policies clearly show American society's antipathy toward women working outside of the home. Throughout history, both statutes and employer policies have restricted the rights of women to participate fully in the paid workforce. Initially, statutes prohibited women from holding certain jobs.⁸⁴ The trend of excluding women from certain occupations continued throughout the late 19th and early 20th centuries.⁸⁵ Cases from this period reflect the prevailing view of women as wives and mothers first and as workers second.⁸⁶ Furthermore, women were only allowed to be workers if it was not detrimental to their role of wife and mother.⁸⁷

⁸³ RHODE, *supra* note 80, at 165. Less than half of the difference in wages result from "human capital" factors, such as education, experience and hours worked. *Id.* For a discussion on societal factors affecting "choice," see *id.* at 165-167.

⁸⁴ In 1873, for example, the Supreme Court upheld a statute prohibiting women from practicing law, stating that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

⁸⁵ Colvin, *supra* note 11, at 560. Within those jobs women could hold, numerous restrictions limited the total hours and schedule which a woman could work, the amount of her pay, and the conditions of her work, including mandatory rest periods. *Id.* at 560-563. The result of such restrictions was to exclude women from jobs which were higher paying, contained supervisory duties, and which provided promotional opportunities, because they could not accommodate the women's mandated "needs." *Id.* at 562-563.

⁸⁶ In perhaps the most famous case of that era upholding an Oregon statute limiting the number of hours a woman could work each day, the Supreme Court stated, "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, *as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care* in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (emphasis added).

⁸⁷ Barbara J. Nelson, *Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality*, 10 SIGNS 209, 229 (1984).

In modern times, policies toward women workers continue to reflect this view. Throughout the twentieth century, and as recently as 1971, companies prohibited the employment of married women, pregnant women and women with young children.⁸⁸ Until 1991, employers restricted women of child-bearing age from certain occupations because they feared fetal injury.⁸⁹ These cases all show society's discomfort in employing women, especially mothers, outside of the home.

Even when women are not patently prohibited from working outside of the home, other types of discrimination also exist. Employers have structured the typical employment relationship, for example, with the male worker in mind. Employer-determined work schedules and benefits are not always amenable to those who have family responsibilities.⁹⁰ Most work, and especially the most desirable work (that with better pay and benefits and more promotional opportunities), is full-time, not part-time.⁹¹ Benefits often are better for those who have a long, uninterrupted job tenure. This pattern fits the typical male worker, not the typical female worker.⁹² Even the items found in a typical benefit package suit male employees better than female employees.⁹³ They do not include benefits such as

⁸⁸ In the 1920's and 30's, statutory law forced *married* women to leave the workforce and prohibited them from holding certain jobs. Berquist, *supra* note 6, at 238. Within the last twenty years, statutes have prohibited *pregnant* women from holding certain jobs, especially positions as teachers. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). Flight attendants have faced the same prohibitions. See cases cited in Berman, *supra* note 6, at 468 n.95. As recently as 1971, a major company refused to even consider employing women with pre-school age children. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (a similar exclusion did not exist for men).

⁸⁹ Even though evidence existed that workplace hazards could also affect fetuses through the father, the prohibition only applied to women. Automobile Workers v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). Although this practice was held illegal, four of the Justices concurred in the judgment because they believed that sex-specific fetal protection policies *might* be justified if the employer could show that the possible costs associated with fetal injury were substantial. *Id.* at 1210. Given the recent changes in the Court's composition, it may again uphold sex-specific fetal protection policies.

⁹⁰ Knight, *supra* note 5, at 410-411.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Sara Rix, *Mandated Benefits and the Work/Family Dilemma or What's a Good Congress to Do?*, in GOVERNMENT MANDATING OF EMPLOYEE BENEFITS 265, 274 (Employee Benefit Research Institute, ed., 1987).

parental leave, paid childcare or leave for sick children; instead, these packages contain benefits such as vacation, which employers expect to be taken all at once, rather than in many small increments.⁹⁴

The structure of the government's major employment-related benefit program, social security, also reflects the worklife of a man, not a woman.⁹⁵ The government determines the amount that a worker receives from social security upon retirement based on a formula that looks at, among other things, length of employment and earnings. The government developed this formula to provide a reasonable retirement income to a worker with a "typical" male workforce record. When a "typical" female works for a shorter total period of time, interrupts her worklife, and earns less than a typical male worker, she will earn significantly less upon retirement than her male counterpart because the male profile was used to develop the system.⁹⁶ In addition, the system favors women who work in the home over female workers in the paid labor force.⁹⁷ Thus, the structure of the employment relationship, defined by the employer and the government, discriminates against female workers.

This structural discrimination is apparent in attempts to deal with the issue of parental leave within the current framework of employment benefits. Many companies and states address the need for job-protected leave by labelling pregnancy a "disability" and providing disability leave. Under the current male-oriented structure of the workplace, the only way to fit pregnant women and new mothers into its definitions of "work-

⁹⁴ *Id.*; Knight, *supra* note 5, at 410.

⁹⁵ Nelson, *supra* note 87, at 230; Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 244-245 (1980). Within the structure of social benefits, there is a specious distinction made between social security, which people incorrectly view as an earned premium paid on an insurance policy, and welfare, which people see as a grant or hand-out. This distinction reflects the traditional dual labor market where men "work" outside the home and receive social security, while women provide unpaid care and receive welfare. Nelson, *supra* note 87, at 221; PATEMAN, *supra* note 77, at 192-194; *see also infra* note 129 and accompanying text.

⁹⁶ Blumberg, *supra* note 95, at 244-245.

⁹⁷ Nelson, *supra* note 87, at 230. A spouse who does not work in the paid labor force can collect benefits as the dependent of a worker. When comparing two couples who contributed the same amount to social security (one contributing through one wage earner and the other contributing through two wage earners), the couple with one wage earner will receive more money than the couple with two wage earners. Blumberg, *supra* note 95, at 247-251.

er" and "benefits" is to treat them as imperfect or disabled men.⁹⁸ Since only women are eligible for this type of leave, their action in taking leave makes them vulnerable to adverse employment decisions justified by their "choice." The true inequality in this situation "comes not from the 'natural' differences between the sexes, but from the attempt to fit women into a workplace that was built without regard for the needs of those with responsibility for children."⁹⁹ Since both men and women are parents, a parental leave policy avoids this problem by redefining the workplace to include benefits which, although benefitting primarily women, employers can apply to both sexes.

D. MARKET FAILURES ALLOWING EMPLOYERS TO DISCRIMINATE AGAINST WOMEN

Some employers discriminate against people unconsciously. Others consciously pay an employee more when he comes from a favored group than they pay an equally qualified employee from a disfavored group. These employers are said to have a "taste" for discrimination.¹⁰⁰ Employers act this way, not from a desire for economic gain, but rather to satisfy nonpecuniary preferences to associate with people of their own choosing.¹⁰¹ The mythology of market forces argues that any form of discrimination (intentional, unconscious, or structural) should drive employers out of business, making anti-discrimination laws unnecessary.¹⁰² The free market does not work in the employment arena, however, because of various market failures.¹⁰³ Market failures fall into two categories:¹⁰⁴ those caused by

⁹⁸ Knight, *supra* note 5, at 420.

⁹⁹ *Id.* at 423-424.

¹⁰⁰ Jeffrey G. MacIntosh, *Employment Discrimination: An Economic Perspective*, 19 OTTAWA L. REV. 275, 280 (1987). See generally GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

¹⁰¹ See POSNER, *supra* note 53, at 615; Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. Rev. 271, 272 (1965).

¹⁰² See *supra* note 53 and accompanying text.

¹⁰³ Cf. Richard B. Freeman, *Decline of Labor Market Discrimination and Economic Analysis*, 63 AM. ECON. REV. 280, 284 (1973) (labor market reasons are inadequate to explain the long-term nature of employment discrimination against blacks and the sudden change in the extent of discrimination).

¹⁰⁴ Firms which are not subject to market forces, such as natural monopolies and those in the public sector, also may discriminate without fear of economic repercussions. MacIntosh, *supra* note 100, at 300-301.

government regulation and those caused by management choices.

In the absence of government regulation, a firm seeks to maximize its profits by holding down costs. These costs include labor and a normal economic profit or return for the entrepreneur. In order to secure employment, a prospective employee from a disfavored group may offer her labor at a lower price than one from the favored group. Government regulation affects this behavior in several ways by allowing an employer to indulge his taste for discrimination. In certain regulated industries, the government caps the amount of profit which a firm may make. In these circumstances, the firm no longer has an incentive to limit its costs. It may spend more to hire someone from the favored group, and the government still may allow the firm to receive the same profit.¹⁰⁵ Alternately, a minimum wage law prevents employees from lowering their price, so a discriminating employer can hire someone from a favored group for the same wage as someone from a disfavored group.¹⁰⁶ These regulations, then, prevent market forces from acting against the discriminating employer.

There are also a variety of management choices which lead to market failures. Some employers (those receiving the cost-savings associated with having a share workforce) have found that the wage at which they maximize their profits is above the lowest wage that they could pay employees and still hire them. They buy labor at their "efficiency wage." Since this efficiency wage is highly relative to what prospective employees are willing to accept, they can hire employees from their preferred group.¹⁰⁷ A similar situation exists anytime there is more than one equally qualified candidate willing to work for the same wage. The employer is free to discriminate in this situation.¹⁰⁸

Additionally, in many companies the person making the hiring decision is removed from the discipline of the market-

¹⁰⁵ This situation describes most public utilities, including railroads. Demsetz, *supra* note 101, at 279.

¹⁰⁶ *Id.* at 275; Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 250 (1971).

¹⁰⁷ Joseph E. Stiglitz, *Approaches to the Economics of Discrimination*, 63 AMER. ECON. REV. 287, 290 (1973).

¹⁰⁸ *Id.*

place.¹⁰⁹ Thus, a management that chooses to delegate hiring decisions to lower levels allows the hiring manager to indulge his taste for discrimination over pecuniary needs. A large company can absorb the higher costs because it considers a certain amount of "unexplained" loss normal and probably due to bureaucracy and decentralized management.¹¹⁰ The separation of ownership and control in large companies, where shareholders are removed from and lack power over day-to-day operations, exacerbates this tendency.¹¹¹ A final management choice is simply to take a lower, but still positive, economic profit.¹¹² Entrepreneurs are able to do this when they face relatively weak competitive forces. This is the purest case of sating nonpecuniary tastes over economic ones.

Some commentators argue that employers decide not to hire women or people of color by the use of "rational" or "statistical" discrimination — generalizations about these groups which may be inaccurate for individuals, but provide an easy and inexpensive screening tool for the majority of applicants. For example, employers may assume that women are more likely to quit because of their family responsibilities and so may not invest in their hiring and training. Recent data suggest, however, that men and women in comparable jobs, with comparable qualifications, do not have different turnover rates.¹¹³ The State Parental Leave Study found that 85% of mothers returned to work for the same employer following their leave.¹¹⁴ Additionally, statistical discrimination must be rejected; the social inefficiencies caused by discrimination outweigh any cost savings netted by the discriminating firm.¹¹⁵ Finally, even if employers could

¹⁰⁹ Fiss, *supra* note 106, at 250. This situation also exists when union hiring halls are used. *Id.* at 251.

¹¹⁰ MacIntosh, *supra* note 100, at 300-301.

¹¹¹ *Id.* at 301-303. The shareholders, not the employees, are the ones who are economically hurt when the company is not profitable.

¹¹² Fiss, *supra* note 106, at 250; MacIntosh, *supra* note 100, at 300-301.

¹¹³ RHODE, *supra* note 80, at 169.

¹¹⁴ This figure was the same, both before and after the passage of mandatory parental leave laws. BOND, *supra* note 13, at 70-71.

¹¹⁵ If all members of a group are assumed to have a certain undesirable characteristic and are employed and paid accordingly, individuals in that group have no incentive to act differently from the stereotype or to invest in human capital to overcome the stereotype. For example, if mothers receive less pay because employers assume they will miss work when their children are ill, there is no incentive for any individual mother to make other arrange-

save money by discriminating, cost savings alone do not justify breaking equal employment or other laws.¹¹⁶

Mechanisms clearly exist enabling employers to discriminate in hiring without market forces driving them out of business. Since employers use benefits to attract prospective employees, employers who do not wish to hire certain groups simply will not offer the benefits which would attract members of that group. Market forces do not punish firms for not recruiting certain employees anymore than they punish them for not hiring these workers. An employer who does not want to hire women can avoid doing so by paying more to hire men. In that case, the employer would have no incentive to implement a benefit, such as parental leave, designed to attract and retain women. The entire crux of market failure analysis is that employers are, in many cases, free to ignore market forces militating against discrimination in recruiting and hiring. Statistical evidence, the history of female workers, and the current structure of the workplace all show that employers do discriminate against women. Only legislation will prevent employers who want to discriminate from doing so.

III. MYTH THREE: "[THESE POLICES] MUST BE . . .
CRAFTED AT THE WORK PLACE BY EMPLOYERS
AND EMPLOYEES, AND NOT THROUGH GOVERNMENT
MANDATES IMPOSED BY LEGISLATION."¹¹⁷

Thus far, this article has analyzed two of the myths underlying the President's veto of the Family & Medical Leave Act: its costs would hamper American companies and market mechanisms will lead naturally to parental leave. A third myth lies implicit in the President's disdain for "mandated" benefits.¹¹⁸ He believes that the government does not have the right to interfere with benefit provision, which he views as "traditionally . . . within the purview of employer-employee negotiation," as

ments when her child is ill. Similarly, if women do not receive promotions because employers assume they have no interest in a "career," individual women have no incentive to invest in the training or education necessary for advancement. Thus, the stereotypes lead to socially inefficient behavior by members of the disadvantaged group. Donohue, *supra* note 79, at 1356-1358.

¹¹⁶ Brodin, *supra* note 53, at 323, 357-365.

¹¹⁷ Veto Message, *supra* note 1, at 891.

¹¹⁸ Press Conference, *supra* note 51, at 846.

opposed to "government mandate."¹¹⁹ In reality, our society has chosen the workplace to deliver social welfare benefits. To a large extent, society has rejected the possibilities of individual responsibility or state provision of social benefits. Following from this decision, mandatory job-protected parental leave is proper and consistent with the American social welfare system. After describing the current American benefits delivery system, this section will show why benefits provided by the private sector are properly categorized as either public or social benefits. Finally, this section will examine some advantages of this delivery system: the linkage of demands for benefits to economic constraints and the ability to offset some of the harshness of the labor market.

A. THE AMERICAN SYSTEM FOR DELIVERY OF SOCIAL WELFARE BENEFITS

In most other countries, social welfare benefits are provided by the government and financed through taxes. The United States, however, has chosen a different system to meet these needs.¹²⁰ The U.S. has opted for a system where social benefits are predominantly provided for working people through the employment relationship and are closely regulated by the government. The general population depends primarily on a tie to the workplace, not the government, for basic forms of protection against financial insecurity.¹²¹ The formation of this type of delivery system has surprised social scientists studying societal provision of welfare benefits. Until recently, these scholars assumed that all countries would move eventually to *governmental* programs to cover accident, retirement, sickness, unemployment, family allowance and public assistance for low-

¹¹⁹ Veto Message, *supra* note 1, at 891.

¹²⁰ Theda Skocpol & John Ikenberry, *The Political Formation of the American Welfare State in Historical and Comparative Perspectives*, 6 COMP. SOC. RES. 87, 89-91 (1983).

¹²¹ PUBLIC/PRIVATE INTERPLAY IN SOCIAL PROTECTION: A COMPARATIVE STUDY 14-15 (Martin Rein & Lee Rainwater eds., 1986) [hereinafter "Rein and Rainwater"]; Stevens, *supra* note 49, at 64.

income people.¹²² The United States, however, has resisted this evolution.¹²³

A description of the current welfare benefits system shows that the American benefits delivery system tends to be market-based, as opposed to government-based. Private enterprise provides approximately one-quarter of all social welfare benefits; the highest percentage of non-governmental expenditures in the world.¹²⁴ Social benefits include the satisfaction of any common need, such as medical care, schools and roads, and more specific needs based on incapacity to work, unavailability of work or inadequacy of wages.¹²⁵ Private sources pay for twenty percent of income maintenance programs and over half of health insurance expenditures.¹²⁶ The fact that the United States is the only country in the world in which private health insurance is the principal source of medical protection, dramatizes the unique character of the American system.¹²⁷

The two-pronged American delivery system provides benefits considered "voluntary" and those that are legally required. Although the government does not require employers to provide the voluntary benefits (i.e. vacation, medical insurance, pensions), it provides incentives to do so and closely regulates their provision.¹²⁸ The cornerstone of mandatory benefits is social security.¹²⁹ The employer-based delivery system appeals to

¹²² Theda Skocpol, *The Limits of the New Deal System and the Roots of Contemporary Welfare Dilemmas*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 293 n.1 (Margaret Weir et al. eds. 1988).

¹²³ *Id.* at 293-295.

¹²⁴ Rein & Rainwater, *supra* note 121, at 17 (22.9%); Stevens, *supra* note 49, at 2 (over 25%).

¹²⁵ Rein & Rainwater, *supra* note 121, at 30, 33.

¹²⁶ Stevens, *supra* note 49, at 2.

¹²⁷ Rein & Rainwater, *supra* note 121, at 51.

¹²⁸ *See infra* notes 132-133 and accompanying text. The Government has encouraged and shaped "voluntary" benefits from their outset. These benefits came into existence during World War II as a way to increase compensation to employees whose wages the War Labor Board "froze." LAWRENCE S. ROOT, *FRINGE BENEFITS: SOCIAL INSURANCE IN THE STEEL INDUSTRY*, 43-44 (1982). At the same time, the government was taxing "excess profits." Companies could choose to invest their "excess profits" in nontaxable benefits (which could improve labor relations) and still receive the same actual profit. Stevens, *supra* note 49, at 19.

¹²⁹ Upon introduction of the program, President Roosevelt attempted to disguise the governmental nature of it by calling it an "entitlement" program.

the public because the absence of governmental expenditure makes it appear "free."¹³⁰ These characteristics all reflect American society's belief in the myth of the free market and its desire to have a market-based, as opposed to government-based, system to provide welfare benefits.¹³¹

Although the American benefit delivery system relies primarily on the private sector, the government is heavily involved in regulating the employment relationship.¹³² The myth of "private employment" ignores the extent of government regulation.¹³³ Indeed, there is a huge amount of social and

The President characterized the program as "insurance," with "premiums" paid on workers' "contributions" in order to distinguish the program, in public opinion, from welfare. Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 MINN. L. REV. 379, 398 (1983). He also insisted that the program be financed by a payroll tax in an attempt to make it politically invulnerable to future attack as a private deal. *Id.* at 385. The other mandatory benefits are unemployment compensation, workers compensation, minimum wage, premium wage, and job-protected jury and military leaves.

¹³⁰ ROOT, *supra* note 128, at 200; Deborah Chollet, *Public Policy Options to Expand Health Insurance Coverage Among the Nonelderly Population*, in GOVERNMENT MANDATING OF EMPLOYEE BENEFITS 91, 94 (1987). This appearance is false, however, because the costs are borne by the public through other mechanisms.

¹³¹ Skocpol & Ikenberry, *supra* note 120, at 134-136.

¹³² James A. Burstein & Jeri A. Lindahl, *The Practical Labor Lawyer -- Parental-Medical Leave: A New Trend in Labor Legislation*, 14 EMPLOYEE REL. L.J. 299, 300 (1988); Gimler, *supra* note 6, at 601-602.

¹³³ It regulates the hours and wages of employment through the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988 & Supp. I 1990). The regulation of work conditions which affect health and safety occurs through the Occupational Safety & Health Act, 29 U.S.C. §§ 651-678 (1988). Job-protected leave is mandatory for jury duty, 28 U.S.C. § 1875 (1988), and military service, 38 U.S.C. § 2021(b)(3) (1988). Discrimination in the terms and conditions of employment is regulated by many laws including Title VII, the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1988), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. I 1990), and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1991). The regulation of the employment of non-citizens occurs through the Immigration & Naturalization Service through many laws, including the Immigration Reform & Control Act of 1986 (IRCA), 8 U.S.C. § 1102 (1988 & Supp II 1991). Benefits are regulated by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1453 (1988 & Supp. I 1990), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) Pub. L. 99-272, 100 Stat. 82 (1985), Internal Revenue Code § 162(k). The tax laws provide an example of the extent of government policy. By not taxing benefits as income in 1979, for example, the government forwent

governmental control at the intersection of public and private social benefits policy. The government constrains individual consumption by limiting the type of purchases made and their timing. The government also regulates the free negotiation of labor contracts; social programs which encourage people to work, so that production continues; and social programs which control political mobilization and protest by keeping the public satisfied.¹³⁴ The government also demonstrates an interest in children and quality care through tax deductions for dependent children, tax breaks for childcare and the recognition of family as a protected interest in equal protection/due process analysis.¹³⁵ Given the intensity of government involvement in the employment relationship and its interest in the family, it is difficult to say that mandatory job-protected parental leave would significantly increase the government's involvement in issues not within its purview.

B. EMPLOYER PROVIDED BENEFITS: HALFWAY BETWEEN A RIGHT AND A REWARD

Even though employers' expenditures are "private," they have many "social" characteristics in addition to the social nature of the goods and services which they provide. Within the work group, they are nonelective, and the costs and benefits are socialized or collectivized, rather than determined by an individual bargain or quid-pro-quo.¹³⁶ They are a product of the constant interaction between governmental and private institutions.¹³⁷ Finally, like taxes and other governmental programs,

approximately \$20 billion. ROOT, *supra* note 128, at 189. This amount was larger than the expenditures for Aid for Families with Dependent Children and Medicaid combined. *Id.* An example of an alternative program would be to tax these benefits and use the money to provide health care for low income people. Uwe E. Reinhardt, *Should All Employers Be Required by Law to Provide Basic Health Insurance Coverage for their Employees and Dependents?*, in GOVERNMENT MANDATING OF EMPLOYEE BENEFITS 121, 131 (Employee Benefit Research Institute, ed., 1987).

¹³⁴ Rein & Rainwater, *supra* note 121, at 20-23.

¹³⁵ Bergquist, *supra* note 6, at 257.

¹³⁶ ROOT, *supra* note 128, at 15; Rein & Rainwater, *supra* note 121, at 26.

¹³⁷ Rein & Rainwater, *supra* note 121, at 18-19; see also *supra* notes 136-148 and accompanying text.

they arrange or manage consumer sovereignty by restricting the type of purchases and the time of consumption.¹³⁸

By providing these benefits, employers take responsibility for certain social obligations unrelated to work or production.¹³⁹ Although many categorize "fringe benefits" as wages, they are not compensation for services but rather payments for social, nonwork needs.¹⁴⁰ Employers gave paid vacation, the first fringe benefit, not in response to requests for increased wages, but to provide time off to rest, relax and socialize.¹⁴¹ Unions suggested the framework of viewing benefits as compensation for services, and arbitrators adopted the framework to give a legal claim to payment for terminal vacation pay.¹⁴² Characterizing fringe benefits as payment for services is harmful, however, because it disguises the true nature of the American delivery system of social benefits.¹⁴³

When employers began to provide health benefits to families, benefit coverage extended to nonworkers for the first time. In 1980, for example, employer-provided health insurance covered more *dependents* than employees.¹⁴⁴ This development also expanded the definition of proper remuneration from payment given to individual workers based on their work performance to something that acknowledged and provided for circumstances outside the workplace.¹⁴⁵ An additional category of non-workers who receive benefits are retirees, who receive them not as remuneration, but based on their employers acceptance of responsibility to provide for them even after they cease

¹³⁸ Rein & Rainwater, *supra* note 121, at 9. The programs generally restrict spending by employees during their mid-life years in which they are healthy in order to ensure that they have money in the event of retirement, sickness, unemployment, or disability.

¹³⁹ DONNA ALLEN, FRINGE BENEFITS: WAGES OR SOCIAL OBLIGATION 267 (1969).

¹⁴⁰ An entitlement should only be characterized as part of the market relationship if it has as a basis current labor. If its basis is past labor or citizenship rights, then it is a social or collective provision. Rein & Rainwater, *supra* note 121, at 29.

¹⁴¹ ALLEN, *supra* note 139, at 186.

¹⁴² *Id.* at 198.

¹⁴³ *Id.* at 199.

¹⁴⁴ The ratio was 1.62:1. Stevens, *supra* note 49, at 36.

¹⁴⁵ *Id.*

to work.¹⁴⁶ Employers also provide unemployment compensation and benefits to laid off employees; representing both the obligation of employers to former employees who left work through no fault of their own and the reality that the workplace is the major port of access to benefits.¹⁴⁷ Clearly, compensation and benefits are no longer strictly wages paid in return for production. They provide for the *social* needs of both workers and people outside the workforce.

Society's view that privately supplied social benefits substitute for government-sponsored benefits reinforces the relationship between the public and private sectors. Private benefits become de facto social policy.¹⁴⁸ Their existence can become a roadblock to public sector attempts to provide similar social welfare benefits.¹⁴⁹ As private benefits expand, the pressure to provide more or better public benefits decreases.¹⁵⁰ This scenario is particularly true among those who receive benefits from their employers and who therefore do not perceive a need for better government-provided benefits.¹⁵¹ Employers also do not press for better social benefits as they prefer to provide fringe benefits to prevent the expansion of government-provided, publicly-funded programs.¹⁵²

There are two losers in this situation: the unemployed and those whose employers do not provide benefits. Those people who are most in need of social insurance protection are the ones least likely to get protection through the workplace.¹⁵³ These people tend to be unemployed, low-paid, unskilled, non-white and female.¹⁵⁴ Part of the problem originates in the shift to the use of contingent workers by employers. The labor force is changing, but the social welfare system has not kept up with the changes to insure that these workers receive basic welfare guarantees.¹⁵⁵ Thus, the current structure for providing bene-

¹⁴⁶ *Id.* at 36-37, 61, 62.

¹⁴⁷ *Id.* at 37, 62.

¹⁴⁸ *See id.* at v.

¹⁴⁹ *See id.* at 3; ROOT, *supra* note 128, at 203.

¹⁵⁰ ROOT, *supra* note 128, at 188.

¹⁵¹ *Id.* at 197.

¹⁵² ALLEN, *supra* note 139, at 261.

¹⁵³ ROOT, *supra* note 128, at 187.

¹⁵⁴ *Id.* at 196.

¹⁵⁵ BELOUS, *supra* note 41, at 12.

fits leaves out those most in need of parental leave, while simultaneously acting as a barrier for increased governmental provision of social benefits.¹⁵⁶

The United States has made the unique decision to use the employment relationship to deliver social welfare benefits. This system only covers those who have some connection to the workplace and works well only for those whose connection is to an employer who provides good benefits. Because of these problems, a government-sponsored program that covered temporary workers and people who perform nonmarket household work would, in fact, be preferable. However, such a program is not politically feasible; the current system works to frustrate the expansion of government-provided benefits to those who are not receiving them through the private sector. Mandating job-protected parental leave is a significant and attainable first step toward universal coverage. It would provide an important benefit to employees who tend to be left out in the current benefits scheme, would be consistent with the use of the employment relationship to provide benefits; and would not, as President Bush suggested, involve the government in something considered traditionally outside its purview.

C. THE WORKPLACE AS THE PROPER LOCUS FOR PROVIDING SOCIAL WELFARE BENEFITS

Society's decision to use the employment relationship to provide social welfare benefits has two major advantages. First, this benefits delivery system contains inherent limits; the demands for resources are connected to and limited by the business realities of the entities which produce those resources. Additionally, the system is sound politically because it provides a counterbalance to the harshness of an economic system which relies on the commodification of labor. The employment relationship is more than providing wages for work. It is an integral part of the social and political system. As such, the provision of benefits through this relationship (mandatorily, if they do not arrive voluntarily) is necessary for the stability of the system.

¹⁵⁶ Providing for these social needs is no longer seen as properly borne by the individual. ALLEN, *supra* note 139, at 260-261.

By their very nature, employment benefits are tied to the workplace. Although not compensation for work performed,¹⁵⁷ they are developed within and delivered through the framework of the employment relationship. The benefits offered are subject to business considerations and motivated by employee demands.¹⁵⁸ These competing forces result in the provision of benefits, a result characterized as "halfway between a reward and a right."¹⁵⁹ Their provision is subject to both humanitarian social policy concerns and business considerations.¹⁶⁰ If the workplace does not provide these benefits, the limits imposed by business considerations dissipate. If social claims for resources are divorced from the nation's economic capacity to meet them, the constraints on the ability to meet such demands are not directly perceived or understood.¹⁶¹ Thus, the workplace nexus is necessary to provide rational limits and constraints on the demand for social benefits.

The nature of the employment relationship also makes the workplace the appropriate locus for social benefits. Employment is more than providing work in exchange for wages. It is an integral part of the social and political order of the country. People must work to keep the economy flourishing. The government structures national social policies to encourage people to work. Indeed, the creation of national markets requires that there be a market for labor and that the market consider individuals' labor a commodity.¹⁶² The commodification of labor, however, results in extreme hardship for those who are superfluous to the labor market.¹⁶³ Society is unwilling to accept the abandonment of these individuals, and consequently develops arrangements to protect them from the harshness of the human labor market.¹⁶⁴ Thus, the development of social bene-

¹⁵⁷ See *supra* notes 139-147 and accompanying text.

¹⁵⁸ See Stevens, *supra* note 49, at 3-4.

¹⁵⁹ *Id.* at 1.

¹⁶⁰ *Id.* at vi.

¹⁶¹ Michael J. Piore, 1 Post-Reaganomics: The Resurgence of the Social Sphere in Economic and Political Life? 17 (Jan. 1989) (unpublished manuscript, on file with the *Cornell Journal of Law and Public Policy*).

¹⁶² Fred Block & Margaret R. Somers, *Beyond the Economistic Fallacy: The Holistic Social Science of Karl Polanyi*, in VISION AND METHOD IN HISTORICAL SOCIOLOGY 47, 54 (Theda Skocpol ed., 1984).

¹⁶³ Rein & Rainwater, *supra* note 121, at 32.

¹⁶⁴ See Block & Somers, *supra* note 162, at 65; Rein & Rainwater, *supra*

fits within the employment relationship is an attempt to deal with the inherent contradictions of the commodification of labor. Society wants a market system, but it is unwilling to accept the fact that the market makes no adjustment for human needs.¹⁶⁵ The labor market cannot exist without the provision of social benefits to guard against the negative effects of that market. Since the social political order requires a labor market, the provision of benefits is also necessary.¹⁶⁶

CONCLUSION

Q. Mr. President, during the campaign you said often that we've got to find a way that people who have children won't be threatened with the loss of their jobs, and now you're saying that that has to be a voluntary position on the part of employers to give parental leave. How does that fulfill your campaign promise for people who work for employers who won't give voluntary leave, and what do you have to say to those people?

The President. You've got to keep working for them until they do because my campaign promise did not go to what they call mandated benefits.¹⁶⁷

Some people, including President Bush, have opposed legislation guaranteeing job protected parental leave to all workers. Most people, including the President, have agreed that such leave is necessary to provide all parents, but primarily new mothers, time to bond with and nurture their children without suffering severe economic and career problems. Arguments against job-protected parental leave focus instead upon three basic myths: that the costs of mandatory leave would make it

note 121, at 33. These works, describing the theory of Karl Polanyi, contend that society will not tolerate the hardship because of humanitarian concerns. A more cynical explanation is that these benefits must be provided to keep people content and to ensure political stability.

¹⁶⁵ Block & Somers, *supra* note 162, at 57-58; Rein & Rainwater, *supra* note 121, at 33.

¹⁶⁶ In an ideal world, the nonmarket work provided by women would receive acknowledgement and benefits provided accordingly. *See generally*, Pateman, *supra* note 77. Similarly, all employees, including temporary employees, would receive these benefits.

¹⁶⁷ Press Conference, *supra* note 51, at 979.

impossible for American companies to compete internationally and to create jobs; that market forces naturally will move employers to provide appropriate leave options; and that the government should not interfere in the field of employer-provided benefits. Although these myths have strong appeal, they prove false when subjected to close scrutiny.

Studies in states that have adopted mandatory parental leave show that a company's ability to do business has not been impaired. Employers in four of these states overwhelmingly reported that they did not experience difficulty in implementing the statute. Mandatory leave did not increase administrative, training, unemployment insurance or health benefit costs for the great majority of the employers. Costs did not increase because employers were able to cover leaves by using temporary employees. The availability and use of temporary employees has skyrocketed because temporary employees cost less to employ and require less commitment than regular workers. Thus, the growth of the temporary workforce enables employers to provide job-protected parental leave without increasing their costs or interfering with their ability to compete.

Even though parental leave is not costly to implement, the free market has not moved the majority of employers to provide it. Adverse selection may mean parental leave is costly if only some employers provide it. Alternately, by hiring contingent workers who do not require leave, employers may have found a different, equally profitable management strategy. Another reason employers do not provide parental leave may be that employers discriminate against women. Market failures, caused by government regulation and management policy, allow employers to satisfy these discriminatory, nonpecuniary preferences without being driven out of business. Employers nonpecuniary preferences include a desire not to employ women, who they view primarily as wives and mothers, not workers. Empirically, then, the assumption that market forces will move employers towards providing parental leave has proven false.

Also false is the myth that the area of benefit provision is outside the government's purview. In the United States, government and "private employment" are inextricably intertwined in the provision of social welfare benefits. Unlike all other countries in the world, American society has chosen to use the employment relationship to deliver social benefits which other governments generally provide. The employer has assumed responsibility for providing benefits unrelated to production and to people not in the workforce. Meanwhile, the government's

role has been to regulate, encourage, and shape these benefits. This system beneficially links demands for resources to resource production and provides a stabilizing counterbalance to the harshness of the labor market. Unfortunately, this delivery system only provides these benefits to those with a connection to the workforce and whose employers provide sufficient benefits. Mandatory job-protected parental leave could start to help correct the inequities in the current benefit delivery system by extending an important social benefit to the group of workers who is currently most likely to be excluded: working mothers.

