

AGGRESSIVE PARENTAL LEAVE INCENTIVIZING: A STATUTORY PROPOSAL TOWARD GENDER EQUALIZATION IN THE WORKPLACE

Ariel Meysam Ayanna*

I. INTRODUCTION

This article starts from the premise that the primary goal of any competent parental leave legislation should be to enable both mothers and fathers to maintain equal career choices without sacrificing a meaningful family life. To this point, leave legislation proposals have not worked hard enough to make this goal a reality. Faced with a great gender imbalance between parents who take leave and those who do not, proposals have often contemplated ways to improve the ratio between male and female leave-takers. Such proposals, however, have rarely considered gender imbalance to be the primary obstacle to a successful leave regime. Thus, they have failed to pay adequate attention to the root of the problem.

This article argues that eliminating, not merely improving or containing, the gender imbalance in leave-taking is the key to maximizing the potential of leave legislation to achieve not only the previously stated goal, but to work more broadly toward complete gender equality in the workplace. To eliminate the gender imbalance, we must make paternal leave-taking not merely a suitable or attractive option, but rather an undeniable one. We must create powerful incentives that overcome trenchant gender norms that strongly encourage a traditional work/family gender split; this may be accomplished by appealing not to men's consciences or family values, but rather to their pocketbooks. In short, we must pay men to take paternity leave.

This article proposes leave legislation that compensates both maternal and paternal leave-takers at rates above and beyond their regular salaries.

* B.A., Bard College, 2002; J.D., Boston University School of Law, 2006. The author wishes to thank Kate Silbaugh for her invaluable suggestions and guidance. The article is dedicated to Amiri and Henry, without whom it would have remained unwritten.

Such a proactive approach to legislation represents a realization that in order to achieve actual gender equalization in leave-taking or elsewhere in the workplace, we must actively seek to change gender norms, instead of simply seeking to change the ratios, biases, and protocols that exist within them. It is the obstinate refusal to look at and affect the bigger picture that makes past leave legislation proposals so fundamentally flawed. While better than the unpaid leave of 1993's Family and Medical Leave Act (FMLA)¹, proposals that contemplate partial or even full wage replacement during leave only serve to make leave-taking a less unattractive option for both men and women. These proposals make leave a possibility, although not necessarily a viable one. However, partial- or full-wage proposals do not affect the odds that men will either want or subsequently take advantage of the possibility to take leave. Under such proposals the minority of men who would like to take leave have less of a disincentive to take it (for disincentives, economic and otherwise, still exist). However, such proposals create no impetus to take leave for the majority of men. It logically follows that male leave-takers will remain a minority among fathers, and that therefore replacement proposals will never make more than small inroads into the leave-taking gender ratio.

Mandatory leave-taking proposals, which contemplate forced paternity leave, more directly attack the gender ratio. However, they fail to make leave more desirable among men, so despite a superficial and most likely short-lived change in numbers, underlying gender biases will remain and may even worsen, thus leaving gender norms undisturbed.²

In contrast to wage replacement and mandatory leave proposals, a compensatory leave regime has the potential to dramatically alter the desirability, and hence the long-term success, of paternity leave.

Equalizing the gender divide in parental leave-taking is not only valuable in and of itself, but it wields tremendous power in combating workplace inequality generally. The traditional association of women with motherhood has historically contributed to women's inability to attain equal power in the job market.³ From this disadvantaged starting position, the interference of maternity breaks in a woman's career can make it difficult to build and retain human capital, further distancing women from their unencumbered male counterparts.⁴ Once out of the workforce,

1. 29 U.S.C. § 2601 (1994).

2. Any change will likely be short-lived not only because the effectiveness of a mandatory rule in an unsympathetic and unprepared environment is questionable, but also because the legislation itself will likely be short-lived due to its failure to affect gender biases. *See infra* Section II.A.2.

3. *See* SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 1-27 (1983) (providing an evidentiary background and historical accounts of inequality of power in the job market).

4. *See* FRANCINE D. BLAU & MARIANNE A. FERBER, THE ECONOMICS OF WOMEN, MEN,

women become increasingly less likely to resume working. The gauge for measuring this phenomenon is known as “attachment” to the workforce.⁵ As Professor Martin Malin succinctly notes, “as long as parental leave remains de facto maternal leave, work-family conflicts will remain a significant barrier to women’s employment and a significant source of discrimination against women.”⁶

Outside of the immediate economic effects, the use of both maternal and paternal leave presents a number of benefits. If men become as likely as women to take parental leave, it will result in a greater equalization of bargaining power in the job market, as well as an equalization of the disadvantages parents face in building their careers. Furthermore, a successful parental leave policy can have the positive impact of reducing risks to human capital, workforce attachment, and other factors that leave-taking jeopardizes. If men participate equally in parental leave they will share its disadvantages equally. Additionally, a leave policy that advances gender equality in leave-taking will help to eviscerate those disadvantages. There is also evidence indicating that early bonding with an infant and the early development of parenting skills are directly linked to the future division of labor between parents, suggesting that the successful promotion of paternity leave will likely reap benefits even beyond its scope.⁷ A more equal division of parental labor throughout childhood can only aid in the pursuit of gender equalization in the workplace.

Part II of this article will explain why a leave regime that compensates parents in addition to providing full wage replacement is most favorable. Additionally, it will discuss what such a regime might look like, as well as some issues that it might engender. Part III will offer an economic defense of the proposal, as well as discuss potential funding mechanisms.

AND WORK 152-81, 184-85 (1987) (observing that the starting point for women employees, while improving, generally remains lower in pay and position).

5. See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 38 (2005) (indicating a decrease of attachment due to maternity leave); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 730-736 (2000) (regarding women’s lessened attachment to the labor force after maternity leave).

6. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1052 (1994) [hereinafter Malin, *Fathers*].

7. See generally KATHRYN C. BACKETT, *MOTHERS AND FATHERS* (1982) (examining the development of parental behavior). See also Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 36-37 (1998) [hereinafter Malin, *Leave Revisited*] (correlating paternal leave with future parental involvement); Malin, *Fathers*, *supra* note 6, at 1055-1057 (suggesting early maternal involvement leads to later paternal exclusion).

II. EMPLOYEE INCENTIVIZING: A COMPENSATION PLAN FOR PARENTAL LEAVE

A. *Explaining Away the Alternatives: The Inadequacies of Unpaid Leave, Leave Mandates, and Simple Wage Replacement*

As established in Part I, in order to effectuate change in patterns of leave-taking over the long-term, leave legislation must do more than simply make it possible for men to take leave, absent extra incentives.⁸ Thirteen years of history under the FMLA evidence the ineffectiveness of an unpaid leave regime in significantly altering preexisting leave behavior among males. Logistically, the easiest solution would be to statutorily mandate leave for men, thus eliminating the need for incentives. Though mandates may have a role to play, overly aggressive mandates, or an over-reliance on them, are not only more unrealistic and potentially problematic than an incentive-based system, but may also prove more costly over time. Finally, while a wage replacement regime would do more than an unpaid regime to encourage men to take leave, the incentive provided by such a regime is insufficient to provide any real or lasting parity between maternal and paternal leave-taking. This section posits that the only effective solution to the gender leave gap is to implement a compensation plan for taking parental leave that pays a significant sum on top of full wage replacement.

1. The Family and Medical Leave Act

Though the FMLA has arguably made a positive impact in some areas,⁹ it has clearly failed to significantly increase the number of men who take leave, even if they are eligible.¹⁰ The language of the FMLA is gender neutral, so at first glance it appears to take a step in the direction of gender parity by shifting the statutory focus from maternity to parental leave.¹¹

8. See Selmi, *supra* note 5, at 759 (suggesting that the FMLA is unlikely to alter gender roles because it fails to create incentives for men to take leave).

9. See STEVEN K. WISENSALE, *FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA* 158, 163 (2001) (noting tangible turnover reduction, a slight overall employment gain, no negative (but no positive) effect on women's wages, slightly increased utilization rates, and a negligible economic burden for employers).

10. See DAVID CANTOR ET AL., *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 4-15 (2000)* (indicating that fewer than half as many men take leave under the FMLA as compared to similarly situated women). See also Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 54-55 (2004) (positing that the figures regarding paternal leave are often misleading, as paternal leave is often of shorter duration than maternal leave).

11. See generally 29 U.S.C. § 2601 (1994) (using the term "parents" instead of gender specific nomenclature).

However, because leave is unpaid, and women generally command lower wages than men, it is still much more likely that women will take leave in a two-parent family in order to lessen the financial loss.¹² Perhaps more importantly, the FMLA, because it is unpaid and thus an unattractive option taken only if absolutely necessary, perpetuates existing cultural norms that simultaneously promote maternity leave and discourage paternity leave.¹³ In addition to economic considerations, cultural norms that oppose paternity leave find expression in workplace hostility, social pressure, and individual male reticence to leave-taking.¹⁴ The combination of these pressures often renders paternity leave de facto unavailable, even if men possess a legal right to take leave.

The perpetuation of these leave-taking norms reinforces the American model of the ideal worker as anyone but a woman of child-bearing age; if maternity leave is a cultural reality but paternity leave is not, women become much less attractive as potential employees.¹⁵ Some scholars even argue that an act targeted exclusively to women could have done more to promote gender equality in the workplace than the FMLA in its present form. This is because such an act could have included more economically vulnerable women among its protected beneficiaries to the exclusion of only "a few relatively privileged men."¹⁶ If the FMLA fails to change cultural norms with respect to paternity leave, an alternative would be to focus on creating and protecting better maternity leave options. However, changing paternity leave norms is a particularly efficient means of arriving at workplace gender equality.¹⁷ Therefore, while a maternity-focused leave policy might do more for women's welfare than the FMLA, leave

12. See, e.g., 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 (2000) (noting that women are more likely to take leave because of their relative position in the workplace); Grossman, *supra* note 10, at 38 ("[T]here exists a clear incentive for a couple to prefer maternal leave over paternal leave . . .").

13. Bornstein, *supra* note 12; Grossman, *supra* note 10.

14. Bornstein, *supra* note 12; Grossman, *supra* note 10. See Malin, *Leave Revisited*, *supra* note 7, at 39-42 (discussing workplace hostility toward accommodating family responsibilities); Joseph H. Pleck, *Fathers and Infant Care Leave*, in THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 177, 185-187 (Edward F. Zigler & Meryl Frank eds., 1988) [hereinafter Pleck, *Fathers*] (affecting paternal leave decisions are "the length and timing of leave, whether and how the leave is paid, and employer attitudes toward male employees who take these leaves."); Selmi, *supra* note 5, at 757-759 ("[M]en. . . fear they will suffer workplace repercussions from their employers [for taking paternal leave].").

15. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64-113 (2000) (discussing the perception that an ideal employee works full time, or more, if necessary—a role few women are able to fill because of the unwillingness of their spouses to stay home and raise their children).

16. Bornstein, *supra* note 12, at 115 (citing Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 33 (1991)).

17. See *supra* Part I.

legislation that attempts to change existing gender norms is still preferable. Unpaid leave, as articulated under the FMLA, is unambiguously inadequate even as a temporary resolution, and it is far from norm-changing.¹⁸

2. Mandatory Leave-Taking

In light of the policy goal of equalized leave-taking, it would seem logical to initiate a system that makes leave-taking mandatory if we cannot expect men to take advantage of leave voluntarily. Although it could instantaneously and drastically increase the number of men who will take leave, instigating such a system has obvious drawbacks. First, even if the leave were unpaid and therefore arguably less costly to employers, a proposal mandating leave would likely be met with staunch, and perhaps insurmountable, political opposition.¹⁹ The unpopularity of this proposal is evidenced by its notable absence from the scholarly discussion about proper leave policy. One rare reference is the negative response that the proposed FMLA sometimes encountered prior to its enactment when men confused an employer's mandatory obligation to provide paternity leave with making leave-taking mandatory for an employee, the latter of which the FMLA never contemplated.²⁰ This negative response merely foreshadows the political response that would occur if mandatory leave were actually under consideration.

In a political climate that emphasizes economic and personal freedom from obligations, it will be difficult to pass a proposal that contemplates any sort of government interference with the free market (which any leave legislation would necessitate), let alone inhibits the freedom of employment of a significant number of individuals. Professor Michael Selmi is one of the only commentators who has seriously contemplated making leave-taking mandatory.²¹ Though he notes the possible benefits of such a proposal, Selmi questions its administrability; he is particularly concerned with what set of fathers and/or male caretakers such a proposal would apply to, and consequently, the proposal's ability to garner sufficient

18. See Grossman, *supra* note 10, at 61 (noting that in order to change gender norms through leave policy, “[m]en must be affirmatively pressed into service. At a minimum, the law should make paternity leave more enticing.”).

19. See Selmi, *supra* note 5, at 774-75 (illustrating and presenting reasons why legislation espousing mandatory paternity leave is unlikely to receive sufficient political support).

20. See Pleck, *Fathers supra* note 14, at 188 (“[M]en often mistakenly think the . . . technical term *mandated parental leave* (that is, employers are mandated to offer it) actually means that fathers would be required to take it[.]”) (emphasis in original).

21. See Selmi, *supra* note 5, at 773-775 (discussing both the benefits of, and possible objections to, mandatory paternal leave).

support.²² Professor Selmi's qualms are understandable but greatly under-inclusive; such a proposal would probably face fundamental and substantial opposition, extending beyond mere doubts about its administrability.

A second consideration involves the questionable constitutionality of a mandatory leave-taking obligation. A statute only mandating paternity leave might be susceptible to a challenge under the Equal Protection Clause of the Fourteenth Amendment.²³ Indeed, a statute that applied equally to men and women would more easily pass constitutional muster.²⁴ But even a statute that mandates coequal but sequential leave for both mothers and fathers may face opposition as a restriction based on gender.²⁵ Meanwhile, a statute mandating that both parents take leave simultaneously might come at too significant a cost to employers, resulting in employment discrimination based on familial status.²⁶ Indirectly promoting discrimination is less defensible under a mandatory system where parents must take leave when they may, depending on whether leave is paid or unpaid, have no independent incentives to take leave. Discrimination under a voluntary, incentive-laden regime, though still problematic, would at least be somewhat less offensive as a statutory side-effect since parents would have the opportunity to weigh incentives and disincentives before

22. *Id.* at 775.

23. The Supreme Court affords intermediate scrutiny to claims of Equal Protection violations based on gender. *See United States v. Virginia*, 518 U.S. 515, 595 (1996) (applying intermediate scrutiny to find that denying women admittance into the Virginia Military Institute is unconstitutional). Consequently, legislators would have to show an "exceedingly persuasive justification" in order to classify based on gender. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). Though one might argue that mandatory leave is justified as the only reasonable means of achieving gender-equalized leave-taking, *see Selmi, supra* note 5, at 774 n.246 (outlining an argument for the constitutionality of mandatory paternity leave), the likely availability of gender-neutral avenues to arrive at gender equality makes this argument somewhat dubious and unconvincing. *See infra* Section II.B.

24. A gender-neutral statute need only survive rational basis review for Equal Protection claims to pass constitutional muster. *See, e.g., F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). It would be relatively easy to demonstrate that a statute employed rational means to arrive at "the important goal of reducing gender inequality." *Selmi, supra* note 5, at 774 n.247.

25. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 732 (2003) (indicating that if the FMLA, gender-neutral on its face, operated to reinforce traditional gender roles by, for example, not setting a minimum amount of leave, thereby excluding women who would need leave to be guaranteed for a substantial period, that it might be unconstitutional).

26. Discrimination based on familial status is also a significant threat under a compensatory leave proposal. But, as the next paragraph argues, the costs, and the accompanying risk of discrimination, might actually be greater under a mandatory leave system.

opting to take leave.

Even among feminists, mandatory leave-taking may be an unpopular solution to workplace gender inequality in any incarnation, and particularly if it involves women. Maternity leave has been compulsory in the past and historically served as an obstacle to women's employment and consequently women's empowerment.²⁷ Mandatory leave is therefore often associated with paternalism and the subjugation of women, and therefore may be equally distasteful across a wide political spectrum.²⁸ Though a mandatory system might work to change cultural norms by force, it would be met with more resistance than a system that incentivized norm-changing behavior. In addition, it might take longer to take positive effect, assuming a mandatory system would take positive effect at all. It is more realistic to foresee a backlash against both female employment and female advancement, despite statutorily imposed equalized leave-taking, due to the bitterness engendered by any statute that requires action at odds with long-standing, definitive norms.

Finally, though the chief appeal of compulsory leave over incentivized leave is cost savings, a compulsory approach would arguably cost more than an incentivized approach in the long run. Without any corresponding wage replacement, some of the economic benefits that leave-taking otherwise creates for parents would be missing.²⁹ Even if accompanied by partial or complete wage replacement, natural resistance to compulsory initiatives might negatively impact worker efficiency and productivity.³⁰ In any event, this would lessen the initial cost-gap between a compulsory and an incentivized leave system. A compulsory system would also include enforcement costs, though it is unclear how significantly these would differ from monitoring costs in an incentivized leave system.³¹

27. See Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States*, in THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY, *supra* note 14, at 3-22 (tracing the history of protective leave for mothers in the United States and in other countries). See also KAMERMAN ET AL., *supra* note 3, at 29-46 (discussing the history of maternity policies in the United States).

28. See, e.g., KAMERMAN ET AL., *supra* note 3; Beth Willinger, *Resistance and Change: College Men's Attitudes Toward Family and Work in the 1980s*, in MEN, WORK, AND FAMILY 108, 110-112 (Jane C. Hood ed., 1993) (offering a variety of perspectives to facilitate the understanding of male resistance to changing gender roles) (citing Janet G. Hunt & Larry L. Hunt, *Male Resistance to Role Symmetry in Dual-Earner Households: Three Alternative Explanations*, in FAMILIES AND WORK 192, 192-203 (Naomi Gerstel & Harriet Engel Gross eds., 1987)).

29. See *infra* Section III.B.

30. Mandatory leave might also create significant backlash among male employees and employers, thereby heightening the risks of noncompliance and possibly providing an impetus for increased discrimination against women. Indeed, a similar sort of backlash has been observed in Sweden. See *infra* Section II.A.3, at note 55.

31. The bulk of monitoring under incentivized leave would consist of minimizing employer abuse of leave-takers (i.e., having employees on "leave" in name only and

Despite the substantial impediments to, and potential negative impacts of, a mandatory leave regime, it would be imprudent to universally dismiss advocating for any sort of mandatory leave. A very short period of gender-neutral mandatory leave might engender less opposition, and hence, less potential backlash. Mandatory parental leave for a one or two week period could even be marketed as an emotional health benefit to the newborn, rather than as a politically charged attempt to equalize gender relations domestically and in the workplace. The value of even a brief leave taken universally should not be under-emphasized or dismissed; not only would it encourage early parent-child bonding,³² but it could serve as an important tool in changing parental norms over time. Once men have become accustomed to newborn leave-taking that has been statutorily imposed, it will be a less foreboding step, especially when combined with an incentive scheme, to take voluntary leave. A survey of foreign leave policy, notably Japan's, whose cultural gender-divide is arguably much more severe than in the United States,³³ reveals some consideration of attempts to normalize paternal leave-taking by mandating short leave periods.³⁴

In conclusion, though mandatory leave cannot be seen as the primary solution to increasing male leave-taking, and should be carefully constructed keeping in mind potential costs and difficulties, a short mandatory leave period can augment an incentive-driven leave program and should be considered seriously.

3. Full or Partial Wage Replacement

A form of paid leave that would amount to either full or partial wage replacement is the most oft-supported alternative among critics of the FMLA's unfunded leave. Some degree of wage replacement is advocated by national groups of experts,³⁵ and both major political parties have

requiring or inferring that some amount of work be done on leave), but would also include ensuring that only appropriate parties are taking advantage of compensatory leave.

32. See *supra* note 7.

33. Japan's substantial gender-divide is noteworthy because Japanese policymakers must have concluded that brief mandatory leave would help promote paternity leave without serious backlash of the sort discussed in this section. If Japan's mandatory leave legislation is successful, it may indicate that similar legislation could succeed in the United States.

34. See Leo Lewis, *Fathers Will Be Forced to Mind Baby*, TIMES ONLINE, December 3, 2004, <http://www.timesonline.co.uk/article/0,,3-1384908,00.html> (last visited Oct. 22, 2006) (discussing the mandatory paternity leave implemented by the Japanese city of Ota). See also Arielle Horman Grill, Comment, *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, n.54 (1996) (noting that in Sweden each parent has thirty days of mandatory leave) (citing Ann Numhauser-Henning, Address at the Third Japan Institute of Labor Tokyo Seminar on Comparative Labor Law (Sept. 24, 1994)).

35. See *Task Force Recommendations on Parental Leave and Child Care* in PARENTAL

recognized that some wage replacement might be necessary to invigorate the FMLA.³⁶ In 1999, President Clinton called for federal regulations that would allow states to experiment with partial wage replacement through Temporary Disability Insurance Funds.³⁷ Although the proposal was later discontinued by the Bush Administration, a number of states have continued to experiment with partial wage replacement.³⁸ Many scholars note that without wage replacement at levels sufficient to help defray income loss over the leave period, many FMLA-qualified individuals will be unable to make use of parental leave.³⁹ This is certainly a sufficient reason to advocate for some form of paid leave.

However, even if wage replacement were guaranteed to the extent necessary to fund a parental leave, it would still serve to exacerbate the leave-taking gender gap. Because men on average enjoy higher salaries than women, a straight percentage cut for a family across each wage earner's income will still usually provide an economic bias toward maternity leave.⁴⁰ Even a system that on average equalized the economic impact of paternity and maternity leave by adjusting the percentage of

LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 463, 464 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991) (recommending 75% wage replacement up to a maximum of 150% of the median individual income in the United States for up to 52 weeks); *See also Recommendations of the Yale Bush Center Advisory Committee on Infant Care Leave* in THE PARENTAL LEAVE CRISIS, *supra* note 14, at 344-345 (recommending 75% wage replacement up to a reasonable maximum for up to 3 months).

36. WISENSALE, *supra* note 9, at 160.

37. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37, 210 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604) (“[T]he President directed the Secretary of Labor on May 23, 1999, to propose regulations allowing unemployment fund moneys to be used to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child.”).

38. WISENSALE, *supra* note 9, at 186-187.

39. *See, e.g.,* Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 346-347 (1993) (noting that a deficiency of wage replacement at appropriate levels will deter qualified FMLA persons from taking paid leave).

40. To illustrate the point: suppose a parental couple makes \$180,000 in sum, with the father earning \$100,000, and the mother earning \$80,000. Suppose further that wage replacement for leave-taking is 75% of total income for a full year of leave. If the father took leave, he would be compensated at \$75,000 (75% of \$100,000). The father's net loss as a result of taking leave would therefore be \$25,000 (\$100,000 minus \$75,000). If the mother took leave, she would be compensated at \$60,000 (75% of \$80,000). The mother's net loss as a result of taking leave would therefore be \$20,000 (\$80,000 minus \$60,000). Because the couple would lose less overall net income if the mother took leave, similarly situated couples would trend toward maternity leave over paternity leave (and thus minimize the amount of income that would be lost under the replacement wage). For further clarification, *see* Jean Kimmel & Catalina Amuedo-Dorantes, *The Effects of Family Leave on Wages, Employment, and the Family Wage Gap: Distributional Implications*, 15 WASH. U. J.L. & POL'Y 115, 124-140 (2004) (discussing the economic ramifications of paid parental leave for men and women).

wage replacement upward for men and/or downward for women⁴¹ would still result in less than gender equalized leave-taking due to existing extra-economic cultural norms that cut against paternity leave.⁴²

Professor Selmi asserts that equalized leave-taking may be economically beneficial for men in the long run.⁴³ However, he maintains that even if men realized this, they might be unwilling to sacrifice some of their current advantage over women in earning potential—if only because it is human nature to favor power retention for an immediate short-term gain over power erosion for a distant future benefit.⁴⁴ Thus, even creative proposals to equalize the economic loss suffered as a result of leave-taking within a dual-earner family may aid the reduction of—but will not eliminate—leave-taking's unequal gender distribution. Barbara Bergman's proposal for wage replacement as "a constant proportion of [a couple's] usual joint income, regardless of which parent was staying home," illustrates one possible alternative.⁴⁵ As an alternative to a proposal advocating compensation above full wage replacement, one might consider a system that compensates fathers within a dual-income couple significantly more than mothers such that the economic incentive will be reversed, and a couple would lose less income if the father took leave. However, it may be inequitable to pay fathers more for leave than mothers. Indeed, this method may result in constitutional problems similar to those posed by legislation mandating leave for men but not for women, as discussed above.⁴⁶

With the exception of creative thinkers like Selmi and Bergman, too often commentators in this area observe a low rate of leave-taking among men, as well as data that tends to suggest that even with wage replacement male participation will remain lower than female participation, and

41. See *supra* note 40 and accompanying text (providing a hypothetical situation where the economic impact of taking leave would be equalized if either the father's wage replacement rises to 80%, resulting in a net loss of \$20,000, or the mother's wage replacement falls to 68.75%, resulting in a net loss of \$25,000.).

42. See Lester, *supra* note 5, at 38-41, 59 (citing firm-specific human capital and retention of seniority, as well as "a variety of cultural factors," as additional factors which employees consider in making their decisions regarding paid or unpaid leave.).

43. See *supra* Section III.B.

44. Selmi, *supra* note 5, at 757.

45. Barbara R. Bergman, *Work-Family Policies and Equality Between Women and Men*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 279 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997). Bergman's proposal has the advantage over an equalization proposal consistent with note 40 in that equalization would be non-gender-discriminatory and thus would encounter less legal difficulty.

46. See cases cited *supra* notes 23-25 (listing United States Supreme Court decisions suggesting that there are constitutional problems with mandating paid leave for one gender exclusively and outlining the Court's approach to restrictions based on gender more generally).

conclude that men should be incorporated into leave policymaking as slowly and as moderately as possible.⁴⁷ This thinking is backwards. Rather than accept low rates of participation as constants from which we should develop sound and conservative policy, we should approach them as variables that can increase if such increases are targeted as policy goals.

Professor Joseph Pleck, who subscribes to this faulty position, finds data to support slow increases of wage replacement percentages as the best means of encouraging paternity leave in Sweden's slow, deliberate increases in paternity leave and the corresponding increases in leave participation among Swedish men.⁴⁸ Nowhere in these statistical analyses does Professor Pleck consider or address leave policy's potential for normative change.⁴⁹ Moderate success, however (which fails to approach equalization, and which, after years of governmental promotion, still masks significant employment difficulties for women),⁵⁰ should not be taken as an argument against attempts at more radical change. Unfortunately, the underlying attitude of this sort of perspective is that there is no real problem with women taking parental leave much more frequently than men: "fathers will not necessarily use [parental leave] to an equal degree or in the same way [as mothers]. This should not be viewed as a failure of the

47. See, e.g., Pleck, *Fathers supra* note 14, at 188-189 ("There is a tendency in the U.S. to assume that paternity leave is a six-month leave taken by the father when a child is born . . . However, the actual duration and timing of Swedish paternity leave in practice (relatively short leave-terms, not only at birth) *would be a better model for the United States than the six-month theoretical entitlement.*" (emphasis added)).

48. *Id.* at 181-184 (discussing Sweden's experimentation with paternity leave policy and resulting statistics, concluding that "[f]lexibility in how long and when to take paternity leave seems essential for significant numbers [of men] to make use of them." Professor Pleck's conclusion implies that policymakers should not be overly ambitious or demanding in encouraging men to take leave). See also Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men?*, in *MEN, WORK, AND FAMILY, supra* note 28, at 217, 227-228, 230-234 [hereinafter Pleck, *Employer Policies*] (concluding that "[t]wo principles appear to influence the extent to which men use particular family-supportive policies. Men use policies to the extent that their use (a) does not reduce their earnings, weakening their role and identity as breadwinners, and (b) does not cause them to be perceived as uncommitted to their jobs or unmasculine. Particular policies will be used most if their 'cost' on these two dimensions are low and will be used far less if their cost is higher on either." This conclusion again supports the inference that leave should be carefully constructed so as not to offend men's perceived and actual normative role.)

49. See generally Pleck, *Fathers supra* note 14; Pleck, *Employer Policies supra* note 48.

50. See LINDA HAAS, *EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN* 166-177 (1992) [hereinafter HAAS, *PARENTHOOD*] (asserting that there remain significant employment hurdles for women, despite governmental espousal of equal opportunities for all who seek jobs); Malin, *Fathers supra* note 6, at 1063 (noting continued rampant discrimination against women by employers in Sweden and the United States and that "[employers'] greatest incentive for discrimination will be in hiring decisions.").

policies or of fathers,” Pleck writes.⁵¹ Rather than attempting to change gender norms, Pleck merely seeks to increase paternity leave moderately within existing norms. Though moderate change may be more realistic in the short-term, it will never succeed in achieving actual gender equality in the workplace, which requires widespread norm-changing.⁵² As such, moderate leave policy will never reach the full potential of leave legislation to effect social and economic betterment in the United States and should therefore be rejected.

Sweden presents a good example of a wage replacement system in action.⁵³ While, as Pleck notes, progress has been significant, the Swedish model still demonstrates exactly how and why a wage replacement system is an inadequate vehicle through which to pursue gender equality in the workplace.⁵⁴ Though created with the express goal of promoting gender equality in both work and family life, and though almost half of eligible men took some amount of parental leave as of 1992⁵⁵ (far more than current participation among eligible fathers in the United States),⁵⁶ women still

51. Pleck, *Fathers supra* note 14, at 188. Though this conclusion is couched in a discussion of how policymakers should approach leave policy, the underlying idea that successful leave policy need not, and indeed, should not, challenge men to change their perceptions and practices regarding parental leave reveals a sexist adherence to and unwillingness to question existing gender norms.

52. See WILLIAMS, *supra* note 15 (explaining the various non-economic forces which influence parents' decisions regarding leave and help to maintain the gender inequality within the system); Bornstein, *supra* note 12, at 95-98 (noting the persistence of gender inequality is due, in part, to current workplace norms which are falsely based on the model of a fully committed worker with no familial obligations); see also 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, 121-124 (1998) (noting that prevalent norm-changing is the long-term solution to increasing the number of men who take paternity leave).

53. In Sweden, parents enjoy 90% wage replacement for the first sixty days after the birth of their child, and 80% wage replacement for the following 300 days. Grill, *supra* note 34, at 378-379.

54. Selmi, *supra* note 5, at 772 (noting that, as of the late 1980s, “approximately 44% of Swedish men take parental leave with the average leave [period] lasting forty-five days.”). See also Grill, *supra* note 34, at 377-378 (noting that in Sweden each parent has thirty days of mandatory leave); Linda Haas, *Nurturing Fathers and Working Mothers: Changing Gender Roles in Sweden*, in MEN, WORK, AND FAMILY, *supra* note 28, at 248-249 [hereinafter Haas, *Nurturing*] (demonstrating Swedish fathers' participation in specific child care tasks).

55. HAAS, PARENTHOOD *supra* note 50, at 81.

56. Though his figures are ten years old, Professor Selmi claims that just 2 to 3.6% of employees at private-sector worksites took leave under the FMLA, and that only 41.8% of this approximately 3% were men. Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 408 (1999) (citing the Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Practices* at 58-61 (1997)). Further, Selmi points to indications that the majority of men who did in fact take leave under the FMLA were most likely taking personal sick leave

experience a distinct division from men in terms of employment opportunities and salary levels that is worse than the division felt by working women in the United States.⁵⁷ This division persists in part because Swedish employers know women will take parental leave more often and for much longer duration than men (less than 10% of Swedish fathers share leave equally with their partners).⁵⁸ Not only has the workplace gender gap not improved, but in some cases dissatisfaction with gender-neutral family policy serves as a cover for explicit acts of sex discrimination.⁵⁹

One of the biggest problems with the Swedish system is that parents do not have individual leave allocations, but rather share a total amount of available leave between them, and Swedish mothers almost universally breastfeed for at least six months.⁶⁰ Consequently, mothers are almost always the leave-takers for the early months of a child's life, with fathers taking leave during the child's later infancy to provide a brief respite to the mothers.⁶¹ Thus, this system actually functions to deepen the traditional gender-based division of labor.⁶² Even if leave were available for simultaneous use, there is no indication that a larger percentage of fathers would take advantage of it. That only about half of all fathers even relieve their partners over the entirety of an infant's first year despite nearly full wage replacement,⁶³ a program which has been in place since 1974,⁶⁴ strongly suggests that wage replacement alone is an insufficient incentive to equalize leave-taking behavior.

rather than parental leave. *Id.* A survey from 2000 indicates that 13.5% of eligible men take leave. Chuck Halverson, Notes, *From Here to Paternity: Why Men Are Not Taking Leave Under The Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 259 (2003) (citing FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE, *supra* note 10).

57. According to Professor Nancy Dowd, "[j]ob segregation by sex is even stronger in Sweden than it is in the United States, both between and within occupations. Women are concentrated in fewer jobs, have penetrated male-dominated occupations to a lesser degree, and rarely advance to the middle or upper levels of job hierarchies . . ." Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 326 (1989). See also HAAS, PARENTHOOD *supra* note 50, at 35-38 (claiming that Sweden's labor market is highly sex segregated).

58. HAAS, PARENTHOOD *supra* note 50, at 81.

59. *Id.* at 327.

60. Pleck, *Employer Policies supra* note 48, at 230.

61. *Id.* at 227, 230-31.

62. HAAS, PARENTHOOD *supra* note 50, at 82.

63. See *supra* note 54 and accompanying text (asserting that almost 50% of fathers took some parental leave).

64. HAAS, PARENTHOOD *supra* note 50, at 41.

B. *The Statutory Basics: A Preliminary Sketch of Compensatory Leave Legislation*

In order to work meaningfully toward gender equalization in the workplace, leave legislation, if not mandated, must create incentives for men to take leave. Full or partial wage replacement might make paternity leave an *option*, but it does nothing in and of itself to *encourage* leave.⁶⁵ Suggestions and efforts abroad have created a public paternity leave campaign,⁶⁶ and Selmi makes a promising proposal to persuade certain groups of employers to encourage paternity leave,⁶⁷ but not enough attention has been paid to creating substantive incentives targeting male employees. Without material encouragement, men will not progress beyond Pleck's uninspiring vision of paternity leave, and maternity leave will remain the norm. To this end, I propose legislation which compensates male and female leave-takers above and beyond full wage replacement. If men are actually paid to take leave, it is likely that they will finally take it in large numbers, thus effecting normative change. For simplicity's sake, I will refer to both a leave system that authorizes payment above and beyond full wage replacement and the payments under such a system as compensatory leave. The following legislative proposals are geared toward increasing male participation in leave-taking, as well as improving leave policy for all parents.

1. Expanding the Set of Eligible Workers

The group of employers, and hence, employees, affected by the FMLA⁶⁸ is much too small. The group of affected employers should be expanded to be as large as is politically and economically feasible.⁶⁹ I will address the issue of costs separately, but perceived economic hardship to very small companies (for example employers with ten or fewer

65. See *supra* Part I.

66. See, e.g., Haas, *Nurturing supra* note 54, at 248 (in Sweden, "[c]ampaigns were launched to convince fathers that taking leave was the right thing to do.").

67. See Selmi, *supra* note 5, at 775-781 (advocating a "set-aside program for family leave"). Selmi's set aside program would require the government to mandate that for employers to qualify for government contracts, a certain threshold of workers of each gender must utilize a certain amount of parental leave. So long as the government contract is more lucrative than encouraging paternity leave is costly, employers that are eligible for government contracts would have an economic incentive to encourage paternity leave.

68. The FMLA mandates leave only to employers with fifty or more employees. 29 U.S.C. § 2611(4)(A)(1999).

69. In her published note, Erin Gielow suggests that lowering the threshold from fifty employees to twenty-five will be both effective and feasible. Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1538-41 (2002).

employees) may make it difficult to legislate for companies below a given threshold.⁷⁰ The key is to establish a legal right to leave among a substantial enough majority of workers that over time it becomes an expectation for most prospective employees in most industries. Consequently, employers that are too small to be legally required to provide leave will be motivated by market forces to provide leave to highly skilled workers, as those workers would expect leave if employed by larger companies.

2. Offering Leave to Dual-Income Households

There are two means, through gender-neutral legislation,⁷¹ of offering compensatory leave to dual-income households to encourage male leave-taking. One option would be for parental leave and compensation to be tied to each individual parent. Under this system, a mother and father would each receive an equal amount of compensatory leave to be used at their discretion. If one parent ran out of leave, the other's available leave would remain unaffected. To encourage equal co-parenting, parents would be able to take compensatory leave concurrently.⁷² Depending on the amount of compensatory leave policymakers deem adequate to stimulate male leave-taking, it might be possible to add on a period of mere wage replacement or even unpaid leave after parents exhaust their allocation of compensatory leave.

Though this first option would likely be a sufficient incentive for more men to take leave, it is less than ideal. If compensatory leave added a percentage of a parent's income to their base salary, it would still be biased on average toward maternity leave, due to salary differences between men and women.⁷³ If compensation were set at a fixed amount over base salary,

70. See WISENSALE, *supra* note 9, at 143, 148-51 (documenting the business community's initial reaction to the FMLA).

71. Partially due to constitutional concerns, *see supra* notes 23-25 and accompanying text (describing the possible constitutional pitfalls of mandatory leave legislation, whether gender-neutral on its face or not, and of gender-based legislation generally), and partially due to increased political ease, equitable concerns, and personal preference, this article advocates a gender-neutral compensatory leave regime as opposed to one that explicitly treats men and women differently.

72. This is in contradistinction to the Swedish model, where, after the first ten days of an infant's life, parents cannot take leave concurrently. Grill, *supra* note 34, at 377 (citing *The Act to Amend the Public Insurance Act of 1962*, No. 908, ch. 3, § 13, ILO Leg. Series, Swed. V (1973)). It is also in contradistinction to the leave system advocated by Professor Selmi. *See Selmi, supra* note 5, at 771 (“[L]eave would belong exclusively to one parent without the possibility of sharing the leave between parents.”).

73. *See Bornstein, supra* note 12, at 116 (“[P]arental leave is likely to be used primarily by women due to their position in the workforce as compared to that of men.”).

its success as an incentive would vary widely according to income level,⁷⁴ and it would perhaps be more susceptible to budget cuts over time. Also, this first option might result in a system like Sweden's, where even if a larger percentage of men take leave and for longer periods of time, women will inevitably take leave first and thus reinforce traditional gender roles within the household.⁷⁵ A directive that tried to force parents to take leave for a significant portion of a child's early infancy would be indistinguishable from leave-mandating, and therefore undesirable if too lengthy.⁷⁶ Though gender role preservation would perhaps be an acceptable byproduct in the face of women's employment gains, there exists a second approach to incentivizing paternal participation which does not yield such unwelcome side-effects.

Under this second approach, parents would be evaluated as a couple, and rewarded with a compensatory bonus only if both parents took leave. Desired leave arrangements (both parents maintaining an equal percentage of leave-taking over the first three months after birth, for example) encouraged through a system of bonuses would not take on a distasteful mandatory character.⁷⁷ Rather, parents could consider all of the pros and cons before deciding whether and how to take leave.⁷⁸ Depending on what leave arrangements appear most desirable to policymakers (that is, those that are deemed most likely to yield the greatest gains in achieving gender-equalization in leave-taking and more broadly in the workforce overall), different degrees of monetary incentives could be designed accordingly. Upon initial consideration, a leave arrangement that encourages equal parental participation in early infancy, such as the parenthetical example above, seems particularly important for promoting sustained equal parenting and thus particularly effective in changing gender norms.⁷⁹

74. Not only would success vary, but it might be difficult to arrive at an acceptable figure. A high figure might come at too great a cost to employers of low-skilled and otherwise inexpensive workers. A low figure would threaten rendering compensatory leave merely symbolic, particularly as one ascends the salary ladder.

75. See *supra* text accompanying notes 60-62 (highlighting the disincentives associated with Swedish paternity leave and one of their likely consequences).

76. See *supra* Section II.A.2 (concluding that a mandatory leave system would only be viable if the mandated leave period were of short duration).

77. See *supra* text accompanying note 76 (describing an approach that would force a parent to take leave).

78. Incentives of course would mostly be statutorily imposed in the form of additional compensation, but would also include personal benefits such as increased family time. Disincentives are largely socially imposed, and would hopefully lessen as a compensatory leave system gained traction, but might include economic considerations such as potential harm to one's employment track.

79. See Malin, *Fathers supra* note 6, at 1057-1059 (discussing the correlation between paternal use of leave and paternal involvement in child care).

3. Offering Leave to Single-Income, Dual-Parent Households

For single-income, dual-parent families, policymakers will have to determine whether or not offering compensatory leave is justified. On one hand, because the single-earner in a dual-parent household will most likely be the father, offering compensatory leave will almost surely increase the percentage of men taking parental leave compared to the entire pool of leave takers. Also, the availability of compensatory leave might actually encourage the non-wage earner (often the mother) to enter the workforce, as the wage-earning parent would be able to take over childcare responsibilities without sacrificing any income, leaving the non-wage earner free to add income to whatever the family could have earned absent compensatory leave. Though this benefit is consistent with a wage replacement regime, a compensatory leave regime that makes leave-taking by the single-earner economically preferable to not taking leave would result in many more non-wage earners suddenly available to test the job market.

On the other hand, paid leave is less justified, and harder to sell politically, when one parent already stays home to fulfill the caretaker role. Also, in a political regime that discourages traditional single-wage earner families as inefficient and socially undesirable, as one implementing a compensatory leave program would likely be, rewarding families for sticking to this model seems counterintuitive. Finally, making compensatory leave available exclusively to dual-income families among dual-parent households might also encourage the non-wage earner in a single-income family to enter the workforce so that the household could avail itself of the extra compensation.⁸⁰ In other words, the amount of extra compensation for which a family could qualify would be tacked onto whatever salary the non-wage earner could command on the market. In a compensatory leave regime that requires both parents to take leave in order to receive extra compensation, an exception to such a requirement might be adopted in order to facilitate the introduction of non-wage earners into the workforce. The exception might allow for some amount of wage replacement as opposed to extra compensation, however, since any wage replacement that, combined with the non-wage earner's salary potential, exceeds the initial wage earner's original salary would provide an

80. Note that childcare would still be covered, even assuming, as under the FMLA, that the newly employed parent would not yet be eligible for leave, *see* 29 U.S.C. § 2611(2)(A) (1999) (imposing a requirement that an employee requesting leave must be employed for at least twelve months prior to the request), since the previously single-earner parent would now be eligible for leave. An added benefit of a waiting period prior to leave-eligibility for new employees in this context would thus be that the father, as the likely initial wage earner, would be the only parent available to take leave.

economic incentive for a non-wage earner parent to join the workforce while the initial wage earner takes leave.

It is difficult to determine which approach to single-earner, dual-parent households would be most advantageous. An answer would likely depend on a specific inquiry into whether increasing the percentage of male leave-takers is worth the price of subsidizing single-earner, dual-parent families, and additionally into which approach would most effectively increase labor force participation overall. As something of a political compromise, policymakers may wish to consider providing partial or full wage replacement to single-earners in lieu of additional compensation.

4. Offering Leave to Single-Parent Households

For single-parent families, compensatory leave should be available as though the wage earner were taking advantage of the greatest level of bonuses available to dual-parent families. It is important to provide equal benefits regardless of family status for the sake of children, who cannot control the familial situation in which they find themselves.⁸¹ Furthermore, the level of benefits available to single parents, who are largely women, should have little effect on the desirability of extra compensation for married fathers—the main targets of compensatory leave.⁸²

Though this proposal might be criticized as encouraging single-parent families, it provides no extra incentive to become a single parent: the income available to a single parent household will still necessarily be less than the income available to a dual-parent household. Rather, this tactic merely acknowledges the reality of the growing number of single-parent households and seeks to ensure that these families are not punished as such. Also, because single parents often have no other income to depend on, to deny them compensatory leave would be to deny it to those who need it most.⁸³ While it might be possible to encourage marriage by making compensatory leave exclusively available to dual-parent households, it is

81. For a “sake of the children” argument, *see, e.g.*, Young, *supra* note 52, at 132-133 (urging the need to provide single parents universal access to parental leave and affordable childcare); Dowd, *supra* note 39, at 354 (“We should not punish children for the families into which they are born.”). *See generally* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004) (discussing parents’ obligations to their children and the economic and social effects of raising children on the lives of parents).

82. There might be some effect, however, to the extent that the benefits available to single parents take away from the overall funding for compensatory leave and thus reduce all leave-takers’ individual distribution of compensation.

83. *See* Dowd, *supra* note 39, at 353 (“The differential in income between dual-parent and single-parent families does suggest that family-leave policy should incorporate supplemental benefits for single-parent families.”).

unclear that this goal is desirable. Regardless, pursuing exclusivity in this context exacts too great of a penalty on single-parent families, making pro-marriage policymaking an improper project for this forum.

5. How Much Is Enough: Deciding on Compensation Levels

We need not establish the exact percentage of compensation above normal wages that should be provided under a compensatory leave regime, but it must be sufficiently large to be enticing while not too large to make it unreasonably costly. Also, the percentage should decrease as income increases, with a cap for very high incomes.⁸⁴ However, although adjusting compensation percentages according to an income scale is necessary in order to provide equity across income levels and to avoid obscenely high costs, it should not be overemphasized. Encouraging leave-taking among high-salaried and high powered employees becomes important because it serves as a means to mitigate discrimination based on familial status that might occur as a result of this proposal. If leave-taking becomes economical for high-level employees, norms will change more rapidly, and upper levels of management will be less likely to discriminate against workers who might be a threat to take leave.⁸⁵ Though just because upper-level workers may want to take advantage of leave does not mean they will encourage lower-level workers to do so, over time corporate culture will be more susceptible to change if that change is also present at the executive level.⁸⁶

One might think it is purely beneficial for workers to receive generous

84. Under the FMLA, "highly compensated employees" (defined as the highest-paid ten percent of all employees) are exempted from leave eligibility. 29 U.S.C. § 2614(b)(2) (1993). Though the exception probably originated as a cost compromise, it sets exactly the wrong tone in attempting to alter corporate culture to be receptive to paternity leave. See Heather A. Peterson, Note, *The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act*, 15 WASH. U. J.L. & POL'Y 253, 270 (2004) (arguing that the FMLA's "highly compensated employee" exception contributes to "a gendered division of labor in the household . . .").

85. See BLAU & FERBER, *supra* note 4, at 244-251 (discussing the theory of "tastes for discrimination," where, if employers or high-ranking employees have discriminatory attitudes toward a particularly group, discrimination against that group will likely occur, often in the form of wage differences paid in order to induce the preferred group of employees to work with the less preferred group). "Tastes for discrimination" theory applies in this context because according to the theory wage discrimination is less likely to result among similarly situated employees. Therefore, if upper-level employees are taking leave along with lower-level employees, less enmity between the groups will result in less discrimination.

86. *Id.* See also Bornstein, *supra* note 12, at 118-119 ("As long as these highest ranking employees do not take leave, there is an unspoken message that the top officials neither sanction nor embrace such behavior.").

leave packages, but some argue that if leave packages are too generous they will be disadvantageous to workers, especially women.⁸⁷ If employers bear a significant amount of the cost for paid leave, it is likely that at least some of that cost will be deferred by offering lower wages.⁸⁸ To the extent that women continue to take parental leave more regularly than men, women, among them the vast majority of single parents, will be more likely to suffer wage cuts than their male counterparts. One might question whether a more equalized and generous parental leave system is worth a serious cut to wages. We should be particularly concerned about wages of low-income workers; the lower one's hourly wage, the less likely it becomes that a percentage of that wage, over the short time one qualifies for compensatory leave, will make up for the wage cuts that employers are forced to make.⁸⁹

Therefore, while we must be mindful that compensation levels are not set so high that they will have an unacceptably dramatic effect on wages, and particularly on women's wages, the best way to address these concerns is through funding mechanisms that defer the costs of implementing compensatory leave away from employers.⁹⁰ After that, compensation levels should be determined based on economic reasonableness and political viability. A preliminary suggestion would set compensation above full wage replacement ranging from 25% of salary for a household under the poverty line to 5% for the ninetieth percentile and above. As a compensatory leave regime begins to affect underlying gender norms concerning leave-taking, the compensation percentages can be reevaluated and perhaps lowered.

6. Setting Time Limits: Deciding on Leave Duration

As with excessive levels of compensation, it has also been argued that overly extensive leave may hurt women workers. According to Professor Gillian Lester, "[l]eave[] of very lengthy duration might lead to a loss of work experience and depreciation of human capital."⁹¹ Professor Lester

87. See, e.g., Lester, *supra* note 5, at 41 (claiming that generous paid leave policies increase the likelihood that women will take leave and may contribute to the perpetuation of negative attitudes about working mothers).

88. *Id.* at 60.

89. This assertion assumes that employers will bear the brunt of the costs of a compensatory leave system. Though, arguably, employers will always experience some cost, they need not necessarily bear the brunt of those costs. To the extent that a leave system is funded through alternate mechanisms, wage-reduction, and the associated limits to the level of extra compensation that can be offered, becomes less of a concern. See *infra* Part III.

90. See *supra* note 89.

91. Lester, *supra* note 5, at 41 (citing Christopher J. Ruhm, *Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. ECON. 285, 314-315 (1998)).

cites a study indicating that increases in paid leave duration result in an increased amount of leave taken, at least up to a point.⁹² Not only is this logical for the wage replacement systems studied, but a compensatory leave system would actually provide a disincentive to go back to work for the duration of the period of compensatory leave. We must remember that any economically rational employee, and certainly any single-parent wage earner, will likely use the full extent of compensatory leave that they are provided. Paying parents not to work carries with it a serious danger that parents will be marginalized in the workplace.⁹³ The risk and extent of marginalization increases as the cost to employers rises, which implicates both compensation levels and leave duration.⁹⁴

If a compensatory leave system does not succeed in equalizing leave-taking by gender, women will be made particularly vulnerable to marginalization. Lester finds evidence supporting this unwelcome result in a study indicating that countries with extremely generous parental leave policies (in terms of both wage replacement and time off) “tended to have the most ‘traditional’ attitudes about working mothers.”⁹⁵ Even if a compensatory leave system does eventually equalize leave-taking among dual-parent families, marginalization based on familial status will likely continue to affect women more than men due to the large number of single mothers who will be affected.⁹⁶

The duration of compensatory leave is in some ways a more difficult issue than that of setting compensation levels due to differences of opinion among experts about how much leave will best achieve parent/child bonding while also acknowledging economic exigencies. As previously mentioned, over-extended leave-taking will hurt worker “attachment” to the workforce, which will have an overall negative impact on women’s

92. *Id.* (citing Jutta M. Joesch, *Paid Leave and the Timing of Women’s Employment Before and After Birth*, 59 J. MARRIAGE & FAM. 1008, 1017 (1997)).

93. Concerns about “mommy track” or “parent track” employment will only increase as those employment paths become more traveled. On the other hand, once norms change enough to create a substantial number of “parent track” employees, the distinction as a means of discrimination may lose its footing.

94. Again, cost distribution might work toward minimizing the risk of marginalization generated by employers. *See supra* note 89. Note, however, that it may be more difficult to defer costs from extensive leave duration because this cost is manifested not just in terms of compensation that must be paid, but in terms of a productivity loss for employers. *See infra* Part III.

95. Lester, *supra* note 5, at 41 (citing James W. Albrecht et al., *A Cross-Country Comparison of Attitudes Toward Mothers Working and Their Actual Labor Market Experience*, 1 LABOUR 591, 597-98 (2000)).

96. *See, e.g.*, Dowd, *supra* note 39, at 342 (noting that women are the heads of most single-parent families); Bornstein, *supra* note 12, at 113-114 (discussing the economic infeasibility of taking leave as a single parent).

economic success.⁹⁷ At the same time, too little leave time will negatively impact work/family balance. A world in which the average worker does not have access to an adequately long leave period will be a world where women can only achieve economic success by embracing a male worker ideal.⁹⁸ As long as women are having children and men are not claiming primary responsibility for them, a male worker model will never be equally occupied by female workers and gender equality in the workplace will remain elusive.⁹⁹

Parental leave totaling no more than six months per parent (more for a single parent, but perhaps not twice as much for fear of worker detachment and because of anticipation that couples will use some parental leave concurrently) should maintain the balance between family time and women's positive economic development.¹⁰⁰ Perhaps as gender equalization among leave takers advances, the period of leave offered will rise; presently, the threat of discrimination faced by female workers makes any longer period of leave infeasible.

7. The Case Against "Use-It-or-Lose-It" Incentivizing

Leave systems attempting to incentivize paternity leave without extra compensation exist in some European countries and have also been advocated by American scholars.¹⁰¹ Known as either "use-it-or-lose-it"¹⁰² leave or "capitation,"¹⁰³ this system requires that both parents take a certain amount of paid leave or face losing their right to the amount of wage replacement granted within the given leave system.¹⁰⁴ Thus, as under a compensatory leave regime, men have a financial incentive to take however much leave is required in order for paid benefits to kick in. The chief

97. Lester, *supra* note 5, at 38.

98. See WILLIAMS, *supra* note 15, at 64-65 (discussing women's relationship to the "ideal-worker" norm).

99. *Id.*; Bornstein, *supra* note 12, at 98.

100. Though three months of parental leave would be sufficient "to establish a foundation for the parent-child relationship," a minimum of six months is desirable. Dowd, *supra* note 39, at 348. See also *Yale Bush Advisory Center*, *supra* note 35, at 345 (recommending benefits for a minimum of six months).

101. The most prominent example of a pure "use-it-or-lose-it" policy is in place in Norway, where "four weeks [of paid parental leave] must be taken by the father or that time is lost to the family as a whole." Kathryn Kroggel, Comment, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN ST. INT'L L. REV. 439, 461 (2004). Professor Selmi is the most prominent American scholar who has argued for a "use-it-or-lose-it" system expressly as a means of incentivizing leave-taking among male employees. Selmi, *supra* note 5, at 771.

102. Lester, *supra* note 5, at 80-81.

103. See Dowd, *supra* note 39, at 347, 349-350 (referring to a system that requires men to take a certain amount of leave to qualify for wage replacement as capitation).

104. Lester, *supra* note 5, at 80-81.

argument favoring a “use-it-or-lose-it” leave regime over a compensatory one is that it will save on costs. Not only will society not be responsible for providing compensation beyond full wage replacement, but it will actually save money to the extent that men do not utilize the program.

Negative incentives, however, are not as successful motivators—and therefore not as desirable—as positive ones. For example, if a family loses the benefit of wage replacement leave in a “use-it-or-lose-it” regime, it will likely lose this benefit because a parent has continued working; any loss of benefits will be offset by the continued working of the offending parent, and therefore losses are minimized. In fact, in a capitation system with less than full wage replacement, there is a financial incentive for the primary wage earner to return to work despite the prospect of losing leave benefits. If a father has no intention of taking the necessary amount of parental leave to trigger paid leave, he may be able to take leave as vacation time and subsequently return to full employment.¹⁰⁵ The threat of losing paid leave can often be mitigated; however, this is to the detriment of mothers, who often will be forced to stay home alone while their husbands return to their more lucrative employment.

Additionally, under a capitation system with less than full wage replacement, many couples will not be able to afford to have both parents take the required period of parental leave. Thus, a capitation system may unfairly penalize poorer households for whom partial wage replacement is not an adequate safeguard to enable them to take a sustained leave from work. Under a compensatory leave system, all households, regardless of income, will enjoy the opportunity for both parents to take meaningful parental leave.

8. Conclusion

Despite potential dangers, most significantly the risk of gender-based discrimination in hiring and a negative impact on women’s wages, a compensatory leave system that aggressively incentivizes male participation in leave-taking is well worth the risk. Even Professor Lester acknowledges that simply increasing male participation in leave-taking will obviate the risks for and lessen the impact on working women.¹⁰⁶ Over time, the creation of norms for both maternity and paternity leave will make the potential marginalization of workers with children less of an issue. However, it is critically important that the duration of compensatory leave, possibly in combination with wage replacement and unpaid leave, be carefully calibrated to minimize the negative social and economic effects

105. See, e.g., Pleck, *Employer Policies supra* note 48, at 228 (regarding the use of ‘informal’ paternity leave).

106. Lester, *supra* note 5, at 79.

on working women.

III. FUNDING: POSSIBILITIES AND DEFENSES

Among the political oppositions to a compensatory paid leave program, undoubtedly the strongest and most vocal criticism will be that someone must finance the program. The economic costs of a paid leave program manifest themselves in two ways. First, there are concerns regarding funding compensatory leave. The cost is, of course, increased the more leave is incentivized. These costs will be particularly exacerbated when those incentives take the form of additional compensation above and beyond wage replacement, as I advocate.¹⁰⁷ Pragmatically, the very idea behind incentivization is to increase leave-taking, which will multiply costs as more people take leave; the more successful a leave program is, the more expensive it will be.¹⁰⁸ It follows that the more aggressive leave incentivization proposals are, the more difficult it will be to convince legislators and their constituents to support them.

Second, employers—and hence the economy at large—will suffer production loss and various extra administrative costs for each worker who takes leave.¹⁰⁹ This cost is more acute for an aggressively incentivized leave proposal as employees on leave will not feel the same economic strain that they would under a non-paid leave regime, and presumably will not return to work as quickly.¹¹⁰ This will nearly universally be the case if employees are actually paid more if they stay away from work than if they return. Experts who advocate a high percentage of wage replacement, but an amount which falls short of one hundred percent replacement, may do so because they want to retain financial pressure on employees to return to work, and hence cut down on costs.¹¹¹

The following section will present funding options and identify potential benefits and shortcomings of such methods. Using this information, the section will then establish a desirable funding scheme. Finally, I will also attempt to combat criticisms alleging inevitably exorbitant costs for a compensatory leave proposal.

107. See WISENSALE, *supra* note 9, at 201 (discussing how paid leave will increase the number of participating workers).

108. *Id.*

109. Lester, *supra* note 5, at 51.

110. See Lester, *supra* note 5, at 60-61 (noting this phenomenon for a wage replacement system as opposed to unpaid leave).

111. See *Task Force Recommendations*, *supra* note 35, at 464 (advocating wage replacement at 75% of regular income); *Yale Bush Advisory Center*, *supra* note 35, at 344-45 (advocating wage replacement at 75% of regular income). See also Grill, *supra* note 34, at 378-379 (indicating that Sweden's wage replacement is 90% for the first sixty days after the birth of a child and 80% for the following 300 days).

A. *Methods of Funding*

1. Charging Employees

One obvious way to fund paid leave is to charge workers. Proposals vary from applying a payroll tax that will take a cut from all wage earners¹¹² to creating programs that will target funds specifically from workers likely to take leave. Proposals of the second sort include mandating that employees create personal leave accounts from which they can draw only on special occasions, which would include parental leave.¹¹³ However, self-funded leave can only account for partial costs in a legislative scheme that contemplates monetary rewards for leave-taking, because any compensation that is above wage level would have to come from a source other than the employee's fund. Therefore, this section will focus on a payroll tax that would apply to all workers.

A payroll tax can be applied toward funding either an account dedicated to insuring against leave or paying it directly, or an insurance system already in place at the state level.¹¹⁴ The two most commonly utilized programs are state unemployment insurance and state disability insurance.¹¹⁵ While there has been much debate over the merits of both systems, neither is preferable to establishing a program dedicated to funding parental leave exclusively.¹¹⁶

112. This system would be similar to social security withdrawals, and has operated successfully in other countries with strong leave programs, most notably Sweden. *See* Grill, *supra* note 34, at 380 (describing sources of funding for paid parental leave in Sweden); *see also* Arline Friscia, *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, 73-90 (2001) (discussing a payroll tax proposal in New Jersey).

113. *See* Lester, *supra* note 5, at 53 (describing a paid leave system financed from employee payments which may be drawn upon in situations of work interruption).

114. There has already been experimentation with the notion of partial wage replacement using extant insurance programs. *See supra* text accompanying note 36 (recalling President Clinton's proposal to use Temporary Disability Insurance Funds to finance partial wage replacement).

115. For a comprehensive discussion of both types of insurance programs in the context of parental leave, *see* Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions For a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 29-53 (2002) (examining proposals to expand unemployment and disability insurance to include partial wage replacement for parental leave); Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1079, 1079-88 (2003) (discussing California's disability insurance program).

116. *See*, Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 408 (2003) ("Although a paid leave program should have its own funds, it could be modeled on or even take advantage of the administrative infrastructure for existing programs. . . .") (emphasis added).

Not only is it symbolically important for a tax system to acknowledge the importance of funding leave, but groups both sympathetic and unsympathetic to parental leave have pointed to potential economic problems stemming from a reliance on a pre-established funding program. Business groups argue that raiding other funds is undesirable because it will threaten the economic security of those to whom those funds are rightly intended.¹¹⁷ Though one can debate whether others' benefits will truly be in jeopardy, funding leave-takers through finances intended for the unemployed (which leave-takers by statute are not)¹¹⁸ or the disabled or temporarily disabled (which may include post-partum mothers, but not fathers) seems inappropriate. On the other side, paid leave advocates have noted that relying too heavily on funds from these other programs may place at risk the continuing availability of funds for leave-takers.¹¹⁹

Regardless of the manner of funding, we must consider whether it is wise to derive either primary or partial funding for compensatory leave from workers themselves. Of course, taxing workers will offset some of the financial gain to be had from taking leave; however, because a tax will be distributed among all employees, leave-taking employees will pay a smaller percentage in taxes than they will receive through subsequent leave compensation. If no leave tax is charged, costs of a paid leave system might be internalized by workers in other ways, such as through wage cuts, hiring freezes, or reductions in other benefits.¹²⁰ In addition, compensatory leave might be more politically viable if funding is partially paid for by workers as opposed to employers (traditionally a politically powerful group) or the general public fisc.

Furthermore, providing compensation so that parents can afford to take leave is only part of the motivation behind compensatory leave. Primarily, compensatory leave is intended to provide an incentive for men to take leave in order to further gender equality in the workplace. Thus, some cost to employees in order to implement the program need not overly concern us unless it diminishes the incentives for male employees to take leave. It is unclear how allowing employee-based funding could lessen the

117. See Ulrich, *supra* note 115, at 40 (acknowledging that the unemployed have different needs than parental leave-takers, such as obtaining future employment or training).

118. Arnow-Richman, *supra* note 116, at 405.

119. See *id.*, at 404 (describing failed attempts to use unemployment insurance for funding leave during the economic downturn following the boom of the late '90s).

120. See Christopher J. Ruhm & Jacqueline L. Teague, *Parental Leave Policies in Europe and North America*, in GENDER & FAMILY ISSUES, *supra* note 45, at 137 (posing the argument that benefits could raise costs of employment and force employers to cut costs in ways harmful to employees). But see Marianne A. Ferber, *Commentary on Chapter 5*, in GENDER & FAMILY ISSUES, *supra* note 45, at 164 (noting that costs to employers often manifest themselves in higher prices rather than lower employee wages, so the cost to employees, though they are also consumers, may be much more diffuse).

incentives for men to take leave. Even so, it may be disingenuous to advertise a leave program as beneficial to workers and then force those same workers to pay for it.

2. Charging Employers

An alternate funding mechanism requires employers to fund leave. Individual employers could continue paying their employees while on leave¹²¹ (and perhaps even at a premium) or employers could pay a tax similar to a payroll tax in order to fund leave-taking.¹²² The second, more desirable, option would diffuse costs among the entire population of employers rather than give the responsibility to individual employers on an ad hoc basis. This would make it easier to incorporate small businesses and vulnerable industries into a paid-leave system.¹²³ Though an employer tax may well trickle down to employees or consumers in the form of lower wages and/or higher prices,¹²⁴ some argue that employers would have to internalize at least a portion of a leave tax.¹²⁵

To the extent that employers may have to internalize some of the costs of funding leave, one may wish to tax employers in order for employees to receive the most value from paid leave. However, even among scholars who support some form of paid leave, there are some who oppose employer-funded leave.¹²⁶ The most compelling argument against employer funding is that as long as women remain more likely than men to take leave, female employees will be disproportionately expensive to employ and therefore employers will be more likely to discriminate against women in their hiring practices.¹²⁷ Although a compensatory leave regime will hopefully alter the balance between male and female leave-taking, this concern remains a valid one.

121. See Young, *supra* note 52, at 155-158 (examining the arguments both for and against implementation of a leave system funded solely by employers).

122. For a particularly clear and concise proposal, see Peterson, *supra* note 84, at 279.

123. See Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternate Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689, 695-696 (2001) (discussing the particular difficulties of small businesses in incorporating parental leave programs).

124. See *supra* note 120 (explaining the ways in which employers' costs are sometimes deflected).

125. See, e.g., Lester, *supra* note 5, at 60 (arguing that employers may have to internalize some costs due to the risks of lowering morale among workers or becoming less appealing to workers who stand to gain less from having access to a leave policy).

126. See Young, *supra* note 52, at 156 (citing Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 401 (1984-1985)).

127. *Id.* Concerns about potential discrimination are neutralized somewhat, however, by a universal employer tax as opposed to an ad hoc cost to individual employers.

In addition, many members of the business community predictably oppose employer funding, arguing that employers already bear substantial costs related to parental leave, even if the leave is unpaid.¹²⁸ It is reasonable to argue that employers, by accepting government-mandated leave, are already doing enough, and that paid leave should be funded through other avenues. Whether or not one agrees, it may be practically much more difficult to get paid leave legislation through Congress (already a possibly insurmountable challenge) if industry lobbyists perceive that businesses will have to pay for most or all of it.

3. Charging the Public

A final option would be to fund the program out of the federal government's general tax coffers, thereby distributing the cost of compensatory leave throughout society, not just through employers and/or employees.¹²⁹ Among the benefits of this approach is the possibility that reducing the cost to employers would lessen the risk of discrimination or wage increases. Under this approach, employees would pay less for compensatory leave benefits than they would through either a payroll tax or wage or other benefit reduction. One weakness of this approach is the potential difficulty of convincing the American public that compensatory leave is a policy goal worthy of finite public tax dollars. Paid leave might find enough political support to overcome these economic considerations if it was promoted as a policy to safeguard the welfare of children. As such, it would perhaps make more sense to fund a paid leave program through the public than through employers and/or employees.

4. Conclusion

Because there are positive and negative aspects to each funding method, the best statutory approach will combine all of them. Since it is the easiest political sell and the negative economic effects are not especially significant,¹³⁰ some sort of wage tax should provide the largest portion of funding. However, it is important for the public to commit tax

128. See Peter A. Susser, *The Employer Perspective on Paid Leave and the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169-170, 192 (2004) (explaining employers' position that even uncompensated leave holds peripheral costs for employers, such as the need for temporary employees and furthermore, employers' fear that uncompensated leave is only a stepping stone to a system requiring compensation). See generally WISENSALE, *supra* note 9, at 134-184 (detailing the history of and the policies behind the formulation of the FMLA).

129. See, Lester, *supra* note 5, at 61-62 (discussing the merits and pitfalls of a tax based leave system).

130. Because costs will trickle down to employees at least somewhat under any funding scheme, and because incentivizing for male employees is not weakened.

dollars to the project in order to ensure adequate funding and show societal support for a paid leave program. Also, in light of the economic gains to be had from compensatory leave,¹³¹ it makes sense to give employers some of the responsibility to pay for it.

B. Why the Costs Are Worth It: The Economic Argument for Compensatory Leave

Though I have noted that paid leave will come at the expense of employers in terms of lost productivity and/or the costs associated with replacing the worker's output for the leave period, economists have pointed to numerous areas where paid leave will ultimately save employers money and strengthen the economy overall. For one, workers may be more productive if they can remain at their present employment, since they will be able to continue to use skills they have gained that are specific to that employment.¹³² Restated, workers will retain the human capital they have built at a particular job and retention of human capital is not only beneficial for the worker but also productive for the economy overall.¹³³ Second, allowing for leave reduces the risk of unemployment and encourages the preservation of job tenure.¹³⁴ Further, women will be more likely to remain in the job force if leave is provided.¹³⁵ Also, businesses will save by reducing the need to expend turnover-related costs and reducing individual employee absenteeism.¹³⁶ Economists Roberta Spalter-Roth and Heidi Hartmann have even postulated that the average benefits of (unpaid)

131. See *infra* Section III.B.

132. See Ruhm & Teague, *supra* note 120, at 137 (citing Guy C. Dalto, *A Structural Approach to Women's Hometown and Experience-Earnings Profiles: Maternity Leave and Public Policy*, in *POPULATION & POL'Y REV.* 8(3) 247-266 (1989)).

133. See BLAU & FERBER, *supra* note 4, at 184-185 (explaining the theory behind human capital investments); Lester, *supra* note 5, at 22 (discussing the relationship between differences in human capital, efficiency, and family leave policy).

134. See Ruhm & Teague, *supra* note 120, at 137 (citing ROBERTA M. SPALTER-ROTH & HEIDI I. HARTMANN, *UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE* (1990) [hereinafter SPALTER-ROTH & HARTMANN, *UNNECESSARY LOSSES*]); see also Roberta M. Spalter-Roth & Heidi I. Hartmann, *Science and Politics and the "Dual Vision" of Feminist Policy Research: The Example of Family and Medical Leave*, in *PARENTAL LEAVE AND CHILD CARE*, *supra* note 35, at 41-65 [hereinafter Spalter-Roth & Hartmann, *Science and Politics*] (weighing potential costs and benefits associated with family leave).

135. See *supra* note 5 (finding that women who must leave the workforce due to inadequate family leave systems are less likely to return than women whose absence is not prolonged).

136. See SPALTER-ROTH & HARTMANN, *UNNECESSARY LOSSES* *supra* note 134, at 137 (claiming that parental leave benefits employers more than it costs them due to reduced unemployment and the preservation of job tenure).

parental leave will be “six times greater than the costs. . . .”¹³⁷

Despite these potential benefits, some have questioned why the market does not provide leave of its own accord if the benefits will truly outweigh the costs.¹³⁸ However, trenchant traditional gender norms and the stigma that accompanies leave-taking may explain why employers have been wary to provide leave and workers have been wary to ask for it, even if providing leave would ultimately be economically beneficial. Also, providing leave will create immediate and direct costs that may be easier to see than the long-term and indirect benefit.

Paid leave, of course, will require additional expense above the transactions costs to employers that providing leave will create. Compensatory leave multiplies this additional expense, because not only does compensation increase, but the likelihood that employees actually will take leave also rises dramatically. However, these extra costs may be valid social expenditures if they are paid by employees and by society-at-large. The well-being of children is widely acknowledged to be economically in the best interest of society at large.¹³⁹ Also, providing compensatory leave will likely lessen public welfare expenditures in a way that providing unpaid leave does not because parents will no longer have to choose between working and paying for expensive infant care and staying home unemployed or on unpaid leave. In this sense, compensatory leave, along with its other benefits, may be a more efficient and productive¹⁴⁰ way of providing public welfare.

IV. CONCLUSION

Based on the foregoing considerations, I believe it is necessary and feasible to provide leave compensation as a means of incentivizing male participation in leave-taking. Leave proposals that merely attempt to make it less unattractive for men to take leave or that provide only mild

137. Ruhm & Teague, *supra* note 120, at 137. See also Spalter-Roth & Hartmann, *Science and Politics supra* note 134, at 61 (concluding based on their previous study that “the costs of not having the [FMLA] far outweighed the costs to businesses of implementing it.”).

138. See Ruhm & Teague, *supra* note 120, at 137 (theorizing that a lack of widespread voluntary arrangements shows benefits may not absolutely outweigh costs).

139. See Dowd, *supra* note 39, at 345 (“[I]t is apparent by all indicators that early investment in children reaps long-term developmental and other benefits that inure both to the individual and to society.”); see also Lester, *supra* note 5, at 33 (“An argument for financing a social program in a way that redistributes wealth is best supported with evidence that the program will confer a benefit on society as a whole rather than just on those who receive the specific program benefits.”). See generally ALSTOTT, *supra* note 81.

140. It is more productive because parents will be able to retain and build human capital and to continue to be productive members of society, rather than removing themselves from the economy and relying on government handouts.

incentives for employees and employers to encourage male leave will never achieve the full potential of leave legislation to further gender equality in the workplace, which should be the overriding goal of competent leave legislation. The most apt critique of my proposal is that it is infeasible given the current political landscape. However, it is necessary for scholars and policymakers alike to think outside the box to craft legislative proposals that actually effectuate positive normative changes. A public campaign that highlights the affordability and irrefutable social benefits of my proposal can go far to create public support, which in turn can affect the political landscape.