

A DEFENSE OF PAID FAMILY LEAVE

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I. Introduction

The problem of combining work and family life is perhaps the central challenge for the contemporary American family. In this Article, I evaluate and defend government provision of paid family leave, a benefit that would allow workers to take compensated time off from work for purposes of family caregiving.

A legal intervention in the arena of work-family accommodation can only build on some prior normative understanding of the family, and embedded within that, contested value choices about women's identities and entitlements in workplace, family, and society. I am not the first legal scholar to advocate paid family leave of some kind.¹ The additional contribution here is to offer a normative defense of such a program based on its potential to increase the workforce participation of those who bear the principal obligation of caregiving—women. This, I argue, will increase equality of economic opportunity and the distribution of social power associated with status in paid labor markets. It also will enhance women's capacity to determine the conditions of their lives. In advocating paid family leave, 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.

Paid family leave is particularly valuable, I argue, because other possible alternatives, such as daycare, cannot entirely replicate the value of personal time away from work to engage directly in family caregiving. For women currently working who want to give personal care to family members but cannot afford adequate time off to do so, paid family leave will improve their quality of life and benefit those they care for. For women on the margin between working and staying home, the availability of paid leave may make market work more feasible and attractive, and as a result, increase their attachment to the workforce. At the same time, we must be wary of overly generous leave provision. Very generous leave provisions might encourage such lengthy absences from the job as to undermine women's development of human capital and connection to the workforce. Further, the method used to finance the program must be sensitive to important

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¹ 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, 387–88 (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, 76–84 (2001); Mikel Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 Ariz. J. Int'l & Comp. L. 147, 167–74 (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.J. 373, 383–90 (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. & 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, 2214–21 (1994); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 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, 467–76 (1987); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 Yale. J.L. & Feminism 1, 16–68 (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).

issues of distributive justice and the challenge of ensuring that the program confers gains on its intended beneficiaries. The government should spread at least some of the costs of the program beyond those workers—women in their childbearing years—most likely to take leave.

Paid family leave 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. The Family and Medical Leave Act (“FMLA”) mandates that employers give up to twelve weeks of job-protected leave per year to workers who need to care for a newborn child or their own serious illness or the illness of a family member.² Coverage limitations mean that only about half of all workers, and less than one-third of steadily employed new mothers, receive these protections.³ More importantly, the law does not require wage replacement. This makes the American system the least generous of industrialized nations. All western European nations have programs that give women workers the right to at least three months paid maternity leave, with as much as a year or more in some countries, as well as paid parental leave—for either parent.⁴

For workers who need to take time off to address family or medical needs, financial worries loom largest among their anxieties about taking leave.⁵ The hardship of lost wages leads some workers to foreshorten their time away from work⁶ or simply forgo a needed leave.⁷ A sizeable percentage of workers who lack access to paid benefits resort to public assistance for support during family leaves.⁸ Finally, although more difficult to measure, there are likely some workers who would enter or remain in the workforce if there were better prospects of supported family leaves, but who instead quit or stay home to address their family or medical needs.

Recently, the debate over paid family leave has been revitalized. In the past few years, twenty-one states have introduced bills to expand their unemployment insurance (“UI”) programs to provide wage replacement to parents following the birth or adoption of a child.⁹ In addition, several states are considering bills that would expand existing temporary disability insurance (“TDI”) programs or create new public insurance schemes to provide paid parental or family illness leave.¹⁰ In 2002, California became the first state in the nation to provide employees paid

² Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000). Note that the FMLA provides both (unpaid) family and personal illness leaves. The analysis in this Article is limited to family leave. 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.

³ 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. *Id.* The Act only covers employees who have worked for their employer for twelve months and 1250 hours in the previous year, and whose employer has forty or more employees working within seventy-five miles of the worksite. 29 U.S.C. §§ 2611(2)(A)–(B).

⁴ Ruhm, *supra* note 3, at 176.

⁵ U.S. Dep’t of Labor, FMLA Survey: Balancing the Needs of Families and Employers, at tbl.4.1 (2001) [hereinafter *Balancing the Needs*] (reporting that among worries expressed by workers who took a leave in 2000 to care for a newborn child or their own or a family member’s serious illness, whether or not covered by the FMLA, not having enough money to cover their basic needs was cited most frequently (53.8% of leave-takers)), available at <http://www.dol.gov/asp/fmla/toc.htm> (last visited Nov. 18, 2004).

⁶ *Id.* at tbl.4.8 (reporting that 37% of leave-takers in 2000 reported cutting short their leave time to cope with the hardship of lost wages).

⁷ Although 16.5% of all employees in the United States took leaves of absence from work to handle family or medical needs in 2000, another 2.4% of workers did not take leave despite reporting that they needed it (i.e., roughly 13% of workers who needed to take a leave did not take it). *Id.* at tbs.2.1, 2.14. Among those who were unable to take a needed leave, the most common reason cited (77.6%) was not being able to afford it. *Id.* at tbl.2.17. Workers who take leaves generally are more educated, have higher incomes, and are more likely to earn a salary rather than an hourly wage than those who do not. *Id.* § 2.1.3.

⁸ *Id.* at tbl.4.8 (reporting that 8.7% of leave-takers in 2000 used public assistance to finance leaves).

⁹ These states include Arizona, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Vermont, and Washington. See Nat’l P’ship for Women & Families, *State Paid Leave Initiatives in the 2004 and Prior State Legislatures: Making Family Leave More Affordable* (2004) [hereinafter *Leave Initiatives*] (reporting updates of state legislative developments in paid family leave), available at <http://www.nationalpartnership.org/portals/p3/library/paidleave/stateroundup2004.pdf> (last visited Nov. 18, 2004).

¹⁰ E.g., A.B. 173, 2004 Leg., 211th Sess. (N.J. 2004) (proposing “Family Leave Insurance,” which would expand existing TDI and UI programs to cover family illness and birth/adoption leaves, respectively, to be paid for by a payroll

leave benefits not only for personal illness (including maternity leave), but also for parental bonding and caring for sick family members.¹¹ These developments make closer examination of paid family leave timely.

Although this Article deals exclusively with paid family leave policy, the goal of equalizing men's and women's respective contributions to both market work and family caregiving can only be achieved through a composite of interlocking social policies. For example, affordable, high-quality, publicly available childcare, while not a substitute for paid leave, is a critical part of the picture.¹² Effective antidiscrimination laws,¹³ income tax policies that do not penalize dual-income married couples,¹⁴ and a shorter workweek¹⁵ are also key components. In addition, any paid leave policy we adopt must contain effective incentives for men to take leaves, a challenge I pursue in some detail below.¹⁶ Thus, paid leave is not the only way to advance the goal of greater gender equality in the balance of work and family responsibilities, and paid leave cannot achieve such equality alone. Nevertheless, it is a crucial piece of the puzzle, deserving extended re°ec-tion in its own right.

The Article begins, in Part II, by analyzing why private markets do not (for the most part) provide paid family leave insurance. In Part III, I present my argument that the goal of increasing women's workforce attachment is a defensible basis on which to justify state intervention to create paid family leave, and to °nance it in a way that spreads its costs across society. In Part IV, I turn to theoretical predictions and empirical °ndings on the labor market effects of paid family leave programs. Part V presents objections to government subsidized paid family leave. Part VI analyzes different methods of benefit °nancing and explains how cost-shifting affects who actually pays for a benefit. In Part VII, I explore reform options. I discuss some general features a paid leave program ought to have and illustrate with some examples of implementation models.

tax on workers); H.B. 2399, 2004 Leg., 58th Sess. (Wash. 2004) (would create "Family Leave Insurance," which would pay employees a °at-rate weekly payment of \$250 °nanced by taxing employers and employees one cent each per work hour); S.B. 6272, 2004 Leg., 58th Sess. (Wash. 2004) (same); H.B. 25, 2003 Leg., 22d Sess. (Haw. 2003) (would establish "Family Leave Benefits Insurance" to be °nanced by a payroll contribution by employees and employers totaling a maximum of two cents per work hour); S.B. 772, 2003 Leg., 22d Sess. (Haw. 2003) (same); S.B. 778, 2003 Leg., 22d Sess. (Haw. 2003) (would expand Hawaii's existing TDI program to include parental and family illness leaves); H.P. 567, 2003 Leg., 121st Sess. (Me. 2003) (proposing "Family Security Fund," which provides between fourteen and twenty-eight weeks paid maternity leave °nanced by up to ninety cents employee deduction per week plus matched employer contribution); S.P. 389, 2003 Leg., 121st Sess. (Me. 2003) (would establish "Temporary Disability and Family Leave Benefits Program," which would provide insurance covering leaves taken for birth, adoption, and family illness °nanced by equal contributions from employee and employer).

¹¹ California Family Temporary Disability Insurance Program, Cal. Unemp. Ins. Code § 3301 (Deering 2004) (amending state disability compensation program, which previously provided compensation for individuals unable to work due to their own temporary illness or disability, including pregnancy and childbirth, to also include up to six weeks of compensation for leaves to care for an ill family member, or the birth, adoption, or foster care placement of a new child).

¹² On public childcare reform, see, for example, Janet C. Gornick & Marcia K. Meyers, *Families That Work: Policies for Reconciling Parenthood and Employment* 185–235 (2003); Deborah L. Rhode, *Justice and Gender* 129–31 (1989).

¹³ On antidiscrimination litigation in the area of work-family con°ict, see, for example, Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 *Harv. Women's L.J.* 77 (2003).

¹⁴ See, e.g., Edward McCaffery, *Taxing Women* 16–23 (1999); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *Buff. L. Rev.* 49 (1971); 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, thereby creating disincentives for women to choose market labor over unpaid home labor). Although the 2001 tax reforms reduced the so-called "marriage penalty," federal 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, at D2 (explaining how despite recent amendments to the federal tax code that purport to phase out the marriage penalty, the poorest and wealthiest families get less than the full benefit due to the limitation of the amendments to the °fteen percent tax bracket, and highlighting the persisting marriage penalties in the earned income tax credit, phaseouts, capital loss offset provisions, and other areas of the tax code).

¹⁵ On shortening or increasing the °exibility of work hours, see Gornick & Meyers, *supra* note 12, at 147–84; Joan Williams, *Unbending Gender: Why Family and Work Con°ict and What To Do About It* 100 (2000) (reviewing ethnographic studies describing working-class women's anxiety about leaving children in low-quality daycare and the strains of housework and the "split shift" on marital and family life); Vicki Schultz, *Life's Work*, 100 *Colum. L. Rev.* 1881, 1956–57 (2000) [hereinafter, Schultz, *Life's Work*]; Vicki Schultz & Allison Hoffman, *Precarious Work and Working Time: The Case for a Reduced Workweek in the United States* (to be published in yet untitled book, Judy Fudge & Rosemary Owens eds., forthcoming 2005); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 *Colum. J. Gender & L.* 271, 357–58 (2002).

¹⁶ I discuss incentives for men to take leaves in more detail in Part VII, *infra*.