IN DEFENSE OF PAID FAMILY LEAVE

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In this article I defend state provision of paid family leave. Such a program would allow workers to take compensated time off work to care for a newborn infant or ill family member. I normatively ground my claim in the argument that paid leave would allow women, who have historically performed a disproportionate share of family caregiving labor, to participate more fully in the paid workforce. This enhancement in labor force participation, I argue, would in turn increase women's independence and capacity to determine freely the conditions of their lives. In taking this position, I distinguish myself from those who would make family care subsidies available equally to caregivers who do and do not participate in the paid workforce, as well as from those who would shun workplace accommodations in favor of more "commodified" provision of care, external to the family. Ultimately, I argue, workers have a non-fungible demand for personal time away from work to engage in family caregiving, and absent accommodation of this kind, some women will limit, truncate, or eliminate participation in paid market labor. At the same time, I caution against overly generous leave provision; too generous a program threatens to undermine women's development of human capital and attachment to the workforce. Moreover, the state should spread at least some of the costs of the program beyond those workers (women in their childbearing years) most likely to take leave.

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I. Introduction

For many workers, taking time off work to care for a newborn infant or sick family member creates a severe financial struggle. The Family and Medical Leave Act of 1993 (FMLA) mandates that employers give up to 12 weeks of job-protected leave per year to workers who need it to care for a newborn child or the serious illness of oneself or a family member.[1] Coverage limitations mean that only about half of all workers, and less than one-third of steadily employed new mothers, receive these protections.[2] More importantly, the law does not require wage replacement. This makes the American system perhaps the least generous in industrialized nations. All western European nations have programs that give workers the right to at least 3 months paid maternity leave (and as much as a year or more in some countries), as well as additional guarantees to paid parental leaves.[3] For American workers who need to take time off to deal with family or medical needs, financial worries loom largest among their anxieties about taking leave.[4] For some, this means foreshortening their time away from work.[5] For others, it means simply forgoing a needed leave.[6]

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[1] 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999).

[2] Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. ECON. PERSP. 175, 177 (1997) ("steadily employed," as used here, means employed for at least one year before childbirth). The Act covers only employees who have worked for their employer for 12 months and 1,250 hours in the previous year, and whose employer has 50 or more employees working within 75 miles of the worksite.

[3] *Id*., at 176.

[4] U.S. DEPT. OF LABOR, FMLA SURVEY: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS Tbl. 4.1 (January 2001) [Hereinafter, U.S. DEPT. OF LABOR, BALANCING THE NEEDS] (among worries expressed by workers who took a leave in 1999, whether or not covered by the FMLA, to care for a newborn child or the serious illness of oneself or a family member, not having enough money to pay the bills was cited most frequently (53.8% of leave-takers)).

[5] Id., at Tbl. 4.8 (37% of leave-takers in 1999 reported cutting short their leave time to cope with the hardship of lost wages).

[6] Although 16.5 percent of all employees in the United States took leaves of absence from work to deal with family or medical needs in 1999, another 2.4 percent of workers did not take leave despite reporting that they needed it (i.e., roughly 13 percent of workers who needed to take a leave did not take it). *Id*., Tbls. 2.1, 2.14. Among those who were unable to take a needed leave, the most common reason cited (cited by 77.6 %) was not being able to afford it. *Supra*, Tbl. 2.17. Workers who take leaves are more educated and have higher incomes and salaries than those who do not. *Supra*, § 2.13.

In his final days in office, President Clinton directed the Department of Labor to develop regulations that would allow states to use unemployment insurance (UI) trust fund monies to provide partial wage replacement to parents following the birth or adoption of a child.[7] The resulting regulation, Birth and Adoption Unemployment Compensation (BAA-UC),[8] revitalized public debate over paid family leave. The BAA-UC enabled states to amend their unemployment compensation statutes to exempt workers who voluntarily leave a job for birth or adoption-related reasons from the usual requirement that they be "able and available" for work in order to collect benefits. Although no states amended their unemployment compensation laws pursuant to BAA-UC, its passage led to bills to expand UI in 22 states[9] and more generally triggered widespread evaluation of a range of possible mechanisms for funding family leave. Following its own study of the problem, California took the lead nationally, and in 2002 amended its temporary disability insurance (TDI) program to create the Family Temporary Disability Insurance (FTDI) program, which funds parental and other family leaves for up to six weeks per year.[10] Recently, the Bush administration repealed the BAA-UC, citing concerns about the solvency of state UI trust funds.[11] Nonetheless, the issue of family leave is a long-standing one, and the recent revival of interest in the subject makes closer study timely.

In this Article I defend state provision of paid family leave, with special attention to how it ought to be financed. I am not the first legal scholar to advocate paid family leave of some kind.[12] The additional contribution of this Article is to offer a sustained

[7] Press Release, The White House: Office of the Press Secretary, President Clinton Announces Actions to Offer Paid Leave to America's Working Families (June 9, 2002), *available at* http://clinton3.nara.gove/WH/New?html?20000612_1.html (last visited July 10, 2003).

[8] Birth and Adoption Unemployment Compensation; Final Rule, 65 Fed. Reg. 37,210 (June 13, 2000).

[9] Arizona, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Vermont, and Washington. *See generally*, National Partnership for Women and Families website at www.nationalpartnership.org (contains updates of state legislative developments in paid family leave).

[10] S.B. 1661, 2001-02 Reg. Sess. (Ca. 2002) (amended state disability compensation program, which previously provided compensation for individuals unable to work due to their own temporary illness or disability, including due to pregnancy and childbirth, to also include up to 6 weeks' compensation for leaves to care for an ill family member, or the birth, adoption, or foster care placement of a new child).

[11] Unemployment Compensation - Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 233 (Dec. 4 2002) (published 10/9/03; effective 11/10/03; codified at 20 C.F.R. 604).

[12] See, e.g., Jeremy I. Bohrer, *You, Me, and the Consequences of Family: How Federal Law Prevents the Shattering of the "Glass Ceiling,"* 50 WASH. U. J. URB. & CONTEMP. L. 401, 418-21 (1996); Erin P. Drew, *The Birth and Adoption Unemployment Compensation Experiment: Did the Department of Labor Go Too Far?* 106 DICK. L. REV. 367 (2001); Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time is Now to Help Build Stronger Families with a More Stable Economy*, 26 SETON HALL. LEGIS. J. 73 (2001); Mikel Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 ARIZ. J. INT'L & COMP. L. 147 (1996); Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?* 17 COMP. LAB. L. 373 (1996); Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. AND MARY L. REV. 1507, 1532-38 (2001); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994); Donna Lenhoff & Claudia Withers,

normative defense of such a program based on its potential to increase women's workforce participation, which I argue will in turn enhance women's capacity to determine the conditions of their lives. In taking this position, I distinguish myself from those who would make family care subsidies available equally to caregivers who do and do not participate in the paid workforce, and from those who would shun workplace accommodations in favor of more "commodified" caregiving institutions external to the family. Ultimately, I argue that there is a non-fungible demand for personal time away from work to engage in family caregiving, and that absent accommodation of this demand, some women will limit, truncate, or avoid participation in paid market employment. At the same time, I am wary of overly generous leave provision; too generous a program threatens to undermine women's development of human capital and connection to the workforce. Another key feature of my proposals is that it be at least partially financed by spreading the costs beyond those workers--women in their childbearing years-- most likely the take leave.

In Part II, I explain why private markets do not (for the most part) provide paid family leave insurance and elaborate on why the goal of increasing women's workforce attachment would be a defensible basis on which to justify state intervention to bring about paid family leave, and to finance it in a way that spreads its costs across society. In Part III, I turn to empirical findings on the labor market effects of paid family leave programs, and analyze the linked problem of finance. I review different methods of benefit financing and explain how the dynamic of cost shifting affects who actually pays for a benefit and how it affects their labor market participation. In Part IV, I analyze reform options in light of the normative and economic arguments set out in Parts II and III. Rather than limiting my focus to UI reform, I discuss some general features a paid leave program ought to have, and illustrate with some examples for models of implementation.

II. In Defense of Paid Family Leave

A. Overview

What I mean by "paid family leave" is temporary wage replacement for workers who interrupt work for purposes of family caregiving. It would have two components. It would have a family illness leave component, i.e., temporary paid leave for someone who is not herself incapacitated, but who has a familial obligation to another person who is seriously ill or disabled. It would also have a parental leave component, covering non-medical temporary leave for purposes of allowing parents to nurture newborn children. Note that the FMLA provides both family and personal illness leave. The analysis in this

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Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace, 3 AM. U. J. GENDER & LAW 39, 53-54 (1994); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N. C. L. REV. 707, 770-73 (2000); Stephen D. Sugarman, *Short-Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CAL. L. REV. 465 (1987); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE. J. L. & FEMINISM 1 (2002); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 154 (1998).

Article is limited to family leaves. This is not because paid personal illness leave is unimportant, but because it raises a conceptually distinct set of questions that are not my central focus.

Currently, there are limited sources of financial support --aside from savings or spousal earnings-- for workers who take job leaves to deal with childrearing or family caregiving. About half of all workers in private industry have paid sick leave benefits, i.e., accrued time off that an employee is entitled to in the event of a non-work related personal illness.[13] In addition, roughly one-third of workers in private industry have paid short-term disability insurance, which provides partial wage replacement for this same type of work absence.[14] In a handful of states, the latter type of benefit is mandated or publicly provided.[15] Both sick leave and short-term disability benefit plans must treat workers whose inability to work is related to pregnancy on par with other ill or disabled workers.[16] For the most part, this translates to wage replacement coverage for the period of actual incapacitation due to childbirth, or in extraordinary cases, more extended pregnancy-related illness. The linkage of sick leave and short-term disability benefits to illness or incapacitation of the recipient means that these benefits are not directed toward any broader "parental leave" objective of supporting parent-child bonding: they do not cover extended leaves by birth mothers who have medically recuperated from childbirth for purposes of bonding with their newborns, nor do they cover leaves by fathers or adoptive parents. Data show that a relatively high proportion (though still less than half) of working women receive some form of paid leave in the period immediately after they give birth, but that recipiency drops off significantly after that. One study found that 41% of employed mothers were on a paid leave when their infant was one month old, and

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[13] In 1999, the most recent year in which these data were collected by the Bureau of Labor Statistics, 53 percent of employees in private establishments were covered by paid sick leave plans. United States Bureau of Labor Statistics press release, December 19, 2001, *available at* http://www.bls.gov/ncs/ebs/sp/ebnr0006.pdf.

[14] In 2000, 34 percent of workers in private industry were covered by short-term disability benefits. UNITED STATES BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN PRIVATE INDUSTRY, 2000 1 (2003), *available at* http://www.bls.gov/ncs/ebs/home.htm. Short-term disability benefits are an insurance benefit funded by contributions by the employer or employee (or both). Workers may combine sick leave and short-term disability benefits to increase the duration or amount of coverage..

[15] Five states (California, Hawaii, New Jersey, New York, Rhode Island) plus Puerto Rico currently have TDI programs. Some states have allowed that private employers' pre-existing sick leave plans can satisfy the public TDI program requirements -- the public mandate essentially imposes a floor on the quality and quantity of benefits that employers must supply. Of workers covered by short-term disability benefits in 1999, 14 percent (about 5% of all workers) were given the benefits because of state mandates or public provision. *Id.* at 9.

[16] The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988), amended Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988) requires that workers affected by pregnancy, childbirth, or other related medical conditions must be treated the same for all employment -related purposes, including receipt of benefits under fringe benefit programs, as other persons similar in their ability or inability to work. Title VII applies to employers with 15 or more employees. The passage of the PDA was a direct response to the decision of the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), in which the court rejected a claim that an employer's disability insurance plan discriminated on the basis of sex when it excluded pregnancy and related conditions from otherwise comprehensive coverage.

16% were on paid leave when their infant was two months old.[17] By the third month, however, less than 5% were receiving any form of wage replacement.[18]

For workers who are not ill or incapacitated, then, there is very little private or public financial support for family-related job leaves. For example, unemployment insurance provides wage replacement to workers involuntarily laid off from work, but workers who leave employment to deal with family caregiving demands are typically treated as having voluntarily quit and excluded from eligibility.[19] In a recent large national-level survey of private establishments, about 24% reported having policies in place to extend full pay to workers taking a leave of absence to care for an infant child (other than maternity leave), and 27% reported policies extending full wage replacement to workers who take leaves of absence to care for ill family members.[20] These data, however, do not indicate how many workers are actually *eligible*to receive benefits. Data collected by the Bureau of Labor Statistics in 1996 found that only 2 percent of full-time workers were eligible for paid family leave (as distinct from maternity) benefits.[21] Three states have passed laws requiring employers that have sick leave plans to permit employees to use accrued sick leave benefits to cover work absences to care for sick family members.[22] California is alone among states in having a public program that provides paid benefits not only for personal illness leave (including maternity leave), but also for parental leave for bonding purposes and leave to care for sick family members. A sizeable percentage of workers who lack access to paid benefits resort to public assistance for support during family leaves.[23]

B. Why Private Markets Fail to Provide Paid Family Leave

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[17] Jacob Alex Klerman & Arleen Leibowitz, *The Work-Employment Distinction Among New Mothers*, 29 J. HUMAN RESOURCES 277, 299, Tbl. A3 (1994). This data is from 1986-88. Unfortunately I have been unable to find more recent data directly measuring recipiency of paid maternity leave.

[18] *Id*.

[19] *See generally* Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J. L. REFORM 41 (1996); Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131 (1996); David S. Rosettenstein, *Unemployment Benefits and Family Policy in the United States*, 20 FAM. L.Q. 393, 398–403 (1986).

[20] BALANCING THE NEEDS, *supra* note 4 at Tbl.5.6 (2000 data). Also, 34% reported having a policy in place for providing full pay to women who take maternity leave.

[21] UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN SMALL PRIVATE ESTABLISHMENTS, 1996 (Bulletin 2507, 1999); UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1997 (Bulletin 2517, 1999). These are the most recent data available, as BLS no longer tracks these statistics. The 2000 establishment survey reported in BALANCING THE NEEDS doesn't directly address the duration of paid benefits, but it is likely to be quite short: the longest leave taken during the year 2000 (paid or unpaid) was, for more than half of leave-takers, 10 days or less: *id.*, Tbl.A2-2.2.

[22] California (Cal. Lab. Code §233), Minnesota (Minn. Stat. Annot. § 181.9413) (applicable only for ill children) and Washington (Rev. Code Wash. §49.12.270). Numerous states also have legislation that permits employees to donate unused sick leave to co-workers (e.g., Ala. § 36-26-53; K.S.A. § 75-5549; S.C. Code Ann. § 8-11-730).

[23] BALANCING THE NEEDS, *supra* note 4 at Tbl. 4.8 (reporting that 8.7% of leave-takers in 2000 used public assistance to finance leaves).

Why is it that private markets do not, for the most part, provide workers with leaves of absence to deal with family illness or caring for infant children? First, as readers of the literature on labor market regulation more generally will recognize, scholars have identified a number of (information-based) bargaining failures that might explain private market failures to provide workplace benefits.[24] Many benefits in the United States are linked to employment, with the employer either self-insuring, or acting as an intermediary between the workers and an insurance provider. In theory, then, workers will bargain for benefits they desire as part of their employment compensation packages. Those workers who expect to have children or experience other family-related work conflicts could elect to substitute some wage compensation now for a promise of guaranteed wage replacement at a later time when work interruption occurs. There are a number of familiar reasons, though, why we might fail to observe this kind of bargaining even assuming family leave is valuable to some workers.

Some explanations turn on mistakes workers are apt to make about their own interests. Workers might, for example, miscalculate their downstream needs because of poor information or because cognitive bias leads them to systematically underestimate future needs.[25] In addition, ex ante entitlements such as wealth might affect the value workers place on receiving wage versus non-wage compensation--with low wage workers likely to place a lower relative value on non-wage benefits.[26] In other cases, workers who desire family leave benefits might not demand them for fear that they will signal to their prospective employer that they are likely to need them (and thus might be less reliable than other workers). Conversely, a desire to avoid attracting a disproportionate share of workers likely to need leaves may lead employers to resist offering benefits that workers would be willing to purchase.[27] Collective action problems can also prevent workers from bargaining towards the outcome they desire: no one worker may be willing to incur the up-front costs of pushing for a new kind of benefit, and no good mechanism may be in place to help workers coordinate to overcome this problem. The fact that some workers have no need for family leave policies may make collective action even more difficult. Unions, though they may serve a coordination role, also restrict access to union

[24] For general reviews of the extensive literature on bargaining failures in labor markets, see RICHARD EDWARDS, RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA 42-76 (1993); PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 74-78 (1990).

[25] See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-79 (summarizing research findings on the effect of various kinds of informational and cognitive failures that might lead to poor labor market decisions by workers); Deborah Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI L. REV. 1275, 1297-1311 (1991) (discussing savings failures caused by "myopia," the irrational tendency to favor present over future consumption, time-inconsistent preferences, and impulsiveness).

[26] Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Antidiscrimination Provisions Desirable?*, 55 U. CHI. L. REV. 790, 808-809 (1988) (suggesting that rank-and-file employees may place less value on pension benefits, at the expense of salary, than more highly compensated employees).

[27] David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1618 (1996) (suggesting that firms may offer less extensive insurance coverage than workers would optimally purchase out of a fear that more generous coverage would attract high-risk worker).

jobs, potentially exacerbating the segmentation of the labor market into "good" jobs that have high pay and benefits and "bad" jobs that do not.[28]

In addition to these general labor market bargaining failures, family leave benefits may pose special challenges for private insurance markets. Analyzed closely, the two kinds of family leave benefits, family illness leave and parental leave, each present a distinct set of problems. I will therefore analyze them separately.

First consider family illness leave. When a worker's family member unexpectedly becomes ill, and the worker takes time off to provide care, the resulting lost wages may impose significant hardship. Protection against the risk of unexpected changes in fortune is traditionally the province of insurance, the social device that pools risks.[29] Insurance forms the backbone of health care financing in the United States.[30] For example, about 60% of Americans have private health insurance, most of them through employer plans.[31] Moreover, almost all employer plans include family coverage.[32] One might think that a plausible extension of family coverage would be insurance covering wage loss in the event of job interruptions caused by family illness. Indeed, most employers that offer health insurance also offer wage replacement benefits for personal illness (sick leave).[33] One could say that paid family illness leave is to family health insurance what sick leave is to individual health insurance. Both would cover the opportunity costs (lost wages), rather than the direct costs (medical fees, hospital bills), of illness. What, then, makes paid family illness leave so scarce in private markets?

Insurance in private markets uses an *actuarial* mechanism. The amount an individual is required to contribute to the pool, or premiums, vary with the level of risk insured. The cost of the premium cannot exceed the monetary equivalent of the expected

[28] I discuss the causes and consequences of labor market segmentation in detail elsewhere. See Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 105-116, 129-38 (1998) [hereinafter Lester, *Carers*].
[29] ROBERT RIEGEL & JEROME S. MILLER, INSURANCE PRINCIPLES AND PRACTICES 26 (4th ed. 1959) ("Insurance is a social device whereby the uncertain risks of individuals may be combined in a group and thus made more certain, small periodic contributions by the individuals providing a fund out of which those who suffer losses may be reimbursed.").
[30] David M. Cutler & Richard J. Zeckhauser, *The Anatomy of Health Insurance, in* HANDBOOK OF HEALTH ECONOMICS, VOL. 1A 563 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000).
[31] *Id*., at 569-70 (56% through employer-sponsored plans, 6% through direct purchase). Roughly 25% of the population is insured through the public sector (e.g., Medicare and Medicaid), and the remaining 16 percent remain uninsured. *Supra*. The predominance of employer sponsorship in the private health care market is likely the result of two factors: employer-provided insurance contributions are tax-free whereas wages are taxed, and there may be pooling economies associated with group insurance purchases. Jonathan Gruber, *Health Insurance and the Labor Market, in* HANDBOOK OF HEALTH ECONOMICS, VOL. 1A 651 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000) [herinafter, Gruber, *Health Insurance*].
[32] *See* Gruber, *Health Insurance*, *supra* note 31 at 653 Tbl.2 (91% of employers that offered health insurance in 1993 also offered family coverage).
[33] *See id*. (71.1% of firms that offered health insurance in 1993 also offered short-term disability benefits). Recent federal statistics (2000) report that 34 percent of workers in private industry are covered by short-term disability benefits. *Supra*, note 14.

disutility of self-insuring.[34] If a person's risk of experiencing a hazard is 100%, he will be unable to purchase private insurance. The market (or lack thereof) will simply reflect the fact that the premium for purchasing coverage would be the same as (or even higher than, given transaction costs) the cost of just saving for the inevitable occurrence. An example of the kind of risk that might be excluded from private insurance because the likelihood of its occurrence approaches certainty is a pre-existing condition such as a congenital illness.

From the outset, insurance against family illness-related work leaves would need to contemplate a much higher likelihood of hazard than simply covering personal illness leaves. Instead of merely contemplating the risk of a particular worker suffering a debilitating illness or injury, the pool would need to contemplate the probability of a debilitating illness or injury on the part of the worker, her partner, her parents, or her children. In addition, the average risk level of each individual whose illness might trigger eligibility for benefits would likely increase. On the whole, adult workers are probably more robust and self-sufficient than the children, elders, and disabled adults who might depend on them. Thus the aggregate level of risk in the pool would increase as the scope of coverage broadened, making insurance against these risks more costly to supply.

In addition, information problems would pose formidable barriers to private family illness insurance. Information problems can be the root cause of an insurance market failure. If insurance companies had full information about every applicant for coverage, they would be able to charge each person a premium that perfectly reflected the risk of their need for indemnification. "Low risk" individuals would pay low premiums, and "high risk" individuals would pay high premiums. As mentioned a moment ago, some individuals--those certain to experience the hazard--would be priced out of the market entirely. In many areas of insurance, insurers do a good enough job of estimating the risks of applicants that they are able to offer insurance at a price that is both affordable to purchasers, and profitable to insurers.

Where good information is not available to insurers, though, they may stay out of the market.[35] One informational barrier to insurance is the problem of adverse selection. If the insurer is unable to distinguish between high risk and low risk individuals (perhaps because it is not obvious to outside observers who is high risk, and high risk individuals have an incentive not to disclose information likely to increase their insurance rates), it will be unable to price insurance efficiently. Averaging the price of premiums is no solution, because low risk individuals--assuming they know that they are low risk individuals--are likely to find the "averaged" premiums higher than they are willing to

[34] A competitive insurance premium would be $\pi_i = p_i L + T$, where p_i is the probability of the insured event occurring, L is the magnitude of the insured loss, and T is the transaction costs.

[35] My discussion here of adverse selection, moral hazard, and the potential role for the state in providing insurance relies extensively on Nicholas Barr, *Economic Theory and the Welfare State: A Survey and Interpretation*, 30 J. ECON. LITERATURE 741, 750-53 (1992). Although my citations to further authority are relatively limited here, I more fully detail the literature on these and related issues concerning social insurance elsewhere (see Gillian Lester, *Unemployment Insurance and Wealth Redistribution* 49 UCLA L. REV. 335, 360-65 (2001) [hereinafter, Lester, *Wealth Redistribution*]).

pay, and drop out of the market.[36] As prices charged to those left behind rise, and more participants drop out with each successive increase in premiums, the market unravels.

When a worker is himself incapacitated due to illness or injury, the decision of whether to work is (in theory) relatively non-discretionary. The question for the insurer is authentication of the claim of inability to work, usually done through a doctor's verification of the existence and severity of the illness. When a worker's family member becomes ill or disabled (even assuming adequate verification), the decision as to whether the *insured worker* must absent himself for work to care for the ill family member may involve a more discretionary weighing of personal priorities and alternative options. This heightens the potential for adverse selection problems due to the insurer's inability to tell what kinds of decisions different workers are likely to make.

Another probable barrier to family illness leave is a type of "moral hazard." A person who knows that he must bear the costs of his behavior will take precautions to reduce risk, and once a loss occurs, try to stem losses. Once an individual is insured, though (meaning that he bears only the cost of an insurance premium, rather than the full cost of the loss), he may take fewer precautions. This is called moral hazard.[37] Moral hazard is not a problem if the insurer can observe the insured individual's level of precaution (and either price premiums or restrict coverage accordingly). In the absence of full information about an individual's likely efforts to avoid loss, insurers use copayments, deductibles, partial indemnification and other devices that make insured individuals bear some of the cost of a hazard. When the insured event is highly psychologically or physically costly (e.g., serious personal injury) the insured individual's desire to avoid the event may naturally regulate moral hazard. When a costly event leads to psychic gain, however, problems of moral hazard may make insurance impossible. If the only thing preventing an event from occurring in the absence of insurance is its monetary costs to the individual, the availability of insurance will, *a fortiori*, increase the likelihood of its occurrence. This is the reason why, for example, elective cosmetic surgery is often excluded from health insurance policies.

If wage replacement were available for family illness leave, the insured's incentive to avoid the insured event – in this case lost wages due to job interruption--would fall. Of course, in many or even most cases, a decision to take a family illness leave may functionally be just as non-discretionary as in the run of personal illness cases--the worker may prefer not to interrupt her employment, but great potential hardship to a family member might lie in the balance, and no realistic alternatives may be available. But in other cases, the availability of wage replacement (even partial) would eliminate financial barriers that would otherwise prevent workers who wanted to take leave from doing so. One could even imagine that in some cases the availability of insurance would lead to *inefficient* decisions by workers to take family illness leave. For example, a

[36] Offering two different premiums also fails, for similar reasons. Barr, *id*., at 751-52.

[37] Economists distinguish further between *ex ante* moral hazard (referring to the situation before the hazard) and *ex post* moral hazard (referring to the avoidance of further losses after the hazard). See Peter Zweifel & Willard G. Manning, *Moral Hazard and Consumer Incentives in Health Care*, in HANDBOOK OF HEALTH ECONOMICS, VOL. 1A 409, 413 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000). The kind of moral hazard at issue in the context of job leaves is *ex post* moral hazard.

worker whose productive value is, say, $300 / day might decide to take time off work to care for an ill family member instead of hiring an external caregiver at a cost of $100 / day. There will undoubtedly be instances in which the presence of a *family* caregiver has special advantages, such as emotional benefits, that cannot be replicated by hiring an external caregiver. Yet, there will probably also be cases in which care by the worker herself has no unique value and thus represents an inefficient allocation of resources. The promise of wage replacement nevertheless makes it easier for her to follow her desire to care for a loved one. More troubling, the availability of wage replacement may make it harder for a worker who would prefer to continue working (and perhaps hire an external caregiver) to ignore her overriding sense of duty, or pressure from a spouse or siblings, to take on the responsibility of caring for, say, an ill parent. I will return to discuss these issues in greater detail below, when I take up arguments for and against state intervention, but for the moment my only point is that a private insurer might worry for a variety of reasons about inefficient overutilization of benefits.

Next consider paid parental leave. Paid parental leave would deviate dramatically from the demands of actuarial insurance. Whereas illness of a worker is usually unexpected and psychically costly, and a worker's need to miss work to care for family members is often similarly unexpected and psychically costly, the birth or adoption of a child is normally anticipated and desired, even if the timing cannot be planned with precision.[38] For other workers, bearing or adopting a child is certain *not* to happen. From the get-go, a system to reimburse wage losses associated with parental leaves cannot very convincingly be seen as a function of actuarial insurance (i.e., insurance against *uncertain* risk).[39] Any attempt to squeeze the event of bearing or adopting a child into these parameters immediately encounters overwhelming problems of moral hazard. This stands in contrast to sick leave, in which even those who never use benefits do not know this for sure at the outset, and thus will probably get some value from feeling protected in the event of bad luck.

Here, the kind of need in question is not so much insurance against unexpected, unwanted, events as it is a need to ensure adequate funds are available for workers to deal with predictable, and often chosen, family demands that interrupt work: in other words, there is a need for income-smoothing across a worker's life-cycle. One question is why workers don't simply borrow money or save for predictable interruptions in wage income due to the birth of a child. I have already discussed various cognitive failures that may lead workers to underestimate their future needs. In addition, though, even assuming perfectly rational planning, workers with families may have a difficult time accumulating

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[38] See, e.g., Meryl Frank, *Cost Financing, and Implementation Mechanisms of Parental Leave Policies, in* THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 315-32, 320 (Edward F. Zigler & Meryl Frank eds., 1988) (a program of salary replacement for infant care does not fit the definition of insurance because it does not involve insuring against an event of unknown time and duration; there is no "risk" against which to insure because pregnancy is typically a planned event).

[39] Of course, some pregnancies are unplanned (and some unplanned pregnancies are unwanted). In 1994, 49% of pregnancies in the U.S. were unintended, meaning that they ended in abortion, the woman had wanted no children at that time, or she had wanted no more children ever. Of these unintended pregnancies, 54% ended in abortion. Stanley K. Henshaw, *Unintended Pregancies in the United States*, 30 FAMILY PLANNING PERSP. 24, 26, Tbl.1 (1998).

savings to protect themselves against this kind of loss. For most families, the arrival of children corresponds to the early career years, when wages are relatively low, and the opportunity to set aside surplus earnings for savings is severely constrained. These workers, or other workers who have very low incomes throughout their working years, may find that the costs of daily life leaves them without savings despite a desire to save. In fact, Americans are very poor savers.[40] Recall that workers who report being unable to take leave for financial reasons have lower incomes and educations than those who do take leaves.[41] This suggests, although it does not prove, that their reasons may not simply be that they have other fixed costs (like a mortgage or a college tuition debt) resulting from having made significant other life choices that enhance their quality of life and opportunity but later restrict liquidity. Finally, capital markets are not widely accessible to workers who wish to borrow against the promise of future earnings.[42]

In sum, there are several reasons why private markets may fail to provide family leave -- some due to information or cognitive failures in that may arise in all forms of bargaining between workers and employers, and some due to distinct challenges associated with these kinds of benefits.

C. The Role of State Intervention

Where private markets fail to supply needed economic security--whether due to employment-related bargaining failures, private savings and capital market failures, insurance market failures, or other reasons-- the state can play a role, either through public provision, or by mandating some form of private provision. The combined facts that private markets do not provide particular forms of economic security, and that state provision (or facilitation) is feasible, of course, do not themselves justify state intervention. The distinct task remains of defending the social desirability of compulsory provision.

By mandating participation in an insurance scheme, the state can sustain an insurance pool that would otherwise unravel due to problems of adverse selection. In this sense, it "corrects" the information failure.[43] The state can also help individuals smooth their income over time. Public pension schemes are a version of this: old age and retirement will happen to every worker, and a challenge for the state is making sure each worker will set aside enough money to ensure his long-term well-being. The state could,

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[40] *See* ERIC ENGEN & JONATHAN GRUBER, UNEMPLOYMENT INSURANCE AND PRECAUTIONARY SAVINGS, NATIONAL BUREAU OF ECONOMIC RESEARCH, WORKING PAPER NO. 5252 (1995) (the median 25 to 62 year-old worker has gross financial assets equal to less than three weeks' income).

[41] *Supra* note 6.

[42] *See* Stephen P. Zeldes, *Consumption and Liquidity Constraints: An Empirical Investigation*, 97 J. POL. ECON. 305 (1989) (finding that a significant portion of the population is constrained in the ability to borrow against the promise of future labor income).

[43] In fact, state intervention will not correct all the information problems that made private insurance impossible. Moral hazard, for example, will persist for certain kinds of risks; and indeed, state-run insurance schemes tend to employ the same kinds of risk-internalization devices as private insurers do in an effort to reduce it. In addition to helping overcome adverse selection and moral hazard problems, state mandates might prevent individuals from making incorrect or misguided judgments that they would otherwise make due to cognitive errors or lack of knowledge.

in theory, solve the market problem (which in this case, might be an informational or cognitive failure that leads workers to underestimate future needs) by requiring individuals to regularly contribute some portion of their savings to a personal account. Withdrawal of funds could then be prohibited until the triggering event – in this example, retirement--occurs. Market-correcting mandates such as these may advance efficiency by making risk protection available to individuals who desire it and would be willing, but for current market failures, to “purchase” it at a level tailored to their needs. This alone might be a justification for state intervention.

Suppose, then, that the state were to create an insurance scheme (either by government provision or by mandates on employers) that required all workers to contribute some portion of their earnings to a fund that would be used to replace the wages of workers who took leaves of absence for family illness or parental bonding with newborn infants. State intervention to mandate risk pooling in this case would in part correct informational and savings failures that undermine private economic buffering mechanisms. At the same time, it would probably also have some redistributional effects.[44] Here, state mandates would expand the level of risk in the pool beyond what would likely be feasible in private markets, both by increasing the range of insured events, and by introducing levels of moral hazard beyond what private markets would tolerate (barring prohibitively expensive premiums). Individuals would feel freer than they otherwise would to interrupt work, knowing that they would not have to bear the entire cost themselves. (Indeed, an explicit objective of the program would be to *encourage* leaves that workers might not otherwise take because of financial constraints). In this state-mandated "insurance scheme," state subsidies, or cross-subsidization between low-risk and high-risk individuals, would likely be required to sustain the program.

Here, unlike with a "market correcting" intervention, the state cannot necessarily rely on an efficiency justification alone. Although the promise of macro-level efficiencies certainly might justify redistributive intervention (e.g., enhanced economic security for some segments of the populace might reduce the society-wide costs of illness or poverty), we might also look to other kinds of justification. The next section defends creating a publicly mandated program of paid family leave, and further, designing it in a way that contemplates some redistribution between groups. At the same time, the case is a qualified one, for reasons I will explain.

D. Defending State Intervention and Cost Spreading

[44] To contrast "market-correcting" and "redistributional" state objectives isn't to say that actuarial insurance (or state efforts to facilitate it) isn't itself at least *somewhat* redistributional. When a privately insured individual experiences a covered loss and therefore receives reimbursement from the insurance pool, there is some redistribution between members of the pool. This kind of redistribution--part of a bargain between participants who likely have comparable risk characteristics, or in any event have paid into the pool according to their risk characteristics--is not what we usually mean when we talk about redistributional objectives. Such constrained risk spreading within an actuarial insurance pool is understood differently than redistribution in the equitable sense. Present discussion excepted, throughout this Article, I use the term "redistribution" in the equitable sense.

By way of introducing this discussion, it seems helpful to situate paid family leave benefits within the context of parenting policies generally. The state might aim to reinforce various models of the contemporary family, employing different policy instruments to achieve different goals.[45] Thus, for example, the state might aim to increase national birthrates.[46] It could do this by paying direct flat-rate cash benefits (not dependent on wage income) to families with children.[47] Or, the state might seek to recognize and reinforce the value of "family work" or "family values" by supporting traditional single-earner husband-wife families.[48] It could do so by skewing benefits towards married couples with children that have one primary caregiver who is not working full time, or by providing subsidies designed to create equivalency between paid work and work in the home.[49] The state might instead aim to encourage women's workforce participation, through such policies as public daycare.[50] Yet another goal might be to support good child development.[51] And so on.

In short, government policy can influence the family form by shifting the relative economic rewards attached to competing paths of behavior. This is so even for policies neutrally described as endeavoring to "expand choices": if a state intervention makes a choice previously unavailable to some portion of the population financially more attractive, the effect will be to push individuals on the margin towards the new option. As an example, the work-family benefits policies of the past 15 years in the former Federal Republic of Germany, touted expressly by the government as advancing the principle of free choice -- i.e., that people rearing children should have a choice between working and staying home--created multiple financial incentives for mothers to remain in or return to the home, rather than work.[52] The question before us, then, is the social objectives that might be achieved through state mandated paid family leave policies financed in a way that spreads their cost beyond those workers most likely to use them.

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[45] A helpful overview of the issues discussed in this paragraph, in the context of European social policy experiments, can be found in Sheila B. Kamerman and Alfred Kahn, *Trends, Issues and Possible Lessons*, in CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3S: POLICY INNOVATION IN EUROPE 201-24 (Sheila B. Kamerman and Alfred Kahn, *eds*., 1991).

[46] *See* Anne Hélène Gauthier & Jan Hatzius, *Family Benefits and Fertility: An Econometric Analysis* 51 POP. STUD. 295 (1997) (citing France and Luxembourg as examples of countries that have, in recent years, adopted explicitly pronatalist policies); Kamerman & Kahn, *supra* note 45 at 204 (identifying France, Germany and Hungary as having explicitly pronatalist policies).

[47] Gauthier & Hatzius, *id*. (in a study of family policies in 22 OECD countries between 1970 and 1990, finding direct cash benefits had a significant and positive effect on fertility).

[48] Kamerman & Kahn, *supra* note 45 at 205 (citing Austria and Germany as having this objective).

[49] LILJA MÓSESDÓTTIR, THE INTERPLAY BETWEEN GENDER, MARKETS AND THE STATE IN SWEDEN, GERMANY AND THE UNITED STATES 54 (2001) (describing German legislation over the past 15 years giving incentives to mothers to interrupt their labor force participation to care for babies and toddlers as well as elders, and to work part-time while raising older children); Christiane Schiersmann, *Germany: Recognizing the Value of Childrearing*, in KAMERMAN & KAHN, *supra* note 45 at 63-67 (giving examples of German policies established in the mid-1980s that reward non-working married mothers relative to working mothers and single mothers).

[50] Kamerman & Kahn, *supra* note 45 at 205 (citing Finland and Sweden as articulating gender equity and encouraging women's workforce participation as express objectives of family benefit policies).

[51] Kamerman & Kahn, *supra* note 45 at 214-16 (discussing various economic support initiatives in European countries motivated at least partly by this objective).

[52] See *supra* note 49.

There are a number of potential objections to state subsidized paid family leave policies. One way to describe the need paid family leave would address is as a savings failure. But perhaps, to the extent poor savers' circumstances are the result of their own imprudence, they should pay for their own their bad planning. Arguments for redistribution tend to be more politically palatable when the beneficiaries of a wealth transfer are needy for reasons beyond their control.[53] A related objection is that subsidized or cross-subsidized wage replacement will discourage careful financial planning. Studies have shown that the existence of public insurance can "crowd out" personal saving for purposes of insuring against losses.[54]

Others focus not so much on savings failure as on the justice (or injustice) of redistribution to those who make costly family planning choices. For these critics it is not obvious why the state—or citizens who do not themselves have child caregiving needs—should pay taxes (implicit or explicit) to buffer others from the ordinary private hardships that accompany the decision to have children. For the most part, people choose to have children, and arguably also should undertake the costs of rearing them.[55] Furthermore, caregiving (for children in particular) can be seen as having very powerful private benefits. Caring for children is usually a source of personal joy and satisfaction, perhaps commensurable with the joy a childless person could experience given additional resources to take time away from work to travel, nurture friendships, or pursue personal projects.[56] This might make mandated subsidies especially troubling, or even perhaps offensive, to those who are excluded from this pleasure, e.g., gay and lesbian couples in states where they are not eligible to adopt children. Also, one's children may be a source of security, as adult children often look after the needs of their parents in retirement. Finally, some may be troubled by the notion that we should mandate public subsidies for children yet treat childrearing choices as purely private, demanding no accountability for

[53] *See, e.g.*, Christina Fong, *Social Preferences, Self-Interest, and the Demand for Redistribution*, 82 J. PUB. ECON. 225, 227-28 (2001) (reviewing theoretical and empirical literature arguing people may prefer more redistribution to the poor if they believe that poverty is caused by circumstances beyond individual control); Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity and Accommodation*, *in* REASONS AND VALUES: THEMES FROM THE WORK OF JOSEPH RAZ 270, 272-73 (Philip Pettit *et al*., eds., 2004) (noting a surprising degree of consensus among egalitarians and non-egalitarians alike that a fair distributive scheme would require individuals to internalize the costs of their voluntary choices).

[54] David M. Cutler and Jonathan Gruber, *Does Public Insurance Crowd out Private Insurance?* 111 Q. J ECON. 391 (1996).

[55] ELINOR BURKETT, THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS 20-21 (2000) (raising children should be the responsibility of those who bear them); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How High the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753, 1782-84, (2001) (those who make alternative choices shouldn't have to subsidize those who choose to have children, both because it will undermine prudent individuals' decisions to refrain from having children when they can't afford them, and because those who choose not to be parents owe no debt to those who do).

[56] *See, e.g.*, Case, *supra* note 55at 1767 (describing societal lack of sympathy for the idea that a childless worker should have paid time off to pursue a valuable and sustaining hobby rather than have a baby); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 190-91 (2001) (discussing purely personal, as opposed to altruistic, reasons mothers have children, and criticizing the societal tendency to contrast 'altruistic' mothering with 'selfish' private consumption).

the manner in which children are raised.[57] Related to these arguments is the concern that paid family leave will simply encourage people to have more children (thus commandeering further subsidies from non-parents).

The arguments for internalizing the costs of elder care on choice grounds are more difficult. This is in part because children do not choose to have parents, and do not always willingly choose to undertake their care.[58] In addition, although some caregivers will experience intrinsic benefits from giving care to elders, the personal gratification associated with caring for elders is unlikely to match that associated with raising and caring for children; indeed, in some cases the former is clearly more burdensome than gratifying.[59] One still might argue, however, that adult children's obligations to their parents are long-anticipated duties flowing from moral reciprocity for past benefits received, and that adult children should therefore shoulder the costs themselves rather than enjoy subsidies from other citizens.

If, on balance, distributional transfers to working caregivers are morally indefensible, perhaps the users of state-supported paid family leave should bear the cost of provision. Those who believe this might even be willing to bear the administrative costs of helping workers with family caregiving needs to organize themselves into a pool or ration their own savings across a lifetime – i.e., the administrative costs of "correcting" the market—but nevertheless demand that the costs required to finance benefits themselves be borne by the recipients of those benefits. Let me, then, address these various objections, and offer my own arguments on why transfers that would include the costs (or at least partial costs) of wage replacement are justified.

With respect to savings failures and savings disincentives, it is not always easy to distinguish between those whose need results from imprudence, and those whose inability to save is beyond their own control.[60] Thus policies designed to make poor savers bear the consequences as a matter of desert will probably be overinclusive. Furthermore, in response to arguments about savings disincentives, we currently see very poor savings among Americans *notwithstanding* the dearth of financial support for family leave.[61] In other words, even if funding family leave reduces private saving, it doesn't have far to fall.

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[57] Case, *id*., at 1772-73 (noting that parental leave mandates include no 'quality control' component to monitor how people actually use their leave time); Franke, *id*., at 191-92 (raising the example of parents who seek subsidies to educate their children outside the public school system based on their rejection of the values of toleration, equality and humanity taught in the public schools).

[58] Jacobsen, *supra* note 134 at 153. In addition, many caregivers are daughters-in-law who, when they chose their life partner, did not contemplate the future eventuality of caring for the partner's parents.

[59] *See* Lynn M. Martire & Mary Ann Parris Stephens, *Juggling Parent Care and Employment Responsibilities: The Dilemmas of Adult Caregivers in the Workforce*, 48 SEX ROLES 167, 168 (2003) (canvassing literature on deleterious psychological and physical health effects of providing care to a disabled elder). For a vivid personal account of how difficult and unpleasant it can be to give care to a disabled parent, see Case, *supra* note 56 at 1754, n. 5;

[60] See arguments, *supra* notes 40- 42 and accompanying text, suggesting that savings failures may well be beyond the control of some, perhaps many, workers who are unable to take an adequate family leave.

[61] See *supra* note 40.

As for fertility, empirical research suggests that maternity leave policies do increase the fertility of workers.[62] Projections of the effect of maternity leave policies on fertility in the entire population (as opposed to just working women), however, suggest that as maternity leave policies become available, more women are likely to enter into the workforce, and for those women, fertility will decline.[63] This latter effect should offset the increase in fertility among women already in the workforce. Indeed a recent study examining a large sample of countries over a twenty year period found no significant net effect of paid maternity leave benefits on total fertility rates.[64]

Even if providing wage replacement for family caregiving *would* "reward" what some consider imprudent decisions--whether characterized as savings failure, or shortsighted family planning choices that result in downstream financial needs--the countervailing social benefits of fuller availability of family leave might warrant taking a more instrumental, or all-things-considered, view. There are also non-instrumental arguments for redistribution to accommodate other persons' needs, even when those needs stem from actions within their control.[65]

A sustained period of parental care for a newborn infant would give working parents an opportunity to care for and bond with infant children, to the benefit of both.[66] In addition, parents able to minimize financial strain while doing so may be better able to reduce family stress and create a safe, well-functioning household.[67] In the case of illness, studies find that the presence of a parent lessens the severity of symptoms and speeds recovery of sick children, and that paid leave policies are themselves positively

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[62] Susan L. Averitt & Leslie A. Whittington, *Does Maternity Leave Induce Births?* 68 SOUTH. ECON. J. 403 (2001) (finding that widespread adoption of guaranteed maternity leave policies in the United States would increase births among young, working, women, although it would not affect the probability of having a first child).

[63] C.R. Winegarden & Paula M. Bracy, *Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence From Fixed-Effects Models*, 61 SOUTH. ECON. J. 1020 (1995).

[64] Gauthier & Hatzius, *supra* note 46 at 300-301 (finding paid maternity leave benefits did not significantly affect total fertility rates in a sample of 22 OECD countries between 1970 and 1990; by contrast, paying families direct cash benefits upon the birth of a child had a positive and significant effect on fertility).

[65] *See, e.g.*, Shiffrin, *supra* note 53 at 284-295 (arguing that accommodation, even assuming it involves subsidizing others whose needs are partly or wholly the result of chosen behaviors, is consistent with egalitarianism because it enhances all individuals' freedom to make choices that express certain values, feelings and relations).

[66] T. Berry Brazelton, *Issues for Working Parents*, *in* ZIGLER & FRANK, THE PARENTAL LEAVE CRISIS, *supra* note 38 at 36-51, 39 (there is likely to be a significant improvement in a mother's feelings of personal achievement and intimacy with her baby if she is able to remain home from work for at least three months after birth); DORIANE LAMBERT COLEMAN, FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM 48-50 (2002) (discussing attachment theory and its detractors); Winegarden & Bracy, *supra* note 63 at 1020 (study of effect of increasing the generosity of paid maternal leave policies in 17 OECD countries between 1959 and 1989, finding inverse correlation between duration of paid maternity leave available and infant mortality).

[67] Robin Harwood, *Parental Stress and the Young Infant's Needs*, *in* ZIGLER & FRANK, THE PARENTAL LEAVE CRISIS, *supra* note 38 at 55-76, 69-70 (reviewing studies finding that high levels of parental stress may hinder parents' ability to be emotionally responsive to their infants, suggesting that among the most vulnerable are low-income or single working parents, and arguing that a curtailed postpartum work schedule without financial loss may significantly reduce the stressfulness of this time period).

correlated with child health outcomes.[68] Some defend state involvement in mandated paid leave policies on the basis that the benefits to children have broader value to society. They argue that caring for infants and children is a collective concern because it is an investment in the future of society: healthy, well-adjusted children will eventually become good citizens and workers.[69] Some emphasize the specific burdens on caregivers, arguing that society owes a debt to those who perform these society-preserving caretaking labors.[70] Others make a liberal claim, deeming caregiving labor a public responsibility because it ensures the conditions for children's development into autonomous adults.[71]

In the case of elder care, a family caregiver can assist in daily personal care, administration of medications, transport to medical appointments, shopping, preparing meals, and so forth, but can also be a source of emotional support.[72] The responsibility of

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[68] American Academy of Pediatrics, Committee on Hospital Care, *Family-Centered Care and the Physician's Role*, 112 PEDIATRICS 691 (2003) (reviewing medical literature showing that family presence while children are sick, *inter alia*, decreases child anxiety, speeds recovery, and reduces need for medication); Christopher Ruhm, *Parental Leave and Child Health*, 19 J. HEALTH ECON. 931, 933, 947 (2000) (finding rights to paid parental leave in 16 European countries over 25 year period associated with substantial decreases in pediatric mortality, but no relationship between rights to unpaid leave and infant mortality). *Also see generally* JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 57 (2000) (citing several studies finding a positive correlation between the presence of a parent and health outcomes of sick children).

[69] Nancy Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 Harv. J. Legis. 335, 345-47 (1993) (defending public subsidy of family leave policies on the basis that children are a societal concern, benefit, and investment in the future for all of us); Marianne A. Ferber, *Commentary on Chapter 5*, *in* GENDER AND FAMILY ISSUES IN THE WORKPLACE 162 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) (parental leaves are useful because children will do better when cared for in their home for some months after birth, and these children will grow up to be productive workers and good citizens); Young, *supra* note 12 at 158 (defending state subsidized paid leave policies on the basis that society has an economic interest in the well-being of its children). *Also see generally*, Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 19 [hereinafter Fineman, *Cracking the Foundational Myths*] (caretaking labor provides the citizens, the voters, the consumers, the students, and others who populate its institutions and as such should be compensated by the state). *But see* Case, *supra* note 56 at 1775-78 (criticizing efforts to characterize children as "public goods" in order to justify subsidies to parents); Franke, *supra* note 56 at 192-95 (criticizing arguments that characterize children as the next generation of workers in order to justify subsidies).

[70] *See* Fineman, *Cracking the Foundational Myths*, *id*., at 18-19 (caretaking labor is an unrecognized subsidy to all of society and as such should be compensated by the state); MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 162 (1995) (society must recognize the material costs and consequences of the uncompensated caretaking burden borne largely by women).

[71] *See, e.g.*, ANNE ALSTOTT, OPPORTUNITY FOR A LIFETIME: GENDER, JUSTICE, AND ECONOMIC FREEDOM, unpublished book manuscript, August 20, 2001, at 62-66 (each generation has a right in childhood to receive certain minimum resources and care necessary to the conditions of autonomy, and a reciprocal obligation in adulthood (by parents and non-parents alike) to endow the next generation with the same resources and care); Linda McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) (care for children, which fosters' children's capacities to live successful lives and be good citizens, is a public value and responsibility).

[72] Nadine Taub, *From Parental Leaves to Nurturing Leaves* 13 N.Y.U. REV. L. & SOC. CHANGE 381, 386-87 (1984-85) (arguing that families can provide not only the physical care that would be available in an institutional setting, but also love, intimacy, affection and solidarity).

giving personal care to disabled elders can be extremely stressful for family members.[73] Easing the financial burden of taking time away from work to provide care, by reducing some of this stress, may improve the health of both the ill family member and the worker who gives care. Improving the life conditions of disabled elders and their caregivers in this way also may redound to the benefit of society as a whole by reducing the social burden of health care.

Even assuming one accepts one or more of these reasons to justify redistribution to caregivers, we still must confront the comparative institutional question of why *paid leave* policies, as opposed to other policies that might advance the same ends, are desirable. Society might enjoy the benefits listed above to an even greater degree, for example, if social policy were designed to encourage single-earner partnerships: a financially supported adult, staying in the home, could devote greater time than a worker could to child and elder care. Alternatively, we might create a more comprehensive infrastructure for externally-provided caregiving, such as publicly provided daycare, or state subsidized home healthcare and elder care provision. I will argue in the remainder of this section that paid job leave policies have the distinct benefit of permitting family caregivers the opportunity to spend personal time with family members who need care, while at the same time allowing for their continuous workforce participation. The value of this benefit turns on the fact, discussed in detail in the section to follow, that women overwhelmingly perform a disproportionate burden of family caregiving. Ultimately, my core commitment is to enhancing women's capacity to undertake and maintain attachment to the paid workforce despite caregiving obligations.

I have stated that my central commitment is to increasing women's workforce participation, but I need to clarify this point so as not to mislead. Market work can be a source of wealth, a locus of self-realization, a source of self-esteem (either for intrinsic reasons or flowing from the esteem of others), a source of community membership, social contacts and friendships, an escape from isolation, and a means of structuring everyday life.[74] Clearly, the *status* of being a paid worker can confer certain kinds benefits on the worker, and can represent a good way of life. I do not, however, wish to defend working for pay *per se* as a superior substantive vision of the good life. My defense of policies to facilitate women's workforce participation rests instead on the more foundational argument that greater involvement of women in paid employment will enhance their capacity and freedom to determine the conditions of their lives.

Unequal participation in paid work within a household (and thus unequal access to the features of paid employment described above) can create a dynamic of dependency, traditionally, women's dependence upon men.[75] Some feminists have

[73] *Id*. at 387; Martire & Stephens, *supra* note 59.
[74] See, e.g., Jon Elster, *Is There (or Should There Be) a Right to Work? in* AMY GUTTMAN, ED., DEMOCRACY AND THE WELFARE STATE 53-78 at 62 63 (1988) (enumerating personal benefits of participation in paid work).
[75] Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L. J. 517, 533-34 (1998) (arguing that in this society that uncompromisingly values autonomy, women's dependency as a result of investment in their families at the expense of human capital undermines their security); Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L. J. 47, 83

advocated women's involvement in paid work over housework on the basis of its potential to enhance women's personal development and self-esteem.[76] A related argument is that increasing women's participation in full-time paid work would give them the independent economic means, or perhaps merely the confidence, to have bargaining power in domestic relationships, both in terms of day-to-day decisions that affect family life, and in terms of the ability to walk away from oppressive relationships.[77] Note that this is not merely about the potential for paid employment to increase a woman's personal wealth, although it may increase wealth. (The decision to marry a higher-earning man and become a full-time homemaker may in fact make a woman wealthier than if she had chosen to work.[78]) At core is freedom from dependency on another person, with the psychological and structural limitations that such dependency can impose on a person in developing the confidence, moral awareness and independence to shape her own life path in a satisfying way.[79]

Yet, paid work can be monotonous, degrading, and isolated. This begs the question of whether policies that increase women's workforce attachment will truly increase the quality of their lives, given that for many workers, the job available to them may be less satisfying than a life working--albeit uncompensated-- in the home.[80] This may be especially true for working-class women with young children, for whom affordable high quality childcare and housekeeping assistance may be beyond reach.[81] For at least some of these women, given the market work available to them, staying home

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(1997) (unpaid nature of domestic labor reinforces women's dependency, depression, disintegration of self, and passivity, and diminishes their capacity to resist or organize with other women).

[76] KIMBERLY A. YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES 123-26 (2003) (a full-time homemaker's financial dependency on her husband, where she lacks the self-sufficiency to have an 'exit' option, can breed a kind of insecurity and servility that is inconsistent with human flourishing); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1891-92 (2000) [hereinafter, Schultz, *Life's Work*] (the positive effects of satisfying roles in the paid labor force can increase women's self-esteem and give them the courage to change and grow in other aspects of their lives).

[77] *See* Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEMINISM 177, 201-203 (2000) (women crave power in the home through their role in caregiving, but this choice ultimately puts them in a weaker bargaining position relative to men and further erodes their social power); RHONDA MAHONEY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER 211 (1995) (working part-time rather than full-time will make a mother the 'flexible' parent, undermining her bargaining power within the family); Schultz, *Life's Work*, *id*. Add cites on empirical evidence of relative earnings and decision-making authority within marriages.

[78] YURACKO, *supra* note 76 at 107-108 (critiquing feminists who criticize the choice of homemaking on the basis that it makes women economically more vulnerable without acknowledging their deeper objection to homemakers' lack of self-sufficiency).

[79] *Id*., at 119-126 (arguing that a married women's paid employment advances her intellectual and moral development, as well as increasing her "self-love", i.e., a belief that her own desires and ends have value independent of her husband's).

[80] *See* Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 838 (2002) (stating for many women, unpaid labor in the home is more satisfying than their paid jobs); Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 832 (2002) ("Going to work is no picnic for many women. … What is the point of knocking oneself out, and penalizing one's kids to boot, when work seems an uphill battle?").

[81] JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 154-55 (2000) [hereinafter WILLIAMS, UNBENDING GENDER] (reviewing ethnographic studies describing working-class working women's anxiety about leaving children in low-quality daycare, and the strains of housework and the "split shift" on marital and family life).

full-time may be an appealing aspiration, devotion to family being a source of pride and personal reward, a sign of middle-class status, or a haven from the degradations of exploitive market work.[82] Thus even assuming as empirically true that working can influence a woman's personality and capacities, an important question is whether tipping the incentive structure so as to encourage more women to enter the workforce--in all kinds of jobs, not just privileged jobs--is likely to lead to their development of idealized personal traits associated with autonomy, self-esteem, and moral growth.

There is a well-known literature examining the relationship between the characteristics of work and the personality.[83] A worker's place in the organizational structure, opportunities for occupational self-direction, job pressures, and the extrinsic risks and rewards built into the job can affect that worker's values, self-conceptions (such as self-confidence), orientations to social reality, and cognitive functioning.[84] An important component of these findings is their generalizability to other aspects of life: people who do self-directed work, for example, come to value self-direction more highly, both for themselves and for their children.[85] The provocative implications of this for class and social stratification garnered much early attention.[86] Later researchers turned to the question of how women's participation in paid work versus housework might affect their personalities.

There is a large literature finding a positive relationship between women's workforce participation and their personal well-being, psychological and physical health, and self-esteem. Paid work and housework can be seen simply as different kinds of work, with different structural features, which might in turn differently affect the personality.[87] One study compared the effect of various qualities of unpaid housework and paid work on individuals' sense of personal control.[88] Sense of personal control is the belief that events in one's life depend on one's own behavior, rather than luck or fate; it in turn contributes to individuals' capacity for self-determination (as contrasted with helplessness), sense of self-worth, flexibility in responding to stressful circumstances, ability to learn from experience and avoid repeating past behavior that has led to bad outcomes, ability to cope with adversity, persistence, and, more generally, capacity to

[82] *Id*., at 156-57.
[83] See generally, Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, *in* THE NATURE OF WORK 36-68 (Kai Erickson & Steven Peter Vallas, eds., 1990) (summarizing research in this area, particularly the paradigm-setting work of Melvin Kohn and Carmi Schooler); Kenneth I. Spenner, *Social Stratification, Work and Personality*, 14 ANN. REV. SOCIOL. 69 (1988) (reviewing and critiquing Kohn & Schooler's work and subsequent research supporting and extending it).
[84] Kohn, *id*., at 40-41.
[85] *Id*., at 42-43
[86] *See., e.g*., Adina Schwartz, *Meaningful Work*, 92 ETHICS 634 (1982) (using the Kohn-Schooler findings as a basis for advocating government intervention to improve the conditions of work so that persons across social classes can have access to autonomous rather than routine jobs); Spenner, *supra* note 83 at 80-82 (discussing and reviewing evidence for thesis that parents from higher social classes exhibit different personality traits as a result of occupational characteristics).
[87] See generally, Carmi Schooler, Melvin L. Kohn, Karen A. Miller & Joanne Miller, *Housework as Work, in* WORK AND PERSONALITY: AN INQUIRY INTO THE IMPACT OF SOCIAL STRATIFICATION 242-60 (Melvin L. Kohn & Carmi Schooler eds., 1983).
[88] Chloe E. Bird & Catherine E. Ross, *Housework and Paid Workers: Qualities of Work and Effects on Personal Control,* 55 J. MARRIAGE & THE FAMILY 913 (1993).

ward off anxiety and depression.[89] The researchers found that housework (including child and elder care) as a primary activity involves more actual on-the-job autonomy than paid employment, and that greater autonomy in turn increases one's sense of personal control over one's life.[90] Yet, on all other measures that contribute to a sense of personal control—degree of routinization, fulfillment, recognition from others for the quality and value of the work, and of course pay--housework was inferior to paid work.[91] Taking all the measured qualities into account, subjects whose primary activity was unpaid housework had a significantly lower sense of control over their lives than those whose primary activity was paid work.[92]

There is considerable variation, though, in the parameters of women's work and home lives, with at least two factors--degree of conflict between work and caregiving obligations, and the kind of job--having important mediating effects. Many studies have looked at the question of how multiple roles affect women's psychological and physical health. The role-strain hypothesis, which predicts that the strain of juggling multiple roles will lead to deleterious health effects in worker caregivers, has garnered some support.[93] There is also, however, significant support for the expansion or enhancement hypothesis, which predicts that occupying multiple roles can enhance rather than deplete individuals' energy and health, and that notwithstanding the psychological distress of work/caregiving conflict, women who combine caregiving with full time work are happier and physically healthier than women who do no paid work at all or who work part-time.[94] Explanations for the latter findings include the hypotheses that feelings of confidence and accomplishment in one role spill over into other roles, that full-time employment can give family caregivers a respite or haven from the daily responsibilities of caregiving, and that the availability of alternatives per se increases one's sense of personal control by decreasing dependency on any one object, activity or individual.[95] Similar to the expansion hypothesis in suggesting that multiple roles may improve women's well-being are studies showing that an unequal division of household labor is associated with higher levels of depression, anxiety and other symptoms of psychological

[89] Sarah Rosenfield, *The Effects of Women's Employment: Personal Control and Sex Differences in Mental Health*, 30 J. HEALTH AND SOCIAL BEHAVIOR 77, 79-80 (1989).
[90] Bird & Ross, *supra* note 88 at 919-21. *See also* Marie Clare Lennon, *Women, Work, and Well-Being: The Importance of Work Conditions*, 35 J. HEALTH AND SOCIAL BEHAV. 235, 240, Tbl. 2 (1994) (a sample of full-time housewives reported a greater sense of autonomy in their work than a sample of full-time and part-time working women spanning a range of occupations).
[91] Bird & Ross, s*upra* note 88. *See also* Lennon, *supra* note 90 (finding that greater routinization of homemaking as compared with paid work offset the psychological benefits of autonomy).
[92] Bird & Ross, *id*. Note that the study controlled for sociodemographic differences between subjects.
[93] Martire & Stephens, *supra* note 59 at 169-70 (reviewing studies showing that work interferes with caregiving role and vice-versa, leading to psychological distress).
[94] *Id*., at 170 (reviewing research showing that employed caregivers tend to have better physical health, higher self-esteem, and lower psychological distress than non-employed caregivers, and finding that part-time work does not have the same stress-reducing impact). *See also* ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS / HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF 24-38 (1996) (reviewing relevant research and contesting notion that women who combine family caregiving with full-time paid jobs are less healthy and happy than their stay-at-home or part-time counterparts).
[95] Martire & Stephens, *supra* note 59 at 170-71 (on spill-over and respite); Rosenfield, *supra* note 89 at 80 (on decreasing dependency).

distress, and that women's involvement in paid work may help equalize the division of household labor.[96]

The apparent conflict in the literature, supporting both role-strain and enhancement hypotheses, might be reconciled as follows: even if having multiple roles generally enhances women's sense of personal control, *excessive* role strain (e.g., working while continuing to bear a disproportionate burden of caregiving) might undermine and offset some of these benefits.[97] Presumably, then, policy interventions designed to reduce role strain might facilitate women's capacity to enjoy the positive aspects of involvement in paid employment. Paid leave policies should fall in this category.

Also, as mentioned, the nature of the paid work also may make a difference. Much of the research finding that paid work improves various aspects of women's well-being controls for social class. Studies that explicitly take social class into account, however, suggest that even if combining roles has the potential to enhance women's well-being, there appears to be a class gradient of distress. Unskilled and semi-skilled workers experience higher distress than skilled manual workers, who in turn experience more distress than professional and managerial women.[98] Closer analysis of the data in these studies suggests that it is not multiple roles *per se* that influences psychological well-being, but instead the qualitative features of the tasks or experiences associated with different kinds of roles that matter most.[99] At core here is a policy-circularity: to the extent that jobs available to women tend to be sex-segregated, lower paying, and offer lower opportunities for self-direction and advancement, the difference between women who have paid jobs and women who stay home full-time in terms of their psychological

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[96] *See* Chloe E. Bird, *Gender, Household Labor, and Psychological Distress: The Impact of Amount and Division of Housework*, 40 J. HEALTH & SOCIAL BEHAVIOR 32, 42-43 (1999) (finding inequity in the division of household labor, more than the actual amount of time spent doing housework, contributes significantly to gender differences in depression); Beth Anne Shelton & Daphne John, *The Division of Household Labor*, 22 ANN. REV. SOCIOL. 299, 307-308, 316 (reviewing literature showing women's paid work time negatively associated with their housework time, and finding women's time spent on housework and an unequal division of household labor positively associated with women's depression); Schultz, *supra* note 76 at 1906-09 (reviewing studies that support these propositions); Mary Secret & Robert G. Green, *Occupational Status Differences Among Three Groups of Married Mothers*, 13 AFFILIA J. OF WOMEN AND SOCIAL WORK 47, 61, 63 (1998) (husbands of blue collar working mothers (but not managerial or professional women) more involved in household labor than in households where mother stays home).

[97] Rosenfield, *supra* note 89 at 80; Peggy A. Thoits, *Multiple Identities: Examining Gender and Marital Status Differences in Distress*, 51 AM. SOCIOL. REV. 259, 265 (1986) (finding curvilinear relationship between number of roles and psychological distress, i.e., individuals with very few and very many roles are most distressed).

[98] Sharon Matthews & Chris Power, *Socio-Economic Gradients in Psychological Distress: A Focus on Women, Social Roles and Work-Home Characteristics*, 54 SOCIAL SCIENCE & MEDICINE 799, 803, 804 Fig.2 (2002). *See also* K. Jill Kiecolt, *Satisfaction with Work and Family Life: No Evidence of a Cultural Reversal*, 65 J. OF MARRIAGE & FAMILY 23, 31 (2003) (working class women are more likely than other workers to find home is a "haven", rather than deriving high satisfaction from combining work and family roles); Secret & Green, *id.*, at 56, 58, Tbl.2 (psychological well-being of married mothers in professional-managerial occupations higher than that of blue collar or stay-at-home mothers; stay-at-home mothers' well-being higher than that of mothers with blue collar jobs).

[99] Martire & Stephens, *supra* note 59 at 171 (women with more satisfying jobs may enjoy greater "buffering" benefits from combining work and caregiving than women with less satisfying jobs); Mathews & Power, *id*., at 805; Secret & Green, *id*., at 62.

well-being and sense of personal control will be lower than it would be if women had access to higher quality jobs. Nevertheless, work-family accommodation policies such as paid leave have the potential to improve the quality of jobs for women (with an important caveat, discussed in Part III, with respect to whether it is possible to avoid shifting the costs of those accommodations to their intended beneficiaries) and in turn increase the beneficial potential of women's participation in paid work.

Ultimately, using women's psychological well-being to gauge the value of policies designed to facilitate combining work and caregiving has limitations. Even if the balance of empirical evidence were to show that women who combine caregiving with full-time work experience more stress and unhappiness than those who stay home, it would not necessarily follow that social policy should discourage caregivers from working. First, acting in a manner inconsistent with expected social roles can be stressful, and therefore any effort to change social roles will involve a transitional period of psychological conflict. In addition, looking at the relationship between role conflict and stress may unduly emphasize women's experiences during a discrete life period, rather than their overall experience. Life might be difficult for mothers who continue full-time employment while they have babies and toddlers at home, but in the long run these mothers may experience greater psychic benefits for having remained connected to the workforce.[100]

Some whose principal concern is child and elder welfare will argue that whatever benefits paid leave policies may have once women have decided to work, encouraging women to work in the first place will have a negative, rather than positive, net effect on the lives of their children and elders. There is an extensive literature comparing outcomes of children whose mothers work during the first year of the child's life with those who do not. Several studies in the 1980s and early '90s found that maternal employment during a child's first year was correlated with negative cognitive and behavioral outcomes that may persist through the later childhood years.[101] Studies of the relationship between maternal employment and child outcomes, however, will tell a misleading story unless they also account for quality of childcare, maternal, child, and family characteristics. Thus, for example, adverse effects appear to be concentrated in families of moderate income.[102] These same families have been found to receive the lowest quality external childcare, raising the question of whether it is maternal employment *per se*, or quality of available childcare, that explains the adverse effects.[103] There is also some evidence that mothers who work hardest during a child's preschool

[100] Kiecolt, *supra* note 98 (worker with very young children are more likely to find home a "haven" as opposed to finding work a haven or finding combining work and family highly satisfying, but as children get older (6 and older), they tend to shift towards finding combining work and family highly satisfying, rather than finding either work or home a haven).
[101] Jane Waldfogel, *Child Care, Women's Employment and Child Outcomes*, 15 J. POP. ECON. 527, 536-37 (2002) (reviewing American and European studies on the impact of child care and maternal employment in the pre-school years on child outcomes).
[102] *Id*. at 537.
[103] *Id*. at 537 (lacking the income that allows wealthier families, or the subsidies that often allow poorer families to purchase high quality childcare, moderate income families tend to receive the lowest quality childcare).

years have lower educational attainment and cognitive abilities; these factors may be correlated with fewer resources on the part of these mothers in improving their children's cognitive attainment.[104] Finally, maternal employment may actually improve child outcomes in the longer term by increasing family income.[105] In sum, it is far from clear from these analyses that maternal employment, as opposed to independent factors correlated with maternal employment, causes negative child outcomes.

More to the point for my purposes, though, is that even if subsidies allowing women to stay home full-time were to improve child and elder outcomes relative to paid leave policies, they would not advance the goal of optimizing between satisfying child and elder care needs and enabling women to choose full participation in paid work. The single-earner model will tend to reinforce women's decision to remain in the home or accept jobs with inferior long-term career prospects in order to achieve the flexibility of moving in and out of the workforce.

Some have argued on fairness grounds that any state subsidies designed to offset the costs of family caregiving should at least be available equally to working and stay-at home parents.[106] A core aspect of my defense of paid leave, as mentioned, is that it would positively encourage the entrance and retention of women in full-time employment *as compared to* low-hours part-time employment or full-time caregiving.[107] I do not oppose cross-the-board benefits to families with caregiving needs-- there may be sound reasons to assist families, especially those burdened with the additional expense of caring for, e.g., a disabled child. But central to my proposal is that such subsidies cannot be an alternative to distinct, targeted, subsidies for working caregivers in the form of paid leave. Affirmatively boosting women's relative incentives for market workforce participation is necessary to counter the skew of existing cultural and economic incentives towards women's compromising workforce attachment in order to bear the disproportionate household share of unpaid family labor. Cross-the-board caregiver subsidies, standing alone, would not necessarily change the *relative* attractiveness of paid versus unpaid work.[108]

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[104] *Id*. at 538.
[105] *Id*., at 529, 536-37.
[106] *See, e.g*., ALSTOTT, *supra* note 71 at 102, 134 (criticizing 'work-perfectionism' as contrasted with the neutrality principle, and arguing for equal per-child subsidies to working and non-working primary caregivers).
[107] For reasons I will discuss in detail in Part VI, *infra*, I am also wary of proposals to make paid leave available to workers with low workforce attachment. Stated briefly for the moment, my concern is that relaxed eligibility requirements would not provide adequate incentives for meaningful workforce attachment.
[108] Professor Alstott would limit the use of subsidies to purposes designed to enhance caregivers' opportunities to combine childrearing with other projects (caregiver support accounts to be used only for childcare, education of caregiver, or retirement savings of caregiver). *Id*., at 80. As I will make clear below, I agree in principle with enhancing caregivers' capacity to pursue life projects other than caregiving. However, although Professor Alstott's caregiving subsidies would not be an out-and-out cash equivalent, they would offer considerably weaker incentives than paid leave for ultimately altering the traditional division of household labor and enhancing women's autonomy. For example, although some women might use their subsidy to purchase childcare while working full-time, the option of using the caregiver subsidy to augment retirement savings would also reduce the opportunity costs of foregoing paid employment to engage in full-time unpaid caregiving. I doubt whether support accounts offering this degree of flexibility

My response to proposals that would compensate women for housework is similar. Such proposals take a variety of forms, but their common thread is a reaction against the devaluation of unpaid household labor and failure to recognize it as a crucial component of economic productivity.[109] A thoroughgoing analysis of the very complex problems raised by these proposals --both in terms of the conceptual bases for making compensatory claims against either a cohabitant or the state, and in terms of the valuation of household labor-- is beyond the scope of this Article. But I do wish to respond to arguments within the housework-compensation literature that projects, like mine, that seek to encouraging women's labor force participation ultimately reinforce the devaluation of household labor.[110] Let me be clear that I would not (in a hypothetical world in which it were possible) foreclose women's option to stay home full-time, and I do not claim that paid market work is intrinsically superior to unpaid domestic labor. Some women will elect full-time caregiving even with paid leave policies in place; a policy that tips the balance of incentives need not force a singular substantive outcome. I *do*, however, remain committed to the idea that current incentives and opportunities at the work/family margin unduly discourage women caregivers from pursuing a diversified set of interactions and contributions both within and without the family, which in turn are important to freedom from dependency on the family as the sole locus of identity, responsibility and moral awareness. I am skeptical of the idea that "if primary caregiving were remunerated, then it would be market work."[111] It would still be only one kind of work, with the combined force of social norms and economic incentives serving to inhibit a more free-ranging set of opportunities for women to forge a satisfying life path, whatever that path may be.[112]

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would significantly alter women's opportunity sets in light of existing social pressure and economic incentives to remain in the home.

[109] *See, e.g.*, Martha M. Ertman, *Commercializing Marriage: A Proposals for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998) [hereinafter, Ertman, *Commercializing Marriage*]; Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's Life's Work*, 102 COLUM. L. REV. 848, 853 (2002) (arguing that a caregiving subsidy that singles out workers will devalue women's domestic contributions, and that we ought to instead compensate women for housework); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) [hereinafter Silbaugh, *Turning Labor into Love*] (illustrating myriad ways in which the law devalues domestic labor and advocating a systematic attempt to incorporate the contribution of housework as on par with the wage-earner's contribution to family wealth); Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) [hereinafter Silbaugh, *Family Economy*] (advocating non-enforcement of premarital agreements as a way to counter tendency otherwise to devalue non-monetary as compared to monetary contributions to the household economy). *Cf.*, Nancy Staudt, *Taxing Housework*, 84 GEO. L. J. 1571 (1996) (taxing women's housework would serve to recognize the social and economic value of unpaid household labor).

[110] Silbaugh, *Family Economy*, *id.*, at 95-97 (distinguishing those who characterize housework as creating opportunity costs for women ("loss thinking") from those who characterize it as a valuable contribution ("gain thinking") and arguing that loss thinkers reinforce the devaluation of housework).

[111] Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 CHI-KENT L. REV. 1733, 1750 (2001).

[112] Note re: proposals for compensating housework that try to build in mechanisms to equalize the division of household labor and encourage women's workforce participation, e.g., making breadwinner husbands bear the cost of compensating wives for in-home labor -- e.g., Ertman, *Commercializing Marriage*.

On the other side of the spectrum, public provision of caregiving resources (e.g., publicly-provided daycare) would increase the range of options available to workers who have work-family conflict, and for some make it possible to work without interruption, possibly enabling stronger workforce attachment than leave policies. Indeed, some have raised the objection that because they will be utilized mainly by women, policies that accommodate worker-provided care (as opposed to externally-provided care) will merely reinforce traditional family roles.[113] I contend that external caregiving institutions such as childcare, while essential to the viability of the dual-earner family model, cannot be *alternatives* to paid leave.[114] Although the availability of quality childcare, for example, might be necessary to encourage returns to employment after the birth of a child, it will not be sufficient to prevent at least some mothers from quitting in the immediate aftermath of a birth. To many parents, daycare will not be an acceptable substitute for parental care and bonding in the early months of an infant's life. For the acute but temporary family health events that temporary family illness leave purports to cover, or for the birth or adoption of a child, the type of benefit many workers seek will be the financial means to take *personal* time away from work to tend to these needs.[115] Paid leave policies target this specific, non-fungible, demand in a way that external care provision cannot, and therefore may increase the workforce attachment of a significant subset of workers who might otherwise avoid, limit, or truncate a career in the paid workforce. Supporting these choices may be good social policy, both as a pragmatic response to the inflexibility of many workers' desire to engage personally in some family

[113] Schultz, *Life's Work, supra* note 76 at 1954-57 (arguing that accommodationist policies, including not only the expansion of non-standard employment such as part-time jobs (which I also criticize) but also maternity and family leave, are ultimately regressive because they permit families to carry on with traditional divisions of market and domestic labor)

[114] I am not going to take up in any detail the full range of essential companion policies necessary to support combining work and family (although I do discuss in some detail the importance of creating incentives for men to take family leaves at *infra*, Part IV. D). Others, however, have written extensively on (for example) the need to reform income tax policies that penalize dual-income married couples, the necessity of affordable childcare for improving woman's workforce attachment, and the desirability of a shorter workweek. On income tax policy, *see, e.g.,* Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); EDWARD MCCAFFERY, TAXING WOMEN 17-23 (1999); Lawrence Zelenak, *Marriage and the Income Tax,* 67 S. CAL. L. REV. 339, 365-77 (1994) (showing how income tax laws are biased against secondary earners--overwhelmingly women--in two-earner families and create disincentives for women to choose market labor over unpaid home labor). Although 2001 tax reforms purport to phase out the so-called "marriage penalty," federal tax income tax treatment still creates incentives for second earners to opt out of the labor market: *see* Jamie Heller, *How New Tax Law Relieves Marriage Penalty,* WALL ST. J.. June 4, 2003 D.2 (explaining how despite recent amendments to the federal tax code that purport to phase out the marriage penalty, the poorest and most wealthy families get less than the full benefit due to the limitation of the amendments to the 15% tax bracket, as well as persisting marriage penalties in the earned income tax credit, phase-outs, capital-loss-offset provisions and other areas of the tax code). On childcare, *see, e.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER 129-31 (1989). On shortening or increasing the flexibility of work hours, see Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change,* 11 COLUM. J. GENDER & L. 271, 357-58 (2002); Schultz, *Life's Work, id.*, at 1956-57; WILLIAMS, UNBENDING GENDER, *supra* note 81at 100.

[115] *See* WILLIAMS, UNBENDING GENDER, *id*., at 48-54 (arguing that there is a strong norm of parental care in the United States, and this partly explains the failure of full-scale "commodification", or delegation to the market, of domestic work through policies such as day care).

caregiving, and also as a way of permitting and indeed validating the role-duality of worker/caregivers.

One difficult problem is that in describing "inflexibility" of demand for personal caregiving time I assume this is an option workers (in particular, women) want to have, and that denying them this choice will discourage their workforce participation. Yet, there are at least some workers for whom the "freedom" to take personal time off is more burdensome than liberating. I doubt this is typically true for maternity or parental (bonding) leaves. But family illness leaves--especially for elder care--may present a harder case. Certainly many workers will perceive increased freedom to interrupt work to give personal care to ill family members as a benefit that improves their quality of life. For others, though, the very availability of the option will make it harder to resist feelings of guilt or pressure from a spouse, parent, or sibling to undertake a task they feel is unpleasant. Thus, for example, the availability of wage replacement may effectively deny the daughter or daughter-in-law of a disabled elder the relief from caregiving that a less accommodating policy would passively provide.[116] I take this possibility seriously and realize that my proposal cannot entirely avoid the risk of its occurrence.[117] On balance, though, I still believe paid leave policies are superior to the alternative of fully commodified caregiving.

First, as noted, although it is ultimately an empirical question, my instinct is that for the most part workers do affirmatively desire at least some limited freedom to take paid time off for family caregiving needs and view it as a benefit that improves job quality rather than a burden. Note that I would not support narrowing the kinds of support available--say, eliminating the elder care leave option--as a solution to the concerns I raise. Inclusion of the elder care leave benefit reduces the potential dominance of heterosexual families with children as net beneficiaries of the transfer program and in turn will promote greater fairness and legitimacy, as well as wider approval, among workers.[118] Second, to the extent that I'm focusing on the gendered aspect of the problem, let me emphasize that to achieve the goals I espouse, any paid leave policy we adopt must include increased incentives for men to take leaves.[119] Another caveat is that if paid leave benefits are excessively generous, they may

[116] Note, though, that the FMLA excludes care of in-laws, thus if a paid leave policy were to adopt FMLA rules for benefit-triggering events, pressure to give in-law care would not be a problem. See 58 Fed. Reg. 31794-01, at 825.113 (1993).
[117] In Part I.B, *supra*, I also identified the possible inefficiencies at stake if a worker pressured to take leave has a higher marginal productivity (and wage) than the external caregiver she would hire to perform the same task.
[118] Note, of course, that (assuming a paid leave program that adopts the same triggering events as the FMLA) all biological and adoptive parents, whether married and heterosexual or not, would be eligible for parental leave benefits. So, too, would all workers be eligible for the personal illness leave, discussion of which I have almost entirely excluded from this Article. Thus even excluding the family illness benefits would not make this an exclusive transfer to heterosexual married families with children. My point is simply that we ought to be sensitive to the fact that widening or narrowing the range of triggering events can skew the composition of the pool of likely beneficiaries in ways that raise egalitarian concerns. For this same reason, I would include unmarried domestic partners--currently excluded under the FMLA--in the set of family members whose illness triggers a worker's right to take leave.
[119] I discuss this in more detail in Part IV, *infra*.

encourage such lengthy career interruptions as to risk *undermining* women's workforce attachment.[120] My goal is to defend paid leave benefits, in moderation, as a way to increase women's workforce participation by making it easier for them to take leaves, while at the same time protecting against the risk of excessive human capital erosion among those who do take leave.

This section has argued that paid leave policies, by increasing women's freedom to undertake and maintain paid employment despite family caregiving obligations, will increase their capacity to determine the course of their lives in a meaningful and satisfying way. Let me turn, then, to both predictive theory and empirical evidence that paid leave can in fact facilitate women's involvement in paid work.

III. The Effect of Paid Leave on Women's Workforce Attachment: Theory and Evidence

A. The Family Gap

Although estimates vary somewhat across studies, researchers consistently find women spending significantly more time than men engaged in caregiving activities for children[121] and the disabled elderly.[122] Presumably, some women are deterred from working on account of these obligations.[123] Household decisions to have the woman decline or reduce paid work in order to give care are partly the result of the differential opportunity costs as between men and women of staying home.[124] Yet this creates a self-reinforcing cycle of gender segregation-- the different labor market wages and

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[120] *See* Barbara R. Bergmann, *Subsidizing Child Care by Mothers at Home*, 6 FEMINIST ECON. 77, 84 (2000) (lengthy leaves would make less cogent the distinction between paid parental leaves and subsidies for all at-home parents).

[121] *See* Joseph H. Pleck, *Paternal Involvement: Levels, Sources, and Consequences*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (M.E. Lamb, *ed*., 1997) (meta-analysis of research findings during the 1980s and 90s, estimating that fathers spend about 2/5 of the time that mothers spend directly engaged in childcare activities, and that their accessibility, defined as availability to the child in the absence of direct involvement, is only about 2/3 that of mothers). *See generally* W. Jean Yeung, John F. Sandberg, Pamela Davis-Kean & Sandra Hofferth, *Children's Time with Fathers in Intact Families*, 63 J. MARRIAGE & FAMILY 136, 145 (2001) (finding that on weekdays fathers spend between 62% and 82% of the time mothers spend directly engaged in personal care activities for children).

[122] *See* Robyn I. Stone & Peter Kemper, *Spouses and Children of Disabled Elders: How Large a Constituency of Long Term Care Reform?* 67 MILBANK Q. 485, 494 (1989) (among children who are primary caregivers of disabled parents, daughters outnumber sons by more than 3 to 1; for more seriously disabled elders, the ratio is 4 to 1); Robyn Stone, Gail Lee Cafferata & Judith Stangl, *Caregivers of the Frail Elderly*, 27 THE GERONTOLOGIST 620, 620 (1987) (estimating that daughters were twice as likely as sons to assume primary responsibility for the frail elderly with no assistance).

[123] Among women who were not in the labor force in December 2003 and not looking for work, 27% report family responsibilities as the reason. Only 11% of similarly non-employed men report this as their reason. UNITED STATES BUREAU OF LABOR STATISTICS CURRENT POPULATION STATISTICS, Chart A-37, Persons Not in the Labor Force by Desire and Availability for Work, Age and Sex. A*vailable at* ftp://ftp.bls.gov/pub/suppl/empsit.cpseea37.txt.

[124] Christine A. Littleton, *Does it Still Make Sense to Talk About Women?* 1 U.C.L.A. WOMEN'S L. J. 15, 36 (1991) (noting that the wage gap between men and women makes it economically more rational for married women than it is for their husbands to take an unpaid leave from work to engage in caretaking).

opportunities of men and women influence household decisions about allocating home versus market work, and these decisions in turn reinforce the gender wage gap.[125] Still, many women with caregiving obligations continue to hold paid employment.[126] Being employed doesn't change the inequality of burdens: full-time working mothers spend about twice as much time caring for children as fathers do, and being employed reduces the time sons, but not daughters, spend caring for disabled parents.[127] Women are also more likely than men to interrupt work or quit their jobs to care for children or parents.[128]

The "career" costs to women of interrupting work to care for children and other family members are considerable.[129] Empirical researchers who have compared the wages of women workers with and without children estimate a wage penalty for having children of between 10 and 15% (the family gap).[130] There is no similar penalty for men; on the contrary, married men (most of whom have children) enjoy a wage *premium* relative to unmarried men of 10-15%.[131] Much of the family gap in women can be explained by differences in productivity between mothers and non-mothers. Once researchers control for these differences in human capital, the family gap shrinks, with the wage penalty for having one child at about 5%, and larger penalties for the birth of additional children.[132] An important conceptual question, though, is what we achieve by

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[125] Joni Hersch & Leslie S. Stratton, *Housework, Wages, and the Division of Housework Time for Employed Spouses*, 84 AM. ECON. REV. 120, 124 (1994) (identifying a self-reinforcing cycle in which women spend significantly more time than men on housework, time spent on housework has a direct negative effect on wages, and women engage in relatively more housework in part *because* their market wages are lower).

[126] *See, e.g.*, Stone *et al.*, *id*., at 620 (finding that 44% of adult daughter caregivers are employed).

[127] OECD EMPLOYMENT OUTLOOK 2001 at 140, Tbl. 4.5 (U.S. fathers in 1995 spent an average of 33 minutes per day, compared to full-time mothers' 62 minutes per day, engaged in childcare activities, defined as feeding, dressing, changing, bathing and giving medication to children); Eleanor Palo Stoller, *Parental Caregiving by Adult Children*, 45J. MARRIAGE & THE FAMILY 851, 856 (1983) (being employed decreases the average level of sons' assistance in parental caregiving by 22.9 hours per month, but has no effect on levels of assistance by daughters, who make up the time by reducing leisure).

[128] BALANCING THE NEEDS, *supra* note 4, Tbl. A2-2.6 (26.7 % of women who took a leave from work in 2000, whether or not covered by the FMLA, used the leave to care for children or elders, as compared with 21.4% of male leave-takers); Kristen Keith & Abigail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 INDUS. & LAB. REL. REV. 460, 465 Tbl. 1 (1999) (estimating that 8.4% of women, compared with 3.8% of men, quit their jobs for family related reasons between 1979 and 1984); Stone *et al.*, *supra* note 122 at 622 (of adult children with elder care responsibilities, 11.6% of daughters, compared with 5% of sons quit their jobs as a result).

[129] In this section, I review economic literature on the subject. For a popular account, see ANN CRITTENDEN, THE PRICE OF MOTHERHOOD (2001).

[130] Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSPECTIVES 137, 143 (1998) [hereinafter, Waldfogel, *Understanding the Family Gap*] (citing several studies).

[131] *Id*.

[132] Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited*, 56 MONTHLY LABOR REV. 273, 282, Tbl. 2 (2003) (finding a 5% wage penalty for having one child, and a 7% penalty for two or more children); Charles L. Baum, *The Effect of Work Interruptions on Women's Wages*, 16 LABOUR 1, 17, Tbl. 4 (2002) (4% wage penalty for birth of first child); Shelly Lundberg & Eliana Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689, 705 Tbl. 2, 3 (2000) (5% wage penalty for birth of first child by married women, measuring outcomes longitudinally over a period of between 5 and 13 years of marriage); Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?* 16 J. LAB. ECON. 505, Tbl. 2A (1998)

statistically controlling for these productivity differences. The very fact of a significant productivity gap between women who do and do not have children is reason for thinking about policy intervention, especially given the contrasting pattern for men.[133]

Human capital theorists explain the effect of children on women's productivity in several ways.[134] First, the presence of children can reduce mothers' human capital. Work interruptions due to childbirth and infant care result in foregone work experience, as well as depreciation of accumulated skills during the period of interruption. Related to the latter point, if the worker switches jobs following a work interruption (either because her old job is unavailable, or because she needs a job with more flexibility), some of her human capital may be underutilized because it is specific to the previous employer.[135] Additionally, a worker who knows she will need to interrupt work in the future may make fewer investments in training, knowing that there is a limit on how much she will be able to recoup through later earnings. A firm for its part may also decide to invest less in training women in their childbearing years, fearing that it will not recoup its investments in the form of increased worker productivity. In sum, those who take leaves from work or quit to take more flexible jobs pay a significant "career tax" when they do so.

Having children might also reduce women's market work effort. With the increased burden of household responsibilities, mothers may have less time to allocate to market work. Related to this, they may need to take jobs with greater flexibility in order to accommodate new scheduling and hours demands, accepting lower wages in order to do so. Note that for men, the effects of children may run the other way, perhaps explaining some of the paternal wage premium: with the birth of a child, a father may work harder in order to support the family (although I would note that fathers' capacity to do so is inextricably intertwined with the social assumption and reality that women will take on a proportionately greater burden of household labor).[136]

[hereinafter, Waldfogel, *The Family Gap in the U.S. and Britain*] (4.6% wage penalty for one child, 12.6% penalty for two or more children). Each of these studies controlling for observable factors such as education, job experience, and age, and used fixed-effects models to control for unobserved differences, such as work commitment.

[133] Lundberg & Rose found that when they controlled for observable and unobserved differences, married fathers still enjoyed a 9% wage premium for the birth of one child compared with married men with no children. For men whose wives worked relatively continuously through the birth of their first child (e.g., did not interrupt work beyond the year in which the birth occurred), the paternal wage premium was reduced to 7%. *Id*., at 705, Tbl. 4.

[134] *See generally*, Baum, *id*., at 3-4; Joyce P. Jacobsen, *How Family Structure Affects Labor Market Outcomes*, *in* THE ECONOMICS OF WORK AND FAMILY 133-58 (Jean Kimmel and Emily Hoffman *eds*., 2002); Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women* 82 J. POL. ECON. S76 (1974).

[135] Baum, *id*., at 29-30 finds that wage reductions associated with women's work interruptions are substantially eliminated for women who return to their previous job. He suggests that returning to the old job allows the worker to preserve a good job match, enjoy the benefit of relearning old skills rather than learning new skills, retain seniority, and continue benefiting from firm-specific human capital.

[136] Lundberg & Rose, *supra*, note 132 at 705 (attributing the divergent wage effects of having children on men and women to increased household specialization, with mothers spending proportionally more hours in the home and fathers spending proportionally more time in the workforce, following the birth of a child).

Some economists further suggest that in addition to children reducing mothers' productivity, women who are "less productive" may be more likely to have children.[137] Empirical researchers refer to this as a form of "unobserved heterogeneity" -- i.e., although it cannot be observed in conventional human capital measures, some women may be less career-oriented and more motivated by a desire to have children.[138] They might also channel significant productivity into supporting a husband's career, e.g., planning dinners for their husband's work associates, accompanying them on business trips, and so forth.[139]

The family gap also, though, undoubtedly reflects discrimination. For example, employers may engage in "statistical discrimination" against women in their childbearing years: if an employer cannot observe productivity perfectly, it may estimate a worker's productivity according to perceived work commitment. If women in their childbearing years are more likely to interrupt work at some point in the future, this may serve as a proxy for employers of weak work commitment or effort, and employers may be less willing to hire or train them, pay them lower wages, or channel them into female-dominated occupations that pay less and have lower career prospects.[140] Similarly, employers may make negative judgments about workers who have previously been unemployed or employed in a part-time or temporary job. These stereotypes may make it difficult for a worker who has switched to a part-time job during her childbearing years to return to a full-time, permanent job matched to her skills and preferences.[141]

Gender differences in opportunity also operate on a deeper plane. The hypothesis stated above, for example, that lower average productivity may be a pre-existing characteristic of mothers, is complicated by the fact that social norms validating women's devotion to family over career will tend to shape their preferences before and after the arrival of children.[142] Starting early in life, social pressures and influences may skew

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[137] Lundberg & Rose, *id.*, at 691.
[138] *Id*.
[139] Jacobsen, *supra* note 134 at 142.
[140] *See* Schultz, *Life's Work*, *supra* note 76 at 1894-96 (arguing that women's lower pay is due mainly to the fact that women are segregated into separate but less remunerative occupations, firms and jobs, rather than the fact that women have more family responsibilities and therefore select lower paying but more flexible jobs, or exert less work effort); Selmi, *supra* note 12 at 721-25, 730-32 (2000) (suggesting that employers discriminate against women when making training opportunities available to workers, and reviewing data challenging the work effort hypothesis and the notion that women choose more flexible jobs).
[141] *See* Barry McCormick, *A Theory of Signalling During Job Search, Employment Efficiency, and 'Stigmatized' Jobs*, 57 REV. ECON. STUD. 299, 308 (1990); Ian M. McDonald and Robert M. Solow, *Wages and Employment in a Segmented Labor Market*, 100 Q. J. ECON. 1115, 1124-25 (1985) (both arguing that experience in secondary employment can stigmatize a worker and subsequently block access to primary employment).
[142] There is a huge literature on the social construction of choices. Some examples from other disciplines are L. Richard Della Fave, *The Meek Shall Not Inherit the Earth: Self-Evaluation and the Legitimacy of Stratification*, 45 AM. SOC. REV. 955 (1980) (arguing that those who do poorly in the distribution of social rewards may grant legitimacy to the very social structures and hegemonic norms that deny them status, adopting those norms as part of their self identity); Herbert Gintis, *Education, Technology, and the Characteristics of Worker Productivity*, AM. ECON. REV., May 1991, at 266 (1972) (criticizing neoclassical economic claim that worker preferences are exogenously determined, and arguing that social institutions such as schools affect the tastes and personalities of future workers); George Sher, *Our Preferences,*

their preferences towards motherhood.[143] Once of working age, women's experiences or prospective experiences in the workplace are likely to reinforce these preferences.[144] And after children arrive, the necessity of work interruption or reduction may lead a worker to develop still lower self-esteem and career expectations, making diminished market prospects a self-fulfilling prophecy.[145]

I am skeptical that either purely human capital based, or purely constructivist theories can claim hegemonic status as explanations of women's labor market circumstances.[146] Most plausible is that both operate together, and policy responses ought to take both seriously. More specifically, we should engage the regulatory apparatus of the state to alter women's incentives and options with respect to investments in home- versus market-based human capital, men's incentives to take family leaves, and animus as well as stereotype-based discrimination against female workers. At the same time, we should also take seriously the project of cultural and attitudinal change, which partly will follow from structural change, but also must be encouraged through social institutions that perform an educative function (e.g., schools, job training, public information campaigns). My project, of course, focuses on the first type of intervention.

B. Theoretical Impact of Family Leave Policies on Women's Workforce Attachment

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Ourselves, 12 PHIL. & PUB. AFF. 34 (1983) (arguing that feminists who favor state intervention to override women's traditional preferences on the basis that they are induced by sexual stereotypes and conditioning have failed to provide sound philosophical justifications to support their claim).

[143] *See, e.g.*, ALSTOTT, *supra* note 71 at 26-30 (critiquing libertarian assumption of women's free choice of caretaking role); Naomi R. Cahn, *Gendered Identities: Women and Household Work* 44 VILLANOVA L. REV. 525, 534 (1999) (society socializes women to want to perform household work and childcare, as well as resist work outside the home, in order to affirm their identity as women); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L.L. REV. 79, 90 (1989) (arguing that work-family conflict arises in part from socialized views of appropriate gender roles); Fineman, *Cracking the Foundational Myths*, *supra* note 69 at 21-22 (women's individual choices operate at an unexamined level, products of patriarchal ideology, history, and traditions); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 936-37 (1987) (reviewing DAVID L. KIRP, MARK G. YUDOF & MARLENE STRONG FRANKS, GENDER JUSTICE (1986), and arguing that women have structured their work lives around family in response to societal notions about proper gender roles).

[144] Dowd, *id*., at 147 (discussing the role of workplace structures in shaping individuals' perceptions of their range of employment opportunities); 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 Defense*, 103 HARV. L. REV. 1749, 1815-24 (arguing that pre-labor market explanations are inadequate to explain sex segregation in the workplace and that, instead, employers structure opportunities and incentives and maintain work cultures and relations so as to diminish women's career aspirations and commitments).

[145] *See generally* Arthur H. Goldsmith, Jonathan R. Veum & William Darity, Jr., *The Psychological Impact of Unemployment and Joblessness*, 25 J. SOCIO-ECONOMICS 333 (1996) (discussing the significant psychological trauma of job loss and subsequent reemployment); Knut Gerlach & Gesine Stephan, *A Paper on Unhappiness and Unemployment in Germany*, 52 ECON. LETT. 325 (1996) (same); Lester, *Careers*, *supra* note 28 at 89 -90, 116-117 (discussing the identity- and ambition- shaping aspects of unemployment and employment in lower-status jobs).

[146] *See generally*, Lester, *Careers*, *id*.

Can paid family leave increase women's workforce attachment? The answer, it turns out, is not as straightforward as it initially may appear. Both the supply of labor and demand would theoretically be affected by introduction of paid leave policies. On the supply side, we might expect paid leave to increase the number and duration of leaves women take from work (assuming women continue to be the primary caregiver of children and elders). This might *reduce*, rather than *enhance*, women's workforce attachment. On the other hand, the availability of paid leave may deter some women who otherwise would have quit the workforce from doing so. This will have the opposite effect.

Let me illustrate by focusing on mothers. Economic theorists would frame a person's decision of whether to work or stay home in terms of opportunity costs.[147] Absent children, the main opportunity costs of staying home are giving up income, the satisfaction and status that comes from work, and lost opportunities for professional advancement. Paid employment, on the other hand, has costs of its own in terms of foregone household production (reduced opportunity to maintain the household). When a child arrives, the opportunity costs of work are even higher because market work interferes with the parents' ability to contribute an additional component of home production-- caring for the child. This is likely to involve both monetary and nonmonetary costs. In addition to the monetary cost of obtaining childcare, the family may view the foregone opportunity of providing personal parental care as a cost.[148] If the costs of a dual earner arrangement now exceed the costs of having one parent remain home, it will be economically rational for a parent to quit work. The wage gap between men and women, as well as cultural factors, make it much more likely that if one parent decides to quit in order to stay home and care for a new child, it will be the mother.[149] For some mothers, though, the costs of staying home will exceed the costs of continuing work -- these mothers will interrupt work only briefly before returning to work after the birth of a child.

As mentioned, the cost of interrupting work may go beyond earnings foregone during the time off. For many workers contemplating a work interruption, the prepregnancy job is superior to the best available alternative job, both because of specific human capital invested in the prepregnancy job, and because the search costs for a new job, including the possibility of a poor job match, may be extensive.[150] Firms, for their part (in the absence of maternity leave legislation mandating a specified leave period), would typically limit the permissible leave period a worker may take. The worker who wants to take a temporary leave, then, could face a choice between taking a temporary

[147] In framing this analysis I draw on Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 J. MARRIAGE & THE FAMILY 1008, 1011-13 (1997) and Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, *in* GENDER AND FAMILY ISSUES IN THE WORKPLACE 67-83 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997) [hereinafter Klerman & Liebowitz, *State Maternity Leave*].
[148] Joesch, *id*., at 1012.
[149] Keith & McWilliams, *supra* note 128.
[150] *See* Jacob Alex Klerman & Arleen Leibowitz, *Job Continuity Among New Mothers*, 36 DEMOGRAPHY 145, 146 (1999) [hereinafter Klerman & Liebowitz, *Job Continuity*] (discussing the labor market choices a new mother confronts with respect to maternity leave).

leave from their job that is shorter than desired, or quitting to take more time off, with the risk of later having to take a lower paying job.[151] Thus, the cost of taking a leave longer than what the employer offers may be not only foregone wages during the leave period, but also the present value of the difference between the prepregnancy wage and the wage in the best alternative job over the remainder of the woman's working life.[152]

Let's introduce a family leave mandate to this scenario -- assuming for simplicity that it provides unpaid leave. An unpaid leave reduces a worker's uncertainty about whether she will be able to resume her previous employment following leave of a particular duration. This will be valuable if the worker would like to take time away from work following the birth of a child, but for a longer period than her prepregnancy employer would be willing to grant absent the legislation. Some women will make the same decision despite the new government policy: perhaps they will still exceed the limits of the new policy, or still opt to take no leave at all.[153] For others, the new policy will have a decisive effect. Some women who would have quit if faced with an employer leave policy that was too short for their needs will now take the leave permitted by law and return to their former job at its former wage. The probable effect of this will be a shorter interruption from work than if they had quit. On the other hand, we would also predict that availability of a job-protected leave will induce some women to interrupt work for a *longer* period following the birth of a child than they would have done otherwise: some women who would have taken a short leave for fear of losing their jobs under the pre-statutory regime will now take longer leaves, knowing their job is protected. Finally, some women who would otherwise have stayed home will join the workforce if they know that paid leave policies will be available to ease the balance between work and family obligations.

The foregoing discussion centers on the supply-side effects of leave policies. These policies should also affect demand. Changes in mothers' workforce continuity, as I elaborated earlier in this Part, will affect their human capital, and in turn, employers' demand for their skills. If paid leave deters recent mothers from quitting, it will tend to increase their marginal productivity, because the leave will allow and encourage them to return to her previous employment and exploit firm-specific human capital. If policies allow only such short or ungenerous leaves that women decide to quit, or alternatively, permit very extended leave durations, say more than two years, mothers' marginal productivity will decline, in part because of foregone accumulation of human capital, and in part because of depreciation of their existing human capital. The effect will be to reduce employers' demand for their skills.

In sum, government mandates requiring unpaid leave for maternity purposes will in theory affect different mothers differently: some will be unaffected, some will take leaves instead of quitting, and some will take longer leaves than they would have otherwise. In addition, some women who would not otherwise choose to work will enter the workforce. How aggregate labor supply -- and demand -- will change are empirical

[151] *Id*.
[152] *Id*.
[153] Joesch, *supra* note 147 at 1012 .

questions. I have articulated the normative goal of increasing working parents' ability to engage in family caregiving activities, yet doing so in a way that increases, rather than decreases women's workforce participation and attachment. Seen in this light, a leave program that results in some women taking more and longer leaves (thus decreasing their workforce experience) will be a good thing only so long as it does not actually lead them to quit or take extremely long leaves, and also has the offsetting effect of encouraging other women to join the workforce or refrain from quitting.

A final critical dimension of the problem is financing.

C. Financing Paid Leave

In this section, I introduce the contours of the financing problem, first in general terms, and then as applied to family leave benefits.

(a) Mechanisms for Financing Benefits

A proper analysis of the distributional and efficiency features of any public program requires assessment of both the allocational (who benefits) and revenue (who pays) and sides of the equation. Of central importance to the allocational side are program design features such as eligibility rules and benefit payout caps. On the revenue side, the financing mechanism is also crucial. A program can be financed using techniques that range from personal accounts, to payroll taxes based on worker-hours, to state subsidization using general tax revenues. I will discuss each in turn.

(i) Personal Accounts

One way to ensure that workers have a buffer against the risk of job loss is to force them to save part of their earnings on an ongoing basis. The state could do so by requiring each employee to invest money into a personal account which, prior to retirement, they could draw upon only for certain qualifying work interruptions (e.g., the birth of a child). When the employee retired, any remaining balance in his account could be rolled over into his pension. Some argue that financing benefits in this way is not particularly useful because its beneficiaries are made no better off.[154] This conclusion, however, overlooks the savings objective of social insurance. If people left to their own devices will not save effectively, but it is deemed socially useful that they have savings, a program of this nature will help people overcome their failings in this regard. At core is the equitable question of whether the program's objective is purely to encourage savings, or also has redistributional aims. Some scholars believe on equity grounds that we should use this type of device to replace some very well established forms of social insurance currently in place, such as unemployment insurance and social security,

[154] Frank, supra note 38 at 312 (arguing that a program that requires only the beneficiaries to pay for it leaves the beneficiaries no better off than they are today).

believing these programs should *not* redistribute between individuals.[155] If you believe that the social costs of combining work and family caregiving should be shared across society, however, a system of personal accounts financed through mandatory contributions is inapt, because it involves no redistribution at all--it simply modulates individual spending over a lifetime.

(ii) Payroll Taxes.

A payroll tax may be statutorily imposed on employers, employees, or both. Thus, for example, unemployment insurance is financed by a tax on employers that is a fixed percentage of their expenditures on wages. Existing temporary disability insurance programs are financed in whole or in part by taxing workers a fixed percentage of their wages. Social security is financed by a payroll tax imposed (nominally) in equal parts on employers and employees. Whatever the allocation of legal burdens as between employers and workers, the sector of the population that initially bears a payroll tax will be smaller than if general revenues are used. This implies that there will be less spreading of costs if a payroll tax is used. The focal point of public debates about payroll taxes often centers on whom--as between employers and employees--should bear the tax, the assumption being that it will have implications for wealth distribution.[156] Such debates, however, overlook the important issue of tax incidence. As I will explain in the remainder of this section, the economic burden of a payroll tax may differ from the legal burden. Both theory and empirical evidence suggest that whatever the statutory burden may be, a payroll tax does not significantly distribute wealth from employers to employees.

It is commonplace for economists to assert that the "statutory incidence" of a tax will typically differ from the "economic incidence" of the tax because the party on whom the tax is imposed will try to shift its burden to others.[157] Thus a business faced with a costly mandate may well pass the cost of that mandate to workers in the form of reduced wages. In addition, if an activity is taxed, the party taxed may do less of that activity--e.g., if there is a tax on wages earned, the worker may work fewer hours.[158] Both demand and supply side phenomena operate in an equilibrium that will adjust following imposition of the tax. Trying to project (or empirically test) the outcome of this process of re-equilibration is an important exercise if one is interested in the distributional consequences of a particular employment mandate.

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[155] Michael Orzag & Dennis Snower, *From Unemployment Benefits to Unemployment Accounts*, Watson Wyatt Worldwide Institute for the Study of Labor discussion paper no. 532 (July 2002). Available online at http://papers.ssrn.com/paper.taf?abstract_id=323563.

[156] *See* Bohrer, *supra* note 12 at 420-21 (advocating financing paid family leave through employee payroll contributions because "most businesses simply cannot afford to" pay for it); John M. Broder, *Family Leave in California Now Includes Pay Benefit*, N. Y. TIMES (Sept. 24, 2002) (proposed employer contribution was a sticking point in California legislative process leading to paid leave).

[157] See, e.g., RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE, FOURTH ED. 250 (1984).

[158] *Id*.

In recent years a good deal of scholarly attention has focused on the distributive implications of "employer mandates." By this I mean the legal imposition on employers of either affirmative duties or restraints in setting the terms and conditions of employment. Thus, employers might be required to maintain minimum health and safety standards in the workplace, accommodate the special requirements of workers with disabilities, or refrain from discriminating against women in wages and hiring. Assuming mandates are costly to employers (although some are costless in theory),[159] the mandate operates like a payroll tax on the employer.

The economics of employer mandates have been formalized in a well-known article by Lawrence Summers and others who since then have expanded on his analysis.[160] For ease of illustration, consider the simple supply-demand framework in a competitive labor market from Figure 1 below, and assume (again, solely for illustrative ease) that employers are required to bear the entire cost of the mandated benefit. If the government requires employers to offer a benefit to workers that they do not already provide, then employers will adjust their demand for labor.[161] Specifically, employers' demand for labor will shift downward by an amount equal to the cost of providing the benefit (reflected in a shift from demand curve $\mathbf{D_0}$ to $\mathbf{D_1}$ in Figure 1). Workers, in turn, will see the mandated benefit as a form of additional non-monetary compensation, and be willing to work more. The labor supply curve will shift downward by an amount equal to the valuation that workers place on the benefit (reflected in a shift from $\mathbf{S_0}$ to either of the $\mathbf{S_1}$ curves, explained more fully below). Taken together, these adjustments will lead to a new equilibrium in which wages are unambiguously lower, but employment levels may increase or decrease, depending on how highly employees value the benefit. (In Figure 1, a low employee valuation is reflected by the shift to $\mathbf{S_1'}$, while a high valuation is reflected by the shift to $\mathbf{S_1''}$). How do we measure the efficiency of the benefit? The *net* value of the benefit is the difference between how much the workers value the benefit and the cost of the benefit. If workers value the benefit by more than its cost (reflected by $\mathbf{S_1''}$), there will be an increase in employment levels, and total social efficiency (that is, employee plus employer surplus) will increase. If they value the benefit at less than its cost (reflected by $\mathbf{S_1'}$), wages will fall by more than they value the benefit, employment will fall as well, and there will be a net efficiency loss.[162] Whatever the efficiency gain

[159] Antidiscrimination mandates are, in theory, costless, as they purport to eliminate irrational discrimination between workers who are equally productive. This is different from the affirmative cost of increasing safety standards above the level that they would have been set in the absence of government mandates. Litigating antidiscrimination lawsuits may, of course, be costly, and thus the advent of antidiscrimination mandates might in that sense be said to have imposed costs on employers.
[160] Lawrence Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180-81 (1989) more formally describes the predictions I summarize in this paragraph, using a partial equilibrium analysis based on price theory.
[161] For expositional ease, the effect of the tax is illustrated in Figure 1 as a uniform shift. Under a payroll tax the shift would most likely be a percentage shift, and therefore not uniform at every wage. Nothing in this analysis turns on that distinction, however.
[162] Relative elasticities of supply and demand may affect the magnitude, but not the existence or direction, of the three effects described. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 238 (2000). *See also* Sharon Rabin-Margalioth, *Cross-Employee Redistribution Effects of Mandated Employee Benefits* 20 Hofstra Lab. & Emp. L. J. 311, 320 (2003) [hereinafter, Rabin-Margalioth, *Cross-Employee*

or loss, though, this analysis does not predict a systematic *redistribution* from the employer to workers.

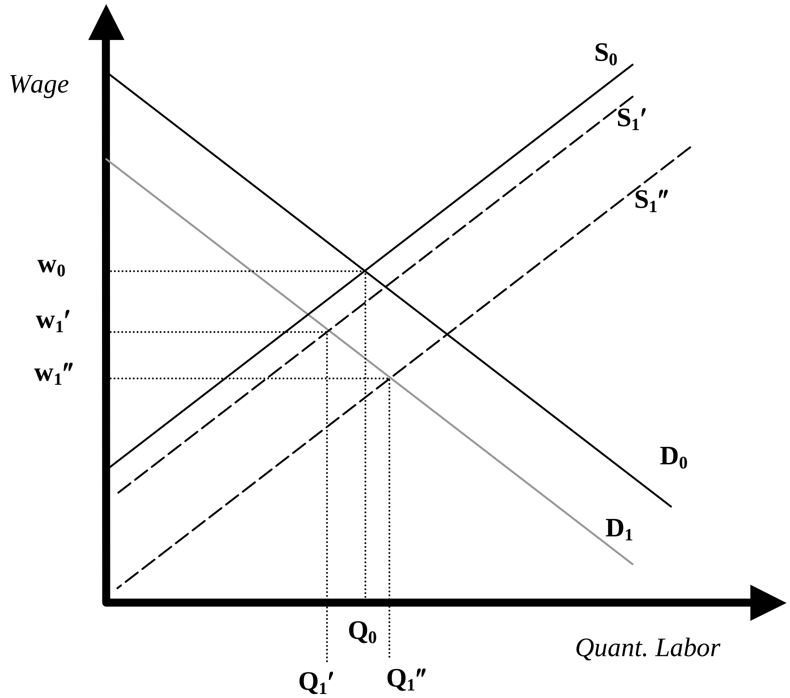

FIGURE 1

The equilibrium I just described is affected critically by whether the cost of the mandate varies with the number or kind of worker employed. A mandate might impose a fixed cost on the employer regardless of number or kind of workers (e.g., the requirement that the employer install a ramp at the entrance to ensure wheelchair access). The employer may either absorb the cost or pass it along to others, but it cannot avoid or reduce the tax by hiring fewer or different workers. A mandate might, alternatively, impose costs that multiply with each additional worker hired, akin to a surcharge (e.g., a requirement that every worker receive health insurance). Here, the employer might choose to hire fewer workers –and perhaps ask them to work longer hours—in order to avoid the "benefit premium" associated with hiring additional workers. Or, a mandate might impose costs that vary with the number of worker-hours, or wages paid, a common example being social security taxes. Here, too, the employer might simply hire fewer workers or it might reduce workers' hours in response to the tax. Finally, a mandate might impose costs associated with hiring certain classes of workers. An example here is the cost of hiring workers with disabilities in a regime where the law mandates accommodation of the disabilities of workers who can otherwise perform the job (e.g.,

Redistribution] (cautioning that because of this phenomenon, it is misleading to assume that a large reduction in wages always reflects a highly efficient mandate).

hiring a reader to assist a worker who is blind). The employer here will have an incentive to avoid hiring workers who will need accommodation.[163]

A prior question to this entire analysis is why, if provision of a benefit is efficient, we would ever need the help of government mandates. As I explained in Part II, however, market failures of several varieties can prevent efficient private provision.[164] Workers may mistakenly underestimate the value of a benefit, for example. Or, information gaps can undermine the functioning of private insurance. Market failure can also occur where a significant part of the value of a program lies in effects external to the parties to the bargain--e.g., the benefits to society of in-home elder care, healthy and well adjusted children, social equality, etc. In such cases, the parties might not take the external benefits into consideration when making personal valuation decisions.

(iii) General Revenues.

Financing through general funds distributes the economic costs of a benefit most broadly. Included in general revenues are all income taxes (not just wage income), corporate taxes, excise and sales taxes, estate and gift taxes, and payroll taxes. In essence, all taxpayers contribute to general revenues in proportion to their tax burdens. Therefore, this method of financing draws revenues from a broader swath of the population than a payroll tax, which targets employers and workers alone. To the extent that the American system of taxation is progressive in the aggregate, the use of general revenues is also progressive--at least on the expenditure side. Researchers debate whether our tax system is, in fact, progressive. Although a snapshot of American households' tax liabilities during one tax year may suggest a fairly flat tax system, life-cycle models tend to reveal a quite progressive fiscal system.[165]

At the same time, using general funds leads to opportunity costs--people's ability to use their money for private uses is restricted by the state's decision to make a public expenditure financed by general tax revenues. Behavioral distortions, i.e., changes in the behavior of taxpayers who alter their choices in response to the taxation of a particular activity, are a type of inefficiency. To give an example, if the income tax (the largest source of general revenues)[166] is increased to help finance a new benefit, there may be

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[163] Mandates that apply equally to all workers are familiarly referred to as "universal" mandates, as contrasted with group-specific "accommodation" mandates. Sharon Rabin-Margalioth cautions that the conceptual distinction between “universal” and “accommodation” mandates is overstated once we recognize that most “universal” mandates have considerable limitations on coverage (in terms of, e.g., employer size, status as an employee, minimal employee earnings). In addition, to the extent that a universal mandated benefit tends to be used more heavily by one group of workers than others, it functionally operates like an accommodation mandate. See Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates--Aren't They All the Same?* [hereinafter Rabin-Margalioth, *Universal Mandates*] 24 BERKELEY J. LAB. & EMP. L. 111, 128-33, 137-39 (2003).

[164] *Supra*, notes 24- 28 and accompanying text.

[165] *See* Jagadeesh Gokhale & Laurence J. Kotlikoff, Does it Pay to Work? (unpublished manuscript on file with the author, 2002) (aggregating all sources of revenues from payroll taxes and income taxes, and concluding that the American tax system is highly progressive).

[166] The proportion of general revenues that comes from income taxes is approximately 54%. BUDGET OF THE UNITED STATES (2003).

some workers currently on the margin between work and leisure who inefficiently exit (or enter) the workforce. But general revenue financing does not lead to distortions in the activity supported by any particular program: it does not, for example, give employers an incentive to avoid hiring or to reduce the wages of workers who would receive benefits if the program were fully funded by levies on payroll.[167] As such, it avoids the potential problem, identified by those who have studied the distributive effects of mandated employment benefits, of hurting those it is designed to help.

Let me briefly highlight the contrast between the cost-shifting analysis I have just conducted for an employer-paid mandated benefit and what we would expect with a scheme that is financed using general tax revenues. Suppose that employers were reimbursed by the government out of general revenues for the full costs of providing a mandated benefit. An individual employer's demand for labor in such case would be unaffected by the mandate (the demand curve in Figure 1 would remain fixed at $\mathbf{D_0}$). Thus although the supply curve would shift depending on how much workers valued the benefit, there would be no countervailing pressure on demand as a result of the cost to the employer of providing it.[168] The effect would be that wages would not fall to the same extent as they would if employers had to provide the benefit using firm revenues.[169]

(b) Financing Family Leave

Family leave benefits should be financed in a manner that spreads costs across a group broader than the workers who will tend to use it--most significantly, female workers with children. For this reason, I do not favor a personal account system, which allocates costs to program beneficiaries. A payroll tax, although it may nominally tax employers, tends to be shifted to workers, and in some cases to the specific workers who benefit directly from the program. As I will explain in this section, this would likely be the case for a family leave benefit. If our goal is to spread the costs of a workplace benefit, the use of general revenues is best able to do so.

(i) The Costs of Family Leave Benefits

Providing workers with job-protected (unpaid) leave imposes several monetary costs on employers. First, despite relief from wage obligations, employers may still pay some direct compensation costs. Although not all employers provide health insurance coverage, those that do have been estimated to pay an average of about $250 per year for each employee taking leave to continue health insurance provision for the worker and the

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[167] The income tax, which supplies a good deal of general revenues, does have some distortionary effects. Any increase in income tax will affect the work-leisure trade-off for some individuals. But this is not the same as a tax that dampens the specific activity one is seeking to encourage.

[168] Note also that under general revenue financing it becomes more difficult to determine whether the mandate is efficient. Under an employer funded mandate, all you have to look at is whether the equilibrium quantity of labor goes up or down. Here, it will go up regardless of whether the mandate is efficient. It will go up by more, however, if the mandate is efficiency enhancing.

[169] Note that relative elasticities of supply and demand would also affect wages, although this phenomenon would not depend on the source of revenue financing. Thus, if supply increased but demand did not, wages would fall under any scheme.

worker's family.[170] In addition, the employer bears several indirect costs that are difficult to monetize precisely. As mentioned earlier, employees who take leave will experience some depreciation of their human capital over time, possibly requiring the employer to invest in retraining them upon return. For leaves of short duration (such as the twelve week maximum under the FMLA) the costs of human capital depreciation are likely to be negligibly small.[171] For leaves of longer duration, however, human capital depreciation might become an important cost consideration. Re-organizing the workplace in the leave-taker's absence is another cost. The most common employer solutions for covering the work responsibilities of the leave-taking employee are temporarily assigning work to other employees (which involves administrative costs and may sap resources in other areas of production), and hiring temporary replacements (which involves both hiring and training costs).[172] In the Department of Labor's 2000 survey, most U.S. employers covered by the FMLA reported no noticeable impact of FMLA compliance on their establishments' productivity, profitability, and growth.[173] These reports may understate the actual costs of job-protected leave, however, given that many establishments covered by the FMLA already had policies in place under state law or voluntarily.

Employers also enjoy some offsetting monetary benefits of providing unpaid leave. Although the employer will incur costs of reorganization as described above, at least some (and possibly much or all) of these costs will be offset by salary savings during the leave-taker's absence. Additionally, to the extent job-protected leave reduces employee turnover, the employer saves on costs of hiring and training permanent replacements. The 1990 U.S. Small Business Administration Employer Survey estimated that it takes an average of 2.5 weeks to replace a terminated employee and that the termination costs averaged at least $1,100.[174] The employer will save on these costs if a leave policy increases the likelihood of a leave-taking employee's return. Employers may also benefit from improved worker morale (which would presumably translate into increased productivity).[175] Ultimately, taking both costs and benefits into account, it is

[170] Waldfogel, *Impact of the FMLA*, *supra* note 208 at 283 (1993 dollars).

[171] Dorothea Alewell & Kerstin Pull, *An International Assessment of Maternity Leave Legislation*, unpublished manuscript on file with the author, 2002, at 4.

[172] See U.S. DEPARTMENT OF LABOR, BALANCING THE NEEDS, *supra* note 4 at Tbl. 6.3 (in 2000, 98% of FMLA-covered establishments temporarily assigned work to other employees, and 41% hired temporary replacement workers). Other strategies include leaving the work for leave-takers when they return, and having leave-taking employees continue some work while on leave.

[173] *Id.*, at Tbl. 6.5 (77% of establishments reported no noticeable effect of FMLA compliance on productivity, 88% reported no noticeable effect on profitability, and 88% reported no noticeable effect on growth).

[174] Arindrajit "Arin" Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits*, June 19, 2002, at 42, *available at* www.laborproject.org/publications/research/dube.pdf (estimates are larger for large businesses).

[175] Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RIGHTS AND EMPLOYMENT POL'Y J. 273, 290 (2001). Note that there could also be a loss of morale on the part of employees forced to take up the slack when co-workers take leave, but recent employee survey data suggests that this has not been a significant problem in the first decade of the FMLA. *See* U.S. DEPARTMENT OF LABOR, BALANCING THE NEEDS, *supra* note 4 at Tbl. 6.5 (in 2000, only 11% of covered establishments reported negative effects, 24% reported positive effects, and 65% reported no noticeable effects of FMLA compliance on employee morale).

difficult to know (and a point of some contention) to what extent unpaid leave actually imposes net "disruption costs" on employers.

The provision of wage replacement, of course, introduces distinct costs on top of the potential disruption costs discussed above. First there is the actual cost of replacing workers' wages. Any estimate of the monetary costs of wage replacement would necessarily depend on the generosity--coverage, duration, percentage wage replacement, benefit ceilings, etc.--of the program. Thus, for example, the program might cover half the workforce, providing 50% wage replacement for six weeks, or it might cover 80% of the workforce, providing 100% wage replacement for six months. Clearly there would be a wide cost difference between various options, and thus it is difficult to throw out a "typical" estimate of the benefit expenditures.

Another factor is that availability of the paid benefit would change current behavior. It would be inadequate simply to multiply the monetary costs of providing a worker with a given level of wage replacement by the number of workers who currently take family leaves. This is because the addition of wage replacement to existing unpaid leave benefits would likely increase the number of workers who take leaves as well as the duration of leaves. In addition to expecting some workers who previously lacked any paid leave benefits to now take family leaves, we would expect some measure of benefit substitution: in the absence of paid family leave benefits, some employers currently allow workers to use vacations days, sick leave, or personal days to receive pay during family emergencies.[176] For these workers, the availability of paid family leave will free up benefits they previously used to finance family leave so they can be used for their designated purposes (e.g., to take a vacation).[177] On the other side of the equation, worker turnover should decline further still compared with unpaid leave, with attendant savings for employers.

The discussion thus far has focused on potential costs and benefits in the workplace. Some of these costs and benefits would intrinsically redound to the employer, regardless of how the program were financed. In addition, we could expect some fiscal savings to the state. Approximately 11% of those on unpaid leave, and --perhaps surprisingly-- 5% of those who receive at least partially paid leave, end up on some form of public assistance.[178] The availability of paid leave benefits would reduce these workers' reliance on public assistance. Health benefits to children, the elderly, and spouses who receive care from leave-takers would presumably also translate into some measure of fiscal savings to the state. Finally, if paid leave programs have the predicted effect of encouraging stronger workforce attachment on the part of women, by reducing

[176] Dube & Kaplan, *supra* note 174, at 23-24.
[177] In fact, we may see less of this than one might initially think: if family leave benefits are less generous at 50 - 60% wage replacement than vacation days at 100% wage replacement, some workers may still opt to take the vacation days, forgoing their right to collect the family leave benefit in order to collect full pay. *Id*., at 24.
[178] Dube & Kaplan, *supra* note 174 at 44. *See also* U.S. DEPARTMENT OF LABOR, BALANCING THE NEEDS, *supra* note 4 at Tbl. 4.8 (reporting that in 2000 8.7% of leave-takers who received less than full pay--including no pay--went on public assistance to cover their lost wages).

quits and encouraging new entrants, governments will be able to collect more income tax revenues.

(ii) The Problem of Cost-Shifting.

We would predict that the unpaid leave benefit provided by the FMLA, while not limited to women, acts like an "accommodation" mandate because it is in fact more likely to be utilized by women of childbearing age than by other workers.[179] This poses a risk that the costs of the program might ultimately fall on these workers. As a result of the disparate costs of accommodation, the demand curve for workers in the accommodated group will shift downward relative to the demand curve for other workers. On the supply side of the equation, because only accommodated workers receive the benefit, they will value it more highly, on average, than other workers. Accommodated workers will be willing to supply more labor at a given wage than other workers (their supply curve will shift downward relative to the supply curve of other workers).[180] Assuming wages and/or employment can adjust freely, then, it will reduce accommodated workers' relative wages, even as it may increase their relative employment levels. As in the discussion in Part III (C) (a) (ii) above, which assumed universally-applicable mandates, efficiency will depend on how much the workers who pay for the benefit value it relative to its cost.

If wages and/or employment cannot adjust freely, though, we may find redistribution to the accommodated workers. A variety of institutional barriers--legal rules and workplace norms, for example--may prevent relative wages and employment levels from shifting in response to a costly mandate.[181] Christine Jolls elaborates on the importance of anti-discrimination laws in this regard.[182] In many instances, the targeted beneficiaries of accommodation mandates are also protected by anti-discrimination laws. If anti-discrimination laws are effective, they will prevent wage or hiring discrimination between the accommodated or protected group (“disadvantaged” group, to use Jolls’ terminology) and "non-disadvantaged" workers who are not protected by the mandate.[183] As such, the costs of the mandate will be shifted to non-disadvantaged workers.[184] If anti-discrimination laws--either wage restrictions or hiring restrictions-- are not binding, however, we would expect a different outcome. If wage restrictions are binding, but hiring restrictions are not, members of the accommodated group will bear the costs of the accommodation mandate in the form of reduced employment.[185] If employers are free to wage discriminate, the situation essentially reverts to what Summers predicted, with workers who use the benefit paying for it in the form of lower wages.[186]

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[179] Jolls, *supra* note 162 at 290 (analyzing the cost-shifting likely to occur -under the FMLA); Rabin-Margalioth, *Universal Mandates*, *supra* note 163 at 152.
[180] Jolls, *supra* note 162 at 241-42.
[181] Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 623, 626 (1994) [hereinafter Gruber, *Maternity Benefits*].
[182] Jolls, *supra* note 162.
[183] *Id*., at 240-54.
[184] This is true even when the cost of the mandate exceeds the value of the mandate to its beneficiaries. Certain caveats apply, e.g., the proportion of the workforce that is non-disadvantaged must not be too small. *Id*. at 249.
[185] *Id*., at 255-57.
[186] *Supra* notes 160- 162 and accompanying text.

Jolls argues that even where antidiscrimination laws are in place to prevent gender wage discrimination, gendered occupational segregation will have a tendency to dampen their effect.[187] Where occupational segregation exists, the cost of providing accommodations to women can be shifted to workers in female-dominated industries in the form of reduced wages across-the-board.[188] In the absence of male employees working at the same jobs, proof of wage discrimination is unlikely or impossible. Jolls makes just this prediction with respect to unpaid leave under the FMLA. She speculates, though, that because the costs of providing unpaid leave are difficult to monetize, an employer will tend in the short run to shift the costs to workers in the form of reduced employment rather than reduced wages, or perhaps won't shift the costs at all, until the actual costs of giving unpaid leaves become more quantifiable.[189]

Another phenomenon that may shift the costs of accommodation mandates disproportionately to women is the more general tendency of mandated benefits, accommodation or otherwise, to entrench labor market segmentation.[190] Labor market segmentation is the division of labor markets into good, "primary" jobs that are buffered from ordinary market competition, and less desirable, "secondary" jobs subject to competitive market conditions.[191] Women tend to be disproportionately employed in the secondary sector.[192] Where benefits have a fixed cost (as in the case of unpaid family leave benefits), the cost of providing them depends on the number of employees. This gives employers an incentive to demand more hours of work from incumbent (primary) workers rather than hiring more workers to primary jobs. In addition, because fixed-cost benefits increase lower-wage workers' compensation relatively more than higher-paid workers', employers will tend to substitute away from lower-wage and towards higher-paid workers—except for those low-wage workers who fall below the threshold for benefits eligibility. Employers are likely to increase hiring of exempt workers, for whom providing the benefit will not be required. The effect is a market in which workers covered by the mandate, especially those with higher wages, are working longer hours, while other workers are crowded into the exempt sector. Even with variable-cost mandates, generally perceived as distributionally more equitable (because workers who earn more are taxed more and receive higher benefits), employers may still shift costs disproportionately to secondary labor market workers in an effort to avoid cutting

[187] Jolls, *supra* note 162 at 284. Note that women's relative employment levels may or may not also go down according to this model: if the value of the mandated benefit exceeds its cost, women's relative employment levels will rise, and vice-versa. Other factors include the ratio of disadvantaged to nondisadvantaged workers in a market, and the degree to which the costs of the mandate can be monetized. *Supra* at 263-72

[188] Jolls notes that accommodation mandates in integrated markets might even increase occupational segregation, as nondisadvantaged workers who bear the costs of the mandates exit those markets. This would, in turn, further erode the redistributive effect of the mandates. *Id*. at 271.

[189] *Id*. at 269-70, 291.

[190] My discussion draws generally on DANIEL HAMERMESH, LABOR DEMAND 46-55 (1993); Olivia S. Mitchell, *The Effects of Mandating Benefits Packages*, *in* RESEARCH IN LABOR ECONOMICS 304-305 (Laurie J. Bassi, David L. Crawford and Ronald J. Ehrenberg eds., 1990); Rabin-Margalioth, *Cross-Employee Redistribution*, *supra* note 162 at 328-43.

[191] I discuss the contours of this model elsewhere in detail: Lester, *Careers*, *supra* note 28 at 105-110.

[192] *Id*., at 104.

compensation of incumbent primary employees. Uncovered and unemployed workers bear the costs of the mandate, serving as a discipline device for workers in the internal labor market.[193]

My focus in the above discussion has been on unpaid family leave benefits. It assumes that the employer bears *some* net costs in connection with unpaid job-protected leave, although as mentioned earlier, whether this is so is an empirical question. If employers do nominally bear a cost in connection with unpaid leave benefits, there are a number of reasons to believe they may shift some or all of those costs to women workers.

Let's add a wage replacement component. If paid leave were funded by requiring the employer to pay the cost of wage replacement for each employee who takes a family leave, the analysis would look very similar to the analysis I have just summarized for unpaid leave. Although the cost may vary depending on the worker (the amount of wage replacement required might depend on a worker's pre-leave wages), it would still be taken up disproportionately by female workers of childbearing age. The cost of wage replacement would be "attached" to individual leave-takers who fall disproportionately into a particular demographic group, and employers would therefore reduce their demand for workers in this group.

My support for a program of paid leave, though, hinges on the empirical assumption that by making paid work relatively more attractive compared to the alternatives, it will better enable women to remain attached to or enter into the workforce despite competing caregiving obligations. Financing the program in a way that leads employers to avoid hiring women in their childbearing years, or reduce their wages to a degree that discourages their workforce participation, risks thwarting the very goal I make central to my defense of paid family leave. This insight speaks directly to arguments that would favor some form of cost-internalization by program beneficiaries. My objection to full cost-internalization is not only a normative one, but also a practical one. The very *existence* of the social benefit I espouse may depend on who pays. As I will discuss below, empirical evidence in the specific context of paid leave suggests that spreading the costs of a paid family leave program through at least partial use of general revenue financing may help avoid this problem.

Many workplace benefits, of course are financed through a tax on the wages of *all* workers. Let me illustrate how a payroll tax on all workers' wages would fit into the cost-shifting analysis we have been using. Let's assume first that the employer pays the tax according to its payroll expenditures. Assume also, for simplicity's sake, no restrictions on wage and employment adjustments. To the employer, there will be no cost difference-- aside from the fixed disruption costs of leave--between workers who take up the benefit and those who do not because the employer must pay taxes per worker-hour whether or not any particular worker uses the benefit.[194] The employer’s demand for

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[193] Rabin-Margalioth, *id*., at 341-43.

[194] This assumes no experience rating. I will have more to say on this, and why it may or may not be important to the context of family leave, later.

labor will fall by an amount equal to the total taxes on payroll, shifting the demand curve downward.

On the supply side, workers would be willing to work more in response to the benefit, shifting their supply curve downward. But what if different workers value the benefit differently? Workers who intend to have children, for example, presumably value wage replacement benefits for family leave more highly on average than other workers do.[195] These workers will be willing to supply more labor at the going wage in response to the addition of the benefit. Other workers will place lower value on the benefit (let's assume zero, for simplicity's sake), and therefore will supply less labor at the going wage because now some portion of the wage/benefits package will be worthless to them. So long as the zero-valuing workers do not exit the labor force entirely, the net effect will likely be redistribution from lower to higher-valuing workers. Note that there is still no wealth transfer from employers to workers-- only redistribution between groups of workers.

This analysis would not in theory change if the tax were nominally imposed on all employees, rather than on employers. Now, the tax would not affect the employer’s demand for labor because, a fortiori, there would be no cost difference between workers. On the supply side, workers across the board would now directly pay the tax in proportion to their earnings. Higher-valuing workers would still value the benefit by the same amount, and would be willing to supply the same additional amount of labor in response to introduction of the benefit as in the earlier scenario. Others would still value it at zero and perhaps some on the margin would drop out of the labor market. In sum, theory would predict the same redistribution between groups of workers regardless of whether the tax were statutorily imposed on employers or workers. Note that if a ceiling were imposed on the tax base, as is often the case with payroll taxes, there may be (regressive) redistribution between workers, but it would not hinge on predicted uptake of the benefit.[196]

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[195] I am simplifying here for purposes of exposition, when in fact valuation issues are actually more complex than uptake (i.e., who is likely to use the benefit). Not only women of childbearing age, but also men whose spouses or partners are covered through their own employment by family leave benefits will place a significant value on the social provision of family leave benefits even if they are not themselves covered or not intend to take leave: the ability of their partner to take a subsidized leave is effectively a subsidy to the whole family. Note also that although workers who do not intend to have children may place no value on the ability to take a maternity or parental leave, they may highly value the ability to take leave to care for an ill spouse or disabled elder. Thus we would predict a more even valuation of family leave benefits across demographic groups than we would of actual uptake.

[196] There may be some cost differential between workers due to the fact that payroll taxes tend to have a ceiling. Once the tax ceiling reached, the tax behaves like a fixed-cost benefit: the relative tax paid per worker begins to diverge for workers whose income exceeds the ceiling. High wage workers are, in essence, a better value, and as I explained earlier when discussing fixed-cost benefits, the employer may have an incentive to work them more hours rather than hire new workers, thus there is distribution from low wage to high wage workers. See discussion *supra* notes 190 - 193. This is part of a more general problem with the regressivity of payroll taxes. Payroll taxes are regressive because of the tendency towards ceilings on tax bases and because at the high end, wages tend to fall as a proportion of total income. MUSGRAVE & MUSGRAVE, *supra* note 157 at 260.

In practice, though, if employers nominally bear the tax, they may not shift costs to workers immediately or fully. Abrupt wage adjustments may undermine employee morale, and thus the employer may phase in wage reductions as it hires future employees. Also, employers may find it difficult to shift the full costs of the tax to employees if it will undermine their ability to attract workers who do not stand to gain as much from the leave policy. Thus despite theoretical predictions, employers and workers may partly share, at least temporarily but perhaps also in the long run, the cost of a mandate financed by a tax nominally imposed on employers.

Finally, I mentioned earlier that there may be an interaction between the availability of wage replacement benefits and the 'disruption costs' of the unpaid job-protection aspect of the benefit. This interaction may in turn affect the cost-shifting dynamic. I mentioned earlier, for example, that for workers who would not have quit their jobs before receiving the benefit, wage replacement will tend to increase the duration of leaves. At the same time, wage replacement will prevent some workers from quitting their jobs, thus reducing employers' costs of turnover relative to unpaid leave. Whether wage replacement leads to a net increase or decrease in the disruption costs of leave would depend on the relative size of these two factors. It is possible, then, that even if the state tries to reduce discrimination against "high uptake" demographic groups in a paid leave program by using a financing mechanism that decouples the cost of wage replacement benefits from workforce composition (e.g., by using general revenues), some version of the problem will still arise indirectly. If, on the other hand, paid leave reduces turnover costs by an amount that exceeds the added disruption costs of lengthier leaves, it will reduce the cost differential between females of childbearing age and other employees. This would mean that despite the increased overall costs associated with wage replacement, adding wage replacement might *reduce* the relative cost burden shifted to young female workers compared to an unpaid leave program.

To summarize, a financing method that uses a tax on worker-hours, or wages, does not distribute wealth very effectively from employers to workers, at least in the long run. It might, however, distribute wealth between groups of workers, with higher-valuing workers enjoying a net distributive transfer from lower-valuing workers. Still, under payroll tax financing, the universe of persons between whom redistribution occurs is limited mainly to workers. Under general revenue financing, by contrast, at least with respect to the wage replacement portion of the cost of paid leave, the employer has no incentive to shift the costs of the program to women in their childbearing years. The upshot of this distinction is that the costs of providing the benefit would be shared broadly across society, rather than being borne nominally by employers (and shifted to workers) or borne directly by workers. Some component of general revenue financing may not be *necessary* to enable a paid leave program to achieve its potential of facilitating women's workforce attachment; a cross-the board payroll tax on employers or workers might also spread costs sufficiently (between workers) to advance this end. Nevertheless, I have defended paid leave as a mechanism to facilitate a certain kind of freedom for women, a concern that extends beyond the population of people who work. As such, there is a moral case for extending the costs beyond workers, to a broader base of society. As such, at least some element of general revenue financing is desirable.

D. Empirical Findings

Before states passed (unpaid) leave statutes, mostly in the 1980s, full-time working mothers followed a pattern we might predict: they took relatively short leaves from work. Klerman and Liebowitz found that before passage of state and federal laws granting job-protected parental leaves, more than 60% of mothers working full-time one year before the birth of a child returned to their prepregnancy jobs (either part-time or full-time) within six months of the birth.[197] This was only about 20% lower than the job continuity of nonmothers during the same period.[198]

This raises the question whether, if increasing women's workforce attachment is the goal, the passage of family leave policies would make enough difference to be worthwhile.[199] The figures cited above, however, mask some important nuances. First, as already noted, the objectives of family leave statutes is not solely to increase workforce attachment, but to strike an optimal balance between *facilitating* leave-taking (assuming it is a good thing to allow workers greater flexibility to take family leaves from work), and increasing women's workforce attachment. Second, the above study did not try to capture the prevalence of women remaining out of the workforce or working part-time because pre statutory leave policies were inadequate to accommodate their need to reconcile family and work. Thus a family leave statute achieving the normative goals articulated would ideally produce some combination of increased leave-taking, reduced quits, and increased entry into the workforce that in the aggregate would represent improved female workforce attachment.

In a subsequent study, Klerman & Liebowitz compared female labor force behavior before and after passage of state maternity leave legislation in the 1980s.[200] The state laws provided for unpaid leave of between 4 and 17 weeks, with an average of about 13 weeks' leave, to workers in firms that met a minimum size requirement. They found these laws had positive but insignificant effects on new mothers' employment levels (working or on leave), leave taking, or work levels during the first year after birth of a child.[201] Han and Waldfogel, using a more recent population sample that was also able to incorporate the effects of the FMLA, found similarly modest effects.[202] Although the share of new parents with some rights to job-protected leave (either state or federal) increased markedly between 1991 and 1999,[203] these laws had no significant effect on leave-taking or duration of leaves taken in the first three months by mothers eligible for

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[197] Klerman & Leibowitz, *Job Continuity*, *supra* note 150 at 151.
[198] *Id*., at 152.
[199] The authors of the study raised just this point. *Id*.
[200] Klerman & Leibowitz, *State Maternity Leave*, *supra* note 147.
[201] *Id*., at 81, 82, Tbl. 3.5. The authors acknowledge that they do not attempt to isolate the cost-shifting effects of employer mandates. *Supra* at 73.
[202] Wen-Jui Han and Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 DEMOGRAPHY 191 (2003).
[203] Between 1991 and 1999, the share of new parents with unpaid parental leave rights increased from between 15 and 25% to between 50 and 65%. *Id*., Fig. 1.

benefits, or by fathers.[204] The laws did, however, increase both the likelihood and duration of leaves when the sample was expanded to include mothers who did not actually meet the work-hours requirements.[205] This suggests some spill-over effects: perhaps as the laws became more generous, so too did firms covered by the laws, extending benefits even to workers they were not required to cover. Despite the possible spill-over effects observed, the authors concluded that in the absence of wage replacement, parental leave laws may do little to alter the status quo.[206] Two studies of the FMLA alone found moderately positive effects on women's workforce attachment. One tracked mothers for a full two years after birth, finding that the proportion of mothers (regardless of eligibility) returning to work within that time-frame was higher after passage of the FMLA than before, that on average mothers returned more than 4 months *sooner* than before, and that they were more likely to return to their former employer.[207] Another study found that the FMLA had no significant effect on the relative employment levels of women overall, but did increase employment of women with children under the age of one.[208] Taken as a whole, these studies suggest that state and federal unpaid leave laws have led to modest increases in maternal leave-taking immediately post-birth, may hasten mothers' return to the workforce in the longer run, and may boost employment levels of at least some women.[209]

As mentioned, it is possible that existing state and federal statutes' potential to affect working mothers' behavior is dampened by the lack of wage replacement-- if workers can't afford to take leave, then the job-protection benefit will have only a modest impact on their decisions. An American study by Jutta Joesch suggests that adding a wage replacement component intensifies the effects we see with unpaid leave.[210] Joesch found that women with access to paid, as compared to unpaid, leave were more likely to

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[204] Id., at 196 Tbl. 1, 197 Tbl. 2. These statistics controlled for state fixed effects, i.e., other changes in states that might have led to increased leave taking during that time.

[205] *Id*. at 196, Tbl. 1.

[206] *Id*., at 198. See also Klerman & Leibowitz, *State Maternity Leave*, *supra* note 147 at 66. Some workers will have used sick leave and other benefits to piece together some partial wage replacement, but as the statutes did not mandate any wage replacement component, some workers will have been without pay for all or a significant portion of the leave.

[207] Sandra L. Hofferth & Sally C. Curtin, *The Impact of Parental Leave on Maternal Return to Work After Childbirth in the United States*, OECD Social, Employment and Migration Working Paper Series, #7 at 13, Tbl. 1, 16, Tbl. 3 (2003). This effect, perhaps not surprisingly, disappeared if the sample was limited to the roughly half of states that had a maternity leave statute in place prior to passage of the FMLA.

[208] Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS AND MGMT. 281, 295-96 (1999) [hereinafter Waldfogel, *Impact of the FMLA*] (finding no change in women's employment overall between 1992 and 1995, but 7.6 percent increase in employment with children under 1 in 1995).

[209] Another study also found positive effects of leave policies on recent mothers' likelihood of returning to their former employer, but is less helpful for present purposes because it did not distinguish between paid and unpaid, or publicly versus privately-based coverage. Jane Waldfogel, Yoshio Higuchi & Masahiro Abe, *Maternity Leave Policies and Women's Employment After Childbirth: Evidence From United States, Britain and Japan*, 12 J. POPUL. ECON. 523 (1999) [hereinafter, Waldfogel *et. al*, *U.S. Britain and Japan*] (finding that after controlling for age, education, and first versus later birth, having maternity leave coverage substantially increases the probability that a woman will return to her prior employer within 12 months following childbirth--16 % in Britain, 23 % in the U.S., and 76 % in Japan).

[210] Joesch, *supra* note 153.

take time off from work during the birth month.[211] Simultaneously, though, mothers with paid leave worked longer into their pregnancy and returned to work sooner once their infant was two months old, all else being equal (e.g., education level, race, age, marital status, etc.).[212] These data are consistent with theoretical predictions: in the absence of wage replacement, mothers are more likely to make "all-or-nothing" choices: either return to work immediately, or quit or take a very extended leave (one year or more).[213] By inducing some women who otherwise would have quit or taken a lengthy leave, possibly switching jobs, to remain with their employer and take a shorter, but compensated leave, wage replacement enhances these workers' attachment. The researchers also found that among women with access to paid leave, the amount of leave available affected how much time they took: with more leave available, they took longer leaves, although this increase in interruption leveled off over time.[214] Therefore, if increasing workforce attachment is one's goal, there may be a limit to how generous a paid leave policy ought to be. Perhaps consistent with this, a study of social attitudes in countries with family leave benefits of varying generosity found that countries with extremely generous parental leave policies (Germany, with more than 18 months at full pay, and Austria, with more than one year leave, though with only a portion at full pay) tended to have the most "traditional" attitudes about working mothers.[215]

Studies of paid maternity leave policies in Europe--where government mandates mean that selection bias is not an issue--are helpful here. Although these studies do not compare paid and unpaid leave policies, they are able to tell us something about the long-term effects of paid leave policies on workforce composition. Christopher Ruhm studied nine European countries over a twenty year period.[216] During that time, government mandated leave entitlements grew from an average of 10 to an average of 33 weeks job-protected leave, and from an average of 7 to an average of 22 weeks full pay.[217] Ruhm found these protections associated with a 3 to 4 percent increase in women's employment levels.[218] The increase was substantial even adjusting for the likelihood that some

[211] *Id*., at 1016-17.
[212] *Id*., at 1017, Tbl. 4. The authors caution that unobserved differences between the groups may explain some of the variance. For example, women who want to return to work sooner may tend to select employers that offer paid leave policies, and vice-versa.
[213] *Id*. at 1018- 19.
[214] *Id*., at 1017.
[215] James W. Albrecht, Per Anders Eden & Susan B. Vroman, *A Cross-Country Comparison of Attitudes Towards Mothers Working and their Actual Labor Market Experience*, 14 LABOUR 591, 597, Tbl. 3 (2000). The authors qualify their conjecture to this effect because the direction of causality is uncertain. I will also note that the attitudes polled were with respect to either part-time or full-time work, without distinction. This leaves open the possibility that some societies have positive attitudes towards mothers working part-time but negative attitudes about their working full-time, a posture that I would argue is still fairly traditional.
[216] Christopher Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q. J. ECON 285 (1998).
[217] *Id*., at 295.
[218] *Id*., at 296, Fig. Ia, 304-305, Tbl. IV (finding a 3.1 % increase in women's employment-to-population ratio for policies permitting up to 20 weeks' paid leave, as compared with no leave, and a 4.2 % increase for policies permitting up to 40 weeks' paid leave). The analysis controlled for state fixed effects, i.e., other changes in states (such as the growth of subsidized childcare) that might have increased women's

women who would not otherwise work will temporarily enter the workforce solely to trigger benefit eligibility,[219] and the likelihood that some women, while on parental leave, are counted as "employed" though they are physically absent from work.[220] Ruhm also analyzed the effects of these laws on the employment levels of women during their childbearing years as compared with older women and found the effects to be concentrated in the younger cohort: for women aged 25-34 years, the legislation increased employment-to-population ratios by around 7-9% compared with the 3-4% increase for all women.[221] Similarly, Winegarden & Bracy found that as the generosity of public paid leave programs (as measured by duration of leave available) in 17 OECD countries increased over a thirty year period, so too did the workforce participation of women in their childbearing years.[222] An important caveat in looking at the European studies is that the costs of benefits are paid for substantially by the government. This means that although workers enjoy the additional benefit of wage replacement—and thus in theory will increase their labor supply and attachment as discussed earlier—the tax these policies impose on employers is mainly associated with the disruption costs of leave—akin to the cost of an unpaid leave.[223] This means that we would not, in theory, expect the level of countervailing reduction in demand that we would anticipate if employers were required to finance the wage replacement benefit themselves.

A recent OECD analysis of family leave policies also concludes that paid family leave policies increase women's workforce participation.[224] The report grapples with the issue of causality, pointing out that in countries where women are more present in employment, they may be better positioned to press for benefits, making the causality run from increased attachment to stronger policies, rather than vice-versa.[225] Yet the report is skeptical that this alone explains women's employment growth in countries with strong policies, pointing out that historically, many countries that currently have high levels of female workforce participation, in particular the Nordic countries, were among the first to introduce work-family reconciliation policies, prominently including paid family leave programs, as part of a deliberate effort to increase female employment levels.[226]

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employment during that time, although Ruhm acknowledges that it might not have captured them fully, meaning these numbers may slightly overstate the employment increase. *Supra*, at 311.

[219] *Id*., at 312-13 (suggesting that this phenomenon might account for anywhere between a 0.4 and 1.0 percent increase in women’s employment). Note, importantly, that some of these "opportunistic entrants" will ultimately decide to remain in the workforce, offsetting at least some of this discount, but Ruhm does not attempt to measure the latter phenomenon.

[220] *Id*. (suggesting that this phenomenon may explain between .25 and .5 percent of the increase in women's employment associated with longer entitlements, but probably not affect the numbers for shorter entitlements).

[221] *Id*., at 310-311, Tbl. VII.

[222] *See* Winegarden & Bracy, *supra* note 68 at 1029, Tbl. III (estimated marginal effect of an added week of leave ranges from about 0.60 to 0.75 percentage points in the labor force participation rate for women age 20-34, with significance rates that are uniformly very high). The authors found the results robust to tests designed to detect the possibility of reverse causation. *Supra* at 1030.

[223] Ruhm, *supra* note 216 at 289-90.

[224] *Supra* note 127 at 153.

[225] *Id*.

[226] *Id*.

Paid leave policies might also shift costs to women in the form of reduced wages. The foregoing discussion of workforce attachment implies that whatever wage effects might exist, they are not sufficiently burdensome to actually deter net workforce participation, at least in European countries where (at least partial) general revenue financing is an important component of program design. Still, it is useful to look at the question directly.

Earlier studies suggested that maternity leave has a positive effect on women's wages. Jane Waldfogel, analyzing the labor market outcomes of two cohorts of young American women observed in 1980 and 1991, found that women who were covered by paid or unpaid maternity leave policies (the study did not try to distinguish between them) and returned to their pre-birth employer had higher subsequent wages.[227] Later studies found similar results for women in Britain and Japan (both of which have paid maternity leave statutes).[228] Although part of the wage difference was due to the fact that women with coverage had higher levels of education and pay, and worked for larger and unionized firms, Waldfogel and her co-authors argued that the main reason was that coverage increased the likelihood that women would return to work for their previous employer after childbirth.[229] As we have seen, returning to work for one's previous employer after taking time off has the advantage of allowing the worker to exploit firm-specific human capital, retain seniority, and re-learn old skills rather than new skills.[230]

Studies not specifically limited to covered mothers who returned to their previous employers are more equivocal. One American study found that for mothers who had worked during at least the final three months of their pregnancy and returned to the workforce within two years post-birth, living in a state that had a maternity leave policy in place at the time of giving birth had a significant negative effect on earnings.[231] The same study of "returners" found that passage of the FMLA, as well, negatively affected the change in pre-birth to post-birth earnings.[232] Another study, analyzing the effects of the FMLA on the relative wages of full-time mothers, and full-time working women in their childbearing years, found no significant wage effects.[233] Both studies looked only at wage effects in the first two years after passage of the FMLA, thus leaving unresolved the question of the longer-run wage effects of the FMLA's mandate. Hofferth & Curtin, for their part, were surprised by the negative wage effects they observed and predicted a longer-run reversal given their other findings discussed earlier that the FMLA hastened

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[227] Jane Waldfogel, *Working Mothers Then and Now: A Cross-Cohort Analysis of the Effects of Maternity Leave on Women's Pay*, *in* GENDER AND FAMILY ISSUES IN THE WORKPLACE 92 (Blau & Ehrenberg, *eds.*), *supra* note 69 at 115-123, Tbl. 4.6.
[228] Waldfogel *et. al.*, *U.S., Britain and Japan*, supra note 209; Waldfogel, *The Family Gap in the U.S. and Britain*, *supra* note 132.
[229] Waldfogel, *Understanding the Family Gap*, *supra* note 130 at 151.
[230] Baum, *supra* note 135. *See also* Hofferth & Curtin, *supra* note 207 at 18, Tbl. 4 (sampling working mothers who gave birth between 1984 and 1997, and finding that those who returned to the same employer within two years after having a child earned about $2.00 more pre hour than those who switched jobs).
[231] Hofferth & Curtin, *id*., at 18, Tbl. 4 (multivariate analysis in which the dependent variable was the gain in hourly earnings between birth and two years post-birth).
[232] *Id*.
[233] Waldfogel, *Impact of the FMLA, supra* note 208 at 296-99, Tbl. 6 (comparison groups were men and women aged 46-60).

mothers' return to work and increased their likelihood of returning to the same employer.[234]

The foregoing discussion focuses on the wage effects of paid leave policies on women in their childbearing years. Another question is what effect leave policies have on women's wages overall. Ruhm's twenty-year survey of European parental leave mandates, discussed earlier, examined this question.[235] Recall that in the period analyzed, entitlements grew from an average of 10 to an average of 33 weeks leave, and from an average of 7 to an average of 22 weeks of full pay replacement.[236] The overall average wage replacement rate by the end of the period analyzed was about 80%.[237] Relatively short duration paid, job-protected leaves (10 weeks) had no consequence for women's wages, although leaves of longer duration (20-40 weeks) were associated with a 2-3% wage reduction.[238] Ruhm's study suggests that leave policies, at least those that permit shorter-duration leaves (somewhere between 10 and 20 weeks), can increase women's workforce participation without reducing their wages.[239] The absence of a wage effect suggests that either the costs to employers of short leaves are trivial, or that for shorter duration leaves, the positive wage effects of increased workforce attachment --and attachment to a particular employer--may offset any costs shifted to female workers.

A few caveats are important for interpreting Ruhm's findings. The first is, once again, that although maternity leave benefits in all European countries include wage replacement, general revenue financing covers most of their cost. This leads Ruhm to suggest that the main costs employers seek to shift in the countries he analyzed are the non-wage "disruption costs" of leave.[240] Thus, in theory, parents would enjoy the benefits of paid leave policies but face the risk of employer cost-shifting for only a minor portion of the full costs of the benefit. Ruhm also suggested factors that might explain the wage reductions he observed for lengthier leaves. One was that while policies increase the supply of female labor, demand for female labor might be relatively inelastic, resulting in a decrease in women's wages.[241] Another was that leaves of very lengthy duration might lead to a loss of work experience and depreciation of human capital that in turn depresses wages.[242] Unfortunately, neither this nor, to my knowledge,

[234] Hofferth & Curtin, *supra* note 207 and accompanying text.
[235] *Supra* note 218.
[236] *Id*., at 295.
[237] *Id*., at 307. In most programs, wage replacement starts out at or around 100%, and in later weeks levels off to a lower percentage.
[238] *Id*. at 303-307.
[239] See also my earlier discussion of Ruhm's study at *supra* notes 216 - 221.
[240] *Id*., at 289-90, 314.
[241] *Id*., at 314. See also Mitchell, *supra* note 190 at 312-13 (speculating as to downward wage pressure as a possible response to increased labor supply of women in response to the--at the time of here article, merely proposed--FMLA).
[242] *Id*., at 314-15. *See also* Jeanne Fagnani, *Parental Leave in France*, *in* PETER MOSS & FRED DEVIN, EDS., PARENTAL LEAVE: PROGRESS OR PITFALL? 79 (1999) (arguing France's policy of allowing three years' leave, taken overwhelmingly by women, is excessive because it leads to erosion of job skills and reinforces employer prejudice regarding women's work commitment); Waldfogel, *Understanding the Family* Gap, *supra* note 130 at 142 (suggesting that Germany's policy of permitting up to three years of paid maternity leave, including a period in which women are *prohibited* from returning to work, has increased the wage gap between women workers who are mothers and women workers who are not).

any other studies have tried to assess more precisely the "tipping point" at which further increasing the duration of available leave ceases to be attachment-enhancing and instead becomes attachment-undermining. This would be a useful direction for future research.

Another shortcoming of Ruhm's analysis--and indeed all of the studies I have found--is the lack of any systematic effort to analyze the influence of different paid leave financing mechanisms on wages and workforce participation. The studies reviewed above focus on either voluntary employer programs, unpaid leave laws, or government programs in which the cost of wage replacement is substantially paid for by the state. If employers were mandated to pay the cost of paid family leave entitlements, the effects on women's wages could be fairly dramatic. For example, Jonathan Gruber studied the effects of state laws prohibiting health insurers that provided hospital and medical benefits from excluding maternity-related expenses.[243] For employers, this added between $750 and $1000 (in 1990 dollars) to the cost of providing health insurance to married employees in their childbearing years.[244] Gruber found that married women of childbearing age paid for most of the costs of these mandates in the form of lowered wages.[245]

In summary, the aggregate empirical evidence suggests that family leave policies generally, and to a greater extent, paid family leave policies, have the potential to increase women's workforce participation. The duration of permissible leaves, however, as well as the financing mechanism, are likely to be important factors in achieving this outcome. At least for European (significantly state-funded) policies that permit leaves of less than one year, it appears that the lengthier the permissible leave, the greater the boost in women's workforce attachment, even though women's wages may start to fall beyond about five months' permissible leave. Future empirical research should try to tackle more directly and precisely two important predictions of the theoretical literature: that leaves of very long duration, as well as the absence of any component of general revenue financing, may eliminate or reduce the potential for paid family leave policies to increase women's workforce attachment.

IV. Implementing Paid Family Leave

The Bush administration's recent repeal of the BAA-UC and historical federal resistance to paid family leave programs make it seem likely that any legislative change in this direction is most likely to happen at the state level. Therefore, it is plausible that programs could take a variety of forms, some incorporated into existing state benefit programs, some created anew. For this reason, rather than craft a detailed proposal for a particular form of paid family leave program, it seems most helpful to suggest several core features I believe a paid leave program, in whatever form, ought to have. In this

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[243] Gruber, *Maternity Benefits*, *supra* note 181.
[244] *Id*., at 626, Tbl. 1.
[245] *Id*., at 630-31 tbl.3 (finding a 5.4% fall in the relative wages of 20-40 year old married women in states that passed these laws, as compared with changes in this cohort's wages in states that had not passed such laws).

final Part of the Article, I will describe five basic features I believe a paid leave program should have. I will then briefly discuss some examples of models that might be adopted for implementing a program of paid leave.

A. Financing

In the United States, social insurance programs have historically been financed using payroll taxes rather than general revenues.[246] All the major social insurance programs--social security, Medicare, federal long-term disability insurance, state temporary disability insurance, and unemployment insurance--are financed in whole or in large part through payroll taxes. Moreover, the trend is towards increasing reliance on the payroll tax.[247]

General tax revenues, either state or federal, are a common source of funding for social insurance programs outside of the United States. As mentioned, for example, all European Union countries have paid family leave programs financed at least partly by general revenues.[248] Reagan-era parental leave advocates who formulated early versions of the bill that would become the Family and Medical Leave Act of 1993 chose to omit wage replacement from their legislative agenda, believing that more incremental demands would have greater chance of success.[249] In the years of debate over pending federal legislation, sharp conservative resistance to the costs of *un*paid leave made introduction of a paid leave provision an increasingly remote possibility.[250] American families with children do receive some federal subsidies financed through general revenues in the form of tax credits. The Child and Dependent Care Tax Credit allows working families with children to deduct a percentage of child care expenses from federal taxes owed,[251] and the Earned Income Tax Credit, a refundable tax credit for low income

[246] For discussions of the historical origins of this practice, see Beth Stevens, *Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector, in* MARGARET WEIR, ANN SHOLA ORLOFF AND THEDA SKOCPOL, THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 123-148 (1988); MARIE GOTTSCHALK, THE SHADOW WELFARE STATE (2000); Frank R. Dobbin, *The Origins of Private Social Insurance: Public Policy and Fringe Benefits in America, 1920-1950*, 97 AM. J. SOCIOL. 1416 (1992).
[247] *See* Andrew Mitrusi and James Poterba, *The Distribution of Payroll and Income Tax Burdens*, 1979-1999, 53 NATIONAL TAX J. 765 (2000) (payroll taxes exceeded income taxes for 44 percent of families in 1979, and for two-thirds of families in 1999); Jonathan Gruber, *Payroll Taxation, Employer Mandates, and the Labor Market*, *in* WILLIAM T. ALPERT & STEPHEN A. WOODBURY EDS., EMPLOYEE BENEFITS AND LABOR MARKETS IN CANADA AND THE UNITED STATES 183-228 at 183 (2000) (noting a rise in the use of payroll taxes as a method of public finance, from 12.4 percent of federal revenues in 1960 to 38 percent in 1993).
[248] *See* Sheila B. Kamerman and Alfred J. Kahn, *Trends, Issues and Possible Lessons*, *in* SHEILA B. KAMERMAN AND ALFRED J. KAHN CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3s: POLICY INNOVATION IN EUROPE 201-224, 211-212 (1991) (listing numerous European countries in which family benefits are financed at least partly through general revenues); Ruhm, *supra* note 216 at 303-307 (same).
[249] *Id*., at 138.
[250] *See id*. at 134-56 (tracing the political evolution of the FMLA from the mid-1980s to its passage in 1993).
[251] The credit is available for families with children under 13, or a dependent of any age who is physically or mentally incapable of self-care. A spouse who is mentally or physically incapable of self-care also qualifies for the credit. The amount of an individual's credit is a percentage of work-related expenses, with the percentage declining as income rises. INTERNAL REVENUE SERVICE, DEPT. OF THE TREASURY,

working families, gives more generous credits to families with children.[252] Still, neither of these programs provides income replacement during family-related work interruptions. And the unusual path by which the BAA-UC ultimately came to pass--President Clinton's decision to bypass Congress by issuing an Executive Memorandum ordering the Secretary of Labor to propose regulations to expand UI for purposes of funding birth and adoption leaves--as well as the ultimate decision of the Bush administration to repeal the regulations, are clear indications that Congress remains unreceptive to funding parental leave, even through a payroll tax.[253]

At the same time, states may be more receptive than Congress to funding paid leave, and to doing so at least partly through general funds. In the wake of BAA-UC, many states considering paid leave programs looked beyond UI, with at least seven state legislatures considering bills for paid family leave that would be financed in part through direct general fund allocations[254] or state tax credits.[255] None of these bills has to date ripened into legislation, but it is not clear that their current stasis reflects resistance to the proposed method of financing, as opposed to resistance to the introduction of paid leave *per se* in times of fiscal restraint. (Bills proposing funded leave programs financed through payroll taxes are also stalled, California being the only state to have actually passed such legislation.)[256] In short, current fiscal retrenchment makes expansion of costly social programs unpopular regardless of financing method. But in future times of fiscal expansion, the possibility of tapping general funds to finance paid family leave may well be a live issue again, at least at the state level. At minimum, general revenue financing merits greater attention in contemporary debates than some commentators have suggested.[257]

PUBLICATION 503, Tbl. p.12. There is a ceiling on the amount of work-related expenses that can be claimed of $3,000 for one qualifying person and $6,000 for two or more qualifying persons. *Supra.*

[252] The Earned Income Tax Credit (EITC) reduces the amount of federal tax owed and can result in a tax refund for individuals if the credit exceeds the amount of taxes owed. Income and family size determine eligibility for the EITC. Individuals must have earned income during the year for which the credit is being sought. Earned income includes all of the taxable income and wages an individual receives from working. For 2003, both the earned income and the adjusted gross income must have been *less than* $29,666 for a taxpayer with one qualifying child ($30,666 for married filing jointly); $33,692 for a taxpayer with more than one qualifying child ($34,692 for married filing jointly); and $11,230 for a taxpayer with no qualifying children ($12,230 for married filing jointly). Further, investment income cannot exceed $2,600. Finally, an individual's filing status can be any filing status except married filing a separate return. A qualifying child is a child who: (1) is your son, daughter, adopted child, grandchild, great-grandchild, stepchild, or eligible foster child; (2) was under age 19 (or under age 24 and a full-time student), or permanently and totally disabled at any age during the year; and (3) lived with you in the United States for more than half of the tax year. See INTERNAL REVENUE SERVICE, DEPT. OF THE TREASURY, PUBLICATION 596 (2003).

[253] *Id*. at 185-87 (noting that between 1993 and 1999 almost twenty initiatives to expand the FMLA died in Congress).

[254] Illinois, Massachusetts, Minnesota and Vermont. See generally, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, STATE FAMILY LEAVE BENEFIT INITIATIVES IN THE 2001-2002 STATE LEGISLATURES: MAKING FAMILY LEAVE MORE AFFORDABLE (summarizing state initiatives).

[255] Colorado, Hawaii, Massachusetts and Missouri. *Id*.

[256] List two or three other states still considering payroll tax financed paid leave bills.

[257] *See, e.g.*, Issacharoff & Rosenblum, *supra* note 12 at 2215 (concluding, in regard to the use of general revenues to pay for family leave, that "there is little purpose in suggesting a benefits approaches whose political viability approaches absolute zero"); Glavinovich, *supra* note 12 at 172-73 (citing Dan Cordtz, *Hire Me, Hire my Family*, FINANCIAL WORLD, Sept. 18, 1990, p.79) (similarly skeptical); Grill, *supra* note

The mechanism for using general revenues need not involve any significant change to existing institutions. In the event that an existing program, such as TDI, were expanded to accommodate paid family leaves, the state could infuse the existing trust funds from which benefits are disbursed with some allocation from general revenues. Moreover, general revenues need not fund the programs entirely (and perhaps ought not do so, given that at least some of the benefits of paid family leave are benefits to working people exclusively). The result would be a cost sharing arrangement between workers and taxpayers more generally, and a more morally defensible program.

B. Eligibility

I am wary of proposals to relax eligibility requirements so that paid leave is available to workers with low workforce attachment (e.g., low-hours part-time workers). Current FMLA eligibility is restricted to workers who have at least one year of service, and whose work hours averaged 24 hours or more per week (which is about 60% full-time) in the year preceding leave.[258] The requirement that workforce experience be recent is important to reinforcing the incentive to maintain continuous workforce attachment during periods of family obligation.[259] The requirement of substantial hours worked during the eligibility period is also important. Making leave available to workers with lower workforce attachment would increase full-time (or substantially full-time) workers' incentives to shift to part-time jobs, which have lower wages and status, to accommodate care obligations. This in turn might undermine, rather than advance, the very career-building and wage-equity goals I believe paid leave programs can facilitate. For reasons I elaborated in Part III, so long as women's labor market opportunities promise lower wages and status than men's opportunities, families will skew women's labor investments disproportionately towards the domestic sphere. In essence, then, the eligibility requirements for paid leave must include a substantial level of attachment in order to advance the gender equity goals I espouse.[260]

One implication of this is that if class redistribution is one's primary goal, paid leave in the form I will propose it has limitations. Transferring resources to leave-takers

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12 at 391 (criticizing general revenue financing because it would lead employees to feel entitled to benefits rather than having earned them); Jolls, supra note 162 at n.121 and text (arguing that subsidizing employers for the cost of providing the accommodation will be stigmatizing, and lack political durability).

[258] Recall that the eligibility requirements for the currently unpaid leaves available under the FMLA are one year of service, 1250 hours worked in the year preceding leave, and an employer with 50 or more employees working within 75 miles of the jobsite. Many low wage workers piece together multiple part-time or temporary jobs, and tend to work for small employers who are not covered by the statute.

[259] See Fagnani, *supra* note 242 at 73 (noting the explicitly natalist objective of French policy hinging eligibility for parental leave benefits on a work requirement of any two of the previous ten years).

[260] For the same reason, it is important that any tax used to finance the program not be linked directly to a head-count of full-time workers. Financing in this way would give employers incentives to reclassify workers into other categories (part-time, temporary, contract, etc.) in order to avoid the tax. As I have explained, with a paid family leave program, this is only partially possible, as at least some of the costs of leave-taking (the employer's cost of reorganizing the workplace to fill the production gap left by the absent worker) are intrinsic to the worker who takes leave. The larger costs of wage replacement, however, can be financed in ways that avoid reclassification incentives.

to fund paid leave would certainly be progressive relative to the current unfunded program. Salaried, higher income, and more educated workers are currently more likely to receive wage replacement during family leaves than hourly paid, low income, least educated workers.[261] The gap appears to be widening.[262] If income transfers were available, leaves would be within grasp of many lower income workers currently unable to take advantage of the program because they cannot afford the lost wages. At the same time, to the extent that some (although not all) low attachment workers are also low income workers, the eligibility requirement of paid leave would exclude some poor workers. This does not mean I do not support progressive wealth redistribution; only that paid family leave cannot be seen as a primary instrument for implementing such a goal.

Drawing again on the example of the FMLA, I believe that a paid leave program could, however, expand eligibility in other areas. Thus, for example, the employer size limitation excludes many workers and need not be so restrictive, especially if the burden of financing the benefits would not be imposed on employers. California's Family Temporary Disability Insurance program, for example, is available to workers regardless of the size of their employer, thus providing coverage to almost one-half of those workers who are not covered under the FMLA.[263] As also mentioned earlier, I would advocate a program that includes caregivers of unmarried domestic partners, rather than just the spouses, children and parents of workers.[264] This, too, is a feature of California's program.

C. Wage Replacement

European paid leave programs tend to provide full or nearly full wage replacement. This may not be feasible in the United States, where existing programs that offer wage replacement benefits, such as UI and TDI, tend to offer wage replacement in the range of 50-60% of former wages. The argument for replacement as a percentage of pre-leave wages as opposed to a flat benefit is that it operates more clearly as an income smoothing device, i.e., one that insures against the wage consequences of work interruption. Flat rate benefits act more as compensation for parenting -- a "parenting wage" that bears no relationship to market wages and may not be an adequate substitute for wages. For this reason I would advocate benefits tied to pre-leave wages.[265] If the program were financed partially through a tax on wages, I would also advocate relatively high ceilings on the taxable wage base, to ensure that higher-earning workers pay a

[261] BALANCING THE NEEDS, *supra*, note 4 at § 4.2.2 (87.6% of salaried workers who choose to take leaves for family or medical reasons receive wage replacement compared with 54% of hourly paid leave-takers; 75% of leave-takers with a high school education and household income above $20,000 receive some wage replacement compared with well under half of leave-takers with lower education and income).

[262] Brooks Pierce, *Compensation Inequality*, 116 Q. J. ECON. 1493 (2001) (noting that employer expenditures on paid leave fell for low wage labor and rose for high wage labor between 1981 and 1997, and that this widening nonwage compensation gap exceeded the wage compensation gap occurring during the same period).

[263] Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1079, 1084 (2003).

[264] See *supra* note 118.

[265] *See* Kamerman & Kahn, *supra* note 248 at 210 (describing earnings-related benefits as more closely linked to an expectation of continued wage work).

proportionally higher tax. I explained earlier some of the problems I see with the regressivity of low ceilings on the taxable wage base.[266]

D. Incentives for Men to Take Leaves

Among workers who have young children, women are significantly more likely than men to take leaves for an FMLA-covered reason.[267] Furthermore, the average length of leave taken by fathers for a birth or adoption is only about five days.[268] Even if paid leave policies have the potential to increase women's workforce attachment--and perhaps over time alter the balance of women's and men's relative contributions to work and family-- we cannot assume that women's increased involvement in paid work, on its own, will significantly alter men's behavior.[269] Successful achievement of this goal requires correlative, active, efforts to increase men's participation.[270]

The importance of this point can scarcely be overstated: absent efforts to boost men's participation, increasing the generosity of family leave policies could potentially *reinforce* rather than reduce the gendered division of family versus market work. I discussed earlier how the economics of the gender wage gap skews the family allocation of market versus home work.[271] Traditional social pressures and corporate culture also discourage men from taking time away from work to assume the role of a family caregiver.[272] In addition, under the FMLA, the "key employee" exemption (under which workers whose earnings are in the top 10% of a covered employer may be excluded from

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[266] See *supra* note 196 and accompanying text.

[267] BALANCING THE NEEDS, *supra* note 4 at Tbl. 4.17 (75.8% of women and 45.1% of men took a leave for a covered reason in 2000). Note that although among all workers with young children, men were about as likely as women to take some leave to care for a newborn or newly adopted child (34.1% men versus 35.8% women), this figure alone may be misleading because another 32.4% of women took a leave classified in the separate category of "maternity-disability." *Supra*, Tbl. 4.19.

[268] Joseph H. Pleck, *Paternal Involvement: Levels, Sources, and Consequences*, *in* M. E. LAMB, ED., THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, 3D. ED. 93-94 (1997) (reviewing studies); Selmi, *supra* note 12 at 755-56 (same).

[269] *See, e.g.*, Silbaugh, *Turning Labor into Love*, supra note 109 at 8-9 (arguing that changes in the division of household labor as women have increased workforce participation reflect a reduction in time women devote to housework, rather than any increase in the time men devote to housework).

[270] Professor Selmi puts this point more strongly: "Increasing workplace equality will require persuading men to behave more like women, rather than trying to induce women to behave more like men." *Supra* note 12 at 708.

[271] *Supra* notes 124- 125 and accompanying text.

[272] Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 116-17 (2000) (both workplace culture and peer pressure discourage men's leave-taking); MINDY FRIED, TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE 91-96 (1998) (information provided by companies, as well as attitudes of managers and workers, reflect and reinforce gendered leave-taking arrangements); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077-79 (1994) (employer hostility and peer pressure discourage men's leave-taking); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. L. REV. 25, 39-42 (1998) (men rightly fear that seeking family accommodations will injure their careers and are secretive when they take leave for family reasons); Pleck, *supra* note 268 at 90 (involved fathers may encounter hostility from acquaintances, relatives and workmates); Rhode, *supra* note 80 at 843 (reviewing surveys of attitudes about male birth and adoption leaves); Selmi, *supra* note 12 at 759 (the notion of men taking leave to care for a newborn may threaten existing gender roles).

the job security guarantee)[273] tends to exclude more men than women from eligibility given men's higher representation among top earners.[274] If uptake of paid leave benefits is understood by employers to be a characteristic of female workers only, rational employers may assign to young women flatter career profiles with less job-training and promotions, and lower wages.[275] Related to this, I explained earlier how corrosive the cost shifting dynamic might be to the goal of increasing women's workforce participation. To the extent that employers might bear at least some nominal fixed costs of providing the unpaid job-protection component of the benefit, increasing men's uptake of benefits is a crucial step towards countering the cost-shifting phenomenon: the less identifiable family leave is as a "women's benefit," the less rational it will be for employers to shift the cost of provision to women.

The European experience suggests that progress in increasing men's leave-taking, although not trivial, is slow.[276] Most analysts agree that adding a wage replacement component to existing unpaid leave programs will increase the willingness of men to take leave (because in addition to reducing the opportunity of leave-taking generally, it will reduce the opportunity cost differential between mothers and fathers).[277] Some European countries have had success with more aggressive policies, for example, establishing "daddy quotas" or benefits offered to fathers on a "use-it-or-lose-it" basis.[278] In other words, the government conditions receipt of some portion of a family's paid leave allocation on the requirement that the father be the primary caregiver for that portion. Note, here, that these "use-it-or-lose-it" schemes operate against the backdrop of paid family leave being a *family*, rather than individual, benefit (i.e., each family with a child gets a certain allocation of paid job leave time). The unpaid leave available under the FMLA, by contrast, is an individual benefit, and thus is essentially already offered on a use-it-or-lose it basis.[279] If a paid family leave program were to build from this model,

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[273] 29 U.S.C. § 2614(b) (1993).

[274] See Amy Olsen, *Comment, Family Leave Legislation: Ensuring Both Job Security and Family Values*, 35 SANTA CLARA L. REV. 983, 1017 (1995).

[275] NABANITA DATTA GUPTA & NINA SMITH, CHILDREN AND CAREER INTERRUPTIONS: THE FAMILY GAP IN DENMARK, INSTITUTE FOR STUDY OF LABOR (IZA) DISCUSSION PAPER NO. 263, at 4 (February 2001); Malin, *Fathers and Parental Leave*, *supra* note 272 at 1062-63.

[276] *See, e.g.*, Heather Joshi, *The Opportunity Costs of Childbearing: More than Mothers' Business*, 11 J. POPUL. ECON. 161, 177 (1998) (citing British surveys for propositions that attitudes about what gender roles are appropriate in the public arena tend to change more slowly than practice); Peter Moss & Fred Deven, *Parental Leave in Context*, *in* MOSS & DEVEN, *supra* note 242 at 13-14 (describing the challenge of encouraging fathers' participation in paid parental leave programs in various European countries).

[277] Bornstein, *supra* note 272 at 116 (2000); Littleton, *supra* note 125 at 36; Selmi, *supra* note 12 at 770-71. *Cf.*, Malin, *Fathers and Parental Leave*, *supra* note 272 at 1081-89 (arguing for an interpretation of existing law that would allow fathers to combine sick leave with FMLA leave to care for mothers during post-partum recovery).

[278] *See, e.g.*, Linda Hass & Philip Hwang, *Parental Leave in Sweden*, *in* MOSS & DEVEN, *supra* note 242 at 46, 49 (describing Sweden's policy of making some portion of family leave available at nearly full wage replacement to fathers on a non-transferable basis); Arnlaug Liera, *Cash-For-Child Care and Daddy Leave*, *in* MOSS & DEVEN, *supra* note 242 at 275 (describing Norway's policy of earmarking four weeks of state-provided family leave for exclusive use of fathers).

[279] Note that where spouses work for the same employer, the employer may limit their total permissible leave to care for a child after birth, adoption or foster care to twelve weeks combined. 29 U.S.C.A. § 2612(f).

the effect of wage replacement would be to increase the sense that the father who declines to take leave is, in fact, "losing" something (a financial benefit), although the proportion of wage replacement will have an important influence on the power of this incentive (in Scandinavia, wage replacement is nearly full).

Michael Selmi has advocated making the stakes still higher, with a proposal to provide six weeks' paid leave to both men and women, but stipulate that it can be claimed only on an all-or-nothing basis by each parent.[280] In other words, each parent would lose his entitlement unless he took the full six weeks' leave. Presumably, a crucial assumption of Professor Selmi's proposal is that pay alone is not enough encouragement for men, and that absent an all-or-nothing stipulation, men who take leave will on average take fewer than six weeks. This is probably correct, although Professor Selmi's plan for its own part may sacrifice the participation of some fathers would take a leave only if they could limit it to, say, two weeks or a month. An open question is which--more men taking relatively shorter leaves (although doubtless longer than we see in the current unpaid scheme), or fewer men taking longer leaves-- would do more to cultivate a norm of meaningful male participation over time. Perhaps at least initially, it would be sensible to determine the effect of adding a pay component without an all-or-nothing stipulation on both the number and duration of leaves by men. If deemed inadequate, experimentation with all-or-nothing entitlements would seem a promising next step. Other proposals include mandating that men take leave following birth or adoption of a child,[281] linking federal contract eligibility to family leave uptake rates by male employees,[282] marshalling anti-discrimination law to challenge workplace hostility to men's leave taking,[283] and public education, both for men and for women.[284] Although each of these ideas merits deeper exploration, I would recommend focusing at minimum on public awareness campaigns and further study of the likely impact on male participation of all-or-nothing entitlements.

E. Duration of Benefits

I have argued that benefits of excessive duration may undermine the goal of increasing women's workforce attachment. Examples from the European literature of excessively generous benefits are the three-year paid programs offered in France and Germany.[285] In the United States, it is extremely unlikely that benefits of this duration would even be debated in the short term. A more realistic goal would be to augment the benefit currently available under the FMLA by adding a wage replacement benefit to part or all of the twelve weeks' job-protected leave currently available. The California program, for example, offers six weeks' compensation. It would be important to monitor

[280] *See* Selmi, *supra* note 12 at 770-71.
[281] *Id*., at 773-75.
[282] *Id*., at 775-79.
[283] Malin, *Fathers and Parental Leave*, *supra* note 272 at 1089-94.
[284] Bornstein, *supra* note 277 at 122-23; Hass & Hwang, *supra* note 278 at 50 (describing Sweden's aggressive public information campaigns directed at encouraging fathers to take family leaves). Note that not just men, but also women, may resist an increased paternal role in caregiving, perceiving it as a threat to their own arena of dominance in the family sphere. See Cahn, *supra* note 77; Malin, *Fathers and Parental Leave*, *supra* note 272 at 1069.
[285] *Supra*, note 242 and accompanying text.

the program over time to determine whether this is adequate. It may be that in order to increase the relative appeal of working versus staying at home, benefits of longer duration--say six months--would be superior. Benefits of under one year duration, however, are unlikely to run the opposite risk of reducing workforce attachment.

F. Models for Implementation

A number of models have been proposed for implementing a paid family leave program. These include expanding existing state UI programs, expanding existing or creating new state TDI programs, creating new, separate, family leave benefits insurance programs, providing incentives for employers to expand sick leave programs, and reimbursing employers who voluntarily create paid leave programs.[286] Most attention, however, has been focused on the first two alternatives listed: expansion of unemployment insurance and expansion or creation of temporary disability insurance to encompass paid family leave.[287]

Unemployment Insurance. Although BAA-UC was recently repealed, the idea of using unemployment insurance as a vehicle for funding paid leaves has been in play for many years, and may well come back on the federal legislative agenda in the future. For this reason, I include this option in my discussion.

UI provides partial, temporary wage replacement for workers who become involuntarily unemployed. It is jointly administered by the federal and state governments. Every state has its own UI program, created within the guidelines of federal law.[288] Federal law requires states to tax employers on the first $7,000 of each worker's earnings per year, and deposit the revenues into a trust fund reserved exclusively for paying unemployment benefits.[289] Although many states have elected to set their taxable wage base at a higher level, many also remain at or near the federal minimum, including the populous states of California, Florida, and New York.[290] A base of $7,000 is very modest compared with other major social insurance programs such as Social

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[286] See NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, FAMILY LEAVE BENEFITS: A MENU OF POLICY OPTIONS (September 2001) (describing various alternatives).

[287] The Right Start Act of 2001, H.R. 265, 107th Cong. § 501-533 (2001); S. 18 § 501-503 (2001) was a bill to fund state efforts to develop programs for paid family leave paid through either unemployment insurance or temporary disability insurance. Although the bill appears to have died in both the Senate and Congress, it reflected a common view about the most promising potential institutional vehicles for funding parental leave. Recent bills in 22 states have proposed to expand UI. *Supra* note 9. Recent bills in Iowa, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, and Washington would either expand TDI or establish new, similar, insurance schemes for family leaves.

[288] The Social Security Act of 1935, 42 U.S.C. §§ 501-504, 1101-1108 (1994 & Supp. V 1999) authorizes the allocation of funds to states that comply with federal requirements, and establishes the Employment Security Administration Account.

[289] 26 U.S.C. § 3306(b) (1) (1994).

[290] California and Florida remain at $7000, while New York has increased the wage base only to $8500. Although only ten states remain at the minimum, most states still hover just slightly above the minimum: in 2002, the median taxable wage base was $9,000 (the average was $12,400). *See* U.S. Dept. of Labor Employment Training & Administration website, *at* http://www.workforcesecurity.doleta.gov/unemploy/statetax.asp (last updated March 28, 2003).

Security, which has a taxable wage base more than twelve times that amount.[291] The upshot is that most state unemployment insurance taxes tend to be quite regressive, with lower income employees paying a significantly higher proportion of their wages in UI taxes than do high income employees.

On the benefit side of the equation, employees receive wage replacement as a proportion of their pre-layoff earnings, usually about half, with floors and ceilings on benefits that tend to limit benefits to within the average earnings range. The average weekly benefit in 1998, for example, was $200.[292] The maximum duration of benefits is typically 26 weeks, but whether an employee is eligible to collect benefits for the maximum duration depends, in almost all jurisdictions, on that employee's work history. In 1998, the average duration was 13.8 weeks.[293]

Federal law also requires that state programs be experience rated.[294] Experience rating varies the tax on each employer according to the costs it imposes on the insurance pool.[295] This encourages employers to self-regulate: if they internalize some of the costs, they will be more reluctant to lay off workers. The linkage of tax liability with benefit use, however, could create a significant cost-shifting problem of the sort discussed in Part III. If an employee's characteristics lead an employer to predict that she will present a higher risk of becoming unemployed and collecting benefits, the employer will have an incentive to avoid hiring that worker, or reduce the worker's wages as a compensatory measure. This might have a very salient effect on women's employment and wage levels. For this reason, BAA-UC sensibly permitted states to devise programs that would exempt employers from experience rating in the case of benefits paid for birth and adoption leave purposes. Any future reprise of a regulation like BAA-UC must also incorporate this exception to prevent targeted cost-shifting.

UI is partially designed to stabilize the economy in the face of sectoral shifts and possible mass dislocations of workers. It is also designed to optimize the use of human capital, with the compensation intended as a tool to help unemployed workers engage in a more sustained search than they would be able to do if they relied on their own savings. Eligibility rules reflect the philosophy that UI is a program of wage replacement insurance for stably employed workers whose job loss is anomalous rather than characteristic, whose unemployment is involuntary, and who are actively seeking reemployment.

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[291] The maximum taxable wage base for social security will increase to $87,900 in 2004 from $87,000 in 2003. See www.ssa.gov/OACT/COLA/cbbdet.html.
[292] The average replacement rate in 2000 was 47% of wages. See Dept. of Labor Employment and Training Administration, *UI Chartbook*, Chart A.13; Dept. of Labor Employment and Training Administration E.T. Handbook No. 394, *at* http://ows.doleta.gov/unemploy/content/hdbk394_99/lnk98.html (1998 statistics).
[293] *Id*.
[294] *See generally* WAYNE VROMAN, U.S. DEPT' OF LABOR, EXPERIENCE RATING IN UNEMPLOYMENT INSURANCE: SOME CURRENT ISSUES 6–12 (1989) (explaining how experience rating works).
[295] In fact experience rating is imperfect, meaning that the heaviest users do not fully compensate the pool for the disproportionate costs they impose on the pool, but in general there is a correspondence between level of usage and level of tax. Elsewhere, I discuss both methods and imperfections in experience rating. See Lester, *Unemployment Insurance and Wealth Redistribution*, *supra* note 35 at 344-45, n. 32, 33.

Thus, although most workers are covered by UI, the major limiting factor on allocation of benefits is whether they meet the eligibility rules.[296] First, they must meet minimum hours or earnings requirements during the previous year, averaging in the range of about $1760 (which is about 8 1/2 weeks' work at the minimum wage).[297] They must also have spread that work out over the course of the year to some minimal degree, rather than having worked in just one quarter of the year. The effect of these rules is to screen out workers with very low or irregular hours or earnings, especially part-time, part-year, or temporary workers.[298] Also, a claimant will ordinarily be disqualified if the reason for unemployment is that he quit his job (or was dismissed by the employer for misconduct).[299] The final major screening factor is the "able and available" requirement. In order to continue to collect benefits, a recipient must register with an unemployment office, and provide ongoing verification of an active job search. The provision of benefits is intended in significant part to permit the worker to engage in a thorough job search so as to find the optimum reemployment.

Both the reason for employment interruption and the short-term goals of the unemployed worker are very different when family caregiving is involved. Compensating a worker temporarily separated from work for the purpose of tending to a newborn of newly-adopted child, for example, would necessitate relaxing two of the three traditional eligibility criteria, because the decision to conceive or adopt a child is usually voluntary, and a worker who has separated from work for the purpose of caring for a child is not “able and available” for work. Although some commentators have identified this lack of philosophical fit as a serious problem, I do not see it as preclusive.[300] Incorporating family leaves into UI would indeed mean re-imagining the program as one that protects workers who are in fact unable to work, whether for involuntary reasons, or for a limited, defined set of voluntary reasons that include family constraints, but this sort of redefinition would not obviously undermine the effectiveness of the program for those who meet the traditional criteria, nor would it necessarily open the floodgates to unmeritorious claimants, assuming the triggering events for family leaves were well defined. It would still preserve the income-smoothing objective, as well as the goal of preserving workers' attachment to the workforce. Of course, state law would need to be

[296] More than 90 percent of civilian employment is covered. ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING AND COVERAGE 163 (1995). Certain groups of workers are excluded, however: for example, coverage of agricultural and household workers is limited, and self-employed workers are excluded. Elected officials, legislators, members of the judiciary, and the State National Guard, and some non-profit employees are also excluded. Special programs for government employees, railroad workers.

[297] Author's calculations, based on 2003 U.S. Department of Labor data found at http://www.ows.doleta.gov/unemploy/uilawcompar/2003/monetary_entit.pdf (December 15, 2003).

[298] I discuss this in detail, giving illustrations, in Lester, *Unemployment Insurance and Wealth Redistribution*, *supra* note 35 at 347-45.

[299] *Id*., at 350.

[300] *See* Bornstein, *supra* note 277 at 114 (inconsistency between the "involuntary unemployment" premise of UI and the fact that most maternity leave is voluntary poses a philosophical problem for proposals to use UI to fund family leave); Drew, *supra* note 12 at 383-84 (also raising this criticism).

modified to make birth and adoption leaves exempt from the federal “able and available” requirement as well as from the involuntariness requirement.[301]

Temporary Disability Insurance. TDI is partial wage replacement for workers who find themselves unable to work due to a temporary non-work related illness or injury. Five states (California, Hawaii, New Jersey, New York, Rhode Island) plus Puerto Rico currently have TDI programs. These are purely creations of state law. Each program includes pregnancy and childbirth-related temporary absences as insured events, but does not currently include absences for infant care beyond the immediate period of physical recovery from birth. Each state funds its program through a payroll tax, in some cases on both workers and employers, and in others on workers alone.[302] Four of the five states (all but Rhode Island) permit employers to satisfy the statutory requirements through self-insurance. In these instances, however, employers are prohibited from requiring employees to make contributions that exceed what they would be required to contribute under the state plan, and benefits must not fall short of what would be available under the state plan.

The taxable wage base in TDI programs tends to be higher than for UI: the median taxable wage base across the five states with TDI programs in 2002 was $35,495 (compared with $9,000 for UI).[303] Benefits vary across states, but as with UI, benefit amounts and duration vary according to an employee’s prior earnings history. As with UI, the replacement rate is about half of an employee’s weekly wages, with specified floors and ceilings similar to those for UI.[304] The average weekly benefits are about $240.[305] The maximum duration of benefits ranges from 26-52 weeks, with the average being about 8 weeks.[306] The fact that the taxable wage base for TDI programs is significantly higher than for UI, while the wage replacement rates are roughly comparable, suggests that TDI programs are more progressive than UI.

As with UI, coverage is very broad, making the eligibility determination the major screening device. Here, too, workers must satisfy a minimum past earnings or hours requirement in order to be eligible for benefits.[307] In contrast to UI, continued eligibility

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[301] BAA-UC permitted modification of the "able and available" requirement. See 65 FR 37211. The involuntariness requirement has always been a creature of state law.

[302] All five existing state programs require contributions from employees. All but California and Rhode Island also require contributions from employers. See THE OFFICE OF POLICY, SOCIAL SECURITY, SOCIAL SECURITY PROGRAMS IN THE UNITED STATES, JULY 1997 48 (1997); STEVEN K. WISENSALE, FAMILY LEAVE POLICY 120-21 (2001).

[303] Author’s calculations, based on examination of current statutes in TDI states (California $46,327, Hawaii $35,495, New Jersey $23,500, New York $6,000, Rhode Island $45,300). The average taxable wage base for TDI programs in 2002 was $31, 324.

[304] The floors range between $14 (Hawaii) and $68 (New Jersey) and the ceilings range between $270 (New York) and $504 (Rhode Island). U.S. Department of Labor data for 2003 from Employment and Training Administration report found at: http://workforcesecurity.doleta.gov/unemploy/uilawcompar/2003/temporary.pdf.

[305] 1997 statistics, Social Security Bulletin Annual Statistical Supplement 2000.

[306] *Id*. Data for New Jersey were unavailable and thus not included in this calculation.

[307] For details, see Department of Labor, Employment and Training Administration report, *supra* note 304.

hinges on the continuation of the disabling condition, rather than ability and availability for work.

As an example, consider the new California family leave law, FTDI, which adds family illness and non-maternity parental benefits to the existing SDI benefits of personal illness and maternity leave. The new benefits are financed with a tax on employees' wages. In 2004 and 2005, the tax will be .08 percent of their wages up to the taxable wage limit of $68,829 in 2004 and $79,418 in 2005, and subject to increase in later years, up to a maximum of 1.5%.[308] The program will cover about 70 percent of California's workforce, with eligibility requiring wage earnings of at least $300 in a 12-month base period prior to application for benefits. It will provide wage replacement at 55% for up to six weeks, with weekly benefits in 2004 ranging from minimum of $50 to a maximum of $728.[309] Note that the personal illness and maternity leave benefits in California's pre-existing state disability insurance program provides up to 52 weeks' wage replacement (on the same terms as above).[310]

The purpose of disability insurance is to provide financial relief to a worker who is physically incapacitated from work for a temporary period due to illness or injury. As with layoff unemployment, the program generally contemplates a worker who didn't choose to be unemployed, a condition that the worker who decides to conceive or adopt a child would not clearly satisfy, although existing programs have by law covered pregnancy-related incapacitation since the late 1970s.[311] Still, parental leave that extends beyond the period of pregnancy-related incapacitation, as well as family illness leave, would both involve decisions that turn on needs external to the worker's own physical capacity, such as a decision to care personally for an ailing parent rather than contract with a professional caregiver, or a desire to bond with a newborn infant.[312] So, as with unemployment compensation, there are some inconsistencies between the typically disability leave and the coverage contemplated under paid family leave. The fit between parental leave and a disability leave program nevertheless seems more comfortable than the fit with unemployment compensation because of the shared intrinsic feature that the employee is temporarily not seeking reemployment and will likely return to her former employer.

Note that whether grafted onto a UI or TDI program, introduction of family leave benefits would create a covered event for which there is significantly higher moral hazard than for the risks ordinarily covered. In the presence of a subsidy, some individuals will take leaves who would not otherwise do so, or take longer leaves. Indeed, this is one of the intended goals of adding a wage replacement component to family leave. There is no

[308] Cal. Unemp. Ins. Code § 984(a)(2)(B). This is an average of about $70 per employee per year. (Workers currently pay a tax of 0.9 percent of their income, or up to $417 per year, to cover state disability insurance taxes). See California Employment Development Dept. website *at* http://www.edd.ca.gov/direp/pflfaq2.asp. (visited on January 16, 2004).
[309] Cal. Unemp. Ins. Code §§ 2652-2653, 2655.
[310] Cal. Unemp. Ins. Code § 2653.
[311] See *supra* note 16.
[312] See discussion *supra* at note 31-32 and accompanying text.

reason we should believe, however, that one program is more vulnerable to moral hazard problems than the other.

More generally, TDI has the virtues of higher taxable wage bases than we tend to see under state UI program (meaning there is greater progressivity of the tax and benefit schedule), and the necessity of less dramatic modifications from the basic features of the program than would be necessary if UI were adapted to accommodate family leaves (e.g., there is no experience rating and no able and available requirement in TDI programs). On the other hand, only five states currently have TDI programs, meaning that the benefits of existing infrastructure would only extend so far.

As mentioned, it would also be possible to create a paid family leave program that is independent of existing UI or TDI programs. The benefit of doing so is that it would not require making exceptions within the existing program to the traditional triggering events, eligibility requirements, and so on. A new program might also be freer to depart from undesirable but institutionally engrained features of existing programs. An example is the low minimal taxable wage base in UI. Ideally, (for the portion of financing the program that comes from payroll taxes), the taxable wage base would be much higher than the $7,000 minimum required by UI -- preferably closer to the $87,900 taxable wage base of Social Security.

V. Conclusion

In this article, I make the case for publicly mandated paid family leave, financed in a manner that spreads its costs beyond those most likely, at least in the short run, to take leaves (women, particularly women in their childbearing years). Although this would mean that some citizens who have no family caregiving needs will end up subsidizing others who do, I believe such redistribution is justified. Publicly-provided paid family leave has the potential to increase women's workforce attachment. Historically and currently, women perform a disproportionate share of unpaid household labor, and this hinders their participation in the paid workforce. Greater involvement in paid market labor has the potential to increase women's self-esteem, economic power, and sense of personal control, and ultimately, advance social equality between men and women.

In making this argument, I challenge two lines of argument that reject targeted accommodation of work-family conflict: those who argue that on fairness grounds that all caregiving labor, whether by workers or by stay-at-home caregivers, should be equally compensated, and those who argue that we must externalize the caregiving infrastructure on order to avoid the trap of reinforcing gender segregation in the workplace. I contend that we must shift the financial incentives of caregiving labor to make continuous attachment to paid work more attractive to caregivers than it currently is relative to unpaid homemaking, and at the same time argue that a fully externalized caregiving policy would ignore the non-fungible demand by many workers to be able to give hands-on, personal care to members of their family.

For paid leave policies to achieve the goals I espouse, there are some limitations on how they can be designed. Although there is still need for further research in both respects, both theory and existing empirical work currently suggest that the effectiveness of paid leave policies in increasing women's workforce attachment may depend on limiting the duration of leaves (probably to under one year), and financing leaves in a way that avoids shifting the costs of the program to women, ideally through at least partial use of general revenue financing. The argument for spreading the costs of leave policies, however, is only partly driven by the practical observation that the very incentive to enter into or remain attached to the workforce may be thwarted if the full cost of caregiving accommodations is borne by women workers. In addition, the argument for cost spreading has a moral element: the goal of increasing women's workforce participation and personal autonomy is at core subservient to the broader project of improving at least one dimension of social equality, gender equality. As such, it is a project that society as a whole might justly subsidize.