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# Commentary: Women's Employment Rights in the Workplace of 2007 and 2027

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# COMMENTARY: WOMEN'S EMPLOYMENT RIGHTS IN THE MARYLAND WORKPLACE OF 2007 AND 2027*

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The papers presented in this symposium have provided us with a rich body of investigation into the range of issues confronting the working women of the State of Maryland, and legal responses thereto. In this commentary, I will situate the matters already addressed in depth by others within the broader framework of legal issues affecting women workers, not only in Maryland but elsewhere. I will outline inter-relationships among these issues as well. I will conclude by offering some thoughts on priorities and strategies for law reform in this state targeted to move Maryland women forward.

## I. OBSTACLES TO WOMEN'S EQUALITY IN THE WORKPLACE

A list of the key legal, social, and economic obstacles to full equality for women in the workplace and the labor market might include occupational segregation, both horizontal and vertical; wage discrimination and its corollary of devaluation of predominantly female work; pregnancy discrimination; obstacles to success for women related to their disproportionate shouldering of home and family burdens; sexual harassment on the job; the design of the unemployment insurance system; and the design of employee fringe benefit plans. Far from being watertight compartments, however, each of these areas is intertwined with the others.

Dr. Vicky Lovell's work highlights the combination of occupational segregation and lower pay for Maryland women.[1] In Maryland,[2] as well as throughout the U.S.,[3] female workers average

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* Several significant changes in statute and case law have occurred since the initial preparation of this article. Every effort has been made to incorporate pertinent updating material, although in depth treatment of 2008 and 2009 developments here is not possible.

** Professor of Law, University of Maryland School of Law. I wish to express my thanks to Professor Margaret Johnson for her leading role in organizing the symposium; to the Women's Law Center of Maryland, University of Baltimore School of Law, and University of Maryland School of Law for supporting it; and to Samantha Kravitz and the editors of this Journal for their hard work in bringing this collection of papers to publication.

1. Vicky Lovell, *Evaluating Policy Solutions to Sex-Based Pay Discrimination: Women Workers, Lawmakers, and Cultural Change*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45 (2009).

2. *See* VICKY LOVELL & OLGA SOROKINA, REPORT TO THE MARYLAND EQUAL PAY COMMISSION (July 19, 2006), *available at* http://www.iwpr.org/pdf/MD_payequity_report.pdf;

lower earnings than men. This remains true even taking into account factors such as hours worked, occupation, and industry. The distribution of women workers in industries, occupations, and jobs is quite different than that of their male peers, and is inter-related both as cause and effect in the gender-earnings gap.[4] The wage gap closed significantly between 1960 and 2006 as the ratio of women's to men's wages for full-time workers grew from 60.7 percent to 77 percent. On the other hand, progress has stalled for the past five years, during which time the ratio has essentially remained unchanged.[5]

Standard comparison figures, holding constant for variables such as full-time employment, occupation, and sector severely understate the depth of the earnings gap in women's lives. This standard methodology erases the compounding effect of the key gender-correlated factors, such as semi-voluntary part-time work, constrained choice to engage in intermittent labor force participation, wage depression in traditionally female fields, and the cumulative wage earning consequences of these disadvantages across a working lifetime. A recent national study concluded that "women workers in the prime working ages of 26 to 59 make only 38 percent of what prime-age men earn across the 15 years [covered] in the study."[6] In addition, "[a]mong those prime-age adults who work every year and average less than $15,000 annually, more than 90 percent are women."[7] Almost two-thirds of all minimum wage workers are women.[8]

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Maryland state profile chart, *available at* http://www.iwpr.org/States2004/MD.htm (analyzing Maryland data); AMY CAIAZZA, ET AL., THE STATUS OF WOMEN IN THE STATES: WOMEN'S ECONOMIC STATUS IN THE STATES: WIDE DISPARITIES BY RACE, ETHNICITY, AND REGION (2004), *available at* http://www.iwpr.org/pdf/R260.pdf (for comparative data on all the states).

3. JUDY GOLDBERG DEY & CATHERINE HILL, BEHIND THE PAY GAP (2007), *available at* http://www.aauw.org/research/upload/behindPayGap.pdf; INST. FOR WOMEN'S POLICY RESEARCH, FACT SHEET: THE GENDER WAGE RATIO: WOMEN'S AND MEN'S EARNINGS (updated Aug. 2008) [hereinafter THE GENDER WAGE RATIO], *available at* http://www.iwpr.org/pdf/C350.pdf (compiled and analyzed recent national data).

4. *See* STEPHEN J. ROSE & HEIDI I. HARTMANN, STILL A MAN'S LABOR MARKET: THE LONG TERM EARNINGS GAP, iii (2004), *available at* http://www.iwpr.org/pdf/C355.pdf (for an excellent presentation of the factors and their interactions).

5. *See* THE GENDER WAGE RATIO, *supra* note 3; INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP: PROGRESS OF THE 1980S FAILS TO CARRY THROUGH (November 2003), *available at* http://www.iwpr.org/pdf/C353.pdf; CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU CURRENT POPULATION REPORTS: INCOME, POVERTY AND HEALTH INS. COVERAGE IN THE UNITED STATES: 2005 11 (Aug. 2006), *available at* http://www.heartland.org/custom/semod_policybot/pdf/19676.pdf.

6. ROSE & HARTMANN, *supra* note 4, at iii.

7. *Id.*

8. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CHARACTERISTICS OF MIN. WAGE WORKERS, 2005, *available at* http://www.bls.gov/cps/minwage2005tbls.htm.

Disparities in level of educational attainment is not at fault, despite the supposed shift into a global economy in which knowledge workers command a high wage premium over others. Higher proportions of women than men are completing their college and higher level university degrees.[9] In Maryland, as of 2000, 83.5 percent of men and 84.1 percent of women had a high school diploma; a modestly higher percentage of men (33.5 percent) compared to women (29.6 percent) had a bachelor's degree or higher final diploma, although women were gaining ground rapidly.[10] However, women's advanced qualifications are less likely than those of men to be in higher paying technical fields, and more likely to be in heavily female specialties.[11]

Intentional discrimination—that is, disparate treatment of women—figures prominently here. Some of this differential is attributable to straightforward, intentional gender discrimination in the wage setting process by employers. Companies may pay women less because their labor market position is weaker, or because they fail to negotiate salary as aggressively as their male counterparts, or because management still harbors traditional notions of men working as family breadwinners and women working to supplement the family's income. Some of it is the result of subconscious gender discrimination; the woman worker may not be perceived by her boss as equally valuable compared to her similarly situated male counterpart, even if all objective indicators suggest that they are identical.

Some of the wage differential is the by-product of intentional gender discrimination in job assignment and promotion that, in the aggregate, contributes significantly to horizontal and vertical occupational segregation. By horizontal segregation, I am referring to a form of gender role stereotyping which leads employers to resist assigning women to jobs which are traditionally and overwhelmingly held by men. Peer sexual harassment plays a part here as well, since male coworkers may resist intrusion of one or a few women into a male working environment. The men may create a hostile working environment as a means of driving the intruding women out. Vertical occupational segregation, often labeled the "glass ceiling," also causes

9. U.S. Census Bureau Press Release, One-Third of Young Women Have Bachelor's Degrees (Jan. 10, 2008) *available at* http://www.census.gov/Press-Release/www/releases/archives/education/011196.html.

10. U.S. CENSUS BUREAU, MARYLAND: EDUCATIONAL ATTAINMENT OF THE POPULATION 25 YEARS AND OVER: 1940 TO 2000, *available at* http://www.census.gov/population/socdemo/education/phct41/MD.pdf.

11. *See* Rose & Hartmann, *supra* note 4, at iv, 13–15.

women's earnings to be lower than those of men.[12] Stereotypes and preconceptions about women, as well as concerns about resistance of male subordinates, often deter employers from promoting women above a certain level, especially when the workforce they will be managing is heavily male.[13]

The gender-earnings gap also is partly the result of an amalgam of factors other than intentional gender discrimination by employers. The disproportionate concentration of women in government and non-profit organizations, which tend to pay lower wages than private, for-profit companies, contributes to the disparity. So, too, does the pattern of intermittent labor force participation, and of part-time rather than full-time work, which is more common among women than men.[14] As of 2007, 89.5 percent of working age men worked full-time, but only 75.3 percent of working age women did so.[15] Two of every three part-time workers are women.[16]

"Contingent" or "atypical" work of all types tends to be paid at lower rates than comparable "standard," full-time work in a permanent position. Even when women's children are in school or grown, and their working time availability resembles that of men, career-dampening effects may persist from earlier years of part-time or intermittent work, causing fewer promotions and lower earnings.[17]

Moreover, women in Maryland, as elsewhere, tend to be disproportionately employed in small and medium-sized businesses. This is partly a result of gender discrimination in the labor market as well as other labor market factors tending to exclude them from non-female stereotyped employment with large businesses. There are many consequences of women's disproportionate employment in smaller firms. These businesses tend to pay lower wages, provide fewer fringe benefits, and have much higher closure and bankruptcy rates than Fortune 500 companies.

Finally, women tend to be concentrated in predominantly female occupations and industries. This occupational segregation has repeatedly been shown to be strongly correlated with undervaluation of the predominantly female jobs compared to those of men.[18] The

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12. *Id.* at 21.

13. *Id.*

14. *Id.* at iii.

15. UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT STATUS OF WOMEN AND MEN IN 2007, *available at* http://www.dol.gov/wb/factsheets/Qf-ESWM07.htm.

16. *Id.*

17. *See* ROSE & HARTMANN, *supra* note 4, at iii.

18. *See, e.g., id.* at iv.

cumulative effect of these realities on women's career prospects accounts for a significant portion of gender disparities in all aspects of employment, remuneration, and benefits.

The papers of Cynthia Calvert[19] and Michael Hayes[20] address some of the consequences for women in the labor force of women's disproportionate undertaking of the burdens of home and family responsibilities.[21] This area, too, is compounded of several intertwined factors. Discrimination against women based on stereotypes about their childbearing and family care roles[22] underlies much of the intentional gender discrimination in hiring, job assignment, promotion, and pay. Even women willing and able to conform to the full-time-plus worker model are often perceived, based on their gender, as less likely to do so.

Equally important, many workplace policies, practices, and structures are based on the traditional, implicitly male, full-time breadwinner worker model. This image of a worker presumes that his primary focus in life is his job and workplace, and deletes any competing caretaking duties from the picture. Employment policies of this sort are occasionally designed as a means of excluding women from a workplace. More commonly, however, they are adopted or maintained despite their foreseeable, disparate impact upon the significant percentage of women workers who in fact assume the lion's share of family responsibilities. Although in theory these practices may be subject to challenge on a disparate impact basis under federal and Maryland equal employment law, or on other grounds, very few such systemic discrimination cases actually have been litigated.[23] It is perhaps noteworthy that the Equal Employment Opportunity Commission (EEOC) guidance on discrimination against caregivers confines itself to disparate treatment.[24]

The continuing assumption by a majority of women of the greater portion of the burden of family caretaking tasks combines with

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19. Cynthia Thomas Calvert, *The New Sex Discrimination: Family Responsibilities*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 33 (2009).

20. Michael J. Hayes, *Employment Leave Issues*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 19 (2009).

21. *See generally* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–2 (2000).

22. *See* EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (No. 915.002) (May 23, 2007) [hereinafter EEOC Enforcement Guidance], http://www.eeoc.gov/policy/docs/caregiving.html (last visited Apr. 8, 2008).

23. *See, e.g.*, Joan Williams and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L. J. 77, 122–23, 134 (2003).

24. EEOC Enforcement Guidance, *supra* note 22.

the implicit male non-caretaking worker norm to reinforce occupational segregation, unequal remuneration, and devaluation of predominantly female occupations. Actual or expected family responsibility roles pressure many women into intermittent paid employment, part-time work, or work in predominantly female occupations or industries. These are work situations in which the implicit male breadwinner employee model is less likely to be prevalent and to influence workplace norms and arrangements. Women become school teachers so they can be home after school to take care of their children. Women enter nursing because hospital employers have accommodated their heavily female workforces by organizing a variety of more flexible work schedules, including part-time work compensated on a pro rata par with full-time work. Women lawyers enter government service to feel confident that they can leave after a normal workday. Women attorneys leave litigation law firm positions for corporate house counsel jobs to escape billable hour requirements, which mandate sixty or seventy hour work weeks. Instead, women lawyers favor jobs with a regularized, forty hour work week schedule, which dovetails with their day care or elder care arrangements. Women doctors enter specialties such as pediatrics, with relatively stable hours, rather than orthopedic surgery, in which for the first ten or fifteen years after completing their training they would be on call almost 24/7. Of course, the poorest women and those lacking skills and educational credentials find themselves mired in dead end, minimum wage jobs, where even a forty hour workweek is insufficient to maintain a basic standard of living.

An important feature of the working time issue for women, as it relates to their constrained employment choices, is the imperative need many of them have for regularity, as well as flexibility on their terms rather than those of the employer. Those relying on day care or elder care providers are especially vulnerable to job loss or exclusion from employment when an employer insists upon employee "flexibility." Flexibility from the employee side, such as the need to take off a sick day to go to the doctor, or a personal business day to go to her child's school for a parent-teacher conference, is inherently at odds with the employer's need for regularity, or at least some control over the employee's presence, and vice versa. Scheduling of work on a rotating shift, or obligating employees to perform mandatory overtime whenever extra work is needed by the employer, operates to exclude workers with conflicting child or day care arrangements or other family responsibilities from employment.

There is an irony to the disproportionate concentration of women in government jobs as well as in small and medium size enterprises. These businesses tend to be excluded from coverage under federal, and to a lesser extent, state laws whose purpose is to respond to gender discrimination in employment, as well as to the unbalanced gender allocation of home and family work. Many labor and employment laws set thresholds based on number of employees, number of employee hours worked, or dollar volume turnover of the business, in defining the "employer" covered by the statute. The higher the threshold for coverage, the greater the extent to which the statute itself disproportionately excludes women workers. More heed, therefore, should be paid to whether any small employer exclusion is really warranted, and even when it is, to minimizing the exclusion.

The federal Family and Medical Leave Act of 1993[25] threshold of fifty employees[26] is a particularly egregious example. The law permits workers to take up to twelve weeks within a twelve month period of unpaid leave of absence, when the leave is necessitated because of the worker's own serious health condition, or because of the serious health condition of a child, parent, or spouse, or to care for a newborn or newly adopted child or a newly placed foster child. The employee is assured of the right to return to her original or an equivalent position. She also is guaranteed continuation of any employer-provided group health insurance.[27] The law was proposed in part to respond to the problem of facially gender neutral employment policies, which permitted so few unpaid absences that virtually every pregnant woman would lose her job for excessive absenteeism.[28] Yet a significant portion of its targeted beneficiary group is excluded as employees of small and medium sized businesses.

Several other areas to which the papers have devoted less attention should be mentioned in this overview of working women's problems. The first is unemployment insurance. Many aspects of the

25. 29 U.S.C. §§ 2601-2654 (2009).

26. *Id.* at § 2611(4)(A)(i).

27. *Id.* at §§ 2612(a)(1) and 2614(a)(1). Special rules now apply to those with family members serving in the armed forces. *See infra* text accompanying notes 91–93.

28. *See, e.g.*, Miller-Wohl Co. v. Comm'r of Labor and Indus., 685 F.2d 1088, 1089, 1091 (9th Cir. 1982) (employer permitted no absences whatsoever during first year of employment and fired worker when her pregnancy-related illness necessitated her absence in violation of Montana statute, which required employer to allow reasonable leave of absence for pregnancy; employer's challenge to Montana law as preempted by Title VII of the Civil Rights Act was dismissed for lack of federal jurisdiction); *see also* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292 (1987) (holding that the Pregnancy Discrimination Act of 1978 does not preempt a state statute that requires employers to provide leave of absence and reinstatement to employees disabled by pregnancy).

unemployment benefits system are skewed in favor of the full-time, permanent, implicitly male worker model.[29] These elements disproportionately disadvantage those who work intermittently or part-time in qualifying for benefit eligibility as well as reducing the amount of benefits to which they are entitled.[30] Even worse, women may be deemed unavailable to work, and hence disqualified, because of pregnancy-related disabilities, or because of working time or commuting limitations connected with child care or elder care. Maryland, for example, expressly makes voluntarily quitting a job to accompany a spouse to a new location or to join a spouse in a new location a disqualifying factor for which a "valid circumstance [does not] exist," precluding eligibility for unemployment benefits.[31] The disqualification will persist until the worker has been reemployed and has earned wages of at least fifteen times her weekly benefit.[32] I will reserve further discussion of this topic for another day, however, since it largely operates in the background of the labor market rather than at its center.

Professor Hayes' work notes special problems suffered by workers who are victims of domestic violence, a class composed

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29. *See* Vicky Lovell, The Unemployment Insurance Modernization Act: Improving UI Equity and Adequacy for Women (Testimony before the House Ways and Means Committee, Subcommittee on Income Security and Family Support, Hearing on Modernizing Unemployment Insurance to Reduce Barriers for Jobless Workers), (Sept. 19, 2007), *available at* www.iwpr.org/pdf/LovellUITestimony.pdf (last visited Apr. 8, 2008); VICKY LOVELL, FACT SHEET: WOMEN AND UNEMPLOYMENT INSURANCE: OUTDATED RULES DENY BENEFITS THAT WORKERS NEED AND HAVE EARNED, (Jan. 2008) *available at* http://www.iwpr.org/index.cfm. *See generally* Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 133, 173 (1996).

30. MD. CODE ANN., LAB. & EMPL. § 8-903(a) (West 2009) (requiring a benefits claimant to be able to work, available to work, and actively seeking work). The Maryland Department of Labor, Licensing and Regulation, Division of Unemployment Insurance formerly administratively interpreted this to require that "[a]t the time you file your claim for unemployment insurance benefits, you must be able and available for full-time work without restrictions. . . " MARYLAND DEPARTMENT OF LABOR, LICENSING AND REGULATION, WHAT YOU SHOULD KNOW ABOUT UNEMPLOYMENT INSURANCE IN MARYLAND 2 (2007), *available at* http://www.dllr.state.md.us/employment/clmtguide. However, while this article was in press, the 2009 Maryland General Assembly amended the law to insert § 8-903(a)(3), allowing a part-time worker who is able to work, available to work part-time, and actively seeking part-time work, in a labor market with "reasonable demand" for part-time work, to qualify for unemployment benefits, provided the worker has worked a sufficient number of hours within the statutory base period. 2009 Md. ALS 5.

31. MD. CODE ANN., LAB. & EMPL. §§ 8-1001(a)(1), 8-1001(d)(2) (West 2009). In 2008, the legislature added a modest exception, § 8-1001(c)(1)(iii), for spouses of armed services members, civilian military employees, and military contractors whose spouses' mandatory relocation entailed relocation, hence job termination, for the spouse. 2008 Md. ALS 669.

32. MD. CODE ANN., LAB. & EMPL. § 8-1001(e)(2)(ii) (West 2009).

primarily of women.[33] When women workers are abused at home, they may become victims of discrimination at work. Their employers may become leery of the violence spilling over into the workplace, as well as concerned about the victim's likely distraction from her job duties. This may render them eager to seize an opportunity to terminate the employment relationship. If the domestic violence leads to injury and medical bills, the increased employee benefit costs add more reason still for the employer to seek to terminate the employee. The employee who suffers a serious health condition as a result of domestic violence has a right to take unpaid leave under the FMLA, provided the employee is lucky enough to work at a larger employer exceeding the fifty employee threshold. Even then, however, she may have trouble establishing that the condition is sufficiently "serious," which depends on showing that her medical condition makes her unable to perform the functions of her job.[34]

A discussion of workplace issues of particular importance to women would be incomplete without mention of sexual harassment. Academic research suggests that this problem remains ubiquitous in American workplaces, and that the huge majority of cases involve male harassment of female co-workers and subordinates; there is no reason to believe that those in Maryland are any different. Besides requiring legal intervention because of its direct consequences upon victims, sexual harassment is often used "to keep women in their place," by male superiors, co-workers, or even subordinates intending to make the woman's situation on the job so miserable that she will leave. Sexual harassment therefore plays a very important role in reinforcing occupational segregation, both vertical and horizontal, which in turn is a major factor underlying the gender earnings gap.

All of the problems identified above are amenable to state legislative response, not in the sense that legislation can fix everything, but in the sense that they are within the sphere of competence of the Maryland legislature. Two others, however, should be noted here, as to which Maryland authority is limited or precluded entirely. The first is employee fringe benefits. The Employee Retirement Income Security Act (ERISA)[35] has largely preempted this field. There are many ways in which employee fringe benefit plans tend to be structured to the disadvantage of women. Of particular note is the frequent exclusion, rather than pro rata inclusion, of part-time workers in pension and health insurance plans, or the setting of an hours per week or per year

33. Hayes, *supra* note 20, at 20–23.

34. 29 U.S.C. § 2612(a)(1)(D) (2000).

35. *Id.* §§ 1001–1461 (2000).

threshold that excludes most of the women workers.[36] Pension plans often perpetuate the effects of past sex discrimination into the present, particularly pre-Pregnancy Discrimination Act (PDA) discrimination in the treatment of pregnancy-related leave, excluding pregnancy and maternity leaves but not other forms of medical leave from service credit calculations in computing pension benefit accrual. The U.S. Supreme Court, however, has held that since the initial disparate treatment of pregnancy-related leave was lawful at the time committed, retention of this failure to allow credited service in current pension benefit calculations is not subject to challenge.[37] Section 514 of ERISA,[38] however, preempts state efforts to regulate employee benefit plans, so most of this cannot be addressed within the framework of Maryland law.

There is a special exception to ERISA preemption for state laws regulating insurance,[39] which does allow states to mandate

36. *See generally* LOIS SHAW & CATHERINE HILL, THE GENDER GAP IN PENSION COVERAGE: WHAT DOES THE FUTURE HOLD? 14–15 (May 15, 2001), *available at* www.iwpr.org/pdf/e507.pdf.

37. AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009). The *Hulteen* Court's reasoning is predicated on two points: First, the assumption that the pregnancy discrimination was lawful when committed, and second, on the characterization of the pension accrual scheme as part of a "bona fide seniority system" protected from challenge under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (2000), unless "adopted for an intentionally discriminatory purpose." Title VII § 706(e)(2), 42 U.S.C. § 2000e-5(2). The Court found inapplicable the Ledbetter amendment permitting claims of compensation discrimination "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice," Title VII § 706(e), 42 U.S.C. § 2000e-5(e), as amended by Lily Ledbetter Fair Pay Act of 2009 (LLFPA), Pub. L. 111-2, 123 Stat. 5-6. The Court reasoned that since the PDA had not yet been enacted when the women were initially denied service credits for time spent on pregnancy leave, the plaintiffs had not been "affected by application of a[n unlawfully] discriminatory compensation decision or other practice." It is quite possible, however, that some plaintiff class members could have shown that the duration of their pregnancy and maternity leaves were prolonged by either being forced onto a leave of absence before they were disabled, or being pressured not to return to work after delivery for a longer period than mandated by their personal physicians. These forms of disparate treatment unduly "burdening" pregnant workers were held to be subject to Title VII sex discrimination challenge by the Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), a pre-PDA decision. In the view of other commentators as well as this author, such originally unlawful employment practices may provide the foundation under the LLFPA to a valid present challenge to current effects in the form of lowered compensation, presumably also including pension benefits. *See, e.g.*, Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499 (2010).

38. 29 U.S.C. § 1144(a) (2000).

39. *Id.* § 1144(b)(2)(A).

elements of group health insurance. However, that exception is inapplicable if the employer self-insures,[40] which they increasingly do.

Some group health plans exclude female contraception, abortion, and sterilization. The legality of excluding female contraception remains contested under the Pregnancy Discrimination Act of 1978,[41] amending the prohibition against sex discrimination of Title VII of the Civil Rights Act of 1964[42] to forbid discrimination on the basis of pregnancy, childbirth, or related medical conditions.[43] Maryland was the first state to utilize its power to mandate prescription contraceptive coverage under its authority to regulate insurance, adopting an exemplary bill in 1998 which requires employers who provide prescription drug coverage as part of their employee fringe benefit plans to include coverage of prescription contraceptives and to cover them at the same co-pay or other cost imposed on other types of prescriptions. Twenty-three other states have since followed suit, and three additional states have interpreted their antidiscrimination laws to impose an equivalent requirement upon employers.[44]

A final area which affects women, along with all workers, deserves mention here: the ability of workers to organize a labor union and bargain collectively with their employers. Much ink has been spilled outlining the inadequacies of the present regime under the National Labor Relations Act (NLRA),[45] widely regarded as having become dysfunctional in the seventy plus years since its inception. As the unionized share of the private sector labor force in the United States drops to levels not seen since before the Great Depression, the significance of the extraordinary difficulty of unionizing and

40. *Id.* § 1144(b)(2)(B).

41. 42 U.S.C. § 2000e(k) (2000).

42. *Id.* § 2000e-2(a).

43. *Id.* § 2000e(k) (however, the exclusion of abortion coverage is expressly permitted by the PDA).

44. MD. CODE ANN., INS. § 15-826(a) (West 2002). For a survey of the states, *see generally* NATIONAL WOMEN'S LAW CENTER, CONTRACEPTIVE EQUITY LAW IN YOUR STATE: KNOW YOUR RIGHTS—USE YOUR RIGHTS: A CONSUMER GUIDE (Aug. 2007), *available at* http://www.nwlc.org/pdf/ConCovStateGuideAugust2007.pdf; GUTTMACHER INST., STATE POLICIES IN BRIEF—INSURANCE COVERAGE OF CONTRACEPTIVES (Apr. 1, 2008), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf. *See, e.g.*, Women's Health and Wellness Act, N.Y. INS. LAW § 3221(l) (McKinney 2008), N.Y. INS. LAW § 4303(cc) (McKinney 2007), upheld as constitutional in Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468–69 (N.Y. 2006); Women's Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000) & CAL. INS. CODE § 10123.196 (West 2005) (upheld as constitutional in Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 73–74, 94 (Cal. 2004)).

45. 29 U.S.C. §§ 151–169 (2000).

bargaining in this country should be noted. In those traditionally female jobs in which substantial gains in wages and benefits have been attained over the past three decades, particularly teaching and nursing, unionization has clearly been a major influence. A union is the only vehicle under American law through which workers can have a real voice in setting their wages, hours, and terms of employment, all of which are otherwise set by the employer acting unilaterally. In addition, having union representation provides workers with an important vehicle for redressing workplace grievances without having to stand up individually against the employer. Studies indicate that women are especially reluctant to press claims for sexual harassment or other forms of sex discrimination in employment. The presence of a union can facilitate advancing such claims and can reassure the worker that she has the added protection against retaliatory discharge of the "just cause" provision constraining termination of employment in nearly all collective bargaining agreements. She also can rely on the support of the union in representing her during the grievance procedure. The flaws of the NLRA, however, are largely immune to response at the state level; preemption of state law regarding the right to organize and bargain collectively in the private sector precludes inclusion of useful measures on any agenda of Maryland legislative reforms on behalf of women.

Many of the problems diagnosed above, as well as in the papers presented in the symposium, involve forms of gender discrimination already unlawful under present Maryland and federal law. It seems clear that the requirement of non-discriminatory treatment of women employees is under-enforced. Moreover, as the federal courts have become increasingly hostile to claims of discrimination of all stripes, a sound state law with strong enforcement and remedies becomes ever more important.

As Professor Deborah Eisenberg's paper points out, the recent amendment to Maryland law to provide for a private right of action in state circuit court, along with a jury trial and compensatory or punitive damages, is a major step forward.[46] The Maryland legislative compromise adopted caps on the amount of damages recoverable, based on the size of the employer. These maxima range from $50,000

46. Deborah Thompson Eisenberg, *Opening the Doors to the Local Courthouse: Maryland's New Private Right of Action for Employment Discrimination*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 7 (2009).

to $300,000,[47] an unfortunate emulation of the federal model enacted in the Civil Rights Amendments Act of 1991.[48]

Needless to say, women workers are disproportionately concentrated in smaller employers. Thus, a woman suffering from an act of racial discrimination similar to that suffered by a man with regards to promotion would be more likely to work in a smaller firm. As such, she would be likely to recover a lower amount of damages as a remedy for the violation. Moreover, the Maryland amendment took the federal caps one step further, and applied them to all covered grounds of discrimination, while the federal law left in place the preexisting remedy for racial discrimination under 42 U.S.C. § 1981, which imposes no ceiling on damages.[49]

The revised Maryland law does represent significant advancement in several other respects, which should be mentioned. First, the Maryland damage remedy as well as the right to trial by jury appears to apply to all claims of unlawful sex discrimination under the Maryland private right of action, including claims of disparate impact as well as claims of disparate treatment. The 1991 Civil Rights Act amended Title VII remedies only as to claims of "intentional discrimination" or disparate treatment, and not as to claims of disparate impact. Disparate impact cases involve claims that a facially neutral employment policy or practice had a disproportionately adverse effect on women as compared to men, and was not justified as job related and a business necessity. Maryland law now affords a superior remedy for these kinds of violations. Federal claims of disparate impact have dropped precipitously compared to claims of disparate treatment, in part because the availability of a jury trial and compensatory damages encourages plaintiffs' counsel to plead cases as alleging intentional discrimination. Leveling up the remedial possibilities may encourage plaintiffs' counsel to bring disparate impact cases under Maryland law, which affords a better prospect of addressing systemic discrimination.

Even where the new Maryland law goes no further than the federal law, it will provide victims of gender discrimination in employment with a very valuable choice of forum. Many plaintiffs may find it more advantageous to litigate in Maryland state courts rather than the federal courts. The new Maryland legislation will

47. H.B. 1034, 2006 Leg., 421st Sess. (Md. 2006).

48. 42 U.S.C. §§ 1981a(a)(1), 1981a(b) (2002). 42 U.S.C § 1981a(c) provides the right to a jury trial in cases in which plaintiff seeks compensatory or punitive damages.

49. MD. CODE ANN., STATE GOV'T, § 20-1013 (West 2009); 42 U.S.C. §§ 1981a(b)(4) (2002).

permit plaintiffs preferring the state court venue to file a state court action pleading only the Maryland statutory allegations, and still be able to recover a damage remedy. By omitting federal antidiscrimination law allegations, the Maryland plaintiff will preclude removal of the case to federal court.

## II. SOLUTIONS TO DEFICIENCIES IN PRESENT MARYLAND LAW

Improvement in the status of women in Maryland will probably entail further revision of Maryland law, and in some cases, federal law. The reform agenda should focus as much as possible on measures to achieve improvement in the problem areas of occupational segregation, wage and benefit disparities, and the constraints in the labor market imposed on women by their disproportionate share of the burden of home and family caretaking.

The first priority should be intensified enforcement of existing bodies of substantive law protecting women workers; primarily this means employment discrimination and equal pay law, but it also means family medical leave and other minimum labor standards legislation. Relatively minor amendments to existing legislation could significantly improve incentives for compliance by employers. For example, the caps could be removed on the recently amended private right of action damage remedies.[50] In addition, employer size thresholds could be eliminated or at least reduced to increase the coverage for women of a wide range of statutory protections.

A modest, but significant legislative improvement would be to eliminate or reduce the threshold for employer coverage under Maryland equal employment law, which at present requires fifteen or more employees, identical to that of Title VII.[51] The threshold is already down to one employee in Prince George's, Montgomery, and Baltimore Counties, and Howard County has set the minimum at five. In practice, reducing the statewide statutory threshold would simply equalize the coverage throughout the less urbanized portions of the state.[52] Because so many small employers are already accustomed to the lower threshold based on county code, opposition ought to be

50. MD. CODE ANN., STATE GOV'T, §§ 20-1009(b)(3), 20-1013(3)(e) (West 2009).

51. *Id.* § 20-601(d)(1)(i); 42 U.S.C. § 2000e(b).

52. MONTGOMERY COUNTY, MD. CODE § 27-6 (2007); BALTIMORE COUNTY, MD. CODE § 29-2-201(c)(1)(i) (2003); PRINCE GEORGE'S COUNTY, MD. CODE § 2-186(a)(5) (2003); HOWARD COUNTY, MD. CODE § 12.208(d). The private right of action provided for under each of these county laws is authorized pursuant to MD. CODE ANN., STATE GOV'T, §§ 20-1202, 20-1203 (West 2009). *See* Edwards Sys. Tech. v. Corbin, 841 A.2d 845 (Md. 2004).

muted. Numerous other states provide for coverage of small and even micro-employers. Alaska, for example, defines any person employing one or more employees as a covered employer;[53] California covers employers with five or more employees.[54]

The present state of affairs is particularly unfortunate. The recent amendment of Maryland law to allow employees directly to file their own civil lawsuits in state circuit court in response to workplace discrimination has retained the equivalent of a small claims procedure. An employee with a modest claim, who is very likely unable to obtain private counsel, can still litigate her case before the Human Relations Commission. Should the Commission then find the claim to have merit, the Commission can pursue it on the worker's behalf in court. Many of the smallest claims, however, will be those for failure to hire in the high turnover, low wage labor market, or for failure to promote where the incremental wage increase is small. These cases are likely to arise among smaller employers, many of whom will fall short of the fifteen-employee threshold, leaving the Commission without jurisdiction and the employee without a remedy.

On the other hand, if the worker is discriminatorily terminated, she will have a Maryland common law tort claim on the basis of the employer's violation of the clear statutory mandate of Maryland law prohibiting employment discrimination on the basis of sex.[55] Such a tort claim would permit recovery of damages without regard to the caps which would apply to employees of larger employers. Maryland recognizes only a common law cause of action for wrongful termination in violation of public policy. The state courts are highly unlikely to recognize a tort claim for wrongful failure to hire, promote, or transfer in violation of that same public policy against employment discrimination, even though the dignitary insult may be equally as great. Covering all Maryland employers would ensure the possibility to all employees of full vindication of the antidiscrimination principle while eliminating this incongruity.

Better enforcement of Maryland employment discrimination law and higher levels of voluntary employer compliance are already facilitated by the new provisions for jury trials and awards of compensatory and punitive damages. Removal of the damage caps would accelerate this effort, but a decision to invest more state resources into administering and enforcing Maryland's prohibition on employment discrimination could make an equally substantial

53. ALASKA STAT. § 18.80.300(5) (2007).

54. CAL. GOV'T CODE § 12926(d) (West 2007).

55. *See* Molesworth v. Brandon, 672 A.2d 608, 628–29 (Md. 1996).

difference. Civil procedure clarification to ease requirements for certification of class actions would also help stimulate an increased volume of pattern and practice litigation in Maryland, enabling structural challenges to systemic discrimination by businesses.

Hand in hand with the numerical threshold for employer coverage goes the definition of the covered employment relationship. Increasingly, under all bodies of labor and employment law, the question becomes whether the worker performing the work is technically an employee of the party for whom the labor is being performed. Sometimes, it occurs in the guise of a claim that the worker is herself an independent contractor, often labeled a "consultant." In other cases, there is a labor supply intermediary, but important incidents of terms and conditions of employment, particularly on the job task assignment, supervision, safety requirements, and exposure to sexual harassment, are controlled not by the labor supply firm—the putative sole employer—but by the party hiring the work done. Women would be among those workers particularly benefiting from an expanded and clarified definition of the employment relationship covered by Maryland's labor and employment laws. A new employment relationship definition could reflect the economic realities of a dependent relationship, rather than being derived from master-servant vicarious liability law, which was formulated with a very different purpose in mind. A particularly fine definition already had been enacted in sections 8-201 and 8-202 of Maryland's unemployment insurance law.[56] They read in pertinent part:

56. MD. CODE ANN. LAB. & EMPL. §§ 8-201–202 (West 2007); *see also* § 8-205 (defining independent contractor). The original version both of sections 8-201 and 8-205 placed the burden of proof on the employer to prove that the worker is excluded from coverage. *See, e.g.*, Dep't of Labor, Licensing and Regulation v. Fox, 697 A.2d 478, 480 (Md. 1997).

8-201. Covered Employment.

* * *

Except as otherwise provided . . . , employment is covered employment if:

(1) regardless of whether the employment is based on the common law relation of master and servant, the employment is performed:

(i) for wages; or

(ii) under a contract of hire that is written or oral or express or implied; and

(2) the employment is performed in accordance with § 8-202 of this subtitle.

8-202. Location of Employment.

* * *

(b) *Performance in State.*—Employment that otherwise meets the requirements of § 8-201 of this subtitle is covered employment if the employment is:

(1) performed in [this] State. . . [57]

At the symposium from which this article is derived, I suggested that similar language could be made applicable to all Maryland legislation pertaining to labor and employment. In 2009, the General Assembly took an important step in this direction, enacting the Workplace Fraud Act of 2009.[58] This bill creates both an administrative enforcement mechanism and a private right of action, including quadruple damages, against employers who misclassify workers over whose work they exercise substantial direction and control. Unfortunately, although it clarifies employment relationship coverage for most of the state's labor and employment laws, the statute applies only to a few industries—construction services and landscaping services. Moreover, although it incorporates similar provisions covering all industries for purposes of unemployment benefits,[59] it weakens the prior definition, set forth above. It renders the definition a mere presumption, rebuttable based on the characterization of the work relationship by the Internal Revenue

57. MD. CODE ANN. LAB. & EMPL. §§ 8-201–202 (West 2007). *See also* § 8-205 (West 2007) (defining independent contractor).

58. MD. CODE ANN. LAB. & EMPL. §§ 3-901–919 (West 2009); 2009 Md. ALS 188.

59. 2009 Md. ALS 188, amending MD. CODE ANN. LAB. & EMPL. §§ 8-201 and 8-205, and inserting 8-201.1.

Service as a contractual rather than an employment relationship. It would have been preferable simply to adopt the prior unemployment insurance statutory language to define workplace fraud.

If the legislature hereafter addresses the definition of "employee" in a provision applying across all industries as well as throughout the labor and employment code, it might do well to address the definition of "employer" at the same time. Many statutes, both state and federal, circularly define "employer" as anyone who employs an employee, or, only slightly better, who employs an individual to perform work. The resolution of the independent contractor-employment relationship boundary line can be used to address labor supply intermediaries and joint employment relationships. However, it falls short of reaching the many situations in which the employer side of the relationship is unclear because of how the party hiring the performance of the work, always the core putative employer, has structured the situation. The as-yet uninterpreted language of the Workplace Fraud Act may actually contract the scope of coverage in triangular employment situations, although undoubtedly that result would be unintended. Section 20-801 of the State Government Article makes aiding and abetting an employer in committing prohibited discrimination a "violation," without specifying that the violation renders the aider and abetter jointly and severally liable with the main employer. Amending that provision to clarify this point, and adopting similar language applicable across-the-board to labor and employment law could provide a solution. It might minimize employer status issues as corporations increasingly build "boundary-less" relationships with their contractors, suppliers, and spun-off units performing component work prior to the production of the final product or service.

Turning to the area of wages, it might be fruitful to systematically examine the gender breakdown in Maryland of the numerous categories of workers excluded from the Maryland Wage and Hour Law.[60] The statute itemizes twelve excluded categories of worker, followed by a separate exclusion for most agricultural labor.[61] Leaving aside the first clause, the remaining twelve listed exclusions do not match those set forth under federal law. Several of these categories seem relatively large and likely to be preponderantly female. Section 3-403(a)(6), for example, excludes workers who are "at least 62 years old and . . . employed no more than 25 hours in a week;" 3-403(a)(7) excludes immediate family members of the

60. MD. CODE ANN. LAB. & EMPL., §§ 3-401–431 (West 2007).

61. *Id.* § 3-403.

employer; 3-403(a)(10) excludes employees "engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, horticultural commodities, poultry, or seafood;" and 3-403(a)(12) excludes employees who sell "food and drink for consumption on the premises" of a small (gross income of $250,000 or less) café, restaurant, tavern, drugstore, or similar establishment.[62]

If these exclusions disproportionately exclude low wage women workers, perhaps an effort should be undertaken to change some of them. Likewise, one or two of the categories of employers excluded under section 3-415 from overtime obligations seem to lack any rational basis to justify the exclusion and would appear primarily to exclude modestly paid women workers.[63] Section 3-415(b)(6) excludes nonprofit entities which provide temporary at-home services to aged or sick persons. Section 3-420(d) imposes a forty-eight hour rather than forty hour work week before overtime rates become payable for employees of bowling alleys and for employees of residential institutions that care for the mentally ill, mentally retarded, and others.[64] If my surmise proves correct, the great majority of workers performing these tasks are poorly paid women, often immigrant workers or workers of color. An effort to restore overtime coverage for their occupations would seem appropriate.

I would be remiss not to mention that Maryland's COMAR regulations interpreting Section 3-403(a)(1), the exemption of administrative, executive, and professional employees from overtime coverage, still simply cross-reference the federal regulations defining these terms under the Fair Labor Standards Act.[65] This may have been appropriate before the major overhaul of the federal regulations in 2004 by the Bush administration,[66] but the Maryland regulations now no longer cross-reference what they previously had. This might be the right time for the Department of Labor, Licensing and Regulation to adopt its own regulations, perhaps reverting to the original language—which worked well for several decades—but raising the dollar limits appropriately. There are many heavily female job classifications whose overtime coverage has been jeopardized by the Bush administration's rewrite of these definitional regulations.

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62. *Id.*

63. *See id.* § 3-415(b).

64. *Id.* §§ 3-415(b)(6), 3-420(d).

65. MD. CODE REGS. §§ 09.12.41.01 (2001), 09.12.41.05 (2001), 09.12.41.17 (1984), cross-referencing respectively 29 C.R.F. § 541.200 et seq., § 541.100 et seq., § 541.300 et seq.

66. The Bush administration regulations may be found at 69 Fed. Reg. 22122 (April 23, 2004), *codified at* 29 C.F.R. Part 541.

As for the state statute prohibiting wage discrimination, a modest amendment to Maryland's Equal Pay Law might be in order. The law commences by announcing that it "applies to an employer of both men and women in a lawful enterprise."[67] This needlessly raises questions about the viability of a worker's claim when she has replaced a man and is being paid less, particularly if at that point all of the workers are women. The sequential rather than simultaneous comparator situation is well-established under the federal Equal Pay Act.

The *Ledbetter* case,[68] as discussed by Dr. Lovell,[69] interpreting time limits under Title VII of the Civil Rights Act, created an untenable situation. Many victims of sex discrimination in pay, particularly in the course of a series of pay raises, found themselves time-barred from protesting the discriminatory elements in their initial or early pay rates, while the employer's subsequent pay setting mechanism relied on the previously set rate, thereby perpetuating the effects of its own past discrimination into the present. Few women would have the requisite information in time to file charges. Even fewer would have the courage to risk their jobs early on, when the wage differential may be very modest, even though percentage wage increase formulas may cause the differential to snowball over the course of a woman's career with one employer.

The perpetuation of its own past discrimination by the employer was once recognized as a clear and present violation of antidiscrimination law, particularly in the area of pay, where each new paycheck had been held to constitute a new violation.[70] In *Ledbetter*, however, the Supreme Court held that the initial discriminatory act of setting pay differently because of the worker's sex triggered the running of the statute of limitations. It was to be treated thereafter as the functional equivalent of a lawfully established pay rate. This move is remarkably similar to the Court's decision of 1989 in *Lorance v. AT&T Technologies*,[71] which That case held that a facially neutral seniority system could not be challenged under Title VII on the basis of its intentionally discriminatory adoption unless the charge was filed within the time limits based on that original event, even though the continued maintenance of the system perpetuated the sex discrimination, occupational segregation and pay discrimination

67. MD. CODE ANN. LAB. & EMPL. § 3-302 (West 2007).

68. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

69. Lovell, *supra* note 1, at 54–56.

70. *See* Bazemore v. Friday, 478 U.S. 385, 395–96 (1986).

71. 490 U.S. 900 (1989).

resulting from the original structure far into the future. In effect, *Lorance* permanently insulated the discriminatory effects of such a seniority system from challenge even by women hired into the system far too late to have raised a timely challenge. *Lorance* was legislatively overruled by Section 112 of the Civil Rights Act of 1991; while this article was in press, Congress similarly overturned *Ledbetter*, enacting the Fair Pay Act.[72]

Marylanders need not depend solely on Congressional action, however. Soon after enactment of the federal legislation, the Maryland General Assembly adopted the Lilly Ledbetter Civil Rights Restoration Act of 2009. Much like the federal law, the Maryland legislation ensures that a claim for compensation discrimination accrues with each discriminatory pay check.[73] Addressing time limits under the state anti-discrimination statute more generally, the Maryland Court of Appeals has already displayed some reluctance in interpreting Maryland's employment discrimination law to follow some of the federal decisions giving an unduly crabbed construction to time limits under Title VII. In its recent holding in *Haas v. Lockheed Martin Corp.*[74] the Court of Appeals interpreted the phrase "occurrence of the alleged discriminatory act," in a case claiming unlawful termination of employment. The question was whether the event which would trigger accrual of the employee's cause of action and the commencement of running of the statute of limitations[75] was the actual cessation of the worker's employment, rather than the employer giving the employee notice that he or she is to be discharged.

Rejecting the guidance of *Delaware State College v. Ricks*,[76] and *Chardon v. Fernandez*,[77] U.S. Supreme Court precedent

72. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1078–79 (Nov. 21, 1991), *codified as* Section 706(e)(2) of Title VII, 42 U.S.C. § 2000e-5(e)(2) (2007); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5-6, amending Title VII by inserting § 706(e)(3), 42 U.S.C. § 2000e-5(e)(3). *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994). The language overruling *Lorance* reads: "For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." § 2000e-5(e)(2). The language overruling *Ledbetter* is quoted *supra* note 37.

73. Lilly Ledbetter Civil Rights Restoration Act of 2009, 2009 Md. ALS 56 amending MD. CODE ANN., STATE GOV'T, §§ 20-607, 20-608, 20-1009, 20-1012, 20-1013 (West 2009).

74. 914 A.2d 735 (2007).

75. The case was brought under the antidiscrimination provision of MONTGOMERY COUNTY, MD. CODE § 27-19, so the two year statute of limitations provided for under Article 49B § 42(b)(1) was applicable. *See Haas*, 914 A.2d at 737, 739–42.

76. 449 U.S. 250 (1980). *See also* United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

construing the analogous provision of Title VII in two cases involving termination of academic employment, the Maryland Court of Appeals pithily declared, "Put in a more homespun idiom, and paraphrasing a frequent motherly admonition, 'Just because [Georgia] ran off a cliff doesn't mean [Maryland] has to follow suit.'"[78] The *Haas* opinion also recited a lengthy list of examples of matters in which Maryland has deliberately turned away from analogous precedent under a similar federal law in favor of its own independent analysis.[79]

The Court of Appeals criticized the Court of Special Appeals for failing to start with the plain language of the Maryland law, which was not identical to that of Title VII, instead of "relying on federal decisional law construing Title VII as a surrogate for analysis of the meaning of the terms used in the Maryland enactments." The Maryland high court explained that "it is our duty to announce a rule that we are convinced is best supported by sound jurisprudential policy germane to the pursuit of legislative intent."[80] Nevertheless, the Court of Appeals also relied on the remedial nature and purpose of Maryland's employment discrimination law, and the maxim requiring remedial statutes to be liberally construed.[81] The court also relied on the fact that triggering the limitations period upon notice when a lengthy period elapses between then and the actual termination of employment operates to frustrate the statutory scheme of conciliation, and "propagates the filing of claims not yet ripe for adjudication."[82] These points, of course, are equally true as to Title VII. There is room for some optimism that the Maryland state courts will similarly chart their own course in analyzing time limits under Maryland law for challenging other forms of sex discrimination.

There is one silver lining to the undue concentration of women in jobs with small and medium size businesses. These businesses are the least likely to have formal employee handbooks and manuals with disclaimers of promises of job security. They are especially unlikely to have unilaterally imposed an adhesion clause committing the employee to binding arbitration of employment disputes, thus displacing the worker's right to trial by jury under employment discrimination and other labor and employment laws. However, the majority of Maryland women are employed in medium and larger

77. 454 U.S. 6 (1981) (per curiam).
78. *Haas*, 914 A.2d at 743.
79. *See id.*
80. *Id.* at 749.
81. *Id.* at 750–51.
82. *Id.* at 751–52.

businesses which can afford to employ attorneys to draft their personnel policies and handbooks. Most of the larger businesses and many of the medium-sized ones as well choose to include a provision mandating binding arbitration as to all statutory, tort-based and contractual disputes arising out of the employment relationship.

As Professor Eisenberg has suggested, the move from courtroom and jury trial to arbitration is to the detriment of the plaintiff employee in the majority of cases.[83] Academic studies are somewhat mixed about whether employee win rates are higher or lower in arbitration compared to courtroom litigation. It seems clear, however, that the amount awarded by arbitrators tends to be considerably lower than the amount awarded in jury verdicts. Moreover, many of the arbitration clauses hamstring or entirely preclude the possibility of class action litigation, even in the arbitral forum. In addition, the arbitrator may not fully comply with statutory law; whether arbitral awards are subject to judicial review and reversal on grounds of statutory incompatibility is far from clear. Most awards are not made public, and the decreasing availability of cutting edge precedent further hampers the course of development of antidiscrimination law.

State courts are constrained toward acceptance of "employment contract" arbitration clauses by Supreme Court precedents interpreting the Federal Arbitration Act (FAA)[84] as applicable to unilaterally-imposed, adhesion contract-like terms of employment.[85] Moreover, Maryland has adopted the Maryland Uniform Arbitration Act,[86] which thus far has been construed analogously to the FAA.

Arbitration agreements remain subject, however, to the normal common law rules of the individual state regarding invalidation of contracts or clauses based on contravention of public policy, unconscionability, illusoriness of the consideration underlying the contract, the implied covenant of good faith and fair dealing, and similar doctrines.[87] There remains open, therefore, the opportunity for the Maryland courts to insist upon minimum due process standards for arbitration and other private dispute resolution systems internal to

83. Eisenberg, *supra* note 46 at 15–16.

84. 9 U.S.C. §§ 1–14 (2007).

85. I use the term "employment contract" in the exceptionally loose fashion required by United States Supreme Court precedent in this area. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

86. MD. CODE ANN. CTS. & JUD. PROC. § 3-201–3-234 (LexisNexis 2007).

87. *See* Holloman v. Circuit City Stores, Inc., 894 A.2d 547, 552–53 (Md. 2006); Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656, 661 (Md. 2003).

employment, consumer, and other contracts as a part of Maryland's general corpus of contract law.

The Maryland courts should consider following the example set by California and other states which have applied standards sufficient at least to eliminate the most one-sided of the arbitration schemes. Maryland courts should prevent employers from rendering nugatory, through the device of a skewed dispute resolution procedure, all of the protections provided for employees by the Maryland General Assembly, along with any contractual promises made by the employer. Should the courts fail to respond to this challenge appropriately, it should be a high priority for state lawmaking, and eventually, one hopes, federal amendment of the FAA as well. Otherwise, the enforcement enhancement accomplished by last year's addition of a private right of action, jury trials, and compensatory and punitive damages to Maryland's employment discrimination law will be rendered impotent in a great many cases.

Thus far, I have not suggested any major changes in substantive law, only in coverage, exclusions, procedures, remedies, and budgetary enforcement allocations. These would increase the efficacy of legislative standards already adopted, promises made by the state to women workers about their rights. These government commitments have been partially honored in the breach for lack of sufficient enforcement mechanisms to induce voluntary compliance by most employers. The next set of ideas, on the other hand, is more substantive in nature. As a result, they would entail building a broader, stronger political coalition to win adoption. They might engender greater resistance on the part of employers concerned about building in higher labor costs and decreased flexibility in human resources allocation and utilization. To break the seemingly intractable, cumulative, and self-reinforcing labor market effects of occupational segregation, devaluation of women's work, and in unintegrated jobs, consistent job design at odds with the possibility of reconciling family and work obligations in either the short or the long term, the higher hurdles of deeper changes in law and employment practices may have to be surmounted.

One place to start—indeed, an area where change is already in process—is changing family and medical leave from unpaid to paid.[88] This could be done through incorporation into the state unemployment

88. See the more detailed discussion of these developments in Hayes, *supra* note 20, at 28–29; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, WHERE FAMILIES MATTER: STATE PROGRESS TOWARD VALUING AMERICA'S FAMILIES (February 2007), *available at* http://wfnetwork.bc.edu/pdfs/Final%202006%20Round%20Up.pdf.

insurance benefits system, which would turn the fringe benefit into one whose costs are partly spread throughout the state's employers. Other options could include a statutorily mandated number of paid sick days or family illness days per year per employee or alternatively, a requirement that the employer permit workers to use paid sick or vacation leave entitlements for family caretaking purposes. The latter is the subject of the Flexible Leave Act, a bill passed in May 2008.[89] The virtue of this option is that it is politically more modest, and hence more readily attainable; the drawback is that it isolates the costs on each employer, implicitly disincentivizing employers from hiring and retaining in employment workers with family responsibilities or with their own preexisting medical conditions. A different approach is to prohibit discrimination based on family responsibilities. Careful drafting would be necessary to ensure that this term is construed not to mean family financial support obligations upon divorce, but caretaking time commitment obligations. This approach, pioneered by the Center for WorkLife Law in the U.S., has been attempted in European Union countries, thus far without clear indications of success.

An alternative would be to increase the availability of family and medical leave with assured rights to return to the job, enacting Maryland legislation making leave more broadly available by reducing the coverage threshold to employers with twenty-five or even fifteen employees from the federal fifty employee threshold. Any state law adopted along these lines should be drafted to be responsive to litigation under the federal FMLA. It should clarify the employee's right to take leave on the strength of her doctor's medical evidence. It also should strengthen the employee's flexibility to take the leave intermittently when appropriate in light of the worker's own health condition. This job protection is particularly important when that condition is a complicated pregnancy. Finally, the Maryland law should more clearly maximize the employee's ability separately to utilize any already existing entitlement she may have to employer-provided paid sick leave benefits rather than permitting the employer to compel the employee to count the use of her accrued paid sick leave as part of her federal unpaid twelve week minimum.[90]

89. MD. CODE ANN., LAB. & EMPL. §3-802 (West 2009), 2008 Md. ALS 644, as amended by 2009 Md. ALS 560. This statute covers employers with fifteen or more employees, reaching significantly smaller employers than the FMLA.

90. A chart collecting the basics for each state on availability of unpaid leave are collected in NATIONAL PARTNERSHIP OF WOMEN AND FAMILIES, STATE-BY-STATE GUIDE TO UNPAID, JOB-PROTECTED FAMILY AND MEDICAL LEAVE LAWS, *available at* http://www.nationalpartnership.org/site/DocServer/StateunpaidFMLLaws.pdf?docID=969.

The first significant expansion of the FMLA took place after this symposium, but before this volume went to press.[91] Rather than being oriented toward improving work-family balance or women's workplace situation in general, however, it was adopted to support and facilitate military service and the families of service members. The National Defense Authorization Act for Fiscal Year 2008[92] includes two important expansions of the FMLA. First, employees who provide care to a spouse, parent, child, or next of kin who becomes wounded or seriously ill in the line of active military duty are entitled to a special, one-time "service member family leave" of up to twenty-six weeks of unpaid family leave within a twelve month period. Second, if the call-up to active military duty of an immediate family member causes an employee "any qualifying exigency," the employee is entitled to up to twelve weeks of family leave.[93]

Although aimed at a very specific situation, these are path-breaking expansions of the FMLA. The addition of "next of kin," of course, expands the scope of familial coverage for military-related FMLA leave. This may set a precedent for similar expansion of FMLA leave for more general purposes. Second, the maximum duration of leave for an immediate family member caring for an injured member of the armed services is more than doubled from twelve weeks to twenty-six. Third, in the call-up situation, a new term has been introduced, that of "a qualifying exigency." This phrase has been left to the Department of Labor to define in regulations, and the provision in which it is contained will not take effect until issuance of those regulations. It is contemplated that the provision will be used to address circumstances such as an employee taking leave in order to care for a child when one of the child's parents, a covered relative of the employee, has been suddenly called up for deployment overseas. The recognition of the critical importance of family leave in connection with military service highlights the need for broader availability throughout the economy.

Perhaps as beneficial to women with family responsibilities as enhanced family and medical leave or a prohibition against discrimination on the basis of family responsibilities would be something far simpler and politically more attainable: a flat ceiling on working hours, or a prohibition against mandatory overtime, defined not only as working more than eight hours in a day or forty in a week,

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91. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (2008).

92. *Id.*

93. National Defense Authorization Act §§ 102(a)(1)(E), 102(a)(3).

but working days and hours other than the worker's regularly defined working time.

For many working women, the time and a half for overtime formula established by the Fair Labor Standards Act[94] had failed to achieve its goals—spreading work more evenly through the economy and financially incentivizing employers to avoid long and exhausting working hours for employees—long before the Bush administration regulations partially tore down the applicability of the overtime provisions themselves.[95] The advent of payroll taxes and employee fringe benefits has in more affluent workplaces pushed up the non-wage costs of labor. Today it often is cheaper to pay two workers the extra fifty percent on their wages and have them each work sixty hours per week than it is to hire an additional employee to work forty hours at the regular hourly rate.

Working women, and increasingly, working men as well, need to be assured that they will be able to pick up their children from day care at a set time, which mandatory, unscheduled overtime disrupts. They also need legal assurance that their employment will not entail sixty and seventy hour weeks when they would prefer to work fewer hours, foregoing the overtime pay in favor of a better balance of family and work life. There always will be some workers, particularly younger workers who have yet to start a family, and empty nesters, whose children have grown, who will be enthusiastic about the opportunity to work longer and earn additional money. A voluntary system coupled with reasonable compensation for the overtime work can produce whatever degree of flexibility is needed by an employer under normal operating conditions, without the coercion to work long hours that forces women out of many jobs and career paths.

Maryland, by historical legacy of its blue laws, has retained a statute ensuring that employees of retail businesses have the right to one day's rest in seven, either "Sunday or the Sabbath of the employee."[96] If an employer violates the law by forcing an employee to work on the employee's designated day of rest, the employee has the right to sue the employer for three times the employee's regular rate of pay for each hour the employee works on her rest day.[97] However, employees in other types of establishments, as well as managerial, professional, and (except in Wicomico County) part-time

94. 29 U.S.C. §§ 201–219 (2007); *see id.* § 207.

95. *See supra* note 65 and accompanying text.

96. MD. CODE ANN., LAB. & EMPL. § 3-704(b)(2) (West 2007). *See* Hayes, *supra* note 20, at 19.

97. MD. CODE ANN., LAB. & EMPL. § 3-704(c)(2) (West 2007).

employees are excluded.[98] Simple extension of the right to one day off per week for all employees, full-time or part-time, would be a constructive start toward better work-family life balance.

Another very specific, tightly-focused Maryland law which might become a model or itself be expanded to include other occupations is contained in section 3-421. This statute at present singles out for coverage only nurses.[99] It prohibits mandatory overtime, defined as requiring "a nurse to work more than the regularly scheduled hours according to the predetermined work schedule."[100] It does include narrowly drawn exceptions providing the employer with some flexibility in emergency situations or when confronted with a critical skill shortage. Nevertheless, this law assures this overworked, primarily female labor force some control over their departure time at the end of their shift in precisely the fashion which would serve the need for regularity for many women workers in other lines of work.

A different approach would be to increase social provision of child and parental care, instead of relying on individual and family efforts plus market forces to handle these societal necessities. Expanding the use of public school facilities for after-hours day care would help working parents of both sexes to juggle their paid market employment with the needs of their children. Increased state subsidies either directly to working families or to the service providers, aimed at lowering the cost of both child care and parental care, also could ease the pressure on working women personally to provide child or elder care while somehow simultaneously putting in a full day's effort at work. Alternatively, direct financial or tax subsidies or tax-favored treatment could be provided to encourage employers to offer day care and elder care as an employee fringe benefit. All of these approaches together could begin to address the looming demographically-caused skill shortage in numerous segments of the American economy as the baby boom reaches retirement age. These proposed legislative changes would encourage talented and able women workers to remain on the job full-time rather than moving to part-time work or out of the labor force entirely because of caretaking responsibilities.

The virtue of supporting child and elder care through paid labor by non-family members is that, in the end, no law will wholly equalize the career prospects of a worker who is available twenty hours per week and one of comparable ability, skill and training who is available

98. *Id.* §§ 3-704(b)(2), 3-704(c)(1).
99. *Id.* § 3-421.
100. *Id.*

sixty, at least when the work involves intellectual effort. Too much learning occurs during job performance to permit workers to remain level when working such different hours. Although some workers are bright and clever enough to learn quickly and compensate, many are not. Minimum labor standards that will preclude the worst forms of discrimination based on workers' part-time, full-time, and super-time status, rather than actual performance quality differences should be coupled with affordable child and elder care. High quality, readily-available dependant care would provide a meaningful choice to those willing to compromise in favor of longer working hours and market care, rather than shorter working hours, personal family care, and lower income. This combined approach would in my view be the optimal policy mix.

My personal preference for the next major legislative step is to enact a statute requiring equality and nondiscrimination between full-time and part-time employees, and between regular employees, employed "permanently" (*i.e.*, for the long-term) by the employer, and contingent workers of all types. The term "contingent workers" includes supposedly independent contractors who work directly for the business, provided they are economically dependent upon the user of their services in a manner sufficiently similar to that of a regular employee. It also includes workers supplied by an intermediary so long as they work on the labor user firm's premises under the supervision of the user firm's management, under working conditions controlled by the user firm. Such legislation would disincentivize employers from using nonstandard and indirect forms of employment as a means of undercutting the labor standards of its "regular" workers. It would eliminate a major source of discrimination in compensation for women workers, who are the great majority of part-timers and a significant share of indirectly employed workers. Such legislation would go hand in hand with the proposal to broaden the definition of the employment relationship itself. The use of an equal treatment/benchmark approach in novel situations is already under experiment in Maryland in one narrow provision. Section 3-802 requires that if an employer provides leave with pay for its employees following the birth of a child to the employee, then the employer must provide the same leave with pay for an employee who adopts or undertakes to provide foster care for a child.[101]

Finally, I will conclude with a few words about strategy. The Maryland women's movement can proceed in either of two divergent

101. *Id.* § 3-802.

directions. It can start small and expand. For example, it could push for leave of absence rights for victims of domestic violence, a narrow category unlikely to impose substantial burdens on employers, hoping later to expand to broader groups of workers.[102] Experience, however, raises questions about the viability of this strategy in many situations. Although deep and broad employer opposition is not mobilized, the constituency energetically pressing for enactment is likely to be narrow even among the women's movement. On the other hand, bold legislative proposals can be advanced, mobilizing much broader constituencies and more intensive support, although they must overcome far more solid opposition from the employer side. Needless to say, some employers also may be persuaded to join the effort to enact a minimum labor standard, either because it serves their own competitive advantage purposes, or because they take a longer view about keeping a healthy and well-trained workforce in their own business as well as in the larger state-wide labor market.

It is my view that proposals should be packaged, at a minimum, broadly enough to appeal to a wide range of women, as well as, on a gender neutral basis, to labor unions and other nongovernmental organizations representing the interests of working people. The Family and Medical Leave Act epitomizes this strategy. It increases incentives to equalize burdens within the home through the gender neutral nature of the family leave available. It legitimizes family caretaking leave for those whose minds are still in the grip of the traditional breadwinner model by assimilating it to the medical leave for workers whose health condition renders them personally unable to perform their jobs. Through these devices, the FMLA model minimizes the employer tendency to view the additional employer mandate as imposing extra costs exclusively, or predominantly for women workers, thereby perversely discouraging employers from hiring them, even if the law separately outlaws discrimination based on gender, or based on family responsibilities. The FMLA approach tends to break down rather than reinforce gender stereotypes both at home and in the workplace. If the next generation is to come as long a way as this one has, that is the path to tread.

102. *See, e.g.*, Hayes, *supra* note 20, at 20–23.