

Pro-Choice or No-Choice?

How Corporations Shape Employees'
Reproductive Decision-Making

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Acknowledgements

Special thanks to Professor Hanson and his devoted teaching team for bringing the fun to Zoom University! And thanks to my peer reviewers for their thoughtful and encouraging feedback throughout the writing process.

About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

For more information about the *Systemic Justice Journal* or to read other articles in the Critical Corporate Theory Collection, please visit the website at www.systemicjustice.org.

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ABSTRACT

This paper explores the influence of corporate power on employees' reproductive decision-making. It begins by illuminating the stark contrast in reproductive health offerings between low- and high-wage workers: While low-wage workers often face unsafe work environments and no paid time off, high-wage workers have a wealth of reproductive support from their employers, including stipends for IVF, egg freezing, and adoption and substantial paid parental leave. On the surface, this abundance of choices seems appealing, as choice is prized in both reproductive rights and corporate law. However, as this paper explores, choice is actually a corporate tool to enable consumer sovereignty and shareholder primacy. By relying on the illusion of choice, corporations pin responsibility for workplace inequities on employees and their reproductive decisions, not on corporations' shareholder-friendly policies. Reproductive health programs, then, simply serve shareholders under the guise of employee well-being. Though they purport to promote reproductive flexibility, these programs really help corporations cut costs, attract and retain talent, and cement employee commitment to the job. This paper concludes by arguing that corporations use reproductive health programs to signal support for employee well-being, without making larger structural shifts – like abandoning shareholder primacy – that would actually make that support a reality.

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How Corporations Shape Employees' Reproductive Decision-Making

PART 1: CORPORATE AMERICA'S DIVIDED REPRODUCTIVE HEALTH LANDSCAPE

On the night shift at the XPO Logistics warehouse in Memphis, Erica Haynes ran to the bathroom to find her pants drenched in blood.¹ She had miscarried while in the second trimester of her pregnancy – and she wasn't alone.² That same year, three other XPO employees had miscarried, and many more would follow.³

Their miscarriages were not a coincidence, but the result of XPO's inflexible work policies for pregnant employees.⁴ All of the womenⁱ had requested lighter work shifts, and none had gotten them.⁵ Instead, they were left to hoist **45-pound boxes** for up to **12 hours a day**, with few breaks and no air conditioning.⁶ When one woman asked to leave early after the lifting became too painful, her supervisor told her to get an abortion.⁷ Instead, she miscarried the next day.⁸

Had these women been able to carry their pregnancies to term, they

ⁱ This article uses the term “women” to discuss those in need of reproductive healthcare, as the individuals highlighted at XPO all identified as women, and most reporting in the space is specific to women. However, it is important to note that not all those who become pregnant, including transgender men and nonbinary and gender-nonconforming individuals, identify as women, and corporate reproductive health programs should be available to all.

would have continued to face inflexibility in the workplace. Only **8%** of those in the bottom quarter of wage earners have access to flexible work schedules,⁹ and just **30%** can earn sick days.¹⁰ Low-wage workers are also the least likely to have employer-provided health insurance,¹¹ and their plans often come with the highest deductibles and premiums.¹² Once these employees do have children, they rarely, if ever, get paid time off, as **93%** of low-wage workers have zero access to paid parental leave.¹³

Further, many low-wage workers are effectively unable to leave their jobs. At XPO, countless women expressed a financial need to maintain their employment, particularly once they became pregnant.¹⁴ And in Memphis, warehouses provide some of the highest-paying jobs for those without college degrees – and XPO runs them all.¹⁵

If employees do leave these jobs, they can face immense financial repercussions. They frequently don't get access to unemployment insurance, as they are thought to have "voluntarily quit."¹⁶ Loss of one's job often leads to loss of health insurance, too, forcing pregnant employees to shoulder their own labor and delivery costs – which can reach up to **\$30,000** for a vaginal birth and **\$50,000** for a C-section¹⁷ – if they don't qualify for Medicaid.¹⁸

*This puts employees in a **catch-22 of reproductive decision-making**: risk your pregnancy to make a living, or risk your livelihood to have a baby.*

In contrast, workers in high-paid, white-collar settings – like XPO's corporate headquarters in Greenwich, Connecticut – have an array of employer-provided support. White-collar employers are well known for providing generous salaries and health benefits. But more recently, an increasing number of technology companies, consulting firms, investment banks, and other corporate employers have also begun offering a growing suite of reproductive healthcare coverage to help employees choose if, when, and how to have children.¹⁹

These companies offer support at practically every stage of the reproductive process. For employees not yet looking to become pregnant, firms ensure coverage of contraceptive services – like birth control pills, IUDs, and abortion – and will even pay for egg freezing, where a single cycle can cost as much as **\$20,000**.²⁰ For those struggling with infertility, employers will cover in vitro fertilization (IVF), which costs at least

\$12,000 a cycle, letting employees rack up six-figure bills until they succeed.²¹ There's coverage for adoption and surrogacy support, too.²² And, once employees have children, they can get up to six months of paid parental leave to tack on to their already generous allotment of sick leave and vacation days.

In fact, XPO itself brags about having a fertility policy that is “among the most progressive in the industry.”²³ They offer six weeks of paid parental leave, ten days of paid prenatal leave that can be used following the loss of a pregnancy, and job-related flexibility and alternate work arrangements.²⁴ XPO even grants access to a digital health startup called Maven Clinic, which allows employees to consult with health practitioners across 20 specialties, including fertility, infant sleep, lactation, nutrition, and mental health.²⁵

However, these benefits apply to less than half of XPO's workforce – mainly those concentrated in its corporate headquarters – and not to independent contractors, like Erica Haynes and her fellow warehouse workers in Memphis.²⁶ This illuminates the stark divide in reproductive options for low- and high-wage workers in corporate America, even within a single company.

PART 2: DOMINANT NARRATIVES: FROM CHOICE TO SHAREHOLDER PRIMACY

One key factor divides workers who receive these benefits and workers who don't: freedom of choice. While low-wage workers must sacrifice healthy pregnancies to maintain financial stability, high-wage workers have a wealth of options at every stage of the reproductive process, bolstering their freedom to choose.

Freedom of choice is an incredibly powerful tool in both business and reproductive health. In the world of reproductive rights, evidenced most clearly by abortion debates, choice is paramount. “Pro-choice” became the dominant moniker for reproductive rights groups after *Roe v. Wade* cemented the right to abortion in 1973.²⁷ It was initially introduced to counter the “pro-life” label of anti-abortion groups, and it was seen as more appealing than “pro-abortion.”²⁸ As Suzanne Staggenborg, a professor at the University of Pittsburgh who researches social movements, explains, “‘Choice’ has been extraordinarily successful as a frame for the abortion-rights side because a lot of Americans may not like the idea of abortion but they definitely agree with the idea of choice...And they agree that it should be a woman's choice in

consultation with her doctor.”²⁹

Ideas of choice inform legal frameworks for reproductive rights as well. Rights to contraception and abortion are rooted in the 14th amendment’s privacy right, with court decisions frequently emphasizing that these are personal decisions that should be made free from outside interference. The prevailing constitutional framework for evaluating abortion restrictions, *Planned Parenthood v. Casey*’s undue burden standard, similarly stresses personal freedom, finding abortion restrictions unconstitutional if they place “a substantial obstacle in the path of a woman seeking an abortion.”³⁰

Freedom of choice is prominent in the business world, too. Milton Friedman and his Chicago school of economists first popularized the notion of corporate freedom in their push for free markets, often using “choice” as a stand-in for their free-market theories.³¹ Much like reproductive rights advocates, Friedman capitalized on language of choice to make his ideas seem more appealing, publishing books like *Capitalism and Freedom* and *Free to Choose*.³² In his scholarship, Friedman emphasized that markets were good and regulation was bad. His view was that, “left to their own devices, markets produced the best outcomes...the less government did, the better.”³³ In other words, government interference, just like in the abortion space, was unwanted and unwarranted.

Friedman’s narratives of choice quickly came to dominate consumerism. Today, marketing campaigns emphasize the importance of freedom in almost all avenues. Product names like Jeep Liberty and Chase Freedom imply that one can gain choice through consumerism. And commercial advertising advances similar goals, with travel companies emphasizing consumers’ abilities to go anywhere, anytime. But these narratives also go one step further: they imply that choice brings happiness and prosperity. As one of President George W. Bush’s campaign ads exclaimed, “if you own something, you have a vital stake in the future of America.”³⁴

Consumer choice is also thought to control the free market. Friedman and his fellow economists advanced a theory of consumer sovereignty – namely, that consumers are autonomous actors who have the freedom to choose what to buy.³⁵ In doing so, they allocate economic resources and determine what should be produced and in what quantities.³⁶ Corporations, then, simply respond to the demands of consumers and

are moved not by their own agendas, but by outside forces. In other words, consumers are “stick,” while corporations are “ball.” In this way, the advertising campaigns highlighted above simply reinforce notions of freedom in order to perpetuate consumer sovereignty and pin responsibility for corporate activity on consumers alone.

Friedman’s idea of consumer sovereignty has had one primary effect: promoting shareholder primacy. “According to Friedman, the maintenance of a free society requires that there be ‘one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.’”³⁷ Scholars in the Friedman camp argue that everyone’s best interests are served when corporations maximize profits: “the bigger the corporate pie, the better for everyone.”³⁸ This gives corporations an excuse to focus singlehandedly on shareholders, as consumers are seen as invincible, independent actors.

Shareholder primacy theories enforce the notion that all other corporate stakeholders are automatically protected by market and regulatory forces. Allen and Kraakman, for example, explain that “duty of loyalty to shareholders is equivalent to a duty of loyalty to any other corporate constituency.”³⁹ This allows corporations to shirk responsibilities to their employees, instead believing they are protected in other ways.

Employees are thought to be shielded by private and public regulatory mechanisms, protective market forces, ethical imperatives that influence corporate decision-making, and common law protections.⁴⁰ Specifically, private rights like contracting and collective bargaining are seen to protect the labor force, as are public regulatory protections, “including pension laws, health and safety laws, minimum-wage laws, injury and disability compensation arrangements, antidiscrimination laws, sexual harassment laws, tort laws, and so on.”⁴¹ Similarly, shareholder primacy proponents argue that corporations have no duty to society at large, as “[c]orporate directors have no expertise or special knowledge that would allow them to make decisions that are socially beneficial, except insofar as profit and social concerns coincide.”⁴²

But most importantly, employees are thought to be protected by *themselves*. Choice is seen as central to employment, and freedom of contract is a widely protected American ideal. As a result, corporations view employees as “sticks” who have extensive freedom through collective bargaining: “When workers agree to work for a corporation for

a certain wage, they are made better off by that arrangement than they would be in their next-best job at a different wage (or without a job or wage at all). Otherwise, they wouldn't have reached the agreement. Absent some clear evidence of a market failure such as imperfect information, there is every reason to trust the choices of corporate employees.”⁴³ However, as we will explore in later sections, these narratives of choice also shift responsibility for employees’ outcomes onto themselves, making their situations a result of personal choices, not corporate ones.

This view aligns clearly with dominant theories in the reproductive rights world. There, much scholarship has focused on how a framework of “choice” pins responsibility for reproductive decision-making on women alone. As Robin West explains, reproductive rights are negative rights, intended to “keep[] the state out of the domain of family life. As such, [*Roe v. Wade*] privatizes not only the abortion decision, but also parenting, by rendering the decision to carry a pregnancy to term a choice. It thereby legitimates a minimalist state response to the problems of pregnant women who carry their pregnancies to term and for poor parents who might need greater public support.”⁴⁴

This applies to low-income women in particular. Society has a tendency to view these women as “powerful agents exercising dominion over their lives,” which leads to a conclusion that the government and corporations owe them no duty to cover reproductive health services.⁴⁵ As Khiara Bridges explains,

*“If [poor women] find themselves pregnant, it is because they chose to indulge their sexual desires. If after choosing to indulge their sexual desires, they find themselves carrying to term an unwanted pregnancy and giving birth to a child, it is because they chose not to pull together the private resources to pay for an abortion. . . . If an individual finds herself impoverished, it is because she has failed to control her laziness, her gambling, her addiction, her vice, her libido, her inherent criminality, and so forth.”*⁴⁶

Similarly, states justify family caps, which freeze the amount of

government subsidies that a family can receive, regardless of its size, with similarly choice-based theories.⁴⁷ For example, Maryland argued that its family cap policy provided an incentive for indigent parents to seek “gainful employment.”⁴⁸ New Jersey similarly contested that a “ceiling on benefits provides an incentive for parents to leave the welfare rolls for the workforce.”⁴⁹ Yet, as Bridges explains, “This rationale assumes that there are jobs out there that welfare beneficiaries could get if they just tried...[and] that people are unemployed because they choose to be – because they are lazy, unmotivated, and irresponsible.”⁵⁰

As employees at XPO have shown, that is not the case. But companies like XPO still buy into these theories. In their view, it is simply not the duty of corporations to provide optimal work environments or reproductive health benefits for low-wage employees. Workers can seek these out elsewhere and, should they desire, can easily find new jobs. This perspective is directly in line with Krishna Savani’s Stanford study, which found that activating choice decreases empathy and increases the acceptance and maintenance of wealth inequality.⁵¹

While corporations do seem to pay more attention to providing reproductive freedom for high-wage employees, as we’ll see in the next section, this choice can also have repercussions. Though similar notions of poverty do not shape the view of corporate assistance, as West explains, carrying a pregnancy to term is seen as a choice. And having an abundance of reproductive options in corporate workplaces – like assistance with fertility treatments, adoption, or surrogacy – only emphasizes this freedom of choice further. This places responsibility for decisions on parents, who are seen as “stick,” and not on their employers. When employees choose to take employers up on reproductive health benefits, like IVF or extended family leave, it is their responsibility to face the consequences.

Therefore, choice is, in many ways, an illusion. When employees are given the freedom to choose, they are ultimately constrained by their choices. Negative outcomes are considered the fault of employees alone, and not their employers’ shareholder-focused policies. This allows corporations to continue to focus on shareholders – and their bottom lines – at the expense of employee well-being.

PART 3: EMPLOYEE WELL-BEING AS A MASK FOR CORPORATE POWER

While employees may seem like the primary beneficiaries of

reproductive health offerings, these programs are actually designed with shareholders in mind. In fact, reproductive health policies for both low- and high-wage workers directly benefit corporations' bottom lines.

At the low-wage level, failure to provide suitable healthcare and reproductive benefits is clearly a money-saving tool. Healthcare is a major expenditure for companies, as they typically foot the bill for **70-80%** of employees' coverage.⁵² In 2019, this amounted to an average of **\$5,946** a year for individual employees and **\$14,561** a year for family plans.⁵³ Additionally, providing sparse work environments, low wages, and no paid time off are clear cost-cutting strategies – and likely helped XPO secure its spot as **the decade's seventh best-performing stock among the Fortune 500**.

Yet, even policies that promote high-wage employees' well-being are crafted to help a company's bottom line. Extensive health coverage, paid time off, and IVF stipends provide a number of benefits to corporations

For one thing, reproductive health benefits have been proven to help companies attract top talent. Women currently comprise more than half of America's jobholders, with a total of **76 million** women in the U.S. workforce.⁵⁴ Women's labor is **40%** of annual U.S. gross domestic product, totaling **\$7.6 trillion**.⁵⁵ And numerous studies have shown that women are good for business, as gender diversity in the workplace leads to greater profitability.⁵⁶ Yet, as Hidden Value explains, "Women's ability to manage and plan for having children is directly linked to their ability to participate in the labor force."⁵⁷

For example, in the years following the legalization of the birth control pill, contraception accounted for **15%** of total labor force growth and **30%** of labor force growth in professional careers.⁵⁸ Contraception was so important to business that Bloomberg Businessweek listed it as the **ninth most disruptive innovation in history, ranking above Amazon, McDonalds, and email for its impact on the corporate world**.⁵⁹

Providing generous reproductive health coverage can bring more women to the table. PricewaterhouseCoopers found that women consider health benefits as much as salary when deciding where to work, and **83%** of women of reproductive age expect employers to cover a full range of reproductive healthcare.⁶⁰ This trend is only likely to increase, as **90%** of millennials consider reproductive health to be an important personal issue.⁶¹ Additionally, many job seekers are focused on fertility benefits in particular. According to a study by Reproductive Medicine Associates, **68%** of employees said they would switch jobs in order to procure better

fertility coverage.⁶²

These benefits can also help retain talent. Comprehensive reproductive health services are directly correlated with enhanced mental and physical health, which can improve employee performance.⁶³ **86%** of women cite that control of if and when to become a parent has been important to their career trajectory.⁶⁴ And, according to FertilityIQ, employees with IVF coverage were more likely to remain in their jobs for longer periods, more willing to overlook their employers' shortcomings, and more likely to work harder.⁶⁵

Women commonly change their perspectives on their employers after learning they have generous reproductive health benefits. As one woman shared with Good Morning America,

“Finding out that my company and what they offered was so much better than their competitors out there made a difference and made me stay with the company. . . . It’s obviously a company that cares about their employees.”⁶⁶

Similarly, another expressed,

“It’s changed my appreciation for a company that makes the choice to offer this, because there’s not really any gain for them, and maybe there will be younger women who come up under me who will benefit. . . . It made me take a step back and realize the type of people I work for.”⁶⁷

The financial tradeoffs of these policies are also quite small. While many reproductive health services are cost-prohibitive for employees, they are a drop in the bucket for large corporations. As one Fortune 100 executive explains, “We spend almost **\$1 billion** on healthcare annually.”⁶⁸ This makes adding comprehensive reproductive healthcare “a negligible cost.”⁶⁹ Studies have shown that covering contraceptives and IVF is surprisingly cheap.⁷⁰ The cost of adding contraception to health plans ranges from **\$0.4–\$0.66** per health plan member per month – less than **1%** of total health plan costs.⁷¹ In fact, covering contraceptives actually

yielded **15-17%** cost savings for employers who would have otherwise had to cover medical costs of unintended pregnancies.⁷² Similarly, early studies have shown that adding IVF coverage would increase monthly premiums by as little as **\$0.87**.⁷³ And, though IVF is more expensive than contraception, fewer employees are likely to make use of itⁱⁱ – while **99%** of women use contraception at some point in their lives, only **11%** face infertility.⁷⁴

In contrast, employee turnover is extremely expensive. The Work Institute estimates that the cost of replacing a departing employee – including recruiting, training, and productivity loss – is roughly **33%** of that employee’s annual salary.⁷⁵ And, at elite, high-paying corporations, this can easily amount to six figures. Therefore, when you add it all together, reproductive health benefits are not merely intended to promote employee well-being: they’re actually just good business.

Reproductive health coverage offers benefits beyond talent attraction and retention, too. In particular, subsidizing technologies that facilitate delayed parenthood, like egg freezing and IVF, gives employers an added level of control over their employees’ reproductive decision-making. Technologies that enable women to procreate at later dates allow them to stay in the workforce during their prime reproductive years, when corporations need them most. At law firms and consulting companies, these years typically coincide with the push to make partner – a point at which employees are expected to prove their unwavering commitment to the job.

These policies, though masked by an illusion of choice, simply replicate the reproductive inflexibility seen at XPO’s warehouses. As NBC explains, “egg-freezing coverage could be viewed as a ploy to entice women to sell their souls to their employer, sacrificing childbearing years for the promise of promotion.”⁷⁶ Similarly, when Facebook and Apple first announced their egg freezing coverage, a Silicon Valley blog described these stipends as a “lavish amenity designed to keep workers in the office and fixated on the job. . . . [F]emale employees will feel pressured to freeze their eggs rather than take time out to have children, just like everyone feels pressured to always be on call to the office,

ⁱⁱ Though infertility rates are projected to rise as a result of climate change, another product of corporate activity.

always check email, always have a smartphone in hand.”⁷⁷

But this expectation that employees sacrifice reproductive freedom in the name of job loyalty is unique to women:

*“In its darkest reading, company-sponsored egg freezing is a pact or pledge of loyalty by which you assert the primacy of work over other areas of your life. The job comes first and I’ll put my ova on ice to prove that. What’s next? Voluntary vasectomies for entry-level male employees that they can have reversed once they’ve hit the six-figure earning threshold or reached age 40, whatever comes first? **Something tells me that policy wouldn’t be greeted with quite the same level of enthusiasm.**”⁷⁸*

CONCLUSION

These gender-based critiques reveal larger issues with the corporate form. As we have already seen, reproductive health programs can benefit a company’s bottom line in a number of ways. But moving beyond that, they also serve an important virtue signaling role. Benefits programs are a relatively cheap and easy way for corporations to signal support for female employees, without making larger structural shifts that would actually make that support a reality.

While reproductive freedom in the workplace is no doubt a positive development, benefits programs will not fix greater structural inequities that run rampant in the corporate world. As it currently stands, **“[w]hether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder.”⁷⁹** Reproductive health policies “simply timeshift[] the period when women exit the workforce for child bearing to later in their working life....[They don’t] address workplace harassment, gender discrimination or lack of access to workplace mentors and champions,...[and they won’t] solve the problem of equal opportunities for advancement and career achievement for men and women.”⁸⁰

These programs, then, are simply a mask for shareholder primacy, allowing corporations to continue to pursue profit under the guise of employee well-being. In this pursuit, corporations will capture anything and everything that benefits their bottom lines – even biology itself. As

a salient critique of Sheryl Sandberg's *Lean In* illuminates,

*“Pregnancy, by virtue of the body's physical focus on human reproduction, is humanity's last, biological stand against the corporate demand for workers' continuous labor....[but] pregnancy must be converted into a corporate opportunity: a moment to convince a woman to commit further to her job. **Human life as a competitor to work is the threat here, and it must be captured for corporate use.**”⁸¹*

FURTHER READING

For those interested in the reproductive justice side of this paper, I would highly recommend reading Khiara Bridges's full book, *The Poverty of Privacy Rights*.

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⁶³ RHIA VENTURES, *supra* note 54, at 17.

⁶⁴ *Id.*

⁶⁵ Alan Kohll, *Why Your Company Should Offer Fertility Benefits*, FORBES (Apr. 10, 2019), <https://www.forbes.com/sites/alankohll/2019/04/10/why-your-company-should-offer-fertility-benefits/?sh=25cc75697699>.

⁶⁶ Katie Kindelan, *IVF coverage by employers on the rise? How to know what your company offers*, ABC NEWS (Feb. 8, 2019), <https://abcnews.go.com/GMA/Wellness/ivf-coverage-employers-rise-company-offers/story?id=60937743>.

⁶⁷ Grigoriadis, *supra* note 21.

⁶⁸ RHIA VENTURES, *supra* note 54, at 22.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 508 (2010).

⁷⁴ Schiavo, *supra* note 22.

⁷⁵ RHIA VENTURES, *supra* note 54, at 18.

⁷⁶ Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC NEWS (Oct. 14, 2014), <https://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011>.

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⁷⁹ Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>.

⁸⁰ Henderson, *supra* note 78.

⁸¹ Kate Losse, *Feminism's Tipping Point: Who Wins from Leaning in?*, DISSENT (Mar. 26, 2013), https://www.dissentmagazine.org/online_articles/feminisms-tipping-point-who-wins-from-leaning-in.