

# PAID FAMILY LEAVE IN AMERICAN LAW SCHOOLS: Findings and Open Questions

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**ABSTRACT:** *There exists a substantial literature on the status of women in legal education, including studies on women students' experiences in law schools and gender bias on law school faculties. However, no recent study examines the family leave policies and practices in American law schools. This pilot study of thirty-three law schools represents an initial step toward filling that gap. Its findings are threefold. First, almost three-quarters of the law schools surveyed provide some form of wage replacement during a family leave that is more generous than required by federal law. Second, among the law schools surveyed, there is a positive relationship between teaching at top-tier and private law schools and receiving a paid family leave. Third, although many of the surveyed law schools provide paid family leave, most leaves were granted on a case-by-case basis. This study stands to benefit a number of constituencies within the legal academy, including individual faculty members, faculties developing leave policies, appointments committees, and job candidates. While preliminary in nature, it raises a number of open empirical and theoretical questions for future research.*

## TABLE OF CONTENTS

I. INTRODUCTION.....	662
II. STATISTICS ABOUT WOMEN LAW PROFESSORS.....	665
III. METHODOLOGY.....	683
IV. FINDINGS.....	689

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V. DISCUSSION.....	696
A. <i>Have Law Schools Made Progress with Regard to Family Leave Benefits in the Past Twenty Years?</i> .....	696
B. <i>Are Law Schools Keeping up with Other Employers?</i> .....	699
C. <i>What Explains the Positive Relationship Between Teaching at Top-Tier and Private Law Schools and Receiving a Paid Family Leave?</i> .....	705
D. <i>Do Law School Leave Policies and Practices Explain Part of the Underrepresentation of Women Among the Top Law Teaching Positions?</i> .....	708
VI. CONCLUSION.....	711

## I. INTRODUCTION

In the early 1990s, two national controversies involving prominent women lawyers focused the nation's attention on women's underrepresentation in the positions of highest prestige, reward, and influence in the American workplace. In 1991, law professor Anita Hill accused Supreme Court nominee Clarence Thomas of harassing her during his tenure as the head of the Equal Employment Opportunity Commission,<sup>1</sup> heightening national awareness about sexual harassment in the workplace.<sup>2</sup> In 1993, corporate lawyer Zoe Baird and federal appeals court judge Kimba Wood withdrew their nominations for attorney general amid revelations that both women had employed illegal immigrant nannies,<sup>3</sup> focusing the nation on professional women's troubles navigating a workplace still designed largely around the life patterns of men. To a lesser degree, "Nannygate,"<sup>4</sup> as it came to be known, also highlighted professional women's and men's exploitation of domestic workers of color.<sup>5</sup> While it is impossible to

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1. *Thomas Supreme Court Nomination: Hearing Before the S. Judiciary Comm.*, 102d Cong. 12–15 (1991) (statement of Anita Hill, Professor, University of Oklahoma).

2. Less than one year after the Thomas confirmation hearings, reports of sexual harassment to the Equal Employment Opportunity Commission rose over 50%. See Jane Gross, *Suffering in Silence No More: Fighting Sexual Harassment*, N.Y. TIMES, July 13, 1992, at A1.

3. See MARY ROMERO, *MAID IN THE U.S.A.* 9–10 (10th anniversary ed. 2002).

4. Michael Kelly, *Household Hiring Is Trickier with New Broom in Capital*, N.Y. TIMES, Feb. 12, 1993, at A1 ("It's a mess. It's Nannygate.").

5. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 21–29 (1999).

definitively establish a causal link, both controversies can fairly be said to have contributed to an environment favorable to advances in employment discrimination law for women. For example, in 1993 the Supreme Court held in *Harris v. Forklift Systems, Inc.*<sup>6</sup> that an employee need not demonstrate serious psychological injury to have an actionable sexual harassment claim.<sup>7</sup> The Hill/Thomas and Nannygate controversies also likely influenced Congress's passage of the Civil Rights Act of 1991<sup>8</sup> and the Family and Medical Leave Act of 1993 (FMLA),<sup>9</sup> two small but significant legal victories for working women in the early 1990s.

More than a decade later, attention is shifting back to the topic of women's underrepresentation in the best jobs. However, the latest national discussion has a distinctly different flavor. In 2003, the *New York Times Magazine* featured a cover-story announcing the "Opt-Out Revolution."<sup>10</sup> Women and men across America learned over their Sunday morning coffee why more highly educated women "don't run the world": "because they don't want to."<sup>11</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>12</sup> Along the same lines, in early 2005, Harvard University President Lawrence Summers publicly hypothesized that differences between men's and women's preferences and intellectual abilities best explain women's underrepresentation in tenured

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6. 510 U.S. 17, 21 (1993) (holding that actionable hostile work environment sexual harassment requires only that the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment," not that it seriously affected the employee's psychological well-being or led the plaintiff to suffer injury (quoting *Meritor Sav. Bank v. Vinson* 477 U.S. 57, 67 (1986))); see also Susan Deller Ross, *Sexual Harassment Law in the Aftermath of the Hill-Thomas Hearings*, in RACE, GENDER, AND POWER IN AMERICA 228, 230-32 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

7. *Harris*, 510 U.S. at 22.

8. 42 U.S.C. § 1981a (2000) (*inter alia*, expanding the remedies available under Title VII to include compensatory damages for emotional and other harms caused by sexual harassment); see also Ross, *supra* note 6, at 228-29.

9. 29 U.S.C. §§ 2601-2654 (2000 & Supp. 2004). 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).

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

11. *Id.* at 45.

12. *Id.*

positions in science and engineering at top universities.<sup>13</sup> According to Summers, women prefer motherhood over the demands of “high-powered intense work” and demonstrate lower aptitudes in math and science “at the high end.”<sup>14</sup> And in late 2005, a front-page *New York Times* story reported that 60% of female students at Yale planned to retreat from promising careers and “cut back on work or stop working entirely” once they had children.<sup>15</sup> The Hill/Thomas and Nannygate controversies were notable because they created a widespread consciousness of gender bias and structural discrimination, the two primary theories of sex discrimination that legal feminists and employment discrimination scholars had spent the prior three decades developing. As if by the power of some virtual rewind button, in the early twenty-first century, we see prominent institutions and individuals reconstructing these very same discrimination problems as women’s private choice and biological difference.<sup>16</sup>

It is within the context of this resurgence of the idea that women’s socially and biologically based differences from men explain their underrepresentation in high-level positions that this study seeks to enrich the scholarly literature on the status of women professors in the legal academy. Many studies have examined how gender bias operates on law faculties.<sup>17</sup> This study builds on that literature by offering the first examination of family leave practices and policies in American law schools since the passage of the FMLA in 1993.<sup>18</sup> It focuses on whether law schools provide paid family leave and whether family leave is offered pursuant to a formal written policy. It found that almost three-quarters of surveyed law schools provide some form of paid family leave, at least informally. Second, the study found that the private law schools were almost twice as

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13. 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>.

14. *Id.*

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

16. This privatization trend has occurred in the area of sexual harassment as well. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (making available an affirmative defense to hostile work environment sexual harassment by co-workers if the employer can prove that it “exercised reasonable care to prevent and correct promptly” the sexual harassment and “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same).

17. See *infra* Part II.

18. The only prior study was conducted twenty years ago. See Richard H. Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568 (1985).

likely as public law schools to grant paid family leave. Whether a professor is likely to receive a paid family leave was also positively related to the rank of the professor's school—that is, the more highly ranked schools in the survey provided more generous pay during a family leave. Finally, although many of the surveyed law schools are providing at least some paid family leave, fewer than half do so pursuant to a formal policy. Indeed, this study finds that the most generous family leaves were often struck on a case-by-case basis with law school deans.

Part II surveys the social scientific literature on the status of women law professors, discussing what a study of family leave policies contributes to this literature. Part III explains the study's methodology. Part IV outlines the study's empirical findings, identifying school rank and type of law school (public or private) in the ability of professors to obtain paid family leave. Part V assesses law schools' progress in the past twenty years with regard to paid family leave, as well as how the paid leave offered by the surveyed law schools compares with other employers. Finally, Part V also discusses the import of the study's findings for the ongoing debate over the cause of women's underrepresentation in high ranking positions in both law schools and other workplaces, and highlights possible directions for future research.

## II. STATISTICS ABOUT WOMEN LAW PROFESSORS

In order to understand the significance of law school family leave policies and practices, it is helpful to begin with a snapshot of how women law professors are faring in general. The good news is that women have made enormous progress on many measures of success in law teaching. Still, women continue to lag behind their male colleagues on many fronts. The “opt-out” theory provides one possible explanation for this state of affairs, but sexism and structural features of law school workplaces, including law school family leave policies and practices, also likely contribute to women's relative lack of progress. This latter story is consistent with social science research on women in the legal profession, academia, and the workplace more generally.

First, the good news: in the past five years, 51% of new assistant professors listed in the Association of American Law Schools (AALS) *Directory of Law Teachers* were women.<sup>19</sup> This percentage is slightly

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19. See RICHARD A. WHITE, ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 2004–

higher than the percentage of women law school graduates nationally<sup>20</sup> and the percentage of women law students enrolled at the nation's elite "producer schools"<sup>21</sup> during the same period.<sup>22</sup> A higher percentage of women law faculty are starting their careers at the associate professor<sup>23</sup> level than ten years ago.<sup>24</sup> A lower percentage of women are dropping out of law

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05, at 77 tbl.8A (2004), available at [http://www.aals.org/documents/statistics/Report\\_tables\\_0405.pdf](http://www.aals.org/documents/statistics/Report_tables_0405.pdf).

20. See Am. Bar Ass'n, Degrees Awarded 1981–2004, <http://www.abanet.org/legaled/statistics/degrees.html> (last visited Aug. 26, 2006) [hereinafter ABA, Degrees Awarded 1981–2004] (showing that from 2000 to 2004, women earned 48.2% of the J.D. degrees awarded).

21. Producer schools are law schools whose graduates historically have made up a large proportion of U.S. law faculties. See Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419, 436, 439 tbl.12 (2004) (defining "producer school" and identifying thirteen such schools: Yale, Harvard, Columbia, NYU, Chicago, Stanford, Georgetown, Northwestern, Pennsylvania, Virginia, Duke, Michigan, and Berkeley).

22. Women constituted 47.2% of enrolled students at the producer schools from 2000 to 2004. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 64–72 (2005); LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 64–72 (2004); LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 64–73 (2003); LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 56–65 (2002); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR & OFFICE OF THE CONSULTANT ON LEGAL EDUC. TO THE AM. BAR ASS'N, OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 116, 134, 144, 166, 186, 198, 254, 276, 290, 310, 368, 412, 448 (2001). 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 reported on a school-by-school basis by the Law School Admissions Council. See sources cited *supra*.

23. Law schools offer some faculty members initial tenure-track appointments as associate professors, while other new professors begin their teaching careers as assistant professors—the lowest rung of the tenure ladder. For a detailed discussion of the tenure ladder in law schools, see Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 215 nn.44–45 (1997).

24. Compare *id.* at 252 (finding that of the 1094 law professors who began their first tenure-track position between the years 1986 and 1991, 43.7% of white men and 40.4% of men of color obtained initial appointments as associate, full, or chaired professors, whereas only 30.5% of white women and 30.1% of women of color secured these higher level appointments), with WHITE, *supra* note 19, at 84 tbl.8C (finding that of all new law professors with the title assistant, associate, or full professor from 1997 to 2004, 45.3% of the men obtained initial appointments at the rank of associate professor or higher, whereas 36.6% of the newly hired women secured these higher level appointments). For an alternative way of viewing the statistics that also demonstrates progress in this regard,

teaching before obtaining tenure than in the past, and their attrition rates appear to be equal to or possibly even better than men's.<sup>25</sup> While women's tenure rates continue to lag behind men's,<sup>26</sup> law schools appear to promote women at about the same rate as men, at least after their fifth year in law teaching.<sup>27</sup> The appointment of women law school deans has accelerated dramatically.<sup>28</sup> Considering the fact that until 1970, few law schools had more than one or two women professors,<sup>29</sup> these statistics are quite remarkable.

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compare Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 340–41 (2000) (reporting that “during the period from 1992–93 through 1998–99, the female percentage of entry-hire associate professors was 39 percent,” whereas “the female percentage of entry-hire assistant professors was 48 percent”), with WHITE, *supra* note 19, at 84 tbl.8C (finding that during the period from 1997 through 2004, women comprised 44.3% of entry-hire associate professors and 49.1% of entry-hire assistant professors).

25. According to one AALS study, whereas more than one-fourth (26.1%) of women law school faculty hired as associate or assistant professors during the period 1990 to 1991 had dropped out of law teaching by their seventh year, compared with just 18.0% of men, the seven-year attrition rates of both men and women who began their careers in 1996 to 1997 was about the same (12.3% for women and 12.9% for men). RICHARD A. WHITE, *THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997*, at 5 tbl.2C (2004), available at <http://www.aals.org/documents/2005recruitmentreport.pdf>. Indeed, the six-year attrition rates for this later cohort show a reversal, with a smaller percentage of women (8.2%) leaving before tenure compared to men (12.1%) at year six. *Id.* at 4 tbl.2B.

26. Promotion and tenure rates do not necessarily track each other, because at many schools, promotion to the rank of full professor does not go hand-in-hand with the decision to grant tenure. Thus, women's tenure rates can lag behind men's, yet their promotion rates may equal men's if and once tenure is obtained.

27. Of all new law school faculty hired as associate and assistant professors during the period 1996 to 1997, the six-year promotion rates—that is, by the year 2002—were virtually equal: 43.9% for men, 43.8% for women. *See* WHITE, *supra* note 25, at 4 tbl.2B. By seven years, the women in the same cohort had surpassed the men: 53.8% of the men and 58.9% of the women were promoted by 2003. *Id.* at 5 tbl.2C. In contrast, the six-year promotion rates for men and women faculty hired during the period 1990 to 1991 were 54% and 50.3%, respectively, *id.* at 4 tbl.2B, and the seven-year promotion rates for men and women in the same cohort were 61.9% and 56.3%, respectively, *id.* at 5 tbl.2C.

28. *See* WHITE, *supra* note 19, at 41 tbl.6C (showing that during the six-year period from 1998–99 to 2004–05, the percentage of female law school deans nearly doubled, increasing from 10.4% (nineteen women deans) to 19% (thirty-six women deans), whereas during the six-year period from 1991–92 to 1997–98, the percentage of female law school deans scarcely budged, increasing from 6.7% (twelve women deans) to just 7.8% (fourteen women deans)).

29. *See* Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 5–12 (1991); Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 475 (2003).

Progress in these areas may lead one to the conclusion that law schools are close to attaining equal opportunity for women faculty. However, if we look at a number of additional measures, the outlook for women in law teaching is much less certain. The top jobs within the legal academy are still overwhelmingly male. In 2004–05, only 25% of tenured full professors and 19% of law school deans were women.<sup>30</sup> This underrepresentation is most striking at the most highly ranked law schools.<sup>31</sup> Job segregation by sex is pervasive: women disproportionately hold lower-status, lower-paying, non-tenure-track jobs, such as clinicians, administrative deans, legal research and writing instructors,<sup>32</sup> and librarians.<sup>33</sup> Faculties still hire women at lower

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30. See WHITE, *supra* note 19, at 3 tbl.1A.

31. In 2003–04, all but two of the thirteen producer law schools fell below the national percentage of female tenured and tenure-track faculty, which was 28.3% in 2003–04, and eight fell substantially below the national percentage, with women tenured and tenure-track professors making up just 16% to 21% of their faculties. See Neumann, *supra* note 21, at 439 tbl.12. 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 440. The female faculty percentages for each producer school 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.

32. 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%). See WHITE, *supra* note 19, at 3 tbl.1A. These figures have remained consistent for over a decade. For example, the percentage of women lecturers and instructors has hovered around 65%–70% for fourteen years. *Id.* at 41 tbl.6C. See generally Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 4–7 (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); Neumann, *supra* note 21, at 430 tbl.6; Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 3–9, 23–24 (2001).

33. 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 S-37, S-39, S-44, S-45, S-48, S-50 (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). In contrast, 50.6% of law library directors, 41.7% of computer librarians, and 24.1% of computer technicians were women. *Id.* at S-35, S-41, S-57.



ranks<sup>34</sup> and grant tenure to them at lower rates than men.<sup>35</sup> Gendered patterns persist in teaching assignments.<sup>36</sup>

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34. Of all new law professors with the title assistant, associate, or full professor from 1997 to 2004, 45.3% of the men obtained initial appointments at the rank of associate professor or higher; only 36.6% of the newly hired women secured these higher level appointments. See WHITE, *supra* note 19, at 84 tbl.8C.

35. Of all new faculty hired in 1996 and 1997, the eight-year tenure rate for men was 65.9%, compared with 61.6% for women. WHITE, *supra* note 25, at 7 tbl.2F. Although this difference may seem insignificant, when minority status is also considered, the data paint a starker picture: whereas the eight-year tenure rate for white men was 76.6%, it was 65.4% for non-minority women, 52.4% for minority women, and just 42.3% for minority men. *Id.* at 13 tbl.3F. These tenure rates include all those who either left law teaching or stayed and were denied tenure. *Id.* at 12. Because many law professors leave upon learning that they are not likely to receive tenure, rather than stay and force the issue, including those who resign before tenure may provide a more accurate picture of tenure rates in the legal academy. However, even if those who resign are excluded, men still obtain tenure at a higher rate than women. *Id.* at 5, 6 tbl.2D (showing that the seven-year tenure rate of new law school faculty hired in 1996 and 1997, excluding those who dropped out before tenure, is 65.1% for men and 60.9% for women).

Compared with earlier data, these numbers suggest that the gender gap in tenure rates between men and women is closing: of all new law faculty hired in 1990 and 1991, the seven-year tenure rate for men was 72.4% compared with 61.3% (eight-year tenure rates are not available for this cohort). *Id.* at 6 tbl.2E. However, it appears that part of the improvement may be attributable to the decreasing tenure rates of men, and especially minority men, rather than to an overall increase in the tenure rates of women. For earlier studies addressing the gender-gap in tenure rates, see AM. BAR ASS'N COMMISSION ON WOMEN IN THE PROFESSION, *THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION* 27–28 (2001) [hereinafter UNFINISHED AGENDA]; Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 249, 252 (2000); Neumann, *supra* note 24, at 336–37.

36. See WHITE, *supra* note 19, at 108 tbl.10 (showing that women are more likely than men to teach family law, community property, employment discrimination, education law, estates and trusts, health care law, human rights, immigration law, juvenile law, law and medicine, welfare law, feminist legal theory, women and the law, and skills courses, among other subjects traditionally gendered female, whereas men are more likely to teach administrative law, antitrust law, conflict of laws, constitutional law, evidence, federal courts, law and economics, legal history, and business-related courses); Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 303–15 (2004) (finding that the courses that men and women teach not only remained largely segregated in 2002–03, but this segregation has increased since 1990–91 in many courses); Merritt & Reskin, *supra* note 23, at 258–59 (finding that men are “significantly more likely than women to teach constitutional law,” while women are “significantly more likely to teach trusts and estates or skills courses,” and that differences in credentials, personal characteristics, or work experience do not explain these patterns); Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENT. 145, 150–152, 156–61 (1994) (finding that men are more likely to teach constitutional law and that controlling for practice experience and other variables does not eliminate these gender differences).

Why do women remain underrepresented in positions of greatest status, reward, and influence within the legal academy? There is certainly a possibility that this state of affairs reflects the individual choices of women law professors. After all, the best law teaching jobs involve, inter alia, geographic mobility,<sup>37</sup> significant time commitments, frequent travel, and risk tolerance. The commitments traditionally necessary to gain one's first law teaching job are similarly substantial, among them top performance in law school, law journal membership, a judicial clerkship, a high-status litigation job (at least for a short period), and, increasingly, advanced academic training in a discipline other than law. These, in turn, are also likely to require geographic mobility, significant time commitments, frequent travel, and risk tolerance. Many people in their right mind would not find the status, compensation, intellectual fulfillment, or relative flexibility of law teaching worth these sacrifices, perhaps especially women, who may have other options and who are valued, for better or worse, in other roles. This theory is consistent with recent stories about highly educated women increasingly dropping out of professional life,<sup>38</sup> as well as a range of supply-side explanations for gender inequality in the workplace, from human capital disparities to socialization theory.<sup>39</sup>

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37. At least as of about twenty years ago, women law professors were more likely than male law professors to place major geographic limits on their careers. *See, e.g.*, Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 419 (finding that more than half of the women in the study (53.7%) placed a major geographic limit on their job search, compared to less than a third of the men in the study (28.8%)). Even though a substantial portion of male candidates for tenure-track law professor jobs also imposed major geographic limits on their job searches, *id.*, doing so resulted in a *positive* impact on the rank of initial appointment for men, *id.* at 432–34. Similar patterns emerge in more recent studies in other fields. For example, while the presence of children limits women scientists' mobility significantly more than that of male scientists, men with young children exhibit *more* mobility than men with older children or no children. *See* Kimberlee A. Shauman & Yu Xie, *Geographic Mobility of Scientists: Sex Differences and Family Constraints*, 33 DEMOGRAPHY 455, 464, 466 (1996). Presumably, this is “due to their wives' lesser labor force commitment and greater investment in child care.” *Id.* at 466.

38. *See supra* notes 10–15 and accompanying text.

39. *See, e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING 30–39, 178–79, 219 (1978); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 269–73 (1992); DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA 146–64 (2005); Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S55 (1985); Daniel Bell, *On Meritocracy and Equality*, 29 PUB. INT. 29, 37 (1972).

Although academics and public intellectuals have vociferously dismissed the opt-out theory,<sup>40</sup> perhaps we should not be so quick to reject this account of women's hedonic lives.<sup>41</sup> Legal feminism has taught us in the past decade that we should resist theories that rest on an assumption of false consciousness.<sup>42</sup> There are myriad and complex ways women exercise their agency, however limited or distorted by gender subordination.<sup>43</sup> Indeed, as I have explored elsewhere, upon recognition that women have complex, intersecting identities, behaviors or practices that previously appeared to be the product of gender subordination may actually represent political resistance to other axes of oppression.<sup>44</sup> For example, black women's decision 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>45</sup> Similarly, what seems most clear about the elite women at the center of the recent media attention on women and work is that their decisions may reflect an exercise of class power, especially when we consider that "opting-out" for many of these women will involve very little onerous domestic labor and lots of time for playdates at Starbucks, physical fitness, and other life-fulfilling endeavors.<sup>46</sup> While national labor force data suggest the trend is not widespread,<sup>47</sup> it may very well be that

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40. See Symposium, *Innate Differences: Responses to the Remarks by Lawrence H. Summers*, 11 CARDOZO WOMEN'S L.J. 497 (2005); Kanya Balakrishna, *Story Discusses Career Balance*, YALE DAILY NEWS, Oct. 20, 2005, available at <http://www.yaledailynews.com/article.asp?AID=30423> (summarizing panel at Yale during which Louise Story was made to defend her methodology); Katha Pollitt, *Desperate Housewives of the Ivy League?*, NATION, Oct. 17, 2005, at 14.

41. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 86 (1987).

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

43. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 324-50 (1995).

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

45. *Id.* at 12-26.

46. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 55-56 (1997).

47. Most women work, even women with children. For example, approximately two-thirds of married mothers and three-fourths of unmarried mothers with children less than eighteen years old participate in the labor force. See Press Release, U.S. Dep't of Labor, *Employment Characteristics of Families in 2005* (Apr. 27, 2006), <http://www.bls.gov/news.release/pdf/famee.pdf>. Both parents were employed in almost two-thirds of married-couple families with children under eighteen years old in 2005. *Id.* at tbl.4. According to one recent study, the average "off ramp" for highly educated professional women in the

some women are abandoning high-powered careers. Attention to this trend is worthwhile for the nuanced understandings of gender, culture, economics, and personal choice such study might produce.

On the other hand, law schools may be responsible for women law professors' relative lack of success. This interpretation draws support from social science literature as well as anecdotal accounts by women law professors. Although we have come a long way from a time when formal rules excluded women from the profession and academy,<sup>48</sup> and overt discrimination is on the decline,<sup>49</sup> the few empirical studies that exist

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business sector is just one year after the birth of a child. 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 43, 46. This is consistent with national labor force data, which show that from 1996 to 1999, 78.4% of women with a bachelor's degree or higher who worked during pregnancy returned to work within one year of their first birth. JULIA OVERTURF JOHNSON & BARBARA DOWNS, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2000 at 15 tbl.9 (2005), available at <http://www.census.gov/prod/2005pubs/p70-103.pdf>. Among women returning to their same employer after their first birth, 80.1% worked the same number or more hours as before the birth. *Id.* at 16 tbl.10. Moreover, a recent analysis suggests that the child penalty on labor force participation for women is decreasing. See HEATHER BOUSHEY, CTR. FOR ECON. & POLICY RESEARCH, ARE WOMEN OPTING OUT? DEBUNKING THE MYTH 6 fig.2b (2005), available at [http://www.cepr.net/publications/opt\\_out\\_2005\\_11.pdf](http://www.cepr.net/publications/opt_out_2005_11.pdf). Whereas the labor force participation rate of women with children at home was 20.7% less than for women without children at home in 1984, it was only 9.2 percentage points less in 2004. *Id.*

To be sure, it would be disingenuous to deny the existence of a labor force attachment gap between women and men, and especially between mothers and nonmothers. See 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, 385-86 (2001). National labor force participation data show that female participation rates are less than men's, especially women with young children. See U.S. Dep't of Labor, *supra*, at tbl.5. However, these data include women of all ages and levels of educational attainment. *Id.* A more careful examination of the labor force patterns of highly educated, professional women suggests that the opt-out revolution is exaggerated; if anything, there appears to be an opt-in revolution among such women. Moreover, having access to parental leave leads women to take shorter leaves and return to work sooner, suggesting that structural factors provide an equally plausible explanation for any labor force attachment gap. See Sandra L. Hofferth & Sally C. Curtin, *Parental Leave Statutes and Maternal Return to Work After Childbirth in the United States*, 33 WORK & OCCUPATIONS 73, 100 (2006); see also Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. (forthcoming 2007).

48. See *supra* note 29 and accompanying text.

49. See Rhode, *supra* note 29, at 481 (asserting that legal education is now marked by a "pronounced decline in overt discrimination"); cf. Devon W. Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157, 159 (2003) ("[L]aw faculties are neither structured by, nor

suggest that gender bias explains at least part of the continuing gender gap on law school faculties.<sup>50</sup> According to these studies, academic credentials or work experience do not fully account for the gender disparities that pervade legal academia. Although limited in number, these studies are consistent with a rich body of social science research on gender and race discrimination within the legal profession,<sup>51</sup> institutions of higher

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organized around, *intentional* discrimination.”). *But see* Michael 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, 30–32 (2005) (arguing that case studies of sex discrimination class actions in the last decade challenge the common perception that discrimination has become more subtle and less pervasive).

50. See RICHARD A. WHITE, PRELIMINARY REPORT: LAW SCHOOL FACULTY VIEWS ON DIVERSITY IN THE CLASSROOM AND THE LAW SCHOOL COMMUNITY 10, 12 tbl.13 (2000), available at <http://www.aals.org/statistics/diverse3.pdf> (finding that female law faculty “see the climate for diversity at both their law school and their university as less positive” than male law faculty); Debra Branch McBrier, *Gender and Career Dynamics Within a Segmented Professional Labor Market: The Case of Law Academia*, 81 SOC. FORCES 1201, 1237–38 (2003) (finding that women tend to move more slowly from non-tenure-track to tenure-track law teaching jobs than men even when controlling for geographic limits, family ties, other supply-side factors, social capital, academic origins, employment experience, and location of non-tenure-track job); Merritt & Reskin, *supra* note 23, at 274–75, 289–91 (finding evidence of persistent sex bias in law faculty hiring and course assignments, even after controlling for age, work experience, and academic credentials); Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2301 (1992) (“[M]inority women suffer a sex-related disadvantage in law school hiring.”); Merritt et al., *supra* note 37, at 441, 453 (finding that having a partner or children, alone, did not explain why women law teachers hired between 1986 and 1991 began teaching at significantly lower ranks than men, nor why the top twenty-six schools hired significantly fewer women than men into tenure-track positions); Neumann, *supra* note 24, at 345–52 (discussing unconscious gender bias and lack of mentoring, among other factors, that may contribute to women’s lower status in legal education); *cf.* COMM. ON THE RECRUITMENT & RETENTION OF MINORITY LAW TEACHERS, ASS’N OF AM. LAW SCHS., THE RACIAL GAP IN THE PROMOTION TO TENURE OF LAW PROFESSORS (2005), available at <http://www.aals.org/documents/racialgap.pdf> [hereinafter RACIAL GAP] (survey identifying tokenism, excessive service demands, “double standard[s],” deprivations in mentoring, and racially hostile environments as explanations for the racial gap in tenure); WHITE, *supra* note 50, at 10, 11 tbl.12 (finding that minority law faculty see the climate for diversity at both their law school and their university as significantly less positive than white law faculty). For an older survey on the work conditions for minority law faculty presenting eerily similar findings to these two recent studies, see Richard Delgado, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

51. See KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, GENDER AND LAW 163–65 (3d ed. 2002) (summarizing studies on the gender wage gap among lawyers); ELIZABETH CHAMBLISS, AM. BAR ASS’N, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2004); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, DIVERSITY IN LAW FIRMS 5, 29 (2003), available at

education,<sup>52</sup> and the American workplace more generally.<sup>53</sup> These studies

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<http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf> (demonstrating that women “have fared poorly” in the “up and out” system of large national law firms); UNFINISHED AGENDA, *supra* note 35 (discussing studies on women in the legal profession); Joni Hersch, *The New Labor Market for Lawyers: Will Female Lawyers Still Earn Less?*, 10 CARDOZO WOMEN’S L.J. 1, 3–4, 35 (2003) (finding a large unexplained gender pay disparity in the legal profession among lawyers who earned their degrees before 1990, and positing that the relative parity in pay among younger lawyers is unlikely to persist over time); 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); Paul W. Mattessich & Cheryl W. Heilman, *The Career Paths of Minnesota Law School Graduates: Does Gender Make a Difference?*, 9 LAW & INEQ. 59, 112 (1990) (finding that women lawyers are far more likely than men to have experienced sex discrimination in the workplace in the form of discrimination in work assignments, pay, promotion, sexual harassment, and hiring decisions); Robert G. Wood et al., *Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers’ Salaries*, 11 J. LAB. ECON. 417, 417, 438–40 (1993) (finding support for both behavioral and structural discrimination explanations for a 40% earnings gap between men and women graduates of the University of Michigan Law School after fifteen years in practice).

52. See, e.g., VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* 217–49 (1998) (summarizing research showing that women earn less and achieve tenure more slowly than men do throughout academia, even when controlling for productivity); Laura W. Perna, *The Relationship Between Family Responsibilities and Employment Status Among College and University Faculty*, 72 J. HIGHER EDUC. 584, 603 (2001) (finding that women are more likely than men to hold positions of lower status in the academic labor market hierarchy, even when controlling for differences in race, family responsibilities, human capital, and structural characteristics).

53. See BARTLETT, HARRIS & RHODE, *supra* note 51, at 157–59, 198–200, 309–11, 552–53 (summarizing research on the gender wage gap, glass ceiling, sex segregation, and sexual harassment in the workplace); CATALYST, *WOMEN IN U.S. CORPORATE LEADERSHIP: 2003*, at 3, 16 (2003) (finding in a 2003 survey of 705 women executives that the top barriers women see as impacting their own advancement at senior levels include “exclusion from informal networks, gender-based stereotypes, and lack of role models”); DEBORAH L. RHODE, *SPEAKING OF SEX* 145–48, 160–61 (1997) (summarizing research on unconscious gender stereotypes at work); VALIAN, *supra* note 52, at 187–216 (summarizing research on subtle sex discrimination in the professions); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995) (reviewing social science literature on cognitive bias); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–74 (2001)

are also consistent with anecdotal accounts by women law professors about the subtle and not so subtle ways gender bias disadvantages women law teachers. For example, women law faculty have recounted how they are less likely than their male colleagues to enjoy a presumption of competence,<sup>54</sup> may receive fewer opportunities for mentoring,<sup>55</sup> are disproportionately burdened with service obligations,<sup>56</sup> and experience subtle “micro-aggressions.”<sup>57</sup> In all of these areas, women of color suffer the worst disadvantages.<sup>58</sup>

Scholars of the legal academy have also written about the challenges of identifying and remedying gender bias given the subjectivity of academic hiring and promotion standards.<sup>59</sup> To a significant extent, obtaining tenure depends on relationships with key individuals on a faculty who can

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(reviewing studies on subtle discrimination); Implicit Association Test, <https://implicit.harvard.edu/implicit/demo/index.jsp> (last visited Sept. 10, 2006) (presenting Harvard-based research web site allowing individuals to explore the extent of their gender and other biases); cf. IAN AYRES, PERVASIVE PREJUDICE? 12 (2001) (finding overwhelming evidence that in a variety of markets—retail car sales, bail bonding, kidney transplantation, and FCC licensing—racial minorities and females are consistently at a disadvantage). These sources present a good introductory overview of research on gender bias in the workplace, which is too vast to collect here.

54. See Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 335–43 (1996).

55. 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).

56. 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. Carbado & Gulati, *supra* note 49, at 165–72 (discussing the disproportionate service obligations placed on untenured faculty of color). Among other reasons for this phenomenon are the need to place women faculty members on visible and often workload-heavy law school and university committees and the perception by many men and women students that women faculty are more accessible.

57. See Farley, *supra* note 54, at 344 (describing comments about her appearance as well as a student’s request that his grade from her be reviewed by a male colleague); 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”); Wells, *supra* note 55, at 529 (describing a student organization event meant to parody a student-sponsored symposium on women’s rights).

58. See RACIAL GAP, *supra* note 50, *passim*; Rhode, *supra* note 29, at 482. It should not be surprising, then, that women of color do significantly worse than non-minority women on many AALS measures of status. See WHITE, *supra* note 25, at 12–31.

59. See, e.g., Rhode, *supra* note 29, at 482; Wells, *supra* note 55, at 529–31; cf. Carbado & Gulati, *supra* note 49, at 160–61; Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Sub-Text*, 19 W. NEW ENG. L. REV. 151, 175–76 (1997).

influence the decision-making process. Because the top positions within law schools are still comprised primarily of men, women may be disadvantaged relative to their male colleagues in building the social capital that will ultimately construct the context in which their performance is evaluated.<sup>60</sup> This theory is supported by research on women academics outside of law.<sup>61</sup>

Moreover, as Devon Carbado and Mitu Gulati have described so well, law faculties operate on a “squeaky wheel” system in which resources such as research funding, travel funding, technology, and administrative help must be requested.<sup>62</sup> “Typically, there will be a base line level of support,” but the “squeaky wheels” will be the ones who receive anything above that level.<sup>63</sup> Because law school workplaces are “low information environments[,] generally, individual faculty members will know neither

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60. See Nan Lin, *Building a Network Theory of Social Capital*, in SOCIAL CAPITAL 3, 6–7 (Nan Lin et al. eds., 2001). Lin identifies four types of resources that may be accessed through social capital to achieve outcomes such as tenure and promotion: information and knowledge about institutional norms, expectations, and opportunities; access to and influence on key decision makers; certification of an individual’s qualifications; and emotional support and recognition. *Id.*; see also Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 248–52 (John G. Richardson ed., 1986).

61. See Jeffrey F. Milem et al., *The Importance of Collegial Networks to College and University Faculty*, in WORKING EQUAL: ACADEMIC COUPLES AS COLLABORATORS 146, 159–64, 166 (Elizabeth G. Creamer ed., 2001) (reviewing and synthesizing prior research demonstrating that women faculty “are at a significant disadvantage in forming collegial relationships because of their unequal status in . . . the academy”); Connie J. G. Gersick et al., *Learning from Academia: The Importance of Relationships in Professional Life*, 43 ACAD. MGM’T. J. 1026, 1026, 1039–41 (2000) (reporting that in in-depth interviews with business school faculty members about their work relationships, men, more than women, told “help” stories about instrumental assistance from colleagues, whereas women, more than men, told “harm” stories about being devalued and excluded from social networks). Note that no malice is necessary for this negative dynamic to occur: because women do not fully match the role schema for a law professor, they are less likely to appear to “fit in.” See VALIAN, *supra* note 52, at 15, 125–44.

There is little empirical research on gender and social networks within law schools, but one somewhat dated study of nine law schools in Ohio found that a high proportion of women law faculty disagreed when asked if all faculty have the same opportunity to socialize informally with other faculty (44%) and a significantly greater percentage of women faculty believed that mentors were not equally available to men and women faculty (41% versus 7%). Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 330 (1994).

62. Elizabeth M. Iglesias et al., *Labor and Employment in the Academy—A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups*, 6 EMP. RTS. & EMP. POL’Y J. 129, 150 (2002) (Carbado presentation, summarizing his research with Mitu Gulati).

63. *Id.*



who is squeaking nor who is getting oil.”<sup>64</sup> Carbado and Gulati explore the problems of this system for minority law faculty, who may avoid asking for resources in an effort to combat perceptions of noncollegiality,<sup>65</sup> but their analysis is equally relevant for white women law faculty. This theory is consistent with social science research on bias avoidance, which shows that women academics are more likely than their male peers to strategically strive to minimize either actual or apparent intrusions of family on work commitments in order to achieve career success.<sup>66</sup>

Other than gender bias, we also know that the ongoing effect of past discrimination constitutes a significant barrier preventing women from reaching the top ranks of the legal academy. Indeed, because of the relative dearth of entry-level positions, it will take decades to reverse law schools’ long history of de jure sex discrimination. Assistant professors constituted only 10% of tenure-track or tenured law teachers in 2004–05 and associate professors constituted only 17%.<sup>67</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>68</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 and their relative presence in the student bodies of the “producer schools”<sup>69</sup> until 2023.<sup>70</sup>

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64. *Id.*

65. *Id.* at 150–51.

66. See Robert Drago et al., *The Avoidance of Bias Against Caregiving: The Case of Academic Faculty*, 49 AM. BEHAV. SCI. 1222, 1229, 1240 (2006). For example, this study of 4188 chemistry and English faculty in 507 U.S. colleges and universities found that close to half of the surveyed women, compared with just 10% of men, said they went back to work sooner than they would have liked after having a new child because they wanted to be taken seriously as academics. *Id.* at 1222, 1229 tbl.1.

67. WHITE, *supra* note 19, at 3 tbl.1A (showing 4535 full professors, 1096 associate professors, and 659 assistant professors in 2004–05).

68. See *id.* at 3 tbl.1A, 6 tbl.2A (calculated by dividing 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 (1927) by the total number of tenured or tenure-track professors at the full, associate, and assistant professor levels in 2004–05 reported in table 1A (6290)). A similar analysis by Richard Neumann using 2002–03 AALS data corroborates these findings. See Neumann, *supra* note 21, at 427 (showing an increase in female full professors only from 23% to 29% if all the associate and assistant professors in 2002–03 were promoted to full professor).

69. For a definition of producer school, see *supra* note 21.

70. This prediction was calculated by projecting a 6% increase in the percentage of women full professors every five years, which is the rate suggested by the calculations *supra* in note 68 and accompanying text, until the year that the threshold percentages set out *supra* in notes 20 and 22 were met. Other than a five-year tenure track, this prediction

However, even this projection is likely to be overly optimistic. The tenure rate in the legal academy is far less than 100%<sup>71</sup> and women still get tenure at lower rates than do men.<sup>72</sup> Past trends, which account for this porosity in the pipeline, probably provide a more accurate prediction tool. The percentage of women full professors has increased at a relatively constant rate of about 1% a year for the past fourteen years.<sup>73</sup> If this trend continues, women are unlikely to reach relative parity with men at the full professor level until the year 2027. In sum, without a serious commitment to affirmative action, progress toward a truly inclusive legal academy is likely to remain slow.

All of the conditions and processes discussed here—unconscious bias, the absence of mentoring, onerous service obligations, the unequal distribution of law school resources, and the legacy of past discrimination—can be understood as forms of subtle or structural discrimination. Such features of law school workplaces operate as “built in headwinds” for women law faculty.<sup>74</sup> Legal scholars have dedicated a significant amount of energy toward describing this problem in the context of academia<sup>75</sup> and the workplace generally,<sup>76</sup> and, as this discussion has demonstrated, there is a

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assumes continued parity in hiring at the entry-level and a relative stability of the size of the legal academy. While the former is likely to continue, evidence suggests that the latter will not, given that the number of the new tenure-track jobs in the legal academy tends to fluctuate, possibly in an inverse relationship to economic cycles. *See* WHITE, *supra* note 19, at 79 tbl.8C (showing that the number of new assistant, associate, and full law professors has fluctuated dramatically over the past fourteen years, from a low of 143 in 1997–98 to a high of 297 in 2004–05).

71. *See* WHITE, *supra* note 25, at 6 tbl.2E, 7 tbl.2F (reporting that the seven-year tenure rate for all new law faculty hired as associate and assistant professors in 1996–97 was 53.9% and that the eight-year tenure rate for this cohort was 64.4%).

72. *See supra* note 35 and accompanying text.

73. *See* WHITE, *supra* note 19, at 39 tbl.6A.

74. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

75. *See, e.g.,* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 254–55 (2006) (summarizing research on gender bias in academia). Sturm explains:

Research shows that the “glass ceiling” in academia is kept in place by everyday interactions occurring across the entire spectrum of faculty life. At each step of the continuum from graduate student to full professor, women face small differences in treatment, and these small disadvantages accumulate to produce large disparities in status and opportunity.

*Id.* at 256.

76. *See, e.g.,* Sturm, *supra* note 53. According to Sturm:

Exclusion increasingly results not from an intentional effort formally to exclude, but rather as a byproduct of ongoing interactions . . . . The glass

significant body of research documenting these problems inside law schools.

One area of structural discrimination within law schools that has been less well explored in the literature, however, concerns work/family conflict. Most obviously, many women's biological and tenure clocks overlap. Thus, the period of most intensive work to establish an academic career coincides with prime childrearing years. Combined with the fact that women law faculty are more likely than their male colleagues to be burdened with domestic labor,<sup>77</sup> they uniquely experience a time bind even under the

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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.

*Id.* at 469. Vicki Schultz has similarly highlighted the ways in which policies and cultures endogenous to the workplace constrain women's apparent preferences for lower-status, lower-paying jobs. See 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). According to Schultz, “people’s work aspirations are shaped by their experiences in the workworld . . . . [S]tructural features of work organizations reduce women’s incentive to pursue nontraditional work and encourage them to display the very work attitudes and behavior that come to be viewed as preexisting gender attributes.” *Id.* at 1824–25. Schultz’s work is consistent with recent research on women’s ambition, which shows that professional women often exit high-profile jobs not because the work was too demanding, but because their accomplishments have not been appropriately recognized. See ANNA FELS, *NECESSARY DREAMS: AMBITION IN WOMEN’S CHANGING LIVES* 211–12 (2004). This “downsizing” of women’s ambition also commonly occurs in response to workplace structures that are incompatible with family obligations. Joan Williams calls this the “maternal wall.” JOAN WILLIAMS, *UNBENDING GENDER* 69–70 (2000). 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 child rearing.” *Id.* at 1. See generally Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77 (2003).

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. See Abrams, *supra* note 43, at 346–47; Kessler, *supra* note 47. One compelling theory explaining our blinders to constraint is that the stories of choice and merit—what Martha Fineman calls the “autonomy myth”—help us avoid a hard examination of the greater structural and socioeconomic forces that shape our lives. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

77. 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 showing that “women invest significantly

relatively favorable work conditions of academia. Indeed, two-thirds of women lawyers in the education sector surveyed in 2001 reported that work/family conflict is a significant problem.<sup>78</sup>

Despite these significant barriers to women law professors' advancement created by the compressed tenure clock, only one study examines the family leave policies and practices of American law schools.<sup>79</sup> When Richard Chused conducted this study more than twenty years ago, he found that in the early 1980s, "most [law] schools [did] not provide day care services, that obtaining a leave of absence or a reduction in teaching load for child care [was] more difficult than obtaining a leave or reduction for other reasons, and that women [were possibly] leaving law teaching for family reasons more frequently than men."<sup>80</sup> He also found that non-tenure-track faculty were less likely than tenure-track faculty to be covered by law school leave-of-absence policies, leaving out many clinical and legal writing instructors.<sup>81</sup> When faculty members did obtain a leave of absence, leaves were generally unpaid,<sup>82</sup> came with burdensome conditions,<sup>83</sup> and were granted on an ad hoc, discretionary basis.<sup>84</sup> Among schools offering temporary disability insurance, one-fourth did not include coverage for the period when pregnancy and childbirth are disabling, in apparent violation of the Pregnancy Discrimination Act (PDA).<sup>85</sup> Finally, while the study found

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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 *passim* (2000) (metastudy reviewing more than 200 scholarly articles and books on household labor showing that women still do at least twice as much housework as men); *cf.* Merritt et al., *supra* note 37, at 417 (finding that for law professors hired between 1986 and 1991, "[a]lmost all of the partnered women . . . belonged to a dual-career couple," whereas only two-thirds of the partnered men had an employed partner).

78. See CATALYST, WOMEN IN LAW 61 (2001). *But see* Krauskopf, *supra* note 61, at 329 (finding in a study of nine Ohio law schools that female and male faculty "agree . . . that family responsibilities do not interfere with their professional work").

79. See Chused, *supra* note 18.

80. *Id.* at 570.

81. *Id.* at 572.

82. *Id.* at 574.

83. *Id.*

84. *Id.* at 583–85.

85. *Id.* at 576. The Pregnancy Discrimination Act amended the definitions section of Title VII so that discrimination "because of sex" includes discrimination "because of . . . pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (2000). The PDA also requires employers to treat pregnancy, childbirth, and related medical conditions as favorably as other disabling medical conditions in the provision of fringe benefits programs. *Id.*; Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285–86 (1987); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

no relationship between the nature of a law school's leave practices and the departure rates of women faculty,<sup>86</sup> it found that nearly 9% of women departing law teaching did so to take care of children, whereas no men departed law teaching for that reason.<sup>87</sup>

Chused's study was conducted prior to the passage of the FMLA, which significantly changed the legal landscape with regard to employees' rights to family leave, and at a time when women still constituted a very small percentage of female tenure-track law professors.<sup>88</sup> It raised important questions about the effect of law school parental leave policies on faculty with family obligations, especially women. Although many scholars writing about sex discrimination within law schools have discussed the problem of work/family conflict for law teachers,<sup>89</sup> no one has conducted systematic research on the question in the past twenty years.

This gap is curious given the substantial research reviewed here on gender bias within the legal academy. Moreover, the Association of American Law Schools (AALS) and the American Bar Association (ABA) have invested substantial resources into improving the status of women in legal education and the legal profession. The AALS gathers and reports detailed statistics on women law school faculty and women candidates for faculty positions.<sup>90</sup> In 2001, the ABA commissioned two major studies on the status of women in the legal profession, one addressing family leave

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86. See Chused, *supra* note 18, at 580.

87. See *id.* at 578, 595 tbl.11. Chused's methodology is likely to have underreported this discrepancy. Chused relied on the reports of law school deans for the reasons faculty members departed teaching. For obvious reasons, including a law professor's wish to obtain a positive recommendation for future employment, law school deans are not a reliable source for the reasons individual faculty members leave the profession, especially with regard to reasons that may call into question the professor's professional commitments.

88. Of the 2998 traditional classroom teachers in Chused's sample, 470 or 15.7% were female. *Id.* In 2004–05, 46.1% of assistant professors, 44.7% of associate professors, and 25% of full professors in the AALS *Directory of Law Teachers* were women. See WHITE, *supra* note 19, at 3 tbl.1A.

89. See, e.g., Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 837–38 (1988); Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 94–98 (1995); Carl Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143, 1157 (1990); Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 898, 901 (1983); Patricia M. Wald, *Breaking the Glass Ceiling: Will We Ever Rid the Legal Profession of "the Ugly Residue of Gender Discrimination?"*, HUM. RTS., Spring 1989, at 40, 42–43, 54.

90. See, e.g., WHITE, *supra* note 19.

practices and policies among legal employers generally<sup>91</sup> and a second addressing women's progress in the profession.<sup>92</sup> However, neither of these organizations gathers or reports information specifically regarding family leave practices and policies of law schools.<sup>93</sup>

At least four possible reasons explain the lack of research on work/family conflict in legal academia. In contrast with other legal employers, especially private law firms, law school teaching generally requires fewer demands in terms of work hours. It also provides greater flexibility than many legal jobs. These relatively favorable working conditions may contribute to the perception that family leave is not a priority in achieving full equality for women law faculty. Second, because the tenure rate in law is higher than in many other disciplines, the underrepresentation of women in the top of the legal academy may seem like a trivial problem to many observers. Third, senior researchers on the conditions for women law faculty in U.S. law schools came out of the second-wave feminist movement. Steeped in the formal equality tradition, some researchers have resisted the notion that women's continued lack of full equality in law teaching is due to their unique biological role in childbearing or to their disproportionate share of home responsibilities.<sup>94</sup> Fourth, untenured junior faculty who in theory may be more committed to a vision of substantive equality than the previous generation may find such research too risky.<sup>95</sup>

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91. See DEBORAH L. RHODE, AM. BAR ASS'N, *BALANCED LIVES* (2001).

92. See UNFINISHED AGENDA, *supra* note 35.

93. It is true that in 1998, in the context of a larger study on law schools' procedures and practices regarding tenure, the AALS Special Committee on Tenure and the Tenuring Process noted in passing that over half of law schools allow a faculty member to stop the tenure clock and lengthen the normal probationary period. See *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 494 (1992). While the report provided an example of one law school's policy covering serious illness, pregnancy, and single-parenthood, it contained no additional information or analysis on the typicality of this policy, nor did it contain any information on family leaves more generally. *Id.*

94. See, e.g., Deborah Jones Merritt & Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489, 493 (2003) ("As we reflect on our own early years in teaching . . . and observe the junior faculty succeeding us, we are increasingly persuaded that the academic climate is more of a problem for female academics than home responsibilities.").

95. Indeed, commentators have noted the general trend of young women scholars turning away from overtly feminist projects or focusing their attention on historical studies of women. See Symposium, *Subversive Legacies: Learning from History/Constructing the Future*, 12 TEX. J. WOMEN & L. 197 (2003).

Yet information about family leave practices and policies among American law schools is important, especially for women law faculty and for men who increasingly are taking on family-care responsibilities. Even if many law professors generally work fewer hours than lawyers in private firms, many law professors do work fifty to sixty hours a week; these time demands can be quite unbounded. While a five- or six-year tenure clock affects men, there is no question that its effect is felt disproportionately by women. Those committed to equality and diversity inside law schools should be concerned about the gender gap in law school tenure rates, despite significant progress on that front. Toward that end, a better understanding of law school family leave practices may provide a richer understanding of how structural discrimination may be working to create a glass ceiling inside law schools. Finally, current controversies redefining the permissible reach of affirmative action underline the importance of a commitment to achieving diversity among law faculties.<sup>96</sup> This pilot study should aid in that effort to the benefit of individual faculty members, faculties developing leave policies, appointments committees, and job candidates.

### III. METHODOLOGY

In the spring of 2003, I collected data on the family leave practices and policies of American law schools, focusing in particular on whether law schools provide paid family leave, the source of wage replacement (if any) during a family leave, and on whether law schools offer paid family leave pursuant to a formal written policy. The data are largely qualitative and were collected using nonprobability convenience,<sup>97</sup> snowball,<sup>98</sup> and purposive<sup>99</sup> sampling techniques. I posted queries about family leave

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96. See *Grutter v. Bollinger*, 539 U.S. 306, 328–43 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268–76 (2003); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 *passim* (2004); Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1; Jennifer Jacobson, *Conservative Groups Threaten to Sue Bar Association: Proposed Accrediting Standard for Law Schools Comes Under Attack at Hearing of Civil-Rights Panel*, CHRON. HIGHER EDUC., June 30, 2006, at A13.

97. In convenience sampling, members of the population are chosen based on their relative ease of access.

98. In snowball sampling, the respondent refers a colleague who, in turn, refers a colleague, etc.

99. In purposive sampling, the researcher chooses a person she thinks would be appropriate for the study—for example, an associate dean who is likely to have knowledge of her school's family leave policies and practices.

practices and policies of individual law schools and family leaves received by individual faculty members on two AALS listservs, those of the Section on Women in Legal Education and the Section on Family and Juvenile Law. I sent similar queries to colleagues around the country and to associate deans at peer schools. Where available, I gathered formal university leave policies available on the Internet. Finally, Laura Adams, a professor conducting a similar inquiry in the context of developing a family leave policy for her law school, shared the information she had gathered.<sup>100</sup> In those cases, Professor Adams forwarded her original data to me, and I made follow-up inquiries to confirm the information. I coded the responses on the basis of six criteria:

1. whether the school provided paid family leave benefits;
2. the number of weeks of paid leave provided, if any;
3. whether additional unpaid family leave was available beyond one semester;
4. whether part-time arrangements were made available upon return from family leave;
5. whether the school's leave practices and policies were applied to men on the same terms as women; and
6. whether the school's family leave practices and policies extended equally to domestic partners.

The findings presented here focus primarily on the first two questions: whether the law schools sampled provide paid family leave and for how long.

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100. Laura S. Adams was then assistant professor at Thomas Jefferson School of Law and is now assistant professor at San Diego Law School. Her data are included in this study with permission.



Data were received for thirty-three law schools.<sup>101</sup> This figure represents approximately 18% percent of ABA-approved U.S. law schools<sup>102</sup> and 20% of AALS member schools.<sup>103</sup> The sample is fairly representative of U.S. law schools on two basic measures: geographic diversity and source of funding. As Figures A and B demonstrate, the geographical mix of the sample is roughly representative of U.S. law schools.<sup>104</sup> The main discrepancies fall in the pacific and southern states, with the sample over-representing schools in the pacific region and under-representing schools in the South.

The sample is also fairly representative of U.S. law schools with regard to source of funding. Forty-eight percent of the schools surveyed were private institutions, and 52% were public. This roughly matches the ratio of private to public schools nationally,<sup>105</sup> demonstrated in Figures C and D.

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101. Schools were: University of Akron School of Law; University of Arkansas at Little Rock William H. Bowen School of Law; University of Baltimore School of Law; Boston University School of Law; University of California, Berkeley School of Law; University of California, Davis School of Law; University of California, Hastings College of Law; California Western School of Law; Cleveland State University—Cleveland-Marshall College of Law; University of Colorado School of Law; Drake University Law School; The George Washington University Law School; University of Idaho College of Law; University of Iowa College of Law; University of Maryland School of Law; University of Miami School of Law; Northeastern University School of Law; Northern Illinois University College of Law; Northwestern University School of Law; University of Pittsburgh School of Law; University of San Diego—School of Law; Seattle University School of Law; Seton Hall University School of Law; University of Southern California Law School; Temple University—James E. Beasley School of Law; University of Tennessee College of Law; Thomas Jefferson School of Law; The University of Tulsa College of Law; Vermont Law School; Washington University School of Law; Wayne State University Law School; Widener University School of Law; and William & Mary Law School.

102. There are 188 ABA-approved law schools. LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 74 (2006).

103. There are 168 AALS member schools. Association of American Law Schools, Member Schools, [http://www.aals.org/about\\_memberschools.php](http://www.aals.org/about_memberschools.php) (last visited Sept. 14, 2006).

104. See U.S. News & World Report, Find Your Law School, [http://www.usnews.com/usnews/edu/grad/tools/brief/law\\_srch\\_advanced\\_brief.php](http://www.usnews.com/usnews/edu/grad/tools/brief/law_srch_advanced_brief.php) (last visited Sept. 14, 2006).

105. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2005).

Figure A

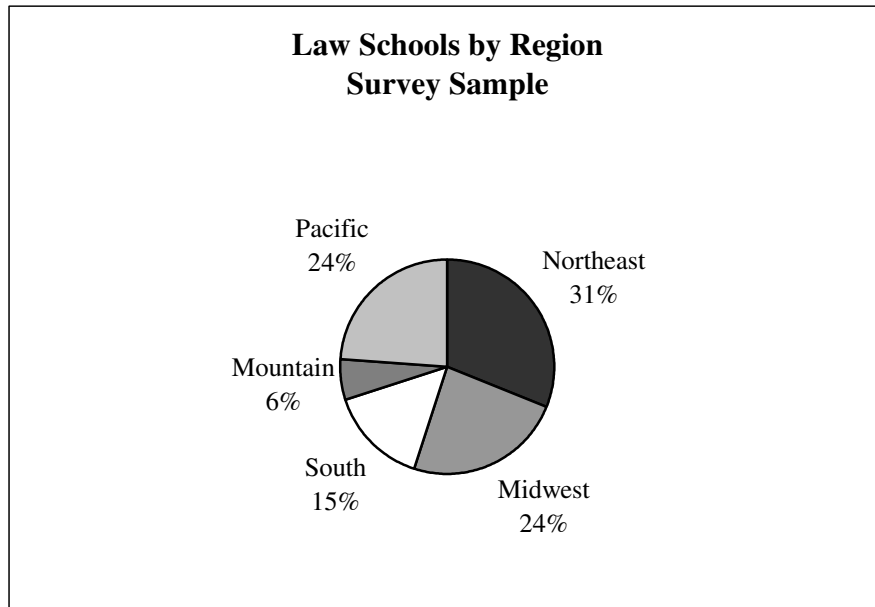


Figure B

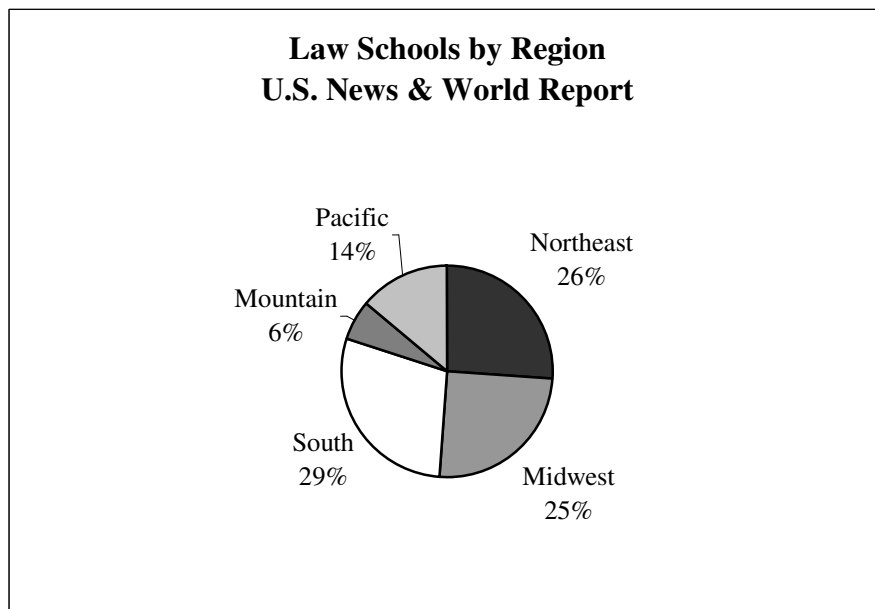


Figure C

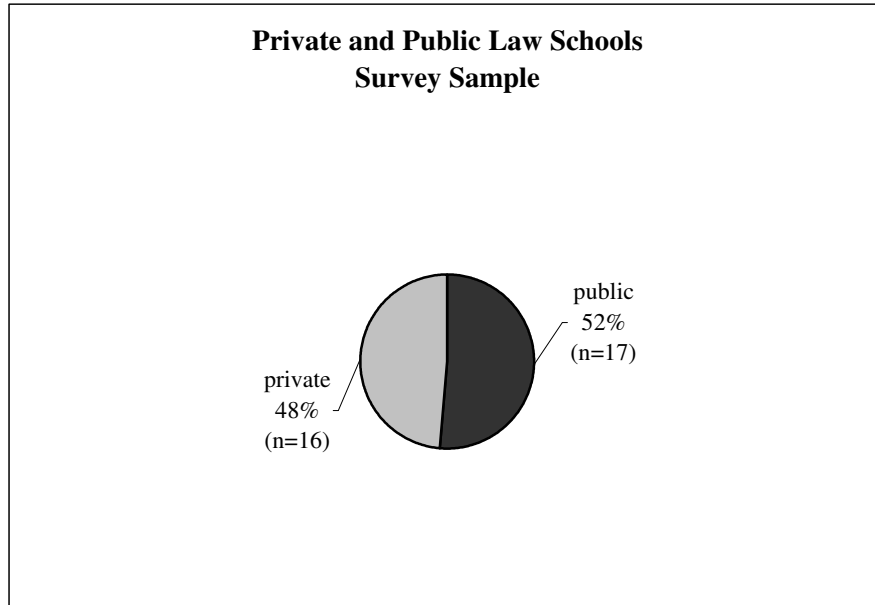
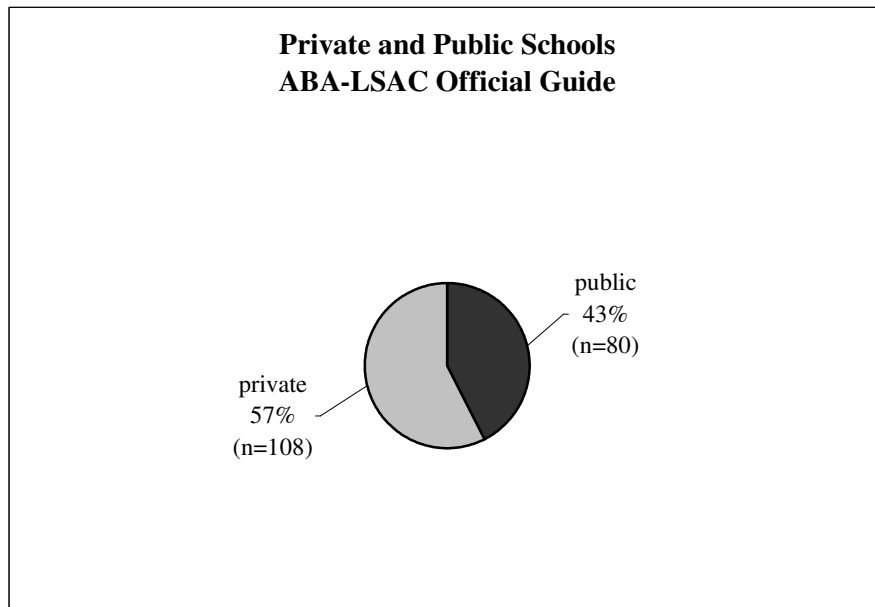


Figure D



At the same time, several features of this study limit its generalizability to the population of all law schools. First, the non-random sampling methods used can, at best, achieve an approximation of the truth. Second, the sample size is small: thirty-three law schools. When divided into sub-groups, such as public/private schools and first tier/second tier, the ability to generalize is limited further. Third, although the sample is fairly representative with regard to geographic diversity and source of funding, it is somewhat skewed toward the more highly ranked law schools.<sup>106</sup> Fourth, because the number of individuals receiving the broadcast request for information on the various listservs is unknown, a response rate cannot be calculated with any precision. The data is also highly qualitative, consisting in many cases of an individual faculty member's reports about the nature of his school's family leave policies and practices or the faculty member's personal experience in receiving a family leave. The quality of such information is limited by the subject's honesty, memory, and ability to respond.

In addition to the methodological limitations discussed here, I was unable to collect school-by-school data on promotion and tenure rates or other measures of status. Therefore, this study cannot directly test the effect of law school family leave policies and practices on tenure rates or other indicia of success. I arrived at the tentative hypotheses presented here by filtering the aggregate survey findings through our substantial existing knowledge of the dynamics of employment discrimination within law schools, the legal profession, academia, and the workplace more generally. Future researchers may be able to access additional school-specific data and test the ultimate question regarding the effect of paid family leave on women's and men's status in legal academia.

Although this is not a scientific survey, it provides a rich set of general theories that can be examined in future research. Moreover, the study's key findings are consistent with large, scientific national studies of family leave policies and practices in academia, suggesting that it is picking up patterns that are likely to be replicated by future research.<sup>107</sup> Such future research is important for a broad array of constituencies. The sustained presence of women in law teaching and changing gender roles demand a serious commitment to addressing work and family conflict inside law schools.

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106. Of the thirty-three law schools in the sample, twenty or 60.6% were ranked in the first or second tiers by *U.S. News & World Report* in 2005. Thus, the relatively positive picture painted by the data about the prevalence of paid family leave within the legal academy may be exaggerated, given that school rank is likely to be a proxy for law school resources. See discussion *infra* Part V.C.

107. See *infra* notes 176–177 and accompanying text.

Increasing fiscal and political pressures on public law schools call for systematic research on how exactly public institutions are faring compared with their private counterparts. Future research on law school family leave policies may provide an important if small window into that question. More generally, researchers have cited the need for more studies on family-friendly policies in the non-profit sector, as a significant portion of work/family research is funded by (and consequently is about) large, for-profit corporations.<sup>108</sup> Finally, law schools' unique culture, acute legal consciousness, and relatively small number render them an especially fruitful case for sociolegal researchers interested in how law gets institutionalized on the ground. This study is offered to raise questions and suggest possible directions for these and other areas of future research.

#### IV. FINDINGS

As outlined in Figure E, four general approaches to family leave were found in the study sample: Some schools by practice or pursuant to official law school or university policy provide one semester of leave following the birth or adoption of a child at 100% pay. Depending on the school, one semester means sixteen to eighteen weeks. During this period, the faculty member is relieved of all job responsibilities.<sup>109</sup> Thirty-nine percent of the law schools surveyed adopt this approach.

A second approach, similar to the first, provides a full semester of paid leave in return for "light duties" such as light research or committee work. In essence, these schools relieve the faculty member of all teaching responsibilities but expect some continued involvement in research, service, or both.<sup>110</sup> Fifteen percent of the law schools surveyed adopt this approach.

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108. See Judith G. Gonyea, *The Nonprofit Sector's Responsiveness to Work-Family Issues*, 562 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 131 (1999).

109. This could mean one paid course release in schools following a three course per year teaching load, with the faculty member teaching two courses upon return from a paid family leave, or two paid course releases in schools adopting a four course per year teaching load. Data regarding school course loads were received for only some schools in the sample. This is an important issue for future exploration.

110. The definition of "light" may vary considerably from institution to institution. For example, some schools define light as continued research and no committee work, whereas others define "light" as only minor administrative tasks. Given this variability, some of the schools in the "full pay light duties" category may more accurately be classified as schools which provide a full semester with pay. Others may more properly belong in the category "6-8 weeks of paid leave." Given the absence of specific time data from faculty members who received light duty paid leave, such classifications could not be made.

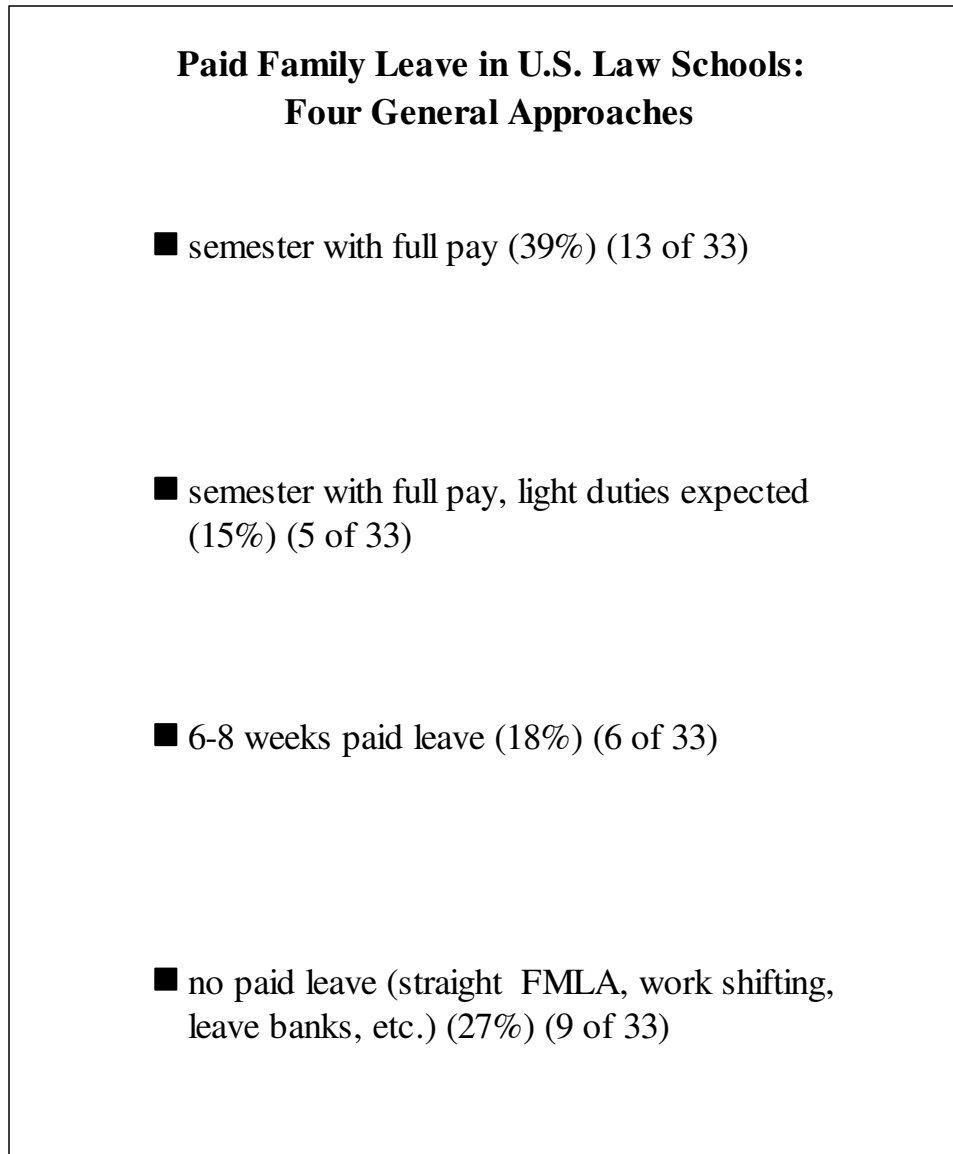
A third approach provides faculty members with six to eight weeks of paid family leave. All but one of the schools taking this approach follow a temporary disability leave model, providing paid leave to birth mothers for the average period necessary to recover from an uncomplicated birth.<sup>111</sup> Eighteen percent of law schools surveyed adopt this approach.

Finally, some schools provide no paid family leave. Within this category, some schools offer donated leave banks or have permitted faculty to bank teaching before or after the leave to make up pay. Although these approaches often succeed in making up part or all of the faculty member's pay during the leave, they cannot be fairly classified as paid leaves. Most leave banks provide leave to employees only on the basis of availability and at an administrator's discretion. Allowing an employee to double up her work load before or after a family leave is simply work shifting. Twenty-seven percent of law schools surveyed adopt this approach.

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111. Men generally are not eligible for this leave, although one surveyed law school provides six to eight weeks paid family leave irrespective of the faculty member's gender or status as a birth-parent.

Figure E



The first three approaches are likely to result in more paid leave than a faculty member would receive in practice under the FMLA. Very briefly, the FMLA provides for only unpaid family leave, serving primarily as a

form of job protection during a family-related leave of absence.<sup>112</sup> However, because the FMLA entitles an employee to use accrued sick, vacation, and personal leave as a source of wage replacement during a leave,<sup>113</sup> in practice most professional employees have access to some wage replacement during an FMLA leave. Thus, for example, a senior faculty member may have so much accrued leave that she could receive more paid family leave under the FMLA than under the first three approaches outlined in Figure E. However, this is unlikely to be the case for an untenured faculty member, who will have been working for her school for less than five or six years and thus will have accrued a limited amount of leave.<sup>114</sup> Moreover, at most law schools, tenure-track faculty members accrue no vacation leave.<sup>115</sup> Finally, even if a professor uses her accrued leave to replace regular pay during a family leave, she has “spent” her leave and cannot use it for any other purpose.

Given these general assumptions about the uncertain availability and exhaustible nature of accrued leave, the first finding of this study is the following: 73% of the law schools surveyed provide women faculty members a separate paid family leave benefit that is more generous than the FMLA, both as a matter of law and in practice, and 58% of law schools surveyed provide male faculty with a separate paid family leave benefit that is more generous than the FMLA.<sup>116</sup> These findings are significant in two regards. First, paid family leave appears to be the norm among the law schools surveyed. Second, women law teachers were more likely than their male colleagues to receive paid family leave.<sup>117</sup> I discuss the implications of these findings at greater length below.

I evaluated the four general approaches to paid family leave on the basis of two variables: whether the school was public or private and the rank of

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112. See 29 U.S.C. §§ 2601–2654 (2000 & Supp. 2003).

113. See 29 C.F.R. § 825.207(b) (2006).

114. This assumes a faculty member earns approximately ten to twelve days of sick leave per year, which is typical for a university professor. Personal leave is uncommon and limited when offered. See, e.g., U.S. DEP’T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 195 tbl.45 (1999) (reporting that, in 1997, 20% of full time workers in medium and large private establishments received paid personal leave; the average was 3.5 days per year).

115. Indeed, there is no legal requirement that any employer provide sick, vacation, or personal leave in the United States, at least at the federal level.

116. These figures vary slightly from the percentages reported in Figure E because one of the six law schools taking the third approach summarized in Figure E (six to eight weeks of paid childbirth leave) provides the leave irrespective of the faculty member’s gender or status as a birth-parent. See *supra* note 111 and accompanying text.

117. This gender disparity exists, because five of the surveyed law schools provide paid maternity leave only to women on the basis of a disability leave model.



the school. The findings of this analysis are summarized in Figures F and G. As demonstrated by the bar chart in Figure F, the private schools sampled were more than twice as likely to offer a semester off at 100% pay as the public schools. Whereas 56% of private law schools in the sample offer such an arrangement, only 24% of the public law schools do.

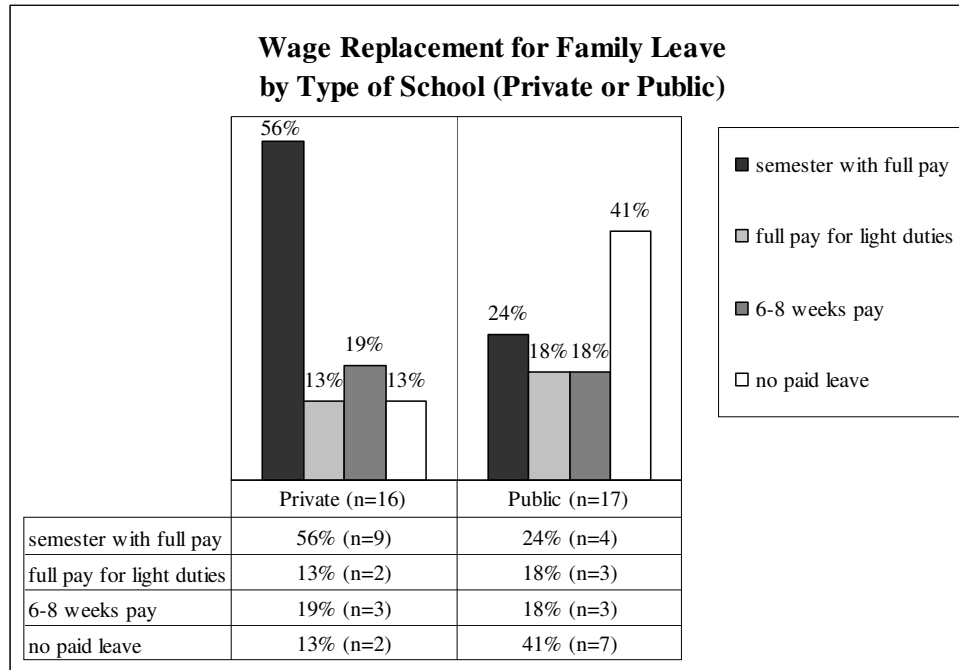
Indeed, private law schools were more generous with regard to paid family leave generally. For example, only 18% of private schools sampled that provide a full semester of paid family leave require any work duties of the professor to continue during the leave. In contrast, 43% of the public law schools in the sample offering a semester of paid family leave expected at least light committee work and/or research to continue as a condition of receiving full pay.<sup>118</sup> This finding is significant and may be explained by the constraints faced by public educational institutions, which will be discussed more fully in Part V.

Perhaps the most significant result illustrated by Figure F is the fact that fully 41% of the public law schools surveyed provide no separate category of paid family leave beyond an employee's accrued sick, vacation, and personal leave. In contrast, only 13% of private law schools fail to provide any paid family leave benefits. Again, for an untenured faculty member, this may mean a virtually unpaid leave after the birth or adoption of a child. And for an unmarried parent or primary wage-earner, this policy may translate into no leave at all.

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118. These percentages are not reflected in Figure F.

Figure F



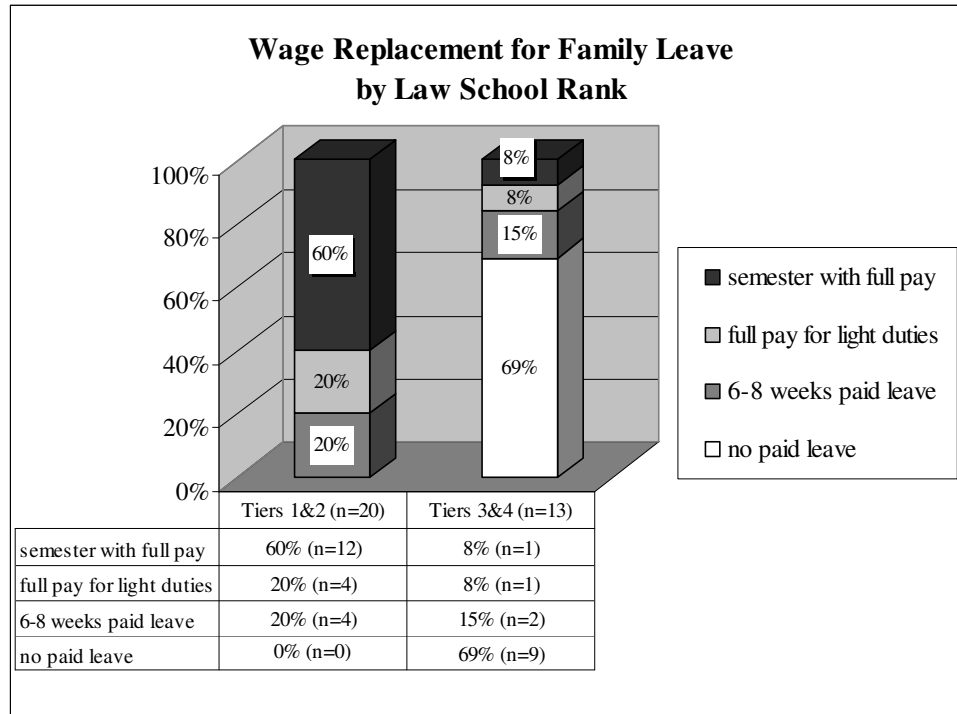
The salience of a faculty member's law school rank to whether he will receive a paid family leave and for how long may be even greater than the public or private status of his law school. Turning to the bar graph in Figure G, we see that 100% of the schools ranked in the first or second tier by *U.S. News & World Report* in 2005<sup>119</sup> in the sample provide some wage replacement for family leave. Fully 60% provide a semester off at 100% pay; 20% provide a semester off at 100% pay with the expectation that light research or committee work will continue; and 20% provide six to eight weeks paid childbirth leave. In contrast, only 31% of schools ranked in the third or fourth tier by *U.S. News*<sup>120</sup> provide any paid family leave. It should be noted that more than half of the straight-FMLA schools surveyed allow work shifting so that the faculty member will not lose income.<sup>121</sup> However, as discussed previously, because the faculty member essentially ends up teaching a double load before or after the leave, she really is not receiving a paid family leave.

119. *Schools of Law*, U.S. NEWS & WORLD REP., Apr. 11, 2005 at 72.

120. *Id.*

121. This last finding is not reflected in Figure G.

Figure G



A final finding relates to whether paid family leave is provided pursuant to a formal policy. Although paid family leave appears to be the norm among the surveyed law schools, fewer than half (45.5%) provide paid leave pursuant to a formal written policy.<sup>122</sup> More commonly, the deals reflected in this survey were struck on a case-by-case basis with law school deans. Indeed, in some cases faculty members at the same school with similar leave needs had no idea about the terms of leave taken by a colleague down the hall. Such lack of transparency is problematic in the hiring market and suggests the importance of the publication of family leave practices and policies by law schools, data collection in this area by the AALS or some other body, and future research in this area.

In sum, this survey suggests that paid family leave appears to be the norm among the surveyed law schools. Because some law schools follow a

122. Specifically, seven of the surveyed law schools had a formal policy providing for one semester of fully-paid family leave, three law schools had a formal policy providing full pay for light duties, and five provided six to eight weeks of paid leave (partial-pay) pursuant to a formal policy. The remaining eighteen law schools provided paid leave pursuant to informal practice or no paid leave at all.

disability leave model, women law faculty were more likely than their male colleagues to receive a paid family leave. There was a positive relationship between teaching at top-tier and private law schools and receiving paid family leave. Finally, although many of the surveyed law schools provided paid family leave, leaves were commonly negotiated on an ad hoc basis with law school deans.

## V. DISCUSSION

What do these findings, however exploratory in nature, teach us about paid family leave in American law schools? Have law schools made progress with regard to family leave benefits in the past twenty years? Are law schools keeping up with other employers? What may explain the positive relationship between teaching at top-tier and private law schools and receiving a paid family leave? Might law school leave policies and practices explain part of the underrepresentation of women among the top law teaching positions? How can this study inform our understanding of structural sex discrimination within law schools and the workplace more generally? In this section, I discuss these questions and suggest possible directions for future research.

### A. *Have Law Schools Made Progress with Regard to Family Leave Benefits in the Past Twenty Years?*

Twenty years ago, in the only other systematic attempt to study law school family leave policies and practices, Richard Chused found that virtually all law school family leaves were unpaid.<sup>123</sup> In contrast, this survey suggests that almost three-quarters of American law schools now offer some form of paid family leave benefits, at least informally. Moreover, even the minority of law schools following a straight FMLA policy must allow a faculty member to use accrued sick, vacation, and personal leave during the period when she takes time off to care for a newly born or adopted child.<sup>124</sup> Clearly, law schools have made significant progress in the area of paid parental leave benefits, partly in response to federal law, but many schools have also gone significantly beyond what federal law requires. In many ways, this finding mirrors women's progress within legal academia generally.<sup>125</sup>

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123. See Chused, *supra* note 18, at 574.

124. See 29 C.F.R. § 825.207(b) (2006).

125. See *supra* Part II.

On the other hand, in one regard very little has changed since Chused's original study. He noted that "[i]n general, the study reveals that . . . few schools have given much thought to the handling of parenthood, that most schools handle the problem on an ad hoc basis, and that there is considerable variety in the ways law schools respond to new parents."<sup>126</sup> This statement remains largely accurate today. Chused surmised that "the general lack of institutional rules is probably . . . due to the recent 'arrival' of this problem,"<sup>127</sup> given that women's presence in law teaching was a relatively recent phenomenon in 1985. The continued absence of formal leave policies in more than half the law schools sampled suggests that other dynamics are at play.

One possibility is that the FMLA actually worked to freeze the development of formal policies by law schools. Michael Selmi has argued that minimum labor standards legislation like the FMLA often can work to create a ceiling of benefits.<sup>128</sup> In his words, "most employers will offer what appears to be a standard and reasonable package, and when a federal mandate exists, the standard and reasonable package is likely to mimic the federal standard."<sup>129</sup> At the same time, and contrary to this negative assessment of the FMLA's impact, the FMLA may have worked to *informally* ratchet up benefits.<sup>130</sup> This theory could explain why many surveyed law schools officially adhere to the FMLA, while at the same time providing faculty members with more generous leaves on a case-by-case basis. Selmi questions whether this dynamic is likely in the case of family leave benefits, which, unlike wages, are not the primary means employers use to compete for employees.<sup>131</sup> Selmi is probably right. However, an additional explanation exists for the apparent norm of informally paid family leave among the surveyed law schools, and that is the Pregnancy Discrimination Act (PDA).<sup>132</sup>

The PDA requires law schools to provide pregnant women paid maternity leave comparable to the paid short-term disability or sick leaves provided to men.<sup>133</sup> With this in mind, the apparent pattern within the survey sample may represent the impact of the PDA on law school leave practices,

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126. See Chused, *supra* note 18, at 570.

127. *Id.*

128. See Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 82-83 (2004).

129. *Id.* at 83.

130. *Id.* at 81-82.

131. *Id.*

132. 42 U.S.C. § 2000e(k) (2000).

133. *Id.*; see also *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285-86 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

even more so than the FMLA. When defining the scope of a maternity leave, the PDA requires only that a law school match the benefits it provides for employees similarly situated in their ability or inability to work for reasons unrelated to pregnancy.<sup>134</sup> Where those sick or disability leave benefits are informal, the benefits offered to pregnant women will be also. Providing informal leaves for illness is a common practice in law schools. There are many possible reasons for this, including the shiftability of law school workloads, the tradition of collegiality within law schools (which historically was bolstered by the common experiences of all-male faculties), and the high discretion of law school deans. Given this type of workplace, it would make sense that the advances with regard to paid leave for maternity have largely also occurred on an informal basis. Such practices, in turn, may work to alter the expectations of employees and the cultures inside law schools, eventually resulting in formal policies that institutionalize a new, higher benefit for everyone, including men who wish to receive paid family leave upon the birth or adoption of a child and women who are not birth mothers.

The picture painted by the surveyed law schools largely supports this neoinstitutionalist theory.<sup>135</sup> Receiving a fully or partially paid family leave is positively related to teaching at top-tier and private law schools. Such schools are also more likely to provide paid leave pursuant to a formal written policy. What we may be seeing, then, is a snapshot of law schools in the various stages of institutionalization of the PDA,<sup>136</sup> with the top-tier, private, more well-resourced law schools representing an institutionalized stage, and the lower-tier, public, less well-resourced law schools representing more of an ad hoc rights diffusion stage.<sup>137</sup> This theory would need to be tested in the future in a study that incorporated the impact of the PDA on law school leave policies and practices. If supported, such research would provide a valuable contribution to research on law and social change,

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134. 42 U.S.C. § 2000e(k).

135. See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 929–30 (1996) (arguing that law exerts pressure on organizations “primarily by redefining the normative value of old practices or by creating the cognitive building blocks for new ones”).

136. Neoinstitutional sociology looks at the diffusion of law from the receiving end, instead of from the perspective of formal legal players such as government regulators and courts. This perspective allows us to see how organizations absorb or resist legal mandates, recognizing that individuals and organizations serve as mediators and interpreters of formal law. See Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC’Y REV. 493, 498 (2006).

137. *Id.*

as well as provide a blueprint for how to increase paid family leave benefits inside workplaces.<sup>138</sup>

The theories explored thus far have focused on dynamics exogenous to law schools, such as the impact of federal law. However, a discrimination approach would suggest that law schools' apparent continued practice of providing paid family leave on an ad hoc basis represents structural discrimination. That is, given that women are disproportionately the beneficiaries of paid parental leave, the absence of formalization may be the product of gender bias. This theory is entirely plausible in light of what we know about the makeup of the legal academy. Men still disproportionately occupy the positions of greatest status and influence on law school faculties, especially deanships.<sup>139</sup> Even without the operation of conscious bias, these conditions inside law schools may explain why the formal benefits offered to faculty members still largely reflect the work and life patterns of men, despite women's significantly greater presence on law faculties since 1985.

Finally, the absence of formalized leave policies may be peculiar to the culture of academia itself, which is structured largely around subjective, fluid evaluation standards and decision-making processes. A discussion of the tenure system and the reasons for this workplace structure are beyond the scope of this project. However, the culture of law schools and academia more generally are likely additional factors that may explain the persistence of informal paid leave practices in American law schools despite the incorporation of women into law teaching and changes in the law.

### *B. Are Law Schools Keeping up with Other Employers?*

Paid family leave now appears to be the norm in legal academia: 58% to 73% of the law schools surveyed provide a separate category of family leave, depending on whether the faculty member is a man or a woman.<sup>140</sup> This finding is best analyzed not as an absolute matter, but in the context of national data on how other employers handle paid family leave. It must be remembered that the FMLA was "[t]he product of nine years of negotiations and compromises."<sup>141</sup> It was largely a symbolic piece of legislation, replicating what many employers already were providing, both in terms of

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138. In particular, if borne out, this theory would suggest that the key to achieving more family-friendly workplaces is enforcing the PDA, especially in contexts where there is a strong tradition of leave taking for short-term disabilities such as law schools.

139. See WHITE, *supra* note 19, at 3 tbl.1A.

140. See *supra* fig.E.

141. Lauren J. Asher & Donna R. Lenhoff, *Family and Medical Leave: Making Time for Family Is Everyone's Business*, 11 FUTURE CHILD. 115, 118 (2001).

leave time and pay.<sup>142</sup> Thus, to gauge the significance of the apparent norm of generously paid family leaves within legal academia, we need to look to the practices of other comparable employers with regard to wage replacement, not to the minimum set by the FMLA.

There is a limited amount of helpful research on this question, but an examination of five studies sheds some light on how law schools are doing relative to other employers with regard to paid family leave. In 2000, the United States Department of Labor (DOL) conducted a major national survey on the impact of the FMLA.<sup>143</sup> Forty-nine percent of surveyed employers covered by the FMLA reported providing at least partial pay for maternity leave and 23% reported providing at least partial pay to parents on leave to care for a newborn.<sup>144</sup> Thus, even when compared with other employers, it appears that law schools are extremely generous with regard to wage replacement for family leave.

However, the usefulness of the DOL data as a measure of how law schools are doing in this area is limited. The DOL survey included employers in a wide-range of industries, including those that employ nonprofessional, hourly, wage workers.<sup>145</sup> Given the fact that salaried employees, more highly educated employees, and those employees with higher levels of household income are the most likely to receive paid leave,<sup>146</sup> the relevance of the DOL findings to the narrow sector of legal academia is likely to be quite low. Moreover, the DOL study did not measure the average length of paid leaves. It simply reported the percentage of employers that provided at least partial pay during a family leave. But more than half of the leaves relating to the care of a newborn were for ten or fewer days, and only 41% lasted longer than thirty days.<sup>147</sup> Finally, the vast majority of leave takers surveyed in the DOL study who received at least some pay during a family leave reported that their pay was in the form of sick or vacation leave.<sup>148</sup> Thus, it really means very little, for comparative purposes at least, that 49% of the surveyed employers provided at least partial pay for maternity leave and 23% provided at least partial pay to parents to care for a newborn, when the vast majority of those leaves lasted for a relatively short period and were funded through employees' accrued

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142. See Selmi, *supra* note 128, at 80–83.

143. DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS (2000).

144. *Id.* at 5-14 tbl.5.6.

145. *Id.* at 1-4.

146. *Id.* at 4-5.

147. *Id.* at A-2-2 tbl.A2-2.3. Although disability related maternity leaves tended to be somewhat longer, one-quarter lasted less than sixty days. *Id.*

148. *Id.* at 4-6 tbl.4.5.



sick and vacation leave, not a separate paid leave benefit. However, for what it is worth, the DOL survey suggests that law schools are significantly more generous than the average U.S. employer with regard to paid family leave.

A second study is more helpful. In 1998, the Families and Work Institute undertook one of the first and most comprehensive studies of how U.S. employers are responding to the family needs of the nation's workforce.<sup>149</sup> The survey included a representative sample of 1057 for-profit employers (84% of the sample) and not-for-profit employers (16% of the sample) with 100 or more employees.<sup>150</sup> This study is more helpful for the purpose of comparison than the DOL survey, because the surveyed employers were classified by size, industry, percentage of salaried workers, and percentage of part-time workers.<sup>151</sup> While there is no separate category for education, the survey does classify a category of employers offering "professional services," which include "business, legal, health, education, social, engineering, management."<sup>152</sup> "Professional services" thus includes law and education, as well as other professional employers whose workforces are made up of highly-educated, salaried workers. As such, the Families and Work Institute study provides a significantly better source of comparative data to gauge law school performance with regard to paid family leave than the DOL study.

The 1998 Families and Work Institute survey reported that 44% of professional service companies provide at least some pay during childbirth leave for mothers beyond that available from accrued sick, vacation, and personal days.<sup>153</sup> Employers with higher percentages of salaried and full-time workers were even more likely to provide paid childbirth leave: 60% of surveyed employers with less than 58% of hourly workers provided at least partial pay during a childbirth leave, and 67% of surveyed employers with less than 2.5% part-time workers did.<sup>154</sup> Employers with the latter characteristics—that is, those with primarily full-time, salaried workers—are arguably the most comparable to American law schools. If this is true, this study suggests that law schools are doing slightly better than comparable professional employers in providing women paid childbirth

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149. ELLEN GALINSKY & JAMES T. BOND, FAMILIES AND WORK INST., THE 1998 BUSINESS WORK-LIFE STUDY (1998).

150. *Id.* at I.

151. *Id.* at 3–5.

152. *Id.* at 3.

153. *Id.* at 21 tbl.15.

154. *Id.*

leave, given that 73% of the law schools surveyed provide such leave.<sup>155</sup> Note that the dramatic generosity by law schools with regard to paid family leave suggested by the DOL study largely disappears once this superior comparative data set is used.

On the question of paternity leave, the 1998 Families and Work Institute Study reported that just 20% of employers surveyed with fewer than 250 employees provided at least some paid paternity leave beyond that available from accrued sick, vacation, and personal days during an FMLA leave.<sup>156</sup> Unfortunately, the study did not report data on paid paternity leave by industry. Therefore, like the DOL study, the relevance of the Families and Work Institute study to the question of how generous law schools are with regard to paid paternity leave is quite limited.

How do the surveyed law schools compare with institutions of higher education on the paid family leave front? Studies on family leave policies in universities suggest that the surveyed law schools are doing about the same or slightly better than institutions of higher education, at least with regard to formal paid leave benefits. For example, two large random national studies suggest that 39% to 43% of four-year colleges and universities offer formal, institution-wide paid family leave benefits covering a period of at least six weeks.<sup>157</sup> Forty-five percent of the law schools in this pilot study formally provide at least six weeks of paid family leave.<sup>158</sup>

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155. See *supra* note 116 and accompanying text.

156. GALINSKY & BOND, *supra* note 149, at 24 tbl.17.

157. See CHARMAINE YOEST & STEVEN E. RHOADS, PARENTAL LEAVE IN ACADEMIA 7, 8, 16 (2004), <http://www.faculty.virginia.edu/familyandtenure/institutional%20report.pdf> (finding that of 84 responding institutions, 39% offered a separate paid leave benefit: 18% in the form of a full-semester or quarter of leave, 9% in the form of eight to twelve weeks of paid parenting leave, 7% in the form of a six-week maternity leave, and 5% in the form of half-pay or a course release); Beth Sullivan et al., *Developing and Implementing Work-Family Policies for Faculty*, ACADEME, Nov.–Dec. 2004, at 24, 26 (finding that of 255 responding institutions, 43% offered a separate paid leave benefit: 18% in the form of a full semester of pay for modified duties and 25% in the form of paid maternity leave for women faculty members).

158. See *supra* note 122. The divergent methods of coding data among these studies make more specific comparisons within categories impossible. For example, this pilot study defined six to ten weeks of paid family leave (typically offered only to women faculty) as a paid maternity leave, whereas one of the national studies discussed in the text coded leaves lasting up to six weeks as maternity leave and leaves lasting eight to twelve weeks as a separate category. See YOEST & RHOADS, *supra* note 157, at 7. Along the same lines, this pilot study separated a full semester of paid leave into two categories, those policies that required continuation of some duties, such as research or committee work, and those that did not. In contrast, one of the studies discussed in the text appears not to have broken full-semester paid leaves into these two categories. See Sullivan, *supra* note 157, at

What about informal leave practices among institutions of higher education? There is limited research on this question, but one somewhat older study suggests that law schools are significantly more generous than colleges and universities, especially with regard to paid family leave for men.<sup>159</sup> Based on a survey of chief academic officers at 191 colleges and universities in the early 1990s, sociologist Phyllis Raabe found that 74% of the surveyed institutions had a practice of providing paid leave to women at childbirth, while 14% had a practice of providing paid leave for fathers at childbirth.<sup>160</sup> In contrast, this pilot study found that 73% of the surveyed law schools provide paid family leave to women and 58% provide paid family leave to men, at least informally.<sup>161</sup> Thus, the Raabe study suggests that while the surveyed law schools are essentially on par with institutions of higher education with regard to the informal provision of paid family leave for women, they are dramatically more generous with regard to informally paid family leaves for men.

Two features of the Raabe study limit its usefulness for comparison purposes, however. First, it was conducted before the passage of the FMLA.<sup>162</sup> This limits its relevance to law school leave practices in the post-FMLA era (although it raises the different and intriguing question of whether the FMLA's primary effect was to improve family leave benefits for men). Second, like the Department of Labor study discussed earlier,<sup>163</sup> Raabe's study did not ask whether the source of wage replacement for "paid" leave came from a separate paid family leave benefit or from accrued sick, vacation, and personal leave.<sup>164</sup> As such, it probably significantly overreports the percentage of institutions offering paid family leave as defined by this study.<sup>165</sup> In sum, additional research is needed to compare law school paid family leave policies and practices with institutions of higher education.

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26. Therefore, the only meaningful comparison is whether the institution offers a separate paid family leave benefit lasting at least six weeks.

159. See Phyllis Hutton Raabe, *Work-Family Policies for Faculty: How "Career- and Family-Friendly" Is Academe?*, in *ACADEMIC COUPLES* 208, 213 tbl.8-1 (Marianne A. Ferber & Jane W. Loeb eds., 1997).

160. See *id.*

161. See *supra* fig.E.

162. 29 U.S.C. §§ 2601–2654 (2000 & Supp. 2004).

163. See CANTOR, *supra* note 143.

164. See Raabe, *supra* note 159, at 212–13.

165. Because a professor using accrued sick, vacation, and personal leave to replace regular pay during a family leave has "spent" the leave and cannot use it for any other purpose, this study does not define such a leave as a paid leave.

Ideally, this survey's finding about paid family leave in law schools should also be analyzed with regard to the benefits provided by large, national law firms. Law schools typically compete with the large, national firms for the best law school graduates. On the basis of a market theory alone, law firms constitute the most logical comparison to law schools on the question of paid family leave. Moreover, law firms have similar "up or out" probationary periods during which young lawyers must prove themselves. Many of the skills required of law professors overlap with those required of lawyers working in large, national law firms. These common characteristics and the labor market would lead one to expect law firms and law schools to have similar policies with regard to paid family leave.

Unfortunately, there is a paucity of research on this question. The National Association of Law Placement (NALP) annually surveys over 600 law firms about the characteristics of law firm workplaces.<sup>166</sup> This survey includes just a few questions on family leave focusing on whether a firm has a written parental leave policy and who it covers.<sup>167</sup> NALP does not collect information on whether firms offer paid family leave.

Until we have better comparative data on paid family leaves in law firms and academia more generally, definitive conclusions cannot be reached regarding the significance of this study's first finding that 58% to 73% of law schools (depending on whether the beneficiaries are men or women) provide a separate category of paid family leave.<sup>168</sup> That said, we know that as an absolute matter the surveyed law schools are generally providing more paid family leave than the FMLA requires, even considering the FMLA's existing wage replacement provisions allowing an employee to use accrued leave to make-up pay during a family leave. We also know that women law teachers in the surveyed law schools appear to be receiving slightly better paid family leave benefits than comparable women professionals. Finally, a few large studies suggest that the surveyed law schools are on par with colleges and universities generally, at least with regard to the formal provision of a minimum paid family leave benefit lasting at least six weeks. How law schools are doing compared with institutions of higher education with regard to informal paid leave practices cannot be determined from the existing research, because the only large-scale study on that question is more than a decade old and employed different measures than this study.<sup>169</sup> Additional research is clearly required before we can know with more

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166. See JUDITH N. COLLINS, NAT'L ASS'N L. PLACEMENT, FINDINGS FROM THE NALP WORKPLACE QUESTIONNAIRE 1 (2005), [http://www.nalp.org/assets/193\\_05wqweb.pdf](http://www.nalp.org/assets/193_05wqweb.pdf).

167. *Id.* at 4.

168. See *supra* text accompanying note 116.

169. See Raabe, *supra* note 159.

specificity how law schools stack up against other employers on the family leave front.

*C. What Explains the Positive Relationship Between Teaching at Top-Tier and Private Law Schools and Receiving a Paid Family Leave?*

In addition to revealing how law schools are performing in the area of paid family leave relative to an earlier period of time and relative to other employers, this analysis illuminates the role of law school rank and source of funding in receiving a paid family leave. The type of a law school's funding and its rank played a significant role in how much pay a faculty member was likely to receive during a family leave. The private schools sampled were almost twice as likely as public schools to offer a semester off at 100% pay and were more generous with regard to paid family leave generally, imposing fewer conditions and offering more weeks of wage replacement on average than the public schools.<sup>170</sup> Even more striking, all of the law schools ranked in the first or second tier by *U.S. News & World Report* in 2005 provided some wage replacement for family leave, with 80% offering a fully paid semester of family leave in one form or another.<sup>171</sup> In contrast, fully 69% of the third- and fourth-tier law schools offered no separate paid family leave benefits, even on a negotiated basis.<sup>172</sup>

In many ways, these findings are not surprising. Assuming the rank of a school and its private status may be rough measures of the resources of the law school or the market power of its faculty members, this study may simply validate the conventional wisdom that the "haves" come out ahead.<sup>173</sup> There is good reason to believe this theory is correct. The tax-supported percentage of public university budgets has been in decline for more than a decade, even though the public investment in public higher education in total dollars continues to rise as more and more students enter postsecondary education.<sup>174</sup> Further, one significant measure of a law school's *U.S. News* ranking is faculty resources, as measured by

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170. See *supra* fig.F and accompanying text.

171. See *supra* fig.G and accompanying text.

172. See *supra* fig.G and accompanying text.

173. See generally Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974) (describing the systemic way in which parties with more power and resources, such as represented parties and repeat players, come out ahead in litigation).

174. See Albert Carnesale, *The Private-Public Gap in Higher Education*, *CHRON. HIGHER EDUC.*, Jan. 6, 2006, at B20.

expenditures per student, faculty-student ratio, and library resources.<sup>175</sup> Thus, public and lower ranked law schools may simply have fewer resources for generous leave benefits than private and higher-ranked law schools. Research on institutions of higher education more generally corroborate this theory. For example, a national study of parental leave by the Family, Gender, and Tenure Project at the University of Virginia found that private colleges and universities are almost twice as likely as public colleges and universities to offer paid family leave.<sup>176</sup> It also found that the schools most likely to offer the most generous paid leave policies were the “elite” and “very difficult” schools.<sup>177</sup>

On the other hand, there is a more optimistic way of interpreting the results of this study. In the absence of any uniform legal mandate, almost three-quarters of the surveyed law schools provided some form of paid family leave, at least on an informal basis.<sup>178</sup> This observation raises an interesting question relevant to the literature on privatization and workplace inequality. In the past decade, some employment discrimination and law and society scholars have begun to reevaluate the effectiveness of substantive legal mandates in delivering workplace equality.<sup>179</sup> Taking into account recent and sophisticated understandings of cognitive bias as well as the complex ways in which anti-discrimination law is mediated by institutional actors, these scholars have advocated more privatized, devolved solutions to the problem of workplace inequality.<sup>180</sup> The federal courts have to a significant extent signed on to this agenda.<sup>181</sup> This pilot study, if confirmed by additional research, may ultimately serve to support these scholars’ and the Court’s apparent faith in employers’ commitment to workplace equality, at least where employers have the resources and their employees have some bargaining power.

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175. See Robert J. Morse et al., *The Ranking Methodology*, U.S. NEWS & WORLD REP., Apr. 11, 2005, at 66.

176. YOEST & RHOADS, *supra* note 157, at 2.

177. *Id.* at 5–6.

178. See *supra* fig.E.

179. See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 164–65, 186–92 (2004); Rachel Arnov-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers* 2007 UTAH L. REV. (forthcoming 2007) (manuscript at 27–42, on file with author); Sturm, *supra* note 53, *passim*.

180. See sources cited *supra* note 179.

181. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that if an employer proves that it took reasonable measures to prevent and address sexual harassment through a grievance procedure or otherwise, and an employee unreasonably fails to avail herself of that measure or policy, the employer will not be liable for hostile work environment sexual harassment).

On the other hand, law schools' unique time culture may caution against generalizing too broadly from law schools to other employers. Sociologists have shown how patterns of time use are socially constructed.<sup>182</sup> This is no less true in the workplace, where "[a] shared . . . culture shapes [the] norms and patterns [of] time expectations."<sup>183</sup> Building on this idea, scholars interested in work and family conflict have shown how the "full-time, face-time norm"<sup>184</sup> in the American workplace may undermine legal reforms such as the FMLA, PDA, and other employment discrimination laws.<sup>185</sup> Yet the "socially expected duration" could conceivably have positive effects as well.<sup>186</sup> Law schools have a strong culture of leave taking. Reductions in teaching loads are standard practice for scholarly pursuits and administrative responsibilities.<sup>187</sup> Sabbaticals are a routine feature of the tenure system.<sup>188</sup> Unpaid leaves of absence are also commonly offered to law school faculty members for outside professional endeavors and visits at other institutions.<sup>189</sup> Moreover, the typical academic semester is substantially longer than the twelve-week floor established by FMLA. Administrators and students alike are likely to resist the federally-required minimum period of family leave (whether paid or unpaid), because in some cases it would require a mid-semester change in faculty. This unique time culture within law schools may serve as a positive pull on the length of family leaves and perhaps even on pay during a family leave. This theory suggests caution in drawing broad conclusions about the law schools' generosity with regard to paid family leave or the effectiveness of private ordering in achieving less discriminatory workplaces. As sociolegal scholars have demonstrated, existing workplace cultures and norms *may* positively transform the meaning of legal rights,<sup>190</sup> but the circumstances

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182. See Lewis A. Coser & Rose Laub Coser, *Time Perspective and Social Structure*, in MODERN SOCIOLOGY 638, 638–650 (Alvin W. Gouldner & Helen P. Gouldner eds., 1963).

183. See CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX 19 (1999).

184. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005).

185. *Id.* at 21–46.

186. See Robert K. Merton, *Socially Expected Durations: A Case Study of Concept Formation in Sociology*, in CONFLICT AND CONSENSUS: A Festschrift in Honor of Lewis A. Coser 262, 265–66, 272–74 (Walter W. Powell & Richard Robbins eds., 1984) (describing the "socially prescribed or collectively patterned expectations about temporal durations imbedded in social structures of various kinds").

187. See Chused, *supra* note 18, at 575.

188. *Id.* at 573–74.

189. *Id.* at 574.

190. See, e.g., Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39

under which this may occur are likely to be highly specific. Future research in this area should be attentive to these observations.

*D. Do Law School Leave Policies and Practices Explain Part of the Underrepresentation of Women Among the Top Law Teaching Positions?*

This study began with some rather dramatic statistics about women's underrepresentation among the positions of highest prestige, reward, and influence in legal academia.<sup>191</sup> Do law school leave policies and practices contribute to this glass ceiling?

Given everything we know about how structural discrimination operates inside law schools, it seems intuitive that the absence of paid family leave benefits or the absence of formal, written leave policies will negatively and disproportionately impact women law teachers. As Arlie Hochschild observed more than thirty years ago, the very idea of an academic career assumes achievement "measured against time."<sup>192</sup> Taking a pre-tenure leave is a high-risk proposition in such a system, even if one's tenure clock is extended. Moreover, the absence of formal institutional rules is likely to exacerbate the negative effects of the "squeaky wheel" system for women.<sup>193</sup> That is, if a faculty member must "squeak" to secure a paid family leave, it will likely result in a concession of research funding, travel funding, technology support, administrative help, or some other resources.<sup>194</sup> No intentional discrimination is required for this to occur, for the main force of the squeaky wheel system lies in its deterrent effect.<sup>195</sup> Being pregnant inside the workplace and taking a parental leave is also likely to make a law professor's sex more salient in subjective evaluation processes.<sup>196</sup>

And yet, this study presents a counterintuitive result. Even though the surveyed top-tier schools do dramatically better than the lower-ranked schools with regard to both the amount of paid family leave and any

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LAW & SOC'Y REV. 11, 15 (2005); Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 478 (2000).

191. See *supra* Part II.

192. Arlie Russell Hochschild, *Inside the Clockwork of Male Careers*, in *WOMEN AND THE POWER TO CHANGE* 47, 61–62 (Florence Howe ed., 1975).

193. See *supra* notes 62–65 and accompanying text.

194. See *supra* notes 62–65 and accompanying text.

195. See *supra* note 66 and accompanying text.

196. See Williams & Segal, *supra* note 76, at 131–33 (reviewing social psychological literature which explains how motherhood makes an employee's sex more salient in the workplace, especially within workplaces that rely on subjective decision-making processes).



conditions imposed as a result of taking a leave, women's underrepresentation among top positions is most striking at the most highly ranked law schools.<sup>197</sup> There are a number of possible explanations for this puzzle. Women at the most highly ranked law schools may be less qualified relative to their male colleagues than women at non-elite law schools, but this explanation is unlikely. Merritt and Reskin demonstrated in their comprehensive study that credentials and work experience did not explain women law teachers' lower status with regard to hiring decisions, level of initial rank, law school prestige, or teaching assignments.<sup>198</sup> Although they did not examine women's promotion or tenure rates, there is little reason to believe that women who are equally qualified with men when they are hired according to all the traditional indicia of scholarly success suddenly become less qualified than their colleagues once on a law faculty. More likely, the elite "producer" law schools may simply have a longer way to go than the rest of legal academia in incorporating women into the upper ranks of their faculties. This makes a lot of sense, given that such schools were among the last to open their doors to women.<sup>199</sup>

Another possibility is that women law teachers at the producer schools are less likely than their female colleagues in the rest of the academy to choose to become parents, neutralizing the value of their schools' paid family leave benefits. Although limited, there is some support for this theory. In their comprehensive study of the effects of sex and race on tenure-track hiring at accredited law schools, Deborah Merritt and Barbara Reskin found that unmarried professors were more likely to be hired by elite law schools.<sup>200</sup> Of course, unmarried people do have children, but it is less common. Or perhaps women professors at the producer law schools avoid taking advantage of their institutions' family leave benefits, even

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197. See Neumann, *supra* note 21, at 439 tbl.12; discussion *supra* note 31.

198. See Merritt & Reskin, *supra* note 23, at 275–76.

199. VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 41–43, 63 (1998); KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA* 90 (1986). *But see* DONNA FOSSUM, *WOMEN IN THE LEGAL PROFESSION* 88–89 (1981) (finding that the most prestigious law schools were more willing than less prestigious law schools to hire the initial woman professor to sexually integrate their tenure-track faculties). Fossom's results may best be interpreted in the context of more qualitative studies, which show that the nation's most elite schools lead the nation in hiring a few token women professors, but did not fully integrate them into their faculties. See DRACHMAN, *supra*; MORELLO, *supra*.

200. See Merritt & Reskin, *supra* note 23, at 242. This finding is consistent with other research demonstrating a higher percentage of single women than married women, and childless women than women with children, among the nation's college and university faculty. See Perna, *supra* note 52, at 585.

when they do become parents, hindering work performance and status. Although there is no research in the context of law schools on this question, one large study of faculty teaching in U.S. colleges and universities found that women teaching at more prestigious research institutions offering doctoral degrees were significantly more likely than women teaching at baccalaureate, associate, and technical degree granting institutions to not take a parental leave when needed.<sup>201</sup> More generally, numerous studies have found that faculty typically underuse work-family policies, because they fear doing so will diminish their chances of earning tenure.<sup>202</sup> Sociologists studying work and family conflict within academia call this the “fear factor.”<sup>203</sup> Given that publishing pressures are likely to be greatest at the most prestigious law schools, it is logical to think that this dynamic is more likely to take hold at such schools, neutralizing any positive effect of those schools’ more generous paid leave benefits. Finally, it could be that all of the other forms of gender bias discussed in Part II—such as subtle discrimination in informal norms, networking, training, mentoring, resource distribution, and evaluation—operate more forcefully at the nation’s most elite law schools. If substantiated, this theory would be consistent with what we know about the workplace more generally: the best companies typically have the best benefits and wages, but women still do not flock to these employers, because they often have the most severe institutional biases that prevent integration.<sup>204</sup> All of these theories suggest important and fruitful areas for further research. A positive correlation between paid family leave and the glass ceiling for women in legal academia may very well materialize when all law schools (not just producer schools) are considered.

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201. See Drago, *supra* note 66, at 1222, 1235, 1236 tbl.4 (surveying 4188 chemistry and English faculty in 507 colleges and universities). These latter two theories may further explain why the higher-ranked schools surveyed offer the most generous family leave benefits: it is easy to provide a generous benefit that few will use. That is, the cost to higher-ranked law schools of providing generous family leave benefits may be no greater than the aggregate cost to lower-ranked schools of providing less generous benefits. Thus, the higher-ranked law schools may be more amenable to offering more generous family leave benefits for reasons of pure cost. I thank Seth Harris for this insight.

202. See, e.g., Susan Kolker Finkel et al., *Childbirth, Tenure, and Promotion for Women Faculty*, 17 REV. HIGHER EDUC. 259, 266 (1994) (“[O]nly 30 percent [of women surveyed] took the full amount of paid time off allowed by university policy, 30 percent took less paid leave than the university policy permitted, and 40 percent took no paid leave at all.”).

203. See Kelly Ward & Lisa Wolf-Wendel, *Fear Factor*, ACADEME, Nov.–Dec. 2004, at 28, 30–31.

204. I thank Michael Selmi for this insight.

## VI. CONCLUSION

Almost three-quarters of the surveyed law schools provided some form of paid family leave to their faculty members over and above the FMLA's wage-replacement provisions, at least on an ad hoc basis, compared with virtually no law schools twenty years ago. Seventy-three percent provided at least six to eight weeks of paid family leave to women, and 58% provided at least six to eight weeks of paid family leave to men. This suggests that women's sustained presence within legal academia, men's increased involvement in family care work, and federal civil rights laws have had a real impact on the structure of law school workplaces. At the same time, more than half of the paid leaves were received on an ad hoc basis, and the most generous leaves were obtained by faculty members teaching in top-100 and private law schools. Clearly, resources and power play a significant role in who has positively benefited from these social and legal advances. Finally, other types of structural sex discrimination unrelated to family leave may overshadow family-friendly leave practices, especially in the most elite institutions.

The results reported here raise broader questions about the operation of structural sex discrimination within law schools and workplaces more generally. Much of the debate regarding work/family conflict has revolved around whether women's lack of progress in the best jobs and professions is a product of women's private choices, intentional discrimination, subtle or unintentional bias by decisionmakers, or features of workplace structures themselves. Scholars and commentators writing on work/family conflict have tended to align themselves with one of these theories, aiming to prove its merits to the exclusion of others. The debate has also assumed, to a certain extent, that discrimination dynamics are the same across workplaces. As this small pilot study demonstrates, no single theory of discrimination is likely to explain the glass ceiling or sex-segregated jobs in law schools. They are all likely operating concurrently, to a greater or lesser extent, depending on other characteristics of the law school in question. Future research could build on this insight by exploring additional variables that may drive a school's family leave practices, such as the percentage of women faculty, the existence of a female dean, state law,<sup>205</sup> unionization,<sup>206</sup>

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205. See, e.g., CAL. UNEMP. INS. CODE §§ 3301–3306 (West 2006) (providing non-governmental California workers paying into a state-run disability insurance program up to six weeks of paid family leave).

206. Studies outside of legal academia show that union members may be more likely to have fully-paid family leave benefits, although the research is inconclusive. Compare John W. Budd & Angela M. Brey, *Unions and Family Leave: Early Experience Under the Family and Medical Leave Act*, 28 LAB. STUD. J. 85, 99 (2003), with Cynthia H. Deitch &

and an ad hoc tradition of providing temporary disability leave to men. Equally important would be a deeper exploration of how the various types of discrimination may subtly work together to hinder women's progress in the legal academy.<sup>207</sup> While quite limited in scope, this study provides a framework for thinking about these questions.

The Hill/Thomas and Nannygate controversies of the early 1990s ushered in a positive national conversation about gender bias inside workplaces and the problems of structural employment discrimination. The latest media attention on the causes of women's workplace inequality provides an opportunity to continue that conversation. This study represents a small contribution to that discussion.

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Matt L. Huffman, *Family-Responsive Benefits and the Two-Tiered Labor Market*, in *WORKING FAMILIES* 103, 123 (Rosanna Hertz & Nancy L. Marshall eds., 2001).

207. See generally Kessler, *supra* note 47; Williams & Segal, *supra* note 76.