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# PARENTAL LEAVE AND AMERICAN EXCEPTIONALISM

*Saul Levmore*<sup>†</sup>

## INTRODUCTION

Why does the United States have one of the least generous parental leave policies in the world? What will the future of our parental leave policies look like? It is often the case that understanding current policy is a means toward predicting future policies. Moreover, change seems most likely in areas where a country's policies differ so from those found elsewhere.

In the case of parental leave, cross-country comparisons are certainly startling. In the United States, employees of firms subject to the Family and Medical Leave Act of 1993 are entitled to twelve weeks of unpaid leave in the event of the birth or adoption of a child.<sup>1</sup> Essentially, the employee's position must be held open, or a comparable one supplied upon return to the workplace.<sup>2</sup> The employer may choose to provide some pay for the period the leave, and in the case of a mother who gives birth, disability coverage will surely come into play,<sup>3</sup> but there is otherwise no mandated or state-

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<sup>1</sup> Family and Medical Leave Act, 29 U.S.C.A. §§ 2601, 2611 (1994) (providing for a single 12 week period within 12 months of triggering event, including birth of a child, as well as adoption or serious medical matters).

<sup>2</sup> *Id.*

<sup>3</sup> See Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 378 (1996) (discussing options for supplementing the FMLA leave, including taking accumulated sick leave or, in some jurisdictions, utilizing disability insurance).

provided compensation for the lost wages. In fact, some employers provide paid leave that is very generous by international standards, but most of the American work force takes extended parental leave at its cost, if no longer at its peril. The apparent cost may, of course, be offset by higher wages or other benefits, but it is not obvious why the bargain between employers and employees, even as influenced by law, would lead to so much of this fringe benefit in most countries and so little in the United States. Outside of the United States, paid parental leave is nearly universal, though it comes in different forms. In Part I, I offer some description of the variety found around the world. Part II takes up the question of what explains the variety, or simply the presence of very generous leave policies in some countries. Part III returns to American exceptionalism and considers the "two-tier" provision of benefits, such that employers sometimes offer a subset of employees benefits that are more generous than those received by other employees. There is the possibility that benefits provided in this two-tier fashion affect the politics of mandated and government-provided benefits. Part IV then turns to the future of parental leave. I suggest that universal paid leave is not to be expected in the United States, and that employers may soon prefer to subsidize child-care benefits because of the likely effects on employee retention.

### I. CROSS-COUNTRY COMPARISONS

In the United States, most employees' jobs are protected for a single twelve-week period taken within twelve months of the birth of a child, adoption or serious medical matter.<sup>4</sup> In California, state law provides for six weeks of paid leave, with the new parent receiving 55% of pay up to a maximum of \$882 per week.<sup>5</sup> An employee who uses the twelve weeks of federally required, but unpaid, leave, will find that half those weeks are (fractionally) compensated in California but not in other states – unless the employer chooses to offer such a benefit.<sup>6</sup> In other countries, jobs must also be held open, but the employee on leave is also paid in whole or in part, either by the government or by legally bound employers. Moreover, the benefit is, in nominal terms, everywhere more extensive.<sup>7</sup> Thus, Sweden offers

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<sup>4</sup> Family and Medical Leave Act, *supra*, note 1.

<sup>5</sup> Employment Development Department, <http://www.edd.ca.gov/direp/pflfaq1.asp> (last visited Aug. 6, 2007) (explaining the particulars of the California Paid Family Leave Act).

<sup>6</sup> See generally Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J. L. & FAM. STUD. 1 (2006) (comparing California's family leave laws to the federal family leave law).

<sup>7</sup> "Nominal terms" because any leave, paid or unpaid, mandated or not, may be offset by

390 days at 80% pay (up to a ceiling) for birth parents, followed by ninety days of payment at a fixed, low rate.<sup>8</sup> These 480 days of leave are mandatory for employer *and* employee, and sixty of these days must be taken by the other parent.<sup>9</sup> In other words, one parent takes more than a year of paid leave, and at some point the other takes two months. The fact that the employee must take leave can be seen as either remarkably intrusive by American standards, or rather as aiming to avoid situations where employees wish to take leave but feel compelled by formal or informal workplace pressures to be at work. Norway offers the parent-employee a choice of forty-four weeks at 100% pay or fifty-four weeks at 80% pay.<sup>10</sup> Italy offers 80% pay for five months.<sup>11</sup> In the United Kingdom, there are six weeks of 90% paid leave with no ceiling, followed by thirty-three weeks at a fixed level, comparable to worker's compensation.<sup>12</sup>

As these few examples illustrate, paid parental leave is an ambiguous expression because of caps and fractions. Some countries offer full pay or a large fraction only up to a specified amount (usually an amount comparable to that paid to civil servants), and some provide no upper bound. We are at first impressed to learn that Tanzania offers paid leave when the United States does not,<sup>13</sup> but when we intuit that employers often avoid the law, and see that even when they pay, it is fractional pay up to a cap that is worth very little in terms of living standards and costs in developed nations, the comparison is less remarkable.<sup>14</sup> All told, only a very few legal systems offer full pay for a significant period to what we would think of as highly paid employees, but very many countries promise or guarantee significant pay to most employees. In some countries this is

a decrease in other benefits or simply by lower wages.

<sup>8</sup> Ingela Björk, *The Best Place for Mothers?*, SCIENCE, Jan. 9, 2004, available at [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2800/the\\_best\\_place\\_for\\_mothers](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2800/the_best_place_for_mothers).

<sup>9</sup> *Id.*

<sup>10</sup> Norwegian Fathers Choose Paternity Leave, Norway: The Official Site in Tanzania, Jan. 8, 2007, <http://www.norway.go.tz/policy/children/welfare/paternityleave.htm>.

<sup>11</sup> Press Release, International Labour Organization, *More Than 120 Nations Provide Maternity Leave* Feb. 16, 1998), [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WCMS\\_008009](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008009).

<sup>12</sup> Department for Work and Pensions-Services and Benefits: Statutory Maternity Pay, [http://www.dwp.gov.uk/lifeevent/benefits/statutory\\_maternity\\_pay.asp#workedout](http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp#workedout) (last visited Jul. 12, 2007).

<sup>13</sup> Jody Heymann, et al. *The Work, Family, and Equity Index: Where Does the United States Stand Globally?*, THE PROJECT ON GLOBAL WORKING FAMILIES (Harvard University, Boston, Mass.), 2004 at 31.

<sup>14</sup> For an account of widespread fraud in Tanzania, see Odd-Helge Fjeldstad, *Fighting Fiscal Corruption: The Case of the Tanzania Revenue Authority*, (Christian Michelsen Inst., Working Paper No. 3, 2002).

required of the employer, in some it is paid for by the state, and, in many, the state and employer share the cost. The social insurance, or state payor, scheme is common in Europe, where the paid leaves are funded by ongoing payments from workers, employers, and the state—much like our social security.<sup>15</sup> China, Indonesia, and other countries have, instead, adopted employer-funded payment schemes.<sup>16</sup> The employer-funded schemes raise questions of employer noncompliance, retaliation, and even chill in employment, but enforcement issues and strategies are beyond the scope of this article. The variety among jurisdictions extends to the treatment of fathers, but there is uniformity in the sense of a maternal-paternal distinction. Many countries offer some paternal leave, and a fair number offer such leave with pay. But there is universal discrimination against what we might call the secondary caregiver. For example, France offers mothers paid leave for sixteen weeks at 100% of their previous earnings.<sup>17</sup> French fathers, in stark contrast, receive two weeks of paid leave.<sup>18</sup> At last count, 169 countries guaranteed some paid parental—perhaps better described as maternal in this context,<sup>19</sup> with sixty-six of these countries guaranteeing some paid paternal leave.<sup>20</sup>

## II. EXPLAINING THE VARIETY IN PARENTAL LEAVE

### *A. Parental Leave as Welfare Policy*

One way to explain the variety in countries' parental leave policies is to begin with the relatively meager policies found in the United States. In other words, what explains the fact that such a wealthy nation has, what we might estimate to be, the 170<sup>th</sup> "best" parental leave policy in the world? A simple but unsatisfactory answer is that this absent benefit or mandate is in line with the United States's more general inclination to provide less of a safety net than do other countries. Many or most American voters and politicians would not be proud to be associated with the expansion of the "welfare state."

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<sup>15</sup> See International Labour Organization, *supra* note 11.

<sup>16</sup> International Labour Organization, *supra* note 11.

<sup>17</sup> Sheila B. Kamerman, *An Overview of ECEC Developments in the OECD Countries*, in *EARLY CHILDHOOD EDUCATION AND CARE: INTERNATIONAL PERSPECTIVES*, 13, 20 (Sheila B. Kamerman ed., 2001).

<sup>18</sup> International Labour Organization: Conditions of Work and Employment Programme, <http://www.ilo.org/public/english/protection/condtrav/family/reconcilw/specialleave.htm> (last visited Jul. 2, 2007).

<sup>19</sup> Jody Heymann et al., *The Work, Family, and Equity Index: How Does the United States Measure Up?*, THE PROJECT ON GLOBAL WORKING FAMILIES (Inst. for Health and Social Pol'y, Montreal, QC), 2007, at 1.

<sup>20</sup> *Id.* at 2.

However, this answer is inadequate because many less developed nations offer little in the way of safety nets, but do much more than the United States for the typical employee whose job is interrupted by childbirth. And even if this were not the case, the welfare-versus-*laissez-faire* picture is inaccurate, because the United States mandates expensive accommodations for disabled persons,<sup>21</sup> imposes occupational safety rules<sup>22</sup> and environmental controls that are expensive<sup>23</sup> and, arguably redistributive and expends considerable resources in relative terms on education and health care. Unpaid parental leave does stand out in this broader context. If we think of welfare policy as including employer mandates that force some redistribution, as well as public programs that are supported by tax revenues, then the United States is hardly at the low end of a ranking of the world's welfare states. It may be so in terms of benefits or the value of redistributed services as a fraction of GNP, and the country's reliance on, or confidence in, private markets does likely rank near the top. Still, the complete absence of mandated or state-supported parental leave is notable.

### *B. Parental Leave as Fertility Policy*

The best way to understand our parental leave practices is as a recruitment technique at the employer level and, more immediately, as a fertility and economic growth policy at the federal level. Employer policies will be taken up presently. As for macroeconomic policy, the critical fact is that the United States has a robust fertility rate of 2.09,<sup>24</sup> which is barely above the replacement rate of 2.01.<sup>25</sup> But the United States also has a seemingly endless line of immigrants at its borders, with a current immigration rate of 3.05 migrants per 1000 population.<sup>26</sup> This is not the forum in which to discuss economic growth and population rates, but it is plain that a declining population generates serious problems for a country's retirement system as well

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<sup>21</sup> See Michael A. Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 89, 91 fn. 89 (2007).

<sup>22</sup> See U.S. Department of Labor: Occupational Safety & Health Administration, <http://www.osha.gov/> (last visited Aug. 7, 2007).

<sup>23</sup> See U.S. Environmental Protection Agency, <http://www.epa.gov/> (last visited Aug. 7, 2007).

<sup>24</sup> Central Intelligence Agency: The World Fact Book—United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#People> (last visited Jul. 7, 2007). The discussion in the text assumes that replacement rate is close to the goal that most advanced economies would set.

<sup>25</sup> Jonathan Bradshaw et al., *Can Policy Influence Fertility*, SOC. SEC. AND LABOUR MKT. IN AN AGING SOC'Y (Int'l Research Seminar Found. for Int'l Studies in Soc. Sec.) Jun. 13, 2005, available at <http://www-users.york.ac.uk/~jrb1/documents/CP2082FISS11.pdf>.

<sup>26</sup> Central Intelligence Agency: The World Fact Book—United States, *supra* note 24.

as its future growth. With a fertility rate that is relatively high for developed countries, and with robust immigration—and the ability to increase the flow of immigrants almost at will—the United States has no reason to try to increase fertility with payments to parents, or through mandated workplace policies. This is obviously not the only reason one might expect, or vote for, paid parental leave, but it is one reason, and the suggestion here is that it is the best explanation of the variety that is found.

At the other end of the spectrum, the Scandinavian countries have remarkably generous parental leave policies,<sup>27</sup> and relatively low birthrates. Denmark, Norway, and Sweden have fertility rates (children born per woman) of 1.74, 1.78, and 1.66, respectively.<sup>28</sup> They seem to have fewer ready immigrants, but they certainly have a domestic political climate—or simply preferences—more averse to immigration than that found in the United States.<sup>29</sup> The evidence is so striking that there is no need to engage in extensive data analysis. Low fertility rates are associated with generous parental leave. Immigration rates (and the apparent ability to increase those rates) add to the picture.<sup>30</sup> One is tempted to say that the prospect of underpopulation *generates* aggressive parental leaves, but I prefer a more neutral description. Low fertility also means that parental leave policies are less expensive; fertility policies may be regarded as ineffective; and parental leave and fertility rates may be affected by a third variable. But the association between low fertility rates and generous parental leave can, in any event, be said to “explain” the American law. There is, as already implied, no shortage of examples confirming this connection. Ireland and Canada also have relatively high birth rates, at least for developed countries,<sup>31</sup> and more modest

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<sup>27</sup> *Swedish Parental Leave: Forced Fatherhood*, THE ECONOMIST, Jan. 8, 2004, available at [http://www.economist.com/printedition/displayStory.cfm?Story\\_ID=2335623](http://www.economist.com/printedition/displayStory.cfm?Story_ID=2335623).

<sup>28</sup> Central Intelligence Agency: The World Factbook—Denmark, <https://www.cia.gov/library/publications/the-world-factbook/da.html#People> (last visited Jul. 7, 2007) (for information on Denmark); Central Intelligence Agency: The World Factbook—Norway, <https://www.cia.gov/library/publications/the-world-factbook/no.html#People> (last visited Jul. 7, 2007) (for information on Norway); and Central Intelligence Agency: The World Factbook—Sweden, <https://www.cia.gov/library/publications/the-world-factbook/sw.html#People> (last visited Jul. 7, 2007) (for information on Sweden).

<sup>29</sup> See sources cited *supra* note 28 (for immigration rates of the Scandinavian countries); Central Intelligence Agency: The World Factbook—United States, *supra* note 24 (for immigration rates of the United States).

<sup>30</sup> With regard to fertility rates, see generally Anne Helene Gauthier et al., *Family Benefits and Fertility: An Econometric Analysis*, POPULATION STUDIES: A JOURNAL OF DEMOGRAPHY 295 (1997); see also Jan M. Hoem, *Public Policy as the Fuel of Fertility: Effects of a Policy Reform on the Pace of Childbearing in Sweden in the 1980s*, ACTA SOCIOLOGICA 19, 27 (1993).

<sup>31</sup> See Central Intelligence Agency: The World Factbook—Ireland, <https://www.cia.gov/library/publications/the-world-factbook/ir.html#People> (last visited Jul. 7, 2007) (for information on Ireland); Central Intelligence Agency: The World Factbook—Canada,

benefits than most other countries with high GNP per capita.<sup>32</sup> Canada provides fifteen weeks of employer- paid maternity leave followed by thirty-five weeks of employment insurance, available as parental leave to both parents, with payment of 55% of earnings up to a cap of \$413 (Canadian) per week.<sup>33</sup> Italy has a very low fertility rate of 1.29<sup>34</sup> and a most generous maternity leave policy.<sup>35</sup>

Perhaps the most striking example of parental leave as fertility policy is found in Bulgaria, where the low fertility rate of 1.39<sup>36</sup> is a problem compounded by a negative migration rate.<sup>37</sup> As we might (now) expect, Bulgaria, though not especially wealthy or inclined to redistribution, is at the high end of generous parental leave. It provides forty-five days paid sick leave before birth, then 270 days of paid maternity leave after birth, and then two years of paid parental leave.<sup>38</sup> A mother has the option of transferring this maternity benefit to the father or to a grandparent.<sup>39</sup> The employer must hold the job open for (these) three years.<sup>40</sup>

The straightforward explanation of this inverse relationship between fertility rates and parental leave policies is that countries need future citizens in order to provide for current residents' old age and in order to ensure continued economic investment. If a nation lacks births and immigrants, we can expect larger subsidies for births, whether in the form of tax exemptions or parental leave or other benefits highly or even perfectly correlated with births. This is an

<https://www.cia.gov/library/publications/the-world-factbook/ca.html#People> (last visited Jul. 7, 2007) (for information on Canada).

<sup>32</sup> See Human Resources and Social Development Canada: Maternity, Parental, and Adoption Leaves, [http://www.hrsdc.gc.ca/en/lp/spila/wlb/wfp/11Maternity\\_Leave.shtml#62](http://www.hrsdc.gc.ca/en/lp/spila/wlb/wfp/11Maternity_Leave.shtml#62) (last visited Jul. 12, 2007) (describing benefits that are relatively generous only to low earners); see Irish Maternity Benefits, [http://www.baby-parenting.co.uk/pregnancy/maternity\\_leave.html](http://www.baby-parenting.co.uk/pregnancy/maternity_leave.html) (last visited Jul. 12, 2007).

<sup>33</sup> Human Resources and Social Development Canada: Maternity, Parental and Adoption Leaves, *supra* note 32.

<sup>34</sup> Central Intelligence Agency: The World Fact Book—Italy, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html#People> (last visited Jul. 7, 2007).

<sup>35</sup> See International Labor Organization, *supra* note 11 (Italy provides five months of maternity leave).

<sup>36</sup> Central Intelligence Agency: The World Fact Book—Bulgaria, <https://www.cia.gov/library/publications/the-world-factbook/geos/bu.html#People> (last visited Jul. 7, 2007).

<sup>37</sup> *Id.*

<sup>38</sup> The European Job Mobility Portal: Bulgaria Family and Maternity Benefits, <http://ec.europa.eu/eures/main.jsp?lang=en&catId=9054&acro=living&countryId=BG> (last visited Jul. 12, 2003).

<sup>39</sup> *Id.*

<sup>40</sup> See The European Job Mobility Portal: Bulgaria Leave, <http://ec.europa.eu/eures/main.jsp?lang=en&catId=8427&acro=living&countryId=BG> (last visited Jul. 12, 2007).



important explanation, though it is not original, except perhaps for the addition of immigration into the equation.

Alternatively, or perhaps additionally, paid parental leave can be seen as an insurance scheme. This sort of alternative may be attractive if the fertility-immigration explanation seems implausible, perhaps because of the view that countries are nothing more than collections of citizens who are not known for their rational, collective long-term planning. That these countries are guided by politicians with short-term re-election goals, or with present-day interest groups in mind, does not help the case for linking parental leave policies to fertility rates. If we think of countries as focused on the short run, rather than on influencing birth rates, it is natural to think of parental leave policies as responding to citizens' aversion to the high or even unexpectedly high opportunity costs of parenting. One problem with this insurance explanation is that it is difficult to see how it would explain variety across countries, especially because many poor countries offer parental leave. Another is that government-provided insurance seems unlikely to emerge in countries where most of the population believes in advance that it will lose more than it will gain from the plan. On the other hand, with a relatively homogenous population, and perhaps especially with low fertility rates, there may be little fear of substantial and predictable cross-subsidies. If every couple in Sweden has two children, and all women work before giving birth, then generous parental leave simply amounts to the mild form of insurance we often call forced savings or, for most people, borrowing. Most women will have children early in their working lives when they would not yet have saved much. In fact, the number of women in Sweden with three or more children is very low.<sup>41</sup> The number with four or more is remarkably low. And the number of these unusual women who also remain in the work force in order to receive benefits associated with the third or fourth child is so low that there is little likelihood of resentment or strong opposition from the median voter.

But why would people in Sweden, or around the world, prefer this insurance (or save-and-borrow) system to so many other pooling schemes they do not bother to form? Put differently, in a heterogeneous population there would be opposition to this insurance, and in a homogeneous population it hardly seems worth the transaction costs. The answer may be that perceptions are distorted

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<sup>41</sup> Gunnar Anderson, *A Study on Policies and Practices in Selected Countries that Encourage Childbirth: The Case of Sweden* 19 (Max Planck Inst. for Demographic Research, Working Paper No. 2005-005).

where this benefit is concerned. Significantly, when asked about their *expected* number of children, even Swedes have for many years overestimated their fertility, answering two, three, or four—though accurate responses would be zero, one, or two.<sup>42</sup> It is possible, therefore, that they would individually welcome a paid parental leave benefit, or insurance plan, because most participants (and voters) expect to benefit more than they would pay in taxes or foregone wages. Even if we assume that their governments are aware of the overestimates, there is no need to forestall that which is politically attractive. As it turns out, Sweden is not alone in individual overestimates. Even in less developed countries with birth rates above 5.0, women expect or “want” more children than they actually produce. Overestimation may well be universal, and parental leave policies may track this optimism. An important part of the homogeneity argument is that incomes are homogeneous along with fertility, for otherwise even if all voters expect to benefit as often, some will be opposed to paying taxes that support income replacement for higher-earning beneficiaries. In short, it is low variance in birth rates and income that might produce generous parental leaves. And as for American exceptionalism, with unpaid leave as the norm, the population is somewhat heterogeneous as to birth rates and famously so as to income.<sup>43</sup> Together these might offer a robust explanation, or additional explanation, for the near absence of mandatory paid parental leaves.

I have already suggested that fertility policies are notoriously ineffective. The Scandinavian encouragements have not brought about high fertility rates in those countries, though we do not know what these would be in the absence of the sometimes enviable policies.<sup>44</sup> It is likely that payments, whether in the form of paid parental leave or other currency, make more difference in low-income countries or for low-income citizens in various countries. This is especially so if the observed leave policies have caps on earnings that will be recovered during leave time. We know to associate affluence with lower birth rates,<sup>45</sup> but that is not inconsistent with the idea that the non-affluent, or even the affluent, might be responsive to incentives for childbearing. There are many low-income countries

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<sup>42</sup> Massimo Livi Bacci, Comment: *Desired Family Size and the Future of Course of Fertility*, 27 POPULATION AND DEVEL. REV. 282, 285 (2001) at 285.

<sup>43</sup> Bernard Guyer et al., *Annual Summary of Vital Statistics: Trends in the Health of Americans in the 20<sup>th</sup> Century*, 106 PEDIATRICS 1307, 1310 (2000).

<sup>44</sup> See sources cited *supra* note 30 (showing that the birthrates of the Scandinavian countries have not increased).

<sup>45</sup> Robert J. Barro, *Economic Growth in a Cross Section of Countries*, 106 THE Q.J. OF ECON. 407 (1991).

with relatively generous parental leave and payment policies,<sup>46</sup> but even here a reasonable conjecture is that the impact of paid parental leave on fertility rates is modest at best because most net wages, and certainly civil service wages and earnings caps, are low. We rarely observe a truly aggressive policy in a low-income country, but of course these countries generally have high fertility rates and therefore more of an inclination to lower, rather than to raise, these rates. Even if there were such a country, it might implicitly use a high discount rate, valuing the near-term much more than the distant future, and defer long-term anxieties to the future when there is some possibility that good fortune will provide for political and economic stability and the luxury of considering long-term needs. Finally, it is noteworthy that here and there where a truly aggressive policy is tried, as it was in Communist-era Romania, it remains astonishingly difficult to raise birth rates, though confounding variables surely come into play.<sup>47</sup>

The preceding discussion raises the question of why countries that want to lower their birth rates would subsidize fertility at all. One possibility is that the insurance-borrowing explanation is a better fit; another is that they aim to promote better child-rearing or another aim ignored thus far. The presence of another goal would make it easier to explain the variety that is found around the world, and especially the North American reality of modestly paid and unpaid leave. Moreover, parental leave can be withdrawn so that it is something of a stick as well as a carrot. Consider the important case of China, which famously seeks to *reduce* fertility,<sup>48</sup> or at least maintain its current, hard-earned, 1.75 level.<sup>49</sup> China offers relatively generous parental leave, albeit with uneven enforcement.<sup>50</sup> But the critical piece of the puzzle is that the leave is given only to couples whose pregnancies were approved. The state rewards those who abide by its family planning rules.<sup>51</sup> In this regard, it is noteworthy that paid leave is available for abortion as well as childbirth, though the abortion must,

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<sup>46</sup> See, e.g., The European Job Mobility Portal: Bulgaria Family and Maternity Benefits, *supra* note 39 (discussing Bulgaria's policy toward generous parental leave).

<sup>47</sup> See generally Ovidiu Gavrilovici, *Past and Present of Total Institutions: Romania as a Case Study*, CHILD INCLUSION (European Commission: Community Action Programme to Combat Social Exclusion, Florence, Italy), May 5, 2007 available at <http://childinclusion.istitutodeglinnocenti.it/down/florence/Ovidiu-Romania.pdf>.

<sup>48</sup> See Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1044 (1996).

<sup>49</sup> Central Intelligence Agency: The World Fact Book—China, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#People>, (last visited Jul. 13, 2007).

<sup>50</sup> International Labour Organization, *supra* note 11.

<sup>51</sup> Lawrence W. Green, *Promoting the One-Child Policy in China*, 9 J. OF PUB. HEALTH POL'Y, 273, 277 (1988).

again, follow a pregnancy for which a permit was obtained as part of the "planned pregnancy" program.<sup>52</sup>

### *C. The Limits of Fertility Policy*

It is likely that there is a subsidy or leave policy that would raise fertility rates. That we do not observe such generous leave policies, or other subsidies, may be a reminder that immigration is an available, and often cheaper, substitute. It is also likely, though politically incorrect to suggest, that countries fear that higher subsidies will raise fertility among, or only among, low-income groups. It is one thing to want a cross-section of families to have more births, or perhaps a cross-section of women to marry or begin bearing children earlier, but it is quite another to have a system in which the least educated and poorest families are deployed to boost the reproduction rate. No country's political system has appeared eager to go this route (and where one has evolved in this way, in Israel, there was a subsequent cutback of benefits<sup>53</sup>). On the other hand, it is hard to imagine a political or tax system that does the opposite, which would be to limit payments to well-educated women or (what might be the same thing) to affluent families in order to boost the fertility rate of this hardest-to-influence group. That leaves us with egalitarian subsidies and the question of why countries in need of new blood do not pay more than they do at present. The answer returns us to the politics of fertility. Simply paying \$25,000 per child, for example, (or per child after the first child), produces a kind of moral hazard: it raises taxes on those who are taxed most and who might, therefore, work more and have fewer children, and it raises birth rates in the population that might not be the target population for the political policy. It is also possible, though perhaps hyper-rational to imagine, that they fear paying for children who will simply depart before they are economically useful. A country can substitute immigration for fertility to a degree; and, if the immigration is not forthcoming, it may be foolhardy to pay for fertility because the lack of ready immigrants signals that emigration by indigenous citizens is a serious risk.

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<sup>52</sup> See A.J. Jowett, *China: Population Change and Population Control*, 1986 GEOJOURNAL, 349, 356.

<sup>53</sup> See Israel Women's Network: Women at Work—Know Your Rights at Work, <http://www.iwn.org.il/innerEn.asp?newsid=36> (last visited on Jul. 13, 2007) (discussing current Israeli maternity leave policies).

*D. Private Insurance*

If parental leave can be described, at least in part, as insurance, then it is fair to ask why private insurance markets do not offer coverage for the lost earnings associated with parental responsibilities. This sort of coverage was unknown before the advent of government mandated paid leave, and it is not currently available as a supplement for lost earnings that exceed statutory caps. One can imagine this sort of insurance packaged with health care or pregnancy insurance, so that the direct and indirect costs of childbirth would be covered and coordinated in a single policy and with a single insurer. But the imagined policy raises a serious adverse selection problem. Many insureds have a good idea as to how many children they will have, and the likelihood they will take time away from work after the arrival of a child. The obvious way to defeat this problem, so that it does not unravel the insurance market, is to require the policy to be purchased when the insured has less information about the likelihood of recovery. Toward this end, the insurance might be sold with a two year waiting period, much as life insurance normally excludes suicide for such a period.<sup>54</sup> But here the waiting period provides a weak solution because few potential buyers will have good estimates of their future earnings. To cover lost earnings, insurance needs to be purchased shortly before a loss; to avoid adverse selection, the purchase needs to be long before. A better, but incomplete business solution might be to limit recovery to earnings lost as a result of the arrival of (at most) two children.

With or without constraints, parental leave "insurance" would be more like a Christmas Club or an educational loan than most insurance. Someone who earns \$80,000 per year and sought insurance as high as the generous Italian parental leave benefits, for example, would need about \$33,000 per child, or \$66,000 for two children.<sup>55</sup> The parties do not know whether they prefer, in essence, to create a loan to be repaid after birth and leave, or a savings plan (somewhat like whole-life insurance) that would accumulate up to the time of parental leave. An insurer might simply charge a one-time premium of \$60,000 that could be paid in ten installments of \$6,000 per year. An insured who worked for five years and then left the workforce to have and care for two children in a four year period would then return to the workplace and resume payments for another five years. The

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<sup>54</sup> Note, *Burden of Proof of Excepted Causes in Insurance Companies*, 46 COLUM. L. REV. 802, n.6 (1946).

<sup>55</sup> See International Labour Organization, *supra* note 11 (discussing Italian parental leave policies).

policy would, in this way, start out as something close to a forced savings plan, because 80–90% of insureds would be expected to receive benefits,<sup>56</sup> and then look more like an educational loan because there would be amounts to pay, with no security, out of later earnings.<sup>57</sup> The overall picture, in any event, suggests that while such private policies might emerge, they do not much resemble popular insurance products.

The preceding thought experiment about private maternity leave insurance makes plain that employer-mandated and government-provided leaves are likely to involve substantial cross payments from other employees or taxpayers. In a homogeneous population, these plans can be understood as social insurance encompassing a kind of life-cycle savings plan; the males and older workers who are forced to participate are, for the most part, beneficiaries in due course. From this perspective, even the most generous parental leave plans produce very few serious winners or losers. If the leave is employer mandated, there is, however, the danger of discrimination against younger women at the time of hiring. Overall, it might be fair to say that while many of the parental leave systems found around the world are ones that some Americans—at particular points in their lives—envy, the benefits are little more than loans that, for the most part, transfer from our future selves to our younger, childbearing selves. For women who have children closer to the end of their childbearing years, they are savings policies, rather than loans. Most Americans who envy the paid parental leaves found elsewhere probably miscalculate.

### III. MORE ON VARIETY: TWO-TIER SYSTEMS AND PARENTAL LEAVE

#### *A. Two-Tier Employment and Mandated Paid Leave*

A final, secondary, explanation for the absence of paid parental leave in the United States begins with the observation that there are some remarkably generous leave programs, provided by employers, and sometimes offered only to a class of employee. The idea here is

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<sup>56</sup> About 85% of women in Finland give birth to at least one child. In the United States, the number might be higher. MINISTRY OF SOCIAL AFFAIRS AND HEALTH, OPPORTUNITIES TO RECONCILE FAMILY AND WORK, REPORTS OF THE MINISTRY OF SOCIAL AFFAIRS AND HEALTH 16, at 22 (Rolf Myhrman & Riitta Sääntti eds., 2007), 2007 at 25; Diedre A. Grossman, Comment, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 COMP. LAB. L.J. 185, 221 (1993).

<sup>57</sup> The example ignores the time value of money. Given that the parties do not know whether the leave will come early, in which case the insured ought to owe interest, or late in the ten year period, in which case the insurer ought to pay interest, perhaps in the form of a lower premium or higher benefits, the actuarially correct answer may be something close to ignoring the time value of money.

that in satisfying one set of employees, the employer—and eventually the state—might face less pressure to develop a plan that benefits all. Consider a large, successful law firm or university. Typically, staff members can take maternity leave that builds on sick leave, disability programs, and accrued vacation days. Employees might accumulate two weeks for each year of employment, or perhaps receive a number of weeks or months depending on years of service. A relatively generous university policy is three months paid leave after three years of employment, which we might think of as a term of employment, or benefit, that adds pay to the federally mandated twelve weeks of unpaid family leave.<sup>58</sup> Another major university offers mothers 55% of salary for six months, with a maximum of \$800 per month.<sup>59</sup> Another is less generous; staff receive ten days sick leave per year, but that can be used only with medical certification, so that a typical staff member might use two weeks of accrued sick pay following birth and then move to short term disability (providing 60% pay) for the balance of the thirteen-week-allowed-disability period.<sup>60</sup>

But at these universities, *faculty* receive greater benefits. A faculty member who receives a term free of teaching, as is not uncommon, can be thought of as receiving paid leave values somewhere between one-quarter and one-half of annual salary. The uncertainty is a product of the fact that the fraction of compensation attributable to teaching, as opposed to other responsibilities (though some universities will also suspend those for a term), is unstated.<sup>61</sup> Similarly, attorney benefits at law firms are often greater than those available to other employees.<sup>62</sup> A survey of national law firms suggests that the average lawyer can receive twelve weeks of fully-

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<sup>58</sup> Case Western Reserve University Human Resources, Case HR Policy Manual: Absence and Leaves for Medical and Parenting Reasons, <http://www.case.edu/finadmin/humres/policies/absence.html> (last visited Jul. 16, 2007).

<sup>59</sup> University Of California Human Resources and Benefits, Short Term Disability Insurance Plan, [http://atyourservice.ucop.edu/forms\\_pubs/eoc/disability\\_ins\\_univ\\_2005.pdf](http://atyourservice.ucop.edu/forms_pubs/eoc/disability_ins_univ_2005.pdf), (last visited Jul. 15, 2007).

<sup>60</sup> The University of Chicago Benefits, Leaves of Absence <http://hr.uchicago.edu/benefits/spds/timeoff/leaves.html> (last visited Jul. 15, 2007).

<sup>61</sup> Compare Yale University Faculty Handbook, [http://www.yale.edu/provost/handbook/handbook\\_vii\\_leaves\\_of\\_absence\\_univers.html#T13](http://www.yale.edu/provost/handbook/handbook_vii_leaves_of_absence_univers.html#T13) (last visited Aug. 13, 2007), with Yale University: Division of Finance, Policies & Procedures, <http://apps.business.yale.edu/ppdev/index.jsp> (last visited Aug. 13, 2007).

<sup>62</sup> Compare Skadden, Arps, Slate, Meagher & Flom: Attorney Recruiting,, <http://www.skadden.com/recruiting/recruitingContent.cfm?p=34> (follow “Competitive Salary and Benefits Package” hyperlink) (last visited Jul. 16, 2007) (discussing its paid parental leave policy for both primary and secondary care-givers), with Skadden, Arps, Slate, Meagher & Flom: Support Staff, <http://www.skadden.com/Index.cfm?contentID=133> (last visited Jul. 16, 2007) (discussing its parental leave policy for support staff offering a base of 12 weeks unpaid leave, with an option of applying 29 paid sick-days, in addition to 6 weeks paid leave for mothers through the disability program).

paid leave in addition to sick leave.<sup>63</sup> Generally speaking, faculty at universities and lawyers at law firms are likely to receive fully-paid leave while other staff members are entitled to unpaid or fractionally-paid leave. The parental benefit has, in many places, also been extended to fathers, in part because of the shadow of antidiscrimination law, but that benefit is also likely to be greater for high-end employees. At one law school, for example, a faculty member who is a new parent receives a semester free from teaching, which we might assess as worth \$50-\$75,000,<sup>64</sup> though that faculty member is asked to aver that he (or she) is the primary caregiver<sup>65</sup>—perhaps just for the leave period. At the high end, there are law firms that also provide a \$50,000 to \$60,000 benefit in the form of four months at full pay for associates with new children.

In short, there are employers that offer a two-tier system, with more generous benefits to more highly-paid employees. The two-tier structure is not simply a product of higher salaries in the upper tier, for the associate and faculty member receive a longer or much longer period of paid leave.<sup>66</sup> The young associate who receives \$60,000 while on leave is plainly better off than she would be in most European countries; but even the most experienced secretary would prefer the European benefits, leaving aside the question of how these benefits affect wages or taxes.

It is tempting, as a next step, to theorize that the generous mandates in Europe (and elsewhere) squeeze out the private market for high-end benefits, while the two-tier private market system in the United States forestalls the emergence of mandated paid leave. In the first case, the argument would be that the mandates satisfy enough employees, that there is not much push to provide higher benefits. In the second case, the argument can be thought of as one drawing on public choice tools, as it is concerned with interest group politics. Employers have incentives to offer generous benefits, in lieu of cash, to employees who value these benefits and who value the signal the employer sends about its willingness to accommodate or attract workers who expect to be parents. But once these employees are satisfied, they have no incentive to work through the political process

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<sup>63</sup> See, e.g., interview by Tim Cleary with Jenna Boelke, Associate, Gibson, Dunn & Crutcher, LLP, in Los Angeles, Cal. (Jul. 28, 2007); see also, interview by Elizabeth Eldridge with Brian Eldridge, Associate, Segal, McCambridge, Singer & Mahoney, in Chicago, Ill. (Jul. 30, 2007) (discussing twelve-week long parental leave policies).

<sup>64</sup> University of Virginia, Leaves of Absence, [http://www.virginia.edu/provost/docs\\_policies/leaves.html](http://www.virginia.edu/provost/docs_policies/leaves.html) (last visited Jul. 16, 2007).

<sup>65</sup> *Id.*

<sup>66</sup> Compare Yale University Faculty Handbook, *supra* note 62, with Yale University: Division of Finance, Policies & Procedures, *supra* note 62.



for more generous leave policies for all employees. And yet it is likely that the high-tier employees are, or could be, more powerful in political terms. In the absence of employer-provided benefits, there would be more political pressure for a social insurance or other parental leave benefit. This perspective is fortified by the idea that some well-organized segments of the lower-paid market, such as members of some labor unions, do negotiate for more generous private parental leave policies.<sup>67</sup> They too have little incentive to agitate for more generous mandated policies for others. They may want to impose this on others so as not put their own firms or industries in a poor competitive position. But, on the other hand, they must fear that they will pay for these benefits with future, higher taxes. It is also strengthened by the conjecture that in most industries where we see generous benefits for high-end employees, immigration can not easily fill the gap that parenting would create. Thus, lawyers enjoy more leave than doctors and engineers.<sup>68</sup>

This theory about two-tier employment markets and the impact on government mandates or programs raises the question of why such a two-tier private market did not materialize in other countries, or at least not in a way that forestalled the move to mandated and paid parental leave. One answer might be that in these countries it is more difficult or politically unacceptable to differentiate among employees. High-tier employees in the U.S. also receive more paid vacation than low-tier employees. In other countries, paid leave is often mandated for all employees.<sup>69</sup>

### *B. Two-Tier Systems for Other Private and Public Goods*

Two-tier benefits with respect to paid parental leave are not so common as to form the basis for a convincing explanation of the exceptional (which is to say, meager) parental leave provided by law and even by private contract in the United States. There are many industries where virtually all employees would receive greater benefits, in the event of a birth of a child, in more than one hundred other countries. Still, it is tempting to suggest that the prevalence of

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<sup>67</sup> Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1961-1962 (1999).

<sup>68</sup> A survey of the websites of several well-known employers of engineers, physicians, investment bankers, and lawyers suggests more generous benefits in the last professions. A careful study of industries and leave policies is beyond the scope of this project.

<sup>69</sup> See Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333, 355 (2007) (discussing how European countries mandate that employers provide paid vacation leave, while the United States gives employers discretion regarding leave, so that there is more variety across employees).

two-tier systems in the United States makes us generally less inclined to look to the government for mandates and benefits. Where we do provide high-end redistribution and benefits, as in air quality, workplace safety, and disability accommodations, it is noteworthy that the benefit is something of a public good, so that two-tier delivery is impossible or difficult. This is a topic to which I plan to return in future work, but it is easy to see that, compared to other countries, we offer two tiers of "benefits" when it comes to university education and health care, much as we do with parental leave. And it is possible that the presence of very fine—and expensive—public schools and universities in some places causes a group of voters to press less for better schools and universities elsewhere, or nationally. Heterogeneity and mobility, and the availability of private market alternatives, reduce pressure on the broad public provision of goods.

But this observation about quality and price differentials in the United States does not by itself offer an explanation for the variety that we find globally. In order to understand the two-tier system in the United States and the single, high-end provision of these goods in Sweden, say, we might need to argue that interest groups play different roles in the two political systems. I do not pursue the topic here—especially because the immediate subject of this Article, parental leave policies, seems well explained by reference to fertility and immigration rates.

#### IV. PARENTAL LEAVE, CHILD-CARE, AND EMPLOYEE RETENTION

A law firm that offers four months of paid parental leave to associates is probably using parental leave as a means of recruiting in the highly competitive market for graduates of elite law schools. In the competition for these new attorneys, excellent parental leave benefits are thought to be a powerful tool. Some support for this view comes from the fact that where supply is more abundant, as it is for paralegals and secretaries, the benefit is much more modest. On the other hand, law firms and other enterprises face something of a crisis in retaining associates, and especially women with children.<sup>70</sup> If retention and not initial recruitment is—or becomes—the issue, then generous parental leave policies, though fairly recently installed, will not seem to have been well designed. In this Part, I aim to provide some tentative thoughts on the future of parental leave and retention strategies. In future work, I plan to discuss data and ideas about child-

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<sup>70</sup> See *Panel Discussion: Women in Law*, 49 U. KAN. L. REV. 847, 868 (2001) (discussing the "glaring issues about female retention in large law firms").

care benefits and other strategies that might be described as connecting family life to the workplace.

From an employer's point of view, the problem with parental leave, and perhaps with paid leave, is that the employee has no particular incentive to return to work after the period of leave. Indeed, the leave itself may have informed the new parent that a life centered on the home rather than the workplace has some rewards. Meanwhile, the employer has held the job, but the employee has no legal obligation to return to it. In some cases, the employer may be satisfied with defection. If the promise of high-end parental leave attracts the best applicants, the employer may thrive with the services of these employees as long as they choose to remain at the firm. An employer may believe, or learn through experience, that employees who depart are simply not those it should wish, or induce, to remain. But what about employers who do hope to retain employees after taking parental leave? One obvious strategy would be to make paid parental leave contingent on the employee's return to work. There is, however, every reason to think that potential employees would be put off by this policy. Moreover, there would be serious demoralization costs in enforcement. Some employees might face real hardship, and some births and children are easier to care for than others. It is unlikely that the employer wants to be in the business of collecting refunds, or deciding to collect otherwise forgivable loans, from ex-employees who have recently left the firm to bear and care for children.

A second strategy would be to offer payments to employees for childcare—instead of generous paid parental leave. For the employee who returns to work, the value of the childcare subsidy at Firm A might be expected to exceed the parental leave benefit at Firm B. Prospective employees might therefore choose a firm with a high-end child-care benefit over one with a high-end paid parental leave benefit. They might even switch firms after taking the leave from the first. Some firms have in fact invested in childcare; a modest number of free days of childcare at a drop-off location or at any approved site is a common benefit at law firms where unexpected and long hours are the norm.<sup>71</sup> It is plausible that the benefits we see at law firms and investment banks, high on paid leave but with a much smaller investment in child-care, are the product of history. Firms offered

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<sup>71</sup> See, e.g., Arnold & Porter LLP, *Our Environment—Work/Life Programs*, <http://www.arnoldporter.com/recruiting.cfm> (last visited Jul. 17, 2007) (offering on-site childcare to associates at its Washington office); see also Sullivan & Cromwell LLP, *Legal Recruiting*, <http://www.sullcrom.com/careers/legalrecruiting/compensationbenefits/> (last visited Jul. 17, 2007) (offering a four week childcare leave in addition to a backup childcare center for emergencies).

paid leave to attract employees, especially when the competition for exceptional women became intense. It now seems reckless to restructure the benefit as a payment or bonus for returning to work for a significant period. It is also difficult to pay more for less work without incurring resentment on the part of other employees who have not had children, or have not taken leave to do so. But more significant payment for child-care seems like the next step in employee retention policy.<sup>72</sup> A caveat is that parental leave, as we have seen, can be given disproportionately to women, because a significant part of that benefit can be structured as disability pay—in which case there is no fear of an accusation of discrimination on the basis of sex. A child-care benefit would presumably need to be offered equally to male and female employees, and that is unattractive to the firm if male employees value cash more than they value child-care payments.

If it is difficult for employers to reduce paid leave, but paid leave is thought an inferior strategy in terms of retention, then employers might be expected to use bonuses to encourage retention and returns from leaves. Future wage increases could be structured as bonuses, earned in proportion to hours billed or available only to those on the job. But bonuses that are structured in this way may bear lower value in recruitment than does paid parental leave. The reason for this is that, as described earlier, women are likely to overestimate the number of children they will bear. If so, and especially if they do not also overestimate the likelihood of returning to work, parental leave will be valued more than bonuses or child-care benefits.

### CONCLUSION

Parental leave can be thought of as a private good and as a public good. It is a private good to the extent that we think of the decision to bear children as private; we might also want to think of the decision to spend time in or out of the workplace as private. Parental leave, and other family-workplace policies, can be thought of as a public good either because fertility rates are of collective concern or because we think there is a social problem associated with highly trained people (often educated at some public expense) leaving the work force and not returning to it. If one takes the public good view, perhaps because of a conviction that higher benefits yield more children, better children, or working parents, then one should not be entirely pleased with the recent development of significant paid

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<sup>72</sup> Paul, Weiss, Rifkind, Wharton, and Garrison, LLP, Associate Life, <http://www.paulweisscareers.com/associatelife/> (last visited Jul. 17, 2007).

parental leave for professionals. After all, the two-tier system of which this is a part probably reduces the political push for universal paid leave of the kind found in most of the world.

If, however, we think of parental leave policy as it affects individual fulfillment, then the message offered here is that the policies found in the United States are likely the product of our robust fertility and immigration rates—and that as far as the individual is concerned, there is probably no need to envy the mandates found elsewhere. An individual can set his or her own parental leave policy by borrowing and saving, much as individuals borrow and save for education. In large part, our system privatizes that which is done publicly, but through higher taxes elsewhere. Fully-paid leave would hardly redistribute wealth toward those with greater need, and so it is not clear who should or would much prefer a national move in that direction.

Finally, there is room for a view at the level of the firm, with an eye on human capital. The claim here is that the focus will move from recruitment to retention, unless prospective employees and parents dramatically misestimate their own future choices. If change comes, it is more likely to be in the form of an increase in child-care benefits than it is in the form of universal paid parental leave.