

Babies Aren't U.S.

Zachary J. Devlin

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Babies Aren't U.S.

Zachary J. Devlin

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ABSTRACT

Parental leave has been an on-going issue in the political process, most recently during this presidential election. This is because upon the birth or adoption of a child, many in the United States cannot afford to take time off from work to care for and integrate children into their families. This is especially true for the contemporary family. The Family and Medical Leave Act of 1993 (FMLA) was Congress's attempt to strike equilibrium between employment and family and medical needs. The FMLA put legal emphasis on the family unit in an effort to neutralize gender discrimination while promoting gender equality for women in the workplace. In its time, the FMLA was a step in the direction of today's trend, where longer, compensated parental leave is required. However, in this day and age where both parents often work full-time jobs, the FMLA has fallen flat. In this article, I argue that the FMLA must be expanded to adequately fulfill the work-family balance.

This article critiques the policy and purpose of the Family and Medical Leave Act of 1993. It will also examine the international approach and how the policies of most industrialized nations have surpassed that of United States, exemplified best by some states willingness to address the trend and implement more modern policies. I argue the FMLA is outdated when considering today's structure of families, fails to align with family values, and is not in the best interests of children, and propose the New York system with some modifications be adopted nationally.

AUTHOR NOTE

J.D. Candidate, May 2018, University of Massachusetts School of Law-Dartmouth.

I would first like to thank my wife, Emily, and my daughter, Ivy. They are the reasons I was interested in this topic and without them this Note would not have been possible. Thank you to my family members who helped and supported me throughout the process. I would like to thank Jeremiah Ho and Misty Peltz-Steele for their patience and guidance during the course of writing this Note. Finally, I thank the UMass Law Review E-Board and the editors for their hard work and due diligence.

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I. INTRODUCTION

Sunday, July 10, 2016, I called work to notify my employer that I would be absent using my accrued family sick leave because my wife was pregnant, in labor, and our baby was overdue by two days.¹ We went to the hospital three times that day: first at one o'clock in the morning, then at about three-thirty in the afternoon, and for the final time at about eight-fifty that night.² Then, in the early hours of July 11, my wife and I had our first child, a beautiful baby girl.³ To care for our newborn daughter, we both took leave from our employers.⁴ My wife, having been with her employer for approximately eight months did not qualify for the Family and Medical Leave Act of 1993,⁵ but did qualify for the eight weeks of unpaid leave provided by the Massachusetts parental leave law.⁶ I, on the other hand, qualified for the twelve weeks of unpaid leave under the Family and Medical Leave Act.⁷ My wife took those eight weeks, and through disability insurance received about sixty percent of her pay for six of those weeks.⁸ I used the Family and Medical Leave Act to take three weeks of leave, fully paid only by utilizing what paid time off I had accrued. We were very

¹ Compare Letter from Vincent Massey, Dir. Of Benefits and Leave Unit, Commonwealth of Massachusetts, to Zachary Devlin, Corr. Officer, Commonwealth of Massachusetts (June 9, 2016) (on file with author) with Certificate of Birth, Commonwealth of Massachusetts (July 18, 2016) (on file with author).

² See Admission/Observation Form, Sturdy Memorial Hospital (July 10, 2016); see also Certificate of Birth, *supra* note 1.

³ See Certificate of Birth, *supra* note 1.

⁴ Art. 8, Section 7.A., COLLECTIVE BARGAINING AGREEMENT BETWEEN THE COMMONWEALTH OF MASSACHUSETTS AND THE MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION 28, July 1, 2015-June 30, 2018 available at <http://www.mass.gov/anf/docs/hrd/oer/u4-4a/mcofu-cba-2015-2018.pdf> [hereinafter C.B.A.].

⁵ 29 U.S.C.A. § 2611(2)(A)(i)(ii) (requiring eligible employees to be employed for at least 12 months by the employer and for at least 1,250 hours of service during the previous 12-month period).

⁶ MASS. GEN. LAWS ch. 149, § 105D (requiring only three consecutive months of full-time employment to be eligible for eight weeks of parental leave).

⁷ 29 U.S.C.A. § 2611, *supra* note 5. My employer also allots ten “Baby days,” which are ten days of leave at full pay that a parent may use within the child’s first year of life; see C.B.A., *supra* note 4, at 29.

⁸ I will not forget how much she cried the Sunday before she was supposed to return to work, feeling that neither my wife nor my daughter were ready to be without one another.

fortunate; many working class and low income parents cannot afford to take as much time off from work as my wife and I.⁹

Parental leave policies¹⁰ in the United States simply do not provide the compensation or the amount of time necessary to care for and integrate newborn or adopted children into the family, offsetting the ability of parents to balance employment with family. Upon the birth or adoption of a child, how can the United States balance employment with family, particularly for parents of newborn or adopted children? Striking this balance has proven to be a struggle, exacerbated even more so for new parents. For new parents, reality and life as they know it completely changes. The memory of what life was like prior to the birth or adoption of a child quickly fades and dissipates into the past, and new parents are asked to figure out how to realign their lives, while integrating a new member into the family dynamic.¹¹

In 1993, to facilitate the compelling need to balance work and family, and pursuant to a number of congressional findings,¹² President Bill Clinton signed into law the Family and Medical Leave Act of 1993 (FMLA).¹³ The promulgation of the FMLA essentially provided, and continues to provide, employment protection and job security for those employees that take leave to tend to their own serious medical conditions, to care for the serious medical conditions of family members, and to care for and integrate newborn or adopted children into the family.¹⁴ The FMLA entitles employees up to twelve weeks of uncompensated leave.¹⁵ Prior to the signing of the FMLA, employers were not required to provide leave for parents upon the

⁹ Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J. L. & GENDER 1, 3, 15-16 (2005); Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1523-25 (2001).

¹⁰ “Parental leave” incorporates both maternity leave and paternity leave, unless otherwise stated by specific reference.

¹¹ This has been my personal experience, yet I would not trade it for anything.

¹² 29 U.S.C.A. § 2601(a) (Findings); *see also* S. REP. NO. 103-3, at 1-51 (1993) (This document is the FMLA legislative history report.).

¹³ William J. Clinton, President of the U.S., Statement on Signing the Family and Medical Leave Act of 1993 (Feb. 5, 1993) (President Clinton’s press statement upon signing the FMLA: “I believe that this legislation is a response to a compelling need—the need of the American family for flexibility in the workplace. American workers will no longer have to choose between the job they need and the family they love.”).

¹⁴ KURT H. DECKER, FAMILY AND MEDICAL LEAVE IN A NUTSHELL 2 (2000).

¹⁵ 29 U.S.C.A. § 2612(a)(1).

birth or adoption of a child.¹⁶ However, the notion of family and medical leave was not new and over thirty states had some form of family and/or medical leave.¹⁷ The FMLA sought to address the compelling need for balance between employment and family, while promoting gender equality within the American workforce.¹⁸ But, the FMLA was enacted almost twenty-four years ago, and times have certainly changed since 1993. In fact, parental leave is an on-going issue, referenced most recently during the 2016 Presidential Election,¹⁹ and even addressed by then President-Elect Donald Trump.²⁰

The United States is one of the few remaining industrialized nations that does not mandate and provide paid parental leave to new parents.²¹ Recognizing the need for updated legislation, a handful of states have already begun to implement paid parental leave.²² However, even the legislation passed by these states fails to provide an adequate amount of leave employees may take to build, care for, and bond with their children.²³ Compounding the issue, on the

¹⁶ DECKER, *supra* note 14, at 1 (A federal statute mandating family and parental leave did not exist until the FMLA's enactment, instead it was an issue left to the states.).

¹⁷ *Id.*

¹⁸ 29 U.S.C.A. § 2601(b) (Purposes).

¹⁹ Hillary Clinton, Former Sec'y of State, Democratic Party, Presidential Debate at Hofstra University in Hempstead, N.Y. (Sept. 26, 2016) (Presidential candidate Hillary Clinton referenced the struggle to balance family and work as well as paid family leave in her opening remarks during the Sept. 26, 2016 Presidential Debate with Donald Trump.).

²⁰ Danielle Paquette, *How Donald Trump Could Change What it's Like to be a Parent in America*, WASH. POST, (Nov. 16, 2016) <https://www.washingtonpost.com/news/wonk/wp/2016/11/14/how-donald-trump-could-change-what-its-like-to-parent-in-america/>.

²¹ W. Adema et al., *Paid Parental Leave: Lessons from OECD Countries and Selected U.S. States* 3 (OECD Social, Emp't and Migration Working Papers No. 172, 2015) available at <http://dx.doi.org/10.1787/5jrqqvqqb4vb-en>.

²² *Id.* at 14 (California, New Jersey, Rhode Island); *see also* *N.Y. State Passes Comprehensive Paid Family Leave Program in Budget*, LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL. (Thompson Publishing Group, Washington D.C.), June 2016, at 12 (describing New York's S.B. 6406C signed into law on April 4 by New York Governor Andrew Cuomo; the bill includes implementation of a paid family leave program) [hereinafter LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL.].

²³ *See generally* THE BEGINNING OF LIFE (Maria Farinha Filmes 2016) [hereinafter THE BEGINNING OF LIFE] (emphasizing the importance of child development from birth through early childhood, specifically how children learn and bond with parents).

international stage, the United States falls far behind the leading countries in providing parental leave.²⁴

Although long overdue, the FMLA must now be expanded to entitle new parents (those with newborn or adopted children) to get compensated leave for a period longer than twelve weeks. Such leave is the only way to align the FMLA with the contemporary demands of the family and of the demographics of today's workforce.

Part II introduces the family as a necessary social institution, the dichotomy between the contemporary family and the traditional family, an examination into family values in the United States, and the best interests of the child standard often used by the judicial system. Part III of this article deals with domestic parental leave policies implemented by a handful of states, as well as, international policies. Part IV provides an overview of the FMLA as it pertains to parental leave specifically. Part V presents a proposal on how the United States should strike balance between work and family by pressing on contemporary family values and adopting a legislative approach analogous to the judicial best interests of the child standard.

II. THE FAMILY INSTITUTION

Family is significant in the study of sociology as it plays numerous and substantial roles in a person's life and upbringing.²⁵ For instance, the sociological structural-functional theory sees society as a structure with interrelated parts designed to meet the biological and social needs of individuals.²⁶ This theory of sociological study views the parts of society as working together to keep it functioning, much like the organs of the human body.²⁷ The various parts of society that act like the organs of the body are termed social institutions, which are patterns of beliefs and behaviors focused on meeting social needs.²⁸ The family unit is one of these social institutions.²⁹ Moreover, the

²⁴ Adema, *supra* note 21, at 71-91.

²⁵ See generally OPENSTAX COLLEGE, INTRODUCTION TO SOCIOLOGY 2E (Rice University 2015) available at <https://d3bxy9euw4e147.cloudfront.net/oscms-prodcms/media/documents/IntroductionToSociology2e-OP.pdf>.

²⁶ *Id.* at 15.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; see also Charles B. Nam, *The Concept of the Family: Demographic and Genealogical Perspectives*, SOCIATION TODAY VOL.2, NO. 2 (2004) available at <http://www.ncsociology.org/sociationtoday/v22/family.htm>.

family unit is a cultural universal.³⁰ These are patterns or traits globally common to all societies; “every human society recognizes a family structure that regulates sexual reproduction and the care of children.”³¹ Further, the family is the first agent of socialization; it is the first social group to communicate expectations and reinforce norms.³² Likewise, family is the best and most prominent example of a primary group, which play the most critical role in a person’s life.³³ A primary group is typically a fairly small group, made up of people that engage in face-to-face long-term emotional needs.³⁴ What constitutes a family, however, remains the subject of dispute in sociology, politics, and religion.³⁵

A. The Family Makeup: Traditional Family v. Contemporary Family

The family dynamic is constantly changing, and has changed dramatically since the promulgation of the FMLA. Social conservatives often define family in terms of structure, where all members fill a certain role.³⁶ However, sociologists construct family by the way members relate to one another.³⁷ Family then is a “socially recognized group (usually by blood, marriage, cohabitation, or adoption) that forms an emotional connection and serves as an economic unit of society.”³⁸ This indicates that a family is a group of people where the individuals view themselves as family and act accordingly by “com[ing] together to form strong primary group connections and maintain emotional ties to one another over a long period of time.”³⁹ Families provide physical, emotional, and social well-being needs, and parents in particular care for and socialize children.⁴⁰ Due to the ever-changing landscape of societal customs and

³⁰ OPENSTAX COLLEGE, *supra* note 25, at 53.

³¹ *Id.*

³² *Id.* at 100.

³³ *Id.* at 118.

³⁴ *Id.*

³⁵ *Id.* at 313.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

norms, today there exists two different family structures: the traditional family and the contemporary family.

The traditional family is often termed the “nuclear family.”⁴¹ It is made up of a man and woman, joined by marriage, and their children.⁴² A 2010 survey by professors from the University of Indiana found that 99.8% of the survey participants agreed that the traditional family makeup—husband and wife, with children—constituted a family.⁴³ However, that figure is not an accurate representation of the structure of families in the United States.⁴⁴ In fact, only 66% of children under seventeen years old live in a household where the traditional family structure exists.⁴⁵ This is an 11% decrease since 1980.⁴⁶ This decrease is due in large part to the growing number of more contemporary families, such as: single parent families, families with cohabiting parents, and families in which the parents are a same-sex couple.⁴⁷ However, regardless of the family structure, the study found that children were the key element in what constituted a family.⁴⁸

Since 1950, an ongoing revolution has occurred in the workforce, in family life, and in family demographics.⁴⁹ Where women once provided the bulk of the caretaking functions and men financially supported the family, this separation of duties is not as prevalent today.⁵⁰ Women’s employment participation is as important to the economic stability and well-being of the family as men’s employment participation.⁵¹ As a result, family demographics continue to shift and

⁴¹ *Id.* at 317.

⁴² *Id.* at 313.

⁴³ *Id.* at 314.

⁴⁴ *Id.* at 317.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 313, 318-20.

⁴⁸ *Id.* at 317.

⁴⁹ DOUGLAS E. ABRAMS *ET AL*, CONTEMPORARY FAMILY LAW 184, AMERICAN CASEBOOK SERIES (4th Edition 2015); *see also* Suzanne M. Bianchi, *Family Change and Time Allocation in American Families*, GEORGETOWN L. WORKPLACE FLEXIBILITY 2010 1, 3-4 (Nov. 29, 2010), *available at* http://workplaceflexibility.org/images/uploads/program_papers/bianchi_family_change_and_time_allocation_in_american_families.pdf.

⁵⁰ ABRAMS, *supra* note 49, at 185; *see also* Bianchi, *supra* note 49.

⁵¹ ABRAMS, *supra* note 49; *see also* Bianchi, *supra* note 49.

change drastically from that of the traditional family; ever more often, contemporary families form, bucking the idea of the traditional “nuclear family.”⁵² A contemporary family can include almost any persons living together where close personal and emotional relationships form.⁵³ The most common examples of these families include single-parent families, families in which both parents cohabit, families in which parents are of the same-sex, and families living with extended family members under one roof.⁵⁴ The primary reasons for this demographic shift are the surge in employment outside of the home for women and the sharp increase of “family instability”—meaning higher divorce rates as well as the increased frequency of children born into families headed by unmarried parents.⁵⁵ The United States Supreme Court is beginning to take notice of the change in family dynamics in more recent cases dealing with same-sex marriage such as *U.S. v. Windsor*⁵⁶ and *Obergefell v. Hodges*.⁵⁷ Ultimately, the central point is that American families continuously evolve, that it is time to accept that families can be different in makeup, and that no one family structure is correct.⁵⁸

⁵² OPENSTAX COLLEGE, *supra* note 25, at 318-20; *see generally* Suzanne M. Bianchi, *Changing Families, Changing Workplaces*, THE FUTURE OF CHILDREN VOL. 21 NO. 2 (Fall 2011) *available at* http://futureofchildren.org/publications/docs/21_02_02.pdf.

⁵³ OPENSTAX COLLEGE, *supra* note 25, at 318-20.

⁵⁴ *Id.* at 313, 318-20.

⁵⁵ Bianchi, *supra* note 49, at 16-21.

⁵⁶ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (“This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, . . . and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

⁵⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590, (2015) (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples.”).

⁵⁸ *See* Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013),

Furthermore, regardless of family structure, families remain the most influential and basic unit of society, providing socialization and instilling values, morals, and norms.⁵⁹

B. American Family Values

What are American family values? Elected officials and politicians often reference this concept; however, the question remains difficult to ask, and even more difficult to answer. Indeed, family values are often relative and subjective to the specific family; thus, most families do not share identical family values.⁶⁰ Families provide the essential units for growth and well-being of members, most commonly nurturance, care, and protection.⁶¹ The discussion of family values translates to a specific family belief system necessary to carry out those essential functions.⁶² Family belief systems develop into “the shared values and assumptions that guide family life and provide meaning and organize experience in the social world.”⁶³ It is, therefore, important to understand and define what constitutes values, specifically, “. . . concepts people use to make choices, to decide courses of action, to explain and justify behaviors, to judge and to be judged.”⁶⁴ Values are the “modes of organizing conduct” and the “emotionally invested principles that guide human action.”⁶⁵ There are many different factors that influence values and subsets of values.⁶⁶ Families commonly develop social, political, moral, religious, work, and recreational values.⁶⁷

http://www.nytimes.com/2013/11/26/health/families.html?_r=1&pagewanted=all&

⁵⁹ OPENSTAX COLLEGE, *supra* note 25, at 100.

⁶⁰ Robert E. Burns, *Family Values Can be Relative*, U.S. CATHOLIC 2 (June 1994).

⁶¹ FROMA WALSH, *NORMAL FAMILY PROCESSES: GROWING DIVERSITY AND COMPLEXITY* 7 (The Guilford Press, 4th ed. 2012); WAYNE BAKER, *AMERICA'S CRISIS OF VALUES* 3 (Princeton University Press 2005), *available at* <http://www.jstor.org/stable/j.ctt4cg9m0.10>.

⁶² WALSH, *supra* note 61.

⁶³ *Id.*; BAKER, *supra* note 61.

⁶⁴ BAKER, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ WALSH, *supra* note 61; Amy Guertin, *List of Family Values*, LOVETOKNOW <http://family.lovetoknow.com/list-family-values> (last visited Dec. 27, 2016).

⁶⁷ Guertin, *supra* note 66.

Social values typically regard peace, justice, freedom, equality, and community improvement or valuing the greater good.⁶⁸ For instance, showing respect and acting courteously during social interactions, volunteering, generosity, and honesty are examples of social and moral values.⁶⁹ Families also instill political values to include American exceptionalism, patriotism, capitalism, equality, and abiding by the law.⁷⁰ Moral values involve discerning right from wrong, and provide the foundation from which a person makes a decision.⁷¹ All of these values are usually learned from one's parents and past experiences.⁷² Individual religious values often derive from the family's faith, as experienced during one's upbringing.⁷³ Work-related values center around the philosophies regarding employment and finances, for instance whether a person is hardworking or lazy, frugal or lavish.⁷⁴ These values may affect children's approaches to school and education.⁷⁵ Recreational values refer to those activities the family regards as fun and/or play and are important in fostering togetherness, "closeness, opportunities for learning, creating memories, improving social skills, and developing empathy."⁷⁶

However, there is one family value that is essential above all others: time together.⁷⁷ Time is of the essence and it is an investment, without which a family cannot institute any of the other values whether relating to social, political, moral, religious, work, or recreation.⁷⁸ Nor can the necessary close personal and emotional relationships develop without adequate time together.⁷⁹ Polls have demonstrated as much, overwhelmingly showing that the American

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Nathan Schneider, *Family Time*, AMERICA: THE NAT'L CATHOLIC REV. (Feb. 2, 2015), <http://www.americamagazine.org/issue/family-time>; see also *Paid Leave: It's Time for America to #LeadOnLeave*, U.S. DEPT. OF LABOR (Sept. 22, 2014), <https://www.dol.gov/featured/paid-leave> [hereinafter U.S. DEP'T OF LABOR].

⁷⁸ Schneider, *supra* note 77; U.S. DEPT. OF LABOR, *supra* note 77.

⁷⁹ OPENSTAX COLLEGE, *supra* note 25, at 118.

attitude toward child care is that parents must spend more time with their children, especially young and infant children.⁸⁰ In another similar poll regarding the stresses on family life, respondents stated that “parents spending more time with their children would be the best way to strengthen values in our country.”⁸¹ Time together allows families to bond, and bonding is essential to the establishment of family values.⁸² Parental leave, an investment of time spent with young and infant children, positively influences pediatric health.⁸³ As outlined *infra*, most other industrialized countries recognize the critical importance of family time.⁸⁴

C. The Best Interests of the Child

“The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better.”⁸⁵

The best interests of the child is a standard based on factors that courts utilize in virtually all proceedings in which children are involved: divorce, custody, visitation, adoption, death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and child protective services proceedings.⁸⁶ The best interests of the child standard is developed either by the court in

⁸⁰ Kathleen Sylvester, *Caring for Our Youngest: Public Attitudes in the United States*, THE FUTURE OF CHILDREN VOL. 11, NO. 1, 53, at 55 (2001), available at http://www.futureofchildren.org/publications/docs/11_01_03.pdf.

⁸¹ *Id.* at 55 (citing *Women’s Voices 2000: The most comprehensive polling and research project on women’s values and policy priorities for the economy*, WASH. DC: CENT. FOR POL’Y. ALTERNATIVES AND LIFETIME TELEVISION (2000)).

⁸² See generally Dennis K. Orthner & Jay A. Mancini, *Leisure Impacts on Family Interaction and Cohesion*, J. OF LEISURE RES., Vol. 22, No. 2, 125-37 (Jan. 1, 1990).

⁸³ See generally Christopher Ruhm, *Parental Leave and Child Health*, 19 J. OF HEALTH ECON. 931 (2000).

⁸⁴ Adema, *supra* note 21, at 72-80.

⁸⁵ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337 (2008).

⁸⁶ *Id.*; see also Linda D. Elrod, *Finding the Best Interests of the Child*, CHILD CUSTODY PRAC. AND PROC., §§ 4:3, 4:4 (2016).

the absence of legislation, or promulgated by legislation requiring a court to weigh a set of factors.⁸⁷

Judicial consideration of the best interests of the child first developed in England with the decisions: *Rex v. Devall*, *Blisset's Case*, and *Powell v. Cleaver*.⁸⁸ Meanwhile, the foundation of the standard in American jurisprudence date back to the 1815 case *Commonwealth v. Addicks*.⁸⁹ *Addicks* was a custody dispute between a father and an adulterous mother.⁹⁰ Initially, the mother was awarded custody of the children because it would have been improper to remove them from her custody based on the tender ages of the children.⁹¹ However, the court accepted the father's argument for custody modification that the children's best interests were better served with him.⁹² Primarily because as it pertained to the future moral core of the children, the court expressed concern regarding the adulterous mother's morality.⁹³ Further, the court stated that keeping the siblings together, and not separating them, was critical pursuant to what was in the best interests of the children.⁹⁴ Later, in the Rhode Island case *United States v.*

⁸⁷ Elrod, *supra* note 86.

⁸⁸ *Powell v. Cleaver*, 29 Eng. Rep. 274 (Ch. 1789) (considering the competing interests between parents and the absolute parental right against the child's interests); *Blisset's Case*, 98 Eng. Rep. 899 (K.B. 1774) (allowing a child to stay with the mother due to the public concern for the child's education); *Rex v. Devall*, 97 Eng. Rep. 913, 914 (K.B. 1763) (regarding custody to be left to the judge's discretion according to the circumstances.); *see also* Kohm, *supra* note 85, at 354-55 (2008).

⁸⁹ *Commonwealth v. Addicks*, 2 Serg. & Rawle 174 (Pa. 1815); *see also* Kohm, *supra* note 85, at 33759.

⁹⁰ *Addicks*, 2 Serg. & Rawle at 176; *see also* Kohm, *supra* note 85, at 357-59.

⁹¹ *Addicks*, 2 Serg. & Rawle at 176; *see also* Kohm, *supra* note 85, at 357-59.

⁹² *Addicks*, 2 Serg. & Rawle at 176.

⁹³ *Id.* ("I am satisfied, that either from books, from conversation, or from the unfortunate speculation of her own mind, the mother has fallen into a fatal error, on a fundamental point of morals—the obligation of the marriage contract. It is the more incumbent on us, therefore, to guard the children against the consequences of this pernicious mistake, and to fortify their minds, by inspiring them with fixed principles on this essential article. At the present moment, they may not reflect on the subject, but they soon will; and when they inquire, why it was that they were separated from their mother, they will be taught, as far as our opinions can teach them, that in good fortune or in bad, in sickness or in health, in happiness or in misery, the marriage contract, unless dissolved by the law of the country, is sacred and inviolable.").

⁹⁴ *Addicks*, 2 Serg. & Rawle at 176 ("[B]ut it is important that the sisters should not be separated; when we decide for one, therefore, we must decide for both.").

Green, the court assessed the parental rights in relation to the welfare of the child, declaring that parental rights only existed to benefit the child and were subservient to the child's best interests.⁹⁵ The Massachusetts case, *Commonwealth v. Briggs*, supported those earlier decisions and ruled that the predominant consideration in custody disputes was "the good of the child."⁹⁶ This policy was again echoed in *Mercein v. People ex rel. Barry* where the Supreme Court recognized "the duty of the Circuit Court to make such orders as will be for the benefit of the child [. . .]."⁹⁷ The Court further held all parties in custody disputes were under an obligation to act in the best interests of the child, regardless of any party's respective rights; but this principle particularly applied to parents in acting within their parental rights.⁹⁸ These cases established the foundation for the American jurisprudential best interests of the child standard, which, through its predominance, provided stability for children and parents.⁹⁹ The best interests of the child standard, in many cases, likely led to the creation of the Tender Years Doctrine.¹⁰⁰

⁹⁵ *United States v. Green*, 3 Mason 482, 26 F. Cas. 30, 31-32 (C.C.D.R.I. 1824) ("As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavour, as far as possible, to administer a conscientious, parental duty with reference to its welfare."); *see also* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 359-60 (2008).

⁹⁶ *Commonwealth v. Briggs*, 33 Mass. 203, 205 (16 Pick. 203) (1834); *see also* Kohm, *supra* note 85, at 360.

⁹⁷ *Mercein v. People ex rel. Barry*, Lock. Rev. Cas. 240 (N.Y. 1840) ("The interest of the infant is deemed paramount to the claims of both parents. This is the predominant question which is to be considered by the court or tribunal before whom the infant is brought. The rights of the parents must in all cases yield to the interests and welfare of the infant. These principles were recognized and adjudged as a part of the law of this state, in the cases last referred to."); *see also* Kohm, *supra* note 85, at 361.

⁹⁸ *Barry*, 46 U.S. at 115-16; *see also* Kohm, *supra* note 85, at 362.

⁹⁹ Kohm, *supra* note 85, at 366.

¹⁰⁰ Kohm, *supra* note 85, at 367-68.

The majority's best interests of the child standard has persevered throughout American jurisprudence and family law. Utilized as a judicial approach to litigation involving children and family law in general, the best interests of the child standard continues to guide courts in most states.¹⁰¹ Courts generally weigh several factors to determine the best interests of the child in custody battles.¹⁰² Generally, the primary considerations in determining the best interests of a child include "the ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance involved."¹⁰³ The living environment of the child is also an important consideration for many judges; a continuous and stable living environment is more desirable than erratic and unpredictable living environments.¹⁰⁴ Likewise, continuity and stability of care and relationships is given great weight in custody disputes.¹⁰⁵ For instance, Rhode Island's court-developed factor test weighs:

*(1) [t]he wishes of the parents; (2) [t]he wishes of the child, if the child is of sufficient intelligence, understanding and experience to express a preference; (3) [t]he interaction of the child with parents, siblings, and any other person who may significantly affect the child's best interest; (4) [t]he child's adjustment to home, school, and community; (5) [t]he mental and physical health of all individuals involved; (6) [t]he stability of the child's home environment; (7) [t]he moral fitness of the child's parents; and (8) [t]he willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and the other parent.*¹⁰⁶

The long-lasting effect on the states that the judicial development at common law of the best interests of the child standard influenced many states to promulgate and ratify statutes with enumerated criteria

¹⁰¹ ABRAMS, *supra* note 49, at 804.

¹⁰² See Elrod, *supra* note 85.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990); see also See Elrod, *supra* note 86.

for a best interests of the child finding.¹⁰⁷ These statutes create relevant factors that a court must consider in custody disputes, serving as a means of guiding courts in the determination of the best interests of a child.¹⁰⁸ The principles commonly echoed in these statutes include the importance placed on family integrity; the child's health, safety, and protection; permanency; and assurances that the parent(s) provide the child with adequate care, treatment and guidance such that the child may develop into a self-sufficient adult.¹⁰⁹ Moreover, some of the most commonly-used factors that a court must consider in such a determination include the emotional relationships the child has with the parents, siblings, extended family, household members, or other caregivers; the capacity of a parent or parents to provide a safe home with the necessary food, clothing, and medical needs of the child; the child's mental and physical health-related needs; parental mental and physical health status; as well as, whether domestic violence exists in the household.¹¹⁰ A majority of states have taken legislative action, in some form or another, for the determination of the best interests of the child, primarily in custody cases.¹¹¹

¹⁰⁷ See Elrod, *supra* note 86.

¹⁰⁸ See *id.*

¹⁰⁹ CHILD WELFARE INFO. GATEWAY, STATE STATUTES: DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2016) https://www.childwelfare.gov/pubpdfs/best_interest.pdf [http://perma.cc/W3BL-R43T] [hereinafter C.W.I.G.].

¹¹⁰ *Id.*

¹¹¹ See ALA. CODE § 12-15-101 (2009); ALASKA STAT. § 47.10.082 and § 47.05.065(4)-(5) (1998); ARIZ. REV. STAT. §§ 8-845(B) and 8-847(D) (2012); CAL. WELF. & INST. CODE § 16000 (1990) and FAM. CODE § 175(a) and (b) (2007); COLO. REV. STAT. § 19-1-102(1), (1.5) (1994); CONN. GEN. STAT. § 45a-719 (1993); DEL. ANN. CODE tit. 13, § 722 (2004); D.C. CODE ANN. § 16-2353 (1999); FLA. STAT. ANN. § 39.810 (2006); GA. CODE ANN. § 15-11-1 and § 15-11-26 (2004); HAW. REV. STAT. § 587A-2 (2010); IDAHO CODE § 16-1601 (2003); 705 ILL. COMP. STAT. 405/1-3 (4.05) (2016); IND. CODE ANN. § 31-34-19-6 (2009); IOWA CODE ANN. § 232.104(1)(c) and CODE ANN. § 232B.2 (2016); KAN. STAT. ANN. § 38-2201(b) (2016); KY. REV. STAT. ANN. § 620.023 (2012); LA. CHILD. CODE ANN. art. 601 and 675(A) (1999); ME. REV. STAT. tit. 19-A, § 1653(3) and tit. 22, §§ 4003 and 4055(2)-(3) (2016); MD. CODE ANN., FAM. LAW § 5-525(f)(1) (2016); MASS. GEN. LAWS ch. 119, § 1 (2008); MICH. COMP. LAWS § 722.23 (2016); MINN. STAT. ANN. § 260C.193, Subd. 3(a)-(h) (2012); MISS. CODE ANN. § 43-21-103 (1989); MO. ANN. STAT. §§ 210.001(1) and 211.44 (2014); MON. CODE ANN. § 41-3-101 (2009); NEB. REV. STAT. § 43-533 (1998); Nev. Rev. Stat. § 128.005(2)(c) (1981); N.H. Rev. Stat. § 169-C:2(I) and (II) (1983); N.J. STAT. ANN. § 30:4C-1.1(a)-(g) and 30:4C-11.1(a) (2006); N.M. STAT. ANN. § 32A-1-3 and 32A-4-28(A) (2009); N.Y. SOC. SERV. LAW

III. PARENTAL LEAVE POLICIES

Leave benefits are lacking in the United States for parents and families surrounding the birth or adoption of a child. Aside from four states, parental leave is typically addressed by the FMLA which only provides the minimum leave requirements for employees that meet specific enumerated criteria.¹¹² But, the FMLA fails to balance the work-family dilemma and those states that have enacted legislation providing paid parental leave recognize this deficit.¹¹³ Those states are: California, Rhode Island, New Jersey, and New York. However, even if the policies in those four states were the norm, the parental leave policies in the United States would still lag behind the policies implemented in nearly every other industrialized nation.

A. Domestic Policies – California, Rhode Island, New Jersey, and New York

Recognition is the first step to solving a problem.¹¹⁴ In the United States, only four states have recognized the parental leave problem and implemented legislative policies and procedures to address it: California, Rhode Island, New Jersey, and, most recently, New York.¹¹⁵ These states provide partially paid parental leave primarily

§ 358-a(3)(c) and 384-b(1) (2010); N.C. GEN. STAT. § 7B-1110 (2011); N.D. CENT. CODE § 14-09-06.2(1) (2013); OHIO REV. CODE ANN. § 2151.414(D)(1) (2016); OKLA. STAT. ANN. tit. 10A, § 1-1-102(A)-(E) (2014); OR. REV. STAT. § 107.137(1) (2014); 42 PA. CONS. STAT. § 6301(b)(1), (1.1), (3), (4) (2012); 15 R.I. Gen. Laws § 15-7-7(c) (1999) and 42 R.I. GEN. LAWS § 42-72-2(1)-(2) (1979); S.C. CODE ANN. § 63-1-20(D) and 30 (2008); S.D. CODIFIED LAWS § 26-7A-56 (1991); TENN. CODE ANN. § 36-1-101(d) (1998), 113(i); TEX. FAM. CODE ANN. § 263.307(a)-(c) (2015); UTAH CODE ANN. § 62A-4a-201(1)(c), (2)-(3) (2015); VT. STAT. ANN. tit. 15A, § 3-504(c) (1995) and VT. ANN. STAT ANN. tit. 33, § 5114 (2009); VA. CODE ANN. § 20-124.3 (2012); WASH. REV. CODE § 13.34.020 (1998); W.VA. CODE ANN. § 49-1-105 (2015); WIS. STAT. ANN. § 48.426(2)-(3) (1980); WYO. STAT. ANN. § 14-3-201 (2005); *see also* C.W.I.G., *supra* note 109, at 4-28.

¹¹² California, Rhode Island, New Jersey, and New York all have statutes that extend the provisions of the FMLA.

¹¹³ Adema, *supra* note 21, at 14, 32.

¹¹⁴ Zig Ziglar, *Problem Solving*, EVANCARMICHAEL.COM (2016) <http://www.evancarmichael.com/library/zig-ziglar1/Problem-Solving.html> (last visited Apr. 25, 2017).

¹¹⁵ *Paid Family Leave*, NAT'L CONFERENCE OF STATE LEGISLATURES (2016), <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx> [hereinafter N.C.S.L.].

through employee-paid payroll taxes, which go into state insurance funds, similar to temporary disability or short-term disability insurance funds.¹¹⁶ In 2002, California became the first state to entitle working parents access to paid parental leave.¹¹⁷ California accomplished this by providing unpaid family leave to employees through the FMLA¹¹⁸ or the California Family Rights Act,¹¹⁹ both of which provide twelve weeks of unpaid leave to eligible employees.¹²⁰ The difference is California's Paid Family Leave system provides wage replacement for employees by utilizing the pre-existing State Disability Insurance as its funding source and operates by a mandatory employee payroll tax.¹²¹ The system provides paid family leave for up to six weeks in a calendar year.¹²² The weekly compensation rate is fifty-five percent of an employee's salary, subject to a maximum compensation cap.¹²³ However, on Monday April 11, 2016, California Governor Jerry Brown signed a bill expanding the compensation rate for the state's paid family leave law.¹²⁴ By 2018, the compensation rate will reach up to as much as seventy percent of weekly salary for employees earning at or near the minimum wage, and sixty percent of weekly salary for employees that earn up to \$108,000 annually.¹²⁵ The bill's primary proponent, Assemblyman Jimmy Gomez (D-Echo Park), echoed his own personal experience with financial hardship due to unpaid family leave stating: "It is unrealistic to expect a worker who is already living paycheck to paycheck on 100 percent of their salary to use a program

¹¹⁶ *Id.*

¹¹⁷ CAL. UNEMP. INS. CODE § 3301 (West 2014); CAL. GOV'T CODE § 12945.2 (West 2016); Caroline Cohen, *California's Campaign for Paid Family Leave: A Model for Passing Federal Paid Leave*, 41 GOLDEN GATE U. L. REV. 213, 214 (2011).

¹¹⁸ 29 U.S.C.A. § 2601 (1993).

¹¹⁹ CAL. GOV'T CODE § 12945.2 (Westlaw 2011).

¹²⁰ *Compare* 29 U.S.C.A. § 2601 (1993), *with* CAL. GOV'T CODE § 12945.2 (Westlaw 2011).

¹²¹ Cohen, *supra* note 117, at 221-22.

¹²² *Id.* at 222.

¹²³ *Id.*

¹²⁴ UNEMPLOYMENT COMPENSATION—DISABILITY INSURANCE—BENEFITS, 2016 Cal. Legis. Serv. c. 5 (A.B. 908) (West); Patrick McGreevy, *Brown Signs California Law Boosting Paid Family-Leave Benefits*, L.A. TIMES (Apr. 11, 2016), <http://www.latimes.com/politics/la-pol-sac-paid-family-leave-california-20160411-story.html>.

¹²⁵ UNEMPLOYMENT COMPENSATION, *supra* note 124; McGreevy, *supra* note 124.

for six weeks at nearly half of their wages.”¹²⁶ President Barack Obama praised California’s policies and the state’s approach to parental and family leave.¹²⁷ Moreover, in April 2016, San Francisco went even further in expanding parental leave benefits to provide employees with fully paid parental leave.¹²⁸ San Francisco mandated that private employers within the city make up the difference between an employee’s full weekly pay and any wage replacement received through California Paid Family Leave.¹²⁹

Like the Californian legislation, New Jersey also provides six weeks of paid parental leave upon the birth or adoption of a child, as well as leave for other family and medical needs.¹³⁰ New Jersey implements partially paid parental leave through the New Jersey Family Leave Act,¹³¹ which protects the job of an employee on leave and provides twelve weeks of leave within a twenty-four month

¹²⁶ McGreevy, *supra* note 124.

¹²⁷ Sarah D. Wire, *Obama: Paid Family-Leave Law ‘Great News for California’*, L.A. TIMES (Apr. 29, 2016), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-20160401-htmlstory.html#6004> (President Obama’s statement upon the passage of the California leave provisions: “This action means more hardworking Californians will have the peace of mind to know that they can take care of a new child or a sick family member. This is great news for California. Yet millions of Americans still don’t have access to any form of paid leave. Congress needs to catch up to California – and to countries all over the world – by acting to guarantee paid family leave to all Americans. As long as I am President, I will continue to do everything I can to ensure that working Americans have access to this basic security.”).

¹²⁸ Kate S. Gold et al, *Paid Parental Leave: San Francisco Will Require Employers to Provide Paid Leave and California Will Increase Benefits Under State Law*, NAT’L L. REV. (Apr. 12, 2016), <http://www.natlawreview.com/article/paid-parental-leave-san-francisco-will-require-employers-to-provide-paid-leave-and>.

¹²⁹ *Id.*; see also Jessica Leigh Hester, *The U.S. Cities Marching Ahead on Paid Parental Leave*, NAVIGATOR (2016), <http://www.citylab.com/navigator/2016/04/two-us-cities-march-ahead-on-parental-leave/477405/>.

¹³⁰ N.J. Family Leave Act, N.J. STAT. ANN. § 34:11B-4(b)(c), 16 (West 2008); Paid Family Leave Insurance, N.J. STAT. ANN. § 43:21-39.1, 39.3, 40 (West 2011); N.J. ADMIN. CODE § 12:16-1A.1, 4.2, and 4.11 (2016).

¹³¹ N.J. Family Leave Act, N.J. STAT. ANN. § 34:11B (West 2008); Kevin Haney, *New Jersey Family Leave Act Regulations*, GROWING FAMILY BENEFITS (Mar. 14, 2013), <https://www.growingfamilybenefits.com/new-jersey-family-leave-act-regulations/>; *Pregnancy and Maternity Leave for New Jersey Employees*, FAIRYGODBOSS, <https://fairygodboss.com/career-topics/pregnancy-and-maternity-leave-for-new-jersey-employees> (last visited Dec. 28, 2016) [hereinafter FAIRYGODBOSS].

period, and a Paid Family Leave Insurance system,¹³² which is funded by employee payroll deductions.¹³³ The Paid Family Leave Insurance provides that “. . . an individual’s weekly benefit rate shall be two-thirds of his average weekly wage, subject to a maximum of fifty-three percent of the Statewide average weekly remuneration paid to workers by employers”¹³⁴ Thus, working parents in New Jersey receive up to two-thirds of their weekly pay capped at fifty-three percent of the statewide average.¹³⁵

Rhode Island does not have legislation as expansive as California or New Jersey regarding paid parental leave, but employed parents are eligible to take partially paid leave from work for up to four weeks.¹³⁶ This is possible through the Temporary Caregiver Insurance, which grants parents paid leave to bond with a newborn child or a child newly placed for adoption or foster care.¹³⁷ However, regarding the total amount of leave entitlement or time off from work, Rhode Island allows parents more time off from work, granting thirteen weeks of parental leave.¹³⁸

New York is the fourth and most recent state to pass paid parental and family leave legislation into law when New York Governor Cuomo signed S.B. 6406C.¹³⁹ To be eligible for New York’s paid family leave, an employee must have been employed by an employer

¹³² Paid Family Leave Insurance, N.J. ADMIN. CODE § 12:16-1A.1, 4.2, and 4.11 (2016); Haney, *supra* note 131; FAIRYGODBOSS, *supra* note 128.

¹³³ N.J. STAT. ANN. § 34:11B (West 2008) (N.J. Family Leave Act); N.J. ADMIN. CODE § 12:16-1A.1, 4.2, and 4.11 (2016) (Paid Family Leave Insurance). *See also* Haney, *supra* note 128; FAIRYGODBOSS, *supra* note 128; Haney, *supra* note 131.

¹³⁴ N.J. STAT. ANN. § 43:21-40 (West 2011).

¹³⁵ *Id.*

¹³⁶ 28 R.I. GEN. LAWS ANN. § 28-41-35 (West 2013).

¹³⁷ 28 R.I. GEN. LAWS ANN. § 28-41-35(a)(1) (West 2013).

¹³⁸ 28 R.I. GEN. LAWS ANN. § 28-48-2 (West 2013).

¹³⁹ N.Y. LEGIS. 54 (2016), 2016 N.Y. Sess. Laws 54 (S. 6406-C)(McKinney); 2015 New York Senate Bill No. 6406, New York Two Hundred Thirty-Eighth Legislative Session; N.Y. WORKERS’ COMP. Law § 204 (McKinney 2016); New York Governor Andrew Cuomo signed the bill into law, which includes a paid family leave program that will provide partially-paid leave to almost all working parents in New York; LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL., *supra* note 22; *Paid Family Leave: Strong Families, Strong NY*, NEW YORK STATE, (last visited Dec. 29, 2016), <https://www.ny.gov/programs/paid-family-leave-strong-families-strong-ny>.

for twenty-six consecutive weeks.¹⁴⁰ Lauded as the most comprehensive out of the four with such legislation; “New York State put together the best Paid Family Leave policy in the nation. Nobody will ever have to choose between what their heart tells them to do and what their bank account allows them to do.”¹⁴¹ The program takes effect in 2018, and upon taking effect will provide eight weeks of family leave paid at fifty percent of an employee’s average weekly wage, but not to exceed fifty percent of the statewide average weekly wage.¹⁴² In 2019, eligible working parents may receive fifty-five percent of their average weekly wages, not to exceed fifty-five percent of the statewide weekly wage, for ten weeks.¹⁴³ The rate of pay then rises, again, in 2020 to sixty percent of an employee’s average weekly wage, not to exceed sixty percent of the statewide average weekly wage.¹⁴⁴ Then, when fully mature on and after January 1, 2021 will allow twelve weeks of family leave partially paid at a rate of sixty-seven percent of an employee’s weekly wage, not to exceed sixty-seven percent of the statewide average weekly wage.¹⁴⁵ Like those of California, New Jersey, and Rhode Island, New York’s program will be completely employee-funded; employees covered under the legislation will be deducted no more than half of one percent of their weekly wages, not to exceed sixty cents per week.¹⁴⁶

Nevertheless, as progressive as these state parental leave provisions are, they only implement paid parental leave, and have not addressed the issue other industrialized nations recognize—the amount of leave time.

B. International Policies for Paid Parental Leave

*“There is only one developed country in the world that does not offer paid maternity leave—and that is us, . . .”*¹⁴⁷

¹⁴⁰ LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL., *supra* note 22.

¹⁴¹ *Id.*

¹⁴² N.Y. WORKERS’ COMP. Law § 204, 2(a)(i) (McKinney 2016).

¹⁴³ *Id.* § 204, 2(a)(ii) (McKinney 2016).

¹⁴⁴ *Id.* § 204, 2(a)(iii) (McKinney 2016).

¹⁴⁵ *Id.* § 204, 2(a)(iv) (McKinney 2016).

¹⁴⁶ LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL., *supra* note 22.

¹⁴⁷ President Obama recognized paid family, parental, and maternity leave as an important issue for working families, and criticized the inaction by Congress at

Internationally, the United States ranks among the bottom of industrialized nations regarding parental leave,¹⁴⁸ and of all countries that are members of the Organization of Economic and Community Development (OECD), the United States is the only one without a national mandate affording paid maternity leave to new and expecting mothers.¹⁴⁹ Further, the United States is one of only nine OECD countries without a paid leave entitlement for fathers.¹⁵⁰ Nearly all OECD countries have policies that entitle mothers to at least fourteen weeks, if not more, of paid maternity leave. Most of the OECD countries allow up to sixteen weeks of leave per the recommendation by the World Health Organization.¹⁵¹ The United States and the FMLA lag every other country in the OECD regarding parental leave policies.¹⁵²

OECD countries identify three models of leave surrounding the birth or, in some countries, adoption of a child available to parents:

the federal level on the topic as well as other workplace flexibility issues at the first annual White House Summit on Working Families (2014). 22 NO. 10 N.J. EMP. L. LETTER 7; Press Release, The White House Office of the Press Secretary, Fact Sheet: The White House Summit On Working Families (June 23, 2014) *available at* <https://www.whitehouse.gov/the-press-office/2014/06/23/fact-sheet-white-house-summit-working-families>.

¹⁴⁸ Jessica Deahl, *Countries Around the World Beat the U.S. on Paid Parental Leave*, NAT'L PUB. RADIO (Oct. 6, 2016), <http://www.npr.org/2016/10/06/495839588/countries-around-the-world-beat-the-u-s-on-paid-parental-leave>; Rita Rubin, *U.S. Dead Last Among Developed Countries When It Comes to Paid Maternity Leave*, FORBES (Apr. 6, 2016), <http://www.forbes.com/sites/ritarubin/2016/04/06/united-states-lags-behind-all-other-developed-countries-when-it-comes-to-paid-maternity-leave/#18b933f95ada>; Michael Kimmel, *Why the U.S. Will Finally Do Something About Paid Parental Leave this Year*, FAST COMPANY (Jan. 11, 2016), <https://www.fastcompany.com/3055288/the-future-of-work/why-paid-parental-leave-will-expand-in-2016>; Andrew Lord, *8 Countries that Put U.S. Paternity Leave to Shame*, THE HUFFINGTON POST (last updated June 19, 2015), http://www.huffingtonpost.com/2015/06/17/best-countries-for-patern_n_7595946.html.

¹⁴⁹ The OECD is made up of 35 countries: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Adema, *supra* note 21, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 71.

¹⁵² *Id.* at 71-91.

maternity leave, paternity leave, and parental leave.¹⁵³ In these nations maternity, paternity, and parental leave policies are regarded as a crucial component of early childhood policy. These countries define maternity leave as an “employment-protected leave of absence for employed women around the time they give birth [or adopt].”¹⁵⁴ Most OECD countries have a fixed leave entitlement for maternity leave, often exceeding the minimum fourteen weeks of paid leave.¹⁵⁵ Also, mothers may typically combine pre-birth and post-birth leave entitlements; in fact, in some countries pre-birth leave is compulsory, along with six to ten weeks post-birth leave.¹⁵⁶ Almost every OECD country supports mothers on maternity leave with public income wage replacement.¹⁵⁷ Likewise, paternity leave is employment-protected leave for fathers surrounding the birth or adoption of a child.¹⁵⁸ However, paternity leave periods are often significantly shorter in duration than maternity leave entitlements, and as a result, fathers on paternity leave usually receive full wage replacement or other benefits equal to their gross earnings.¹⁵⁹ Parental leave, identical to maternity and paternity leaves, is employment protected leave provided to both employed parents.¹⁶⁰ Policies permitting parental leave typically act supplementary to specific maternity and paternity leave periods, most often following a mother’s maternity leave period.¹⁶¹ In OECD countries that have parental leave policies, the entitlement to employment-protected leaves of absence are individual.¹⁶² However, the entitlements to public support and wage replacement is family-based, thus only one parent may claim for public support at a time.¹⁶³ Comparing the United States to some of the leaders in maternity, paternity, and parental leave puts in perspective how far behind the United States is on such an important social issue.

¹⁵³ *Id.* at 72.

¹⁵⁴ *Id.* at 73.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

To begin it is necessary to examine and compare the public spending on general family benefits¹⁶⁴ of the leading OECD countries and that of the United States. In this regard, the United States is relatively low in comparison to other OECD countries.¹⁶⁵ The countries that lead in public spending for family benefits include: the United Kingdom, Denmark, Ireland, and Hungary.¹⁶⁶ These countries spend approximately 4% of their Gross Domestic Product (GDP)¹⁶⁷ on public family benefits.¹⁶⁸ The three countries that follow are Sweden, France, and Iceland; all of which spend over 3.5% of their GDP on family benefits.¹⁶⁹ OECD countries spend roughly 2.5% of their GDP on family benefits.¹⁷⁰ It is alarming that the United States, a country built on family values, spends only 1.5% of its GDP on family benefits.¹⁷¹

The question remains, whether the United States values families? The answer is that if the United States does, it does not seem to value them as much as other OECD countries.¹⁷² In comparisons on maternity, paternity, and parental leave entitlements with other OECD countries such as the United Kingdom, Denmark, Norway, and France, the United States is in arrears.¹⁷³

Regarding maternity, paternity, and parental leave, the United States permits mothers and fathers twelve weeks of unpaid, employment-protected leave.¹⁷⁴ Meanwhile, the United Kingdom gives

¹⁶⁴ “Family benefits” as used here encompasses maternity, paternity, and parental leave as well as state subsidized child care; cash benefits; tax breaks with a social purpose; and tax credits. *Id.* at 16.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Gross domestic product (GDP) is the monetary value of all the finished goods and services produced within a country’s borders in a specific time period. *Gross Domestic Product*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/gdp.asp#ixzz4RWn2IHxw> (last visited Dec. 29, 2016).

¹⁶⁸ Adema, *supra* note 21, at 16.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Adema, *supra* note 21, at 74-80.

¹⁷⁴ *See* 29 U.S.C.A. § 2612(a)(1).

mothers up to fifty-two weeks of statutory maternity leave,¹⁷⁵ and requires mothers to take at least two weeks of leave.¹⁷⁶ Of those fifty-two weeks, the United Kingdom pays eligible employees for up to thirty-nine weeks, the first six at 90% of their average weekly pre-tax earnings, and the remaining thirty-three weeks capped up to £139.58 or \$147.93 weekly.¹⁷⁷ Fathers in the United Kingdom may be eligible for one or two weeks of statutory paternity leave, paid at the same percentage as mothers on maternity leave.¹⁷⁸ However, mothers and fathers may also be eligible for shared parental leave and statutory shared parental pay.¹⁷⁹ For parents to take shared parental leave and statutory shared parental pay, the mother must end her maternity leave and maternity pay.¹⁸⁰ In doing so, the balance in weeks of maternity leave remaining becomes shared parental leave, of which both parents may take in blocks.¹⁸¹ Statutory shared parental pay during this period is capped at £139.58 or \$147.93 weekly, similar to maternity leave pay after the first six weeks, and, likewise, is only available for a maximum of thirty-nine weeks.¹⁸²

Denmark entitles parents with attachment to the labor market to absences for pregnancy, childbirth, and adoption by extending “maternity benefits” to all parents.¹⁸³ Expecting mothers are entitled to absence from work beginning at least four weeks prior to the expected date of delivery.¹⁸⁴ Further, mothers have the right and duty to absences from work in the first two weeks after the birth of a child, and are entitled to take an additional twelve weeks after that.¹⁸⁵ In total

¹⁷⁵ *Statutory Maternity Pay and Leave: Employer Guide*, GOV.UK (Sept. 7, 2016), <https://www.gov.uk/employers-maternity-pay-leave/entitlement>.

¹⁷⁶ *Maternity Pay and Leave*, GOV.UK (Oct. 25, 2016), <https://www.gov.uk/maternity-pay-leave/print>.

¹⁷⁷ *Statutory Maternity Pay and Leave: Employer Guide*, *supra* note 175.

¹⁷⁸ *Paternity Pay and Leave*, GOV.UK (Oct. 26, 2016), <https://www.gov.uk/paternity-pay-leave/print>.

¹⁷⁹ *Shared Parental Leave and Pay*, GOV.UK (last updated Oct. 25, 2016), <https://www.gov.uk/shared-parental-leave-and-pay/print>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Consolidation Act no. 1084 § 1, Consolidation Act on Entitlement to Leave and Benefits in the Event of Childbirth (Nov. 13, 2009) *available at* <http://uk.bm.dk/en/Legislation.aspx#>.

¹⁸⁴ *Id.* at § 6.

¹⁸⁵ *Id.* at § 7(1).

mothers in Denmark are allowed eighteen weeks of leave surrounding the birth of a child.¹⁸⁶ Fathers are entitled to absence for two consecutive weeks after the birth of a child within fourteen weeks.¹⁸⁷ A father is eligible to begin parental leave within the first fourteen weeks of the child's life; however, after fourteen weeks, either parent is entitled to parental leave for an additional thirty-two weeks.¹⁸⁸ Moreover, either parent is entitled to extend parental leave from thirty-two weeks to forty weeks, while employee-parents or self-employed parents shall be entitled to extension to forty-six weeks.¹⁸⁹ These leave entitlements are paid benefits calculated on the "basis of weekly hours and the hourly income which [an] employee would have had during absence after payment of the social security contribution[,]"¹⁹⁰ but such payments are capped at Danish Krone (DKK) 3,332 or \$474.46 per week.¹⁹¹

The parental benefit in Norway provides forty-nine weeks at full salary coverage, or fifty-nine weeks at eighty percent salary coverage.¹⁹² The first three weeks are reserved strictly for the mother to take prior to the birth or the date of delivery, and cannot be used post-birth.¹⁹³ Eligible parents can share a maximum of forty-six or fifty-six weeks with a newborn or adopted child;¹⁹⁴ however, there are "quotas" for each parent.¹⁹⁵ Norway implements a maternal and a paternal quota both equaling ten weeks.¹⁹⁶ Although for medical

¹⁸⁶ *Id.* at §§ 6, 7(1).

¹⁸⁷ *Id.* at § 7(3).

¹⁸⁸ *Id.* at § 9.

¹⁸⁹ *Id.* at § 10.

¹⁹⁰ *Id.* at § 33(1).

¹⁹¹ *Id.* at § 35.

¹⁹² Christa Clapp, *The Smart Economics of Norway's Parental Leave, and why the U.S. Should Consider It*, WASH. POST (Jan. 11, 2016), available at https://www.washingtonpost.com/news/parenting/wp/2016/01/11/the-smart-economics-of-norways-parental-leave/?utm_term=.6d0fe215398a; *Parental Benefit*, NAV (Nov. 17, 2016), <https://www.nav.no/en/Home/Benefits+and+services/Relatert+informasjon/paternal-benefit#chapter-8>.

¹⁹³ *Parental Benefit*, *supra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Paternal Quota (Paternity Leave), Maternal Quota and Shared Period*, NAV (Sept. 2, 2016), <https://www.nav.no/en/Home/Benefits+and+services/Relatert+informasjon/paternal-quota-paternity-leave-maternal-quota-and-shared-period>.

reasons, mothers are required to use the first six weeks of their maternal quota immediately after the birth of the child.¹⁹⁷

In France, mothers are entitled to sixteen weeks of paid maternity leave, while fathers receive eleven days of paternity leave.¹⁹⁸ However, if it is the third child, the mother may then receive twenty-six weeks of maternity leave at full pay.¹⁹⁹ The takeaway from the policies implemented by these countries, and those throughout the OECD, evidence the value placed family at the international level. Furthermore, the OECD has recommended the United States enhance support to parents surrounding the birth or adoption of a child by introducing access to paid maternity and parental leave, administered by the federal social security agencies.²⁰⁰ The OECD recommendations provide for eight weeks of maternity leave, six weeks of gender-neutral parental leave available to both parents, paid on a percentage of previous earnings.²⁰¹ Regarding payment of the recommended leave periods, the OECD found payment of fifty-five to sixty-six percent of weekly earnings to be a practicable and reasonable model, and, in order to limit the cost and burden on employers, finance the system using payroll deductions and taxes.²⁰² Finally, for eligibility purposes of the recommended leave, the criteria for the FMLA sufficed.²⁰³

These recommendations by the OECD are far more progressive than the current state of the FMLA.²⁰⁴ However, if the United States wants to be average²⁰⁵ in comparison to the rest of the industrialized

¹⁹⁷ *Id.*

¹⁹⁸ *European Platform for Investing in Children (EPIC) Country Profiles - France*, EUROPEAN COMMISSION: EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION, <http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3641> (last visited Dec. 29, 2016).

¹⁹⁹ *Id.*

²⁰⁰ Adema, *supra* note 21, at 21.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Compare Adema, *supra* note 21, at 21 (policy recommendations the United States can build from) with 29 U.S.C. §§ 2601, 2611, 2612 (the FMLA “Findings and Purposes,” “Definitions,” and “Leave Requirement”).

²⁰⁵ Adema, *supra* note 21, at 12 (Across the OECD mothers receive at least twelve weeks of maternity leave and often combine maternity and parental leave for up to one year, while fathers typically have paid paternity or parental leave for a minimum of two months.).

international community, then adoption of these recommendations is adequate. But, if the United States, as a world power, wants to be a leader in supporting and valuing families, then it is necessary to enact aggressive, progressive parental leave legislation extending the bounds of the FMLA.

IV. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

On February 5, 1993, President Bill Clinton signed into law the Family and Medical Leave Act, which was supposed to allow employees the opportunity to balance work with family by entitling employees to a reasonable albeit unpaid leave of absence from work.²⁰⁶ This period of leave allows employees to take care of their own medical conditions and deal with familial needs, including caretaking functions for a newborn or an adopted child.²⁰⁷ Its adoption ensured employment-protected leave to American workers on the national level.²⁰⁸ The rationale for adoption of the FMLA is found in the legislative history and further echoed by its purpose and scope.²⁰⁹

A. Legislative History

The legislative history report for the FMLA²¹⁰ found that the United States was enduring a societal shift, in which both genders worked—women and mothers joining their male counterparts by entering the labor force.²¹¹ Further, over two-thirds of adult women were employed, and more than half of mothers worked full-time.²¹² According to labor studies conducted prior to enactment of the FMLA, two out of three new entrants into the workforce would be women of childbearing age, and furthermore, two-thirds of preschool children

²⁰⁶ Clinton, *supra* note 13; DECKER, *supra* note 14, at V.

²⁰⁷ See 29 U.S.C. § 2612(a)(1); DECKER, *supra* note 14, at 2.

²⁰⁸ DECKER, *supra* note 14, at 2.

²⁰⁹ *Id.*

²¹⁰ See generally S. REP. 103-3, at 1-51 (1993).

²¹¹ *Id.* at 5. “America is fast becoming a society in which nearly everyone works. Today, over two-thirds of the nation’s adult women are in the work force, and over half of the mothers with children are employed full-time. . . . Clearly, one of the tasks we face is to reconcile the conflicting needs of women, work, and families.” *Id.* at 49.

²¹² *Id.* at 49.

would have mothers that worked outside of the home.²¹³ According to the Bureau of Labor Statistics at the time, 96% of fathers and 65% of mothers were employed outside of the home.²¹⁴ Compounding the issue was the rising number of single-parent households, which were predominantly mothers with low wage employment.²¹⁵ The inability to take family and medical leave to address the needs of the family had devastating economic effects because it eliminated the primary source of income.²¹⁶ The report also determined that the private sector as well as government policies failed to address the economic and societal shift that the United States was enduring.²¹⁷ This failure by both the private and public sector served to intensify the tension between work and family, and imposed heavy burdens “on families, employees, employers and the broader society.”²¹⁸ All of these legislative findings culminated in the enactment of the FMLA.²¹⁹

B. Findings & Purposes

Codified into the FMLA are the Congressional findings that led to its enactment, as well as the purposes for the act.²²⁰ Relevant to this article are the findings regarding the significant increase in number of single-parent households and two-parent households in which the single parent or both parents work;²²¹ the importance for the development of children and the family unit that both parents be able to participate in early childrearing;²²² the lack of employment policies that accommodate working parents, which force individuals to choose

²¹³ *Id.* at 5. “According to Workforce 2000 and other labor studies, two-thirds of the new entrants into the work force between now and the end of this century will be women, most of them in their childbearing years, and two-thirds of all preschool children will have mothers working outside the home.” *Id.* at 49.

²¹⁴ *Id.* at 6.

²¹⁵ *Id.*

²¹⁶ *Id.* at 4-7.

²¹⁷ *Id.* at 4 (“Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family.”).

²¹⁸ *Id.*

²¹⁹ 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654; *see generally* S. REP. 103-3, 1-51 (1993).

²²⁰ 29 U.S.C. § 2601(a)(b).

²²¹ *Id.* § 2601(a)(1).

²²² *Id.* § 2601(a)(2).

either parenting or job security over the other,²²³ and upon whom the primary responsibility for family caretaking falls.²²⁴ Further, and more important to this critique, the FMLA was enacted to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families and to promote national interests in preserving family integrity;²²⁵ to entitle employees to take reasonable leave for the birth or adoption of a child;²²⁶ and, to accomplish these purposes while accommodating employers' legitimate business interests.²²⁷

C. How the Current System Works for Parents

Employed parents are eligible for the provisions of the FMLA if they have been employed for at least twelve months by the employer whom leave is requested and for at least 1,250 hours of service with the employer in the course of the previous twelve-month period.²²⁸ But there is an eligible employer provision as well:²²⁹ an eligible employer is one that is engaged in commerce or in any industry or activity affecting commerce who employs fifty or more employees for each working day during at least twenty calendar workweeks during the current or preceding year.²³⁰ Further, the term includes any person who acts directly or indirectly, in the interests of an employer to any of the employer's employees;²³¹ any successor in interest of the employer;²³² any public agency;²³³ and includes the Government Accountability Office and Library of Congress.²³⁴

Pursuant to the FMLA, eligible employees are entitled to a total of twelve workweeks of leave during any twelve-month period due to the birth of a child of the employee and to care for the child as well as for the placement of a child with the employee for adoption or foster

²²³ *Id.* § 2601(a)(3).

²²⁴ *Id.* § 2601(a)(5).

²²⁵ *Id.* § 2601(b)(1).

²²⁶ *Id.* § 2601(b)(2).

²²⁷ *Id.* § 2601(b)(3).

²²⁸ *Id.* § 2611(2)(A).

²²⁹ *Id.* § 2611(4)(A).

²³⁰ *Id.* § 2611(4)(A)(i).

²³¹ *Id.* § 2611(4)(A)(ii)(I).

²³² *Id.* § 2611(4)(A)(ii)(II).

²³³ *Id.* § 2611(4)(A)(iii).

²³⁴ *Id.* § 2611(4)(A)(iv).

care.²³⁵ After this twelve-month period, the leave entitlement to care for one's child expires²³⁶ unless the child is diagnosed with a serious health condition.²³⁷ Further, unless agreed to by the employee and employer, an eligible employee cannot take parental leave intermittently or on a reduced leave schedule.²³⁸ Moreover, this period of leave is unpaid.²³⁹ If an employer has a leave policy in place providing paid leave for less than the twelve workweeks stipulated by the Act, the remaining weeks of leave persist without any wage replacement.²⁴⁰ However, "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave. . . ."²⁴¹ Employees must also provide employers notice within thirty days of the expected date of delivery or placement for adoption; in the event such notice cannot be given within thirty days it must be given as soon as practicable.²⁴² If, in the unfortunate event both parents work for the same employer and are eligible for leave under the FMLA, then the aggregate number of workweeks of leave to which they are entitled may be limited to twelve workweeks during any twelve-month period.²⁴³

D. Leave U.S.—Make America Great [on Parental Leave] Again...Finally

*"While I do not feel this bill goes far enough, it is an absolutely necessary first step. Parental leave is critical to the healthy development of children and families."*²⁴⁴

²³⁵ *Id.* § 2612(a)(1)(A)(B).

²³⁶ *Id.* § 2612(a)(2).

²³⁷ *Id.* § 2612(a)(C).

²³⁸ *Id.* § 2612(b)(1).

²³⁹ *Id.* § 2612(c).

²⁴⁰ *Id.* § 2612(d)(1).

²⁴¹ *Id.* § 2612(d)(2)(A).

²⁴² *Id.* § 2612(e)(1).

²⁴³ *Id.* § 2312(f)(1).

²⁴⁴ S. REP. 103-3, 9 (1993) (Quoting Dr. Ed Zigler after reviewing the Yale Bush Center's recommendations for an infant care policy that would allow employees an adequate period for parents to care for newborn or newly adopted infants, as well as his 30 years of work on policies related to children and families).

At its inception and enactment, the FMLA marked a step in the right direction toward valuing families and providing children the parental care they so desperately need. Since 1993, the FMLA has not been expanded nor has it substantially changed regarding parental leave. However, as societal changes occurred prior to its inception and projected into the future, of all the issues it sought to manage—balancing the work-family dilemma by promoting stability, economic security, and the national interest in preserving family integrity;²⁴⁵ employee entitlements to reasonable parental leave²⁴⁶—it has only accomplished the accommodations for employers' legitimate business interests.²⁴⁷ The entitlement to twelve weeks of parental leave scoffs at the notion of promoting balance between work and family, and does little to nothing in preserving family integrity. Additionally, providing this leave without any form of wage replacement indorses instability and economic insecurity, forcing parents back to work before their children and they themselves are ready. The Department of Labor (“DOL”) has recognized this, and in 2014 implemented the “#LeadOnLeave” initiative.²⁴⁸ DOL Secretary Tom Perez wrote about this issue, stating:

*The U.S., shockingly, stands alone as the only industrialized nation on the planet where paid family leave is not the law of the land. Other countries recognize paid leave is good economic policy and good family policy. We should be giving parents the tools to be both attentive parents and productive employees. Forcing people to choose between the job they need and the family they love is wrong.*²⁴⁹

Even President Donald Trump is kicking the tires on a policy for paid maternity leave.²⁵⁰ Currently, the proposed Family and Medical

²⁴⁵ 29 U.S.C. § 2601(b)(1).

²⁴⁶ *Id.* § 2601(b)(2).

²⁴⁷ *Id.* § 2601(b)(3).

²⁴⁸ U.S. DEPT. OF LABOR, *supra* note 77.

²⁴⁹ Sec’y Tom Perez, *Failing Our Nation’s Working Families*, U.S. DEP’T OF LABOR BLOG (Oct. 31, 2014), <https://blog.dol.gov/2014/10/31/failing-our-nations-working-families/>.

²⁵⁰ Danielle Paquette, *How Donald Trump Could Change What it’s Like to Be a Parent in America*, WASH. POST, (Nov. 14, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/14/how-donald->

Insurance Leave Act (FAMILY Act) sits on a desk in the Committee on Finance office.²⁵¹ Though the FAMILY Act supports compensated leave, based on an insurance scheme, it leaves much to be desired in regards to the length of the leave entitlement, as it, like the FMLA, merely provides a twelve week entitlement.

V. STRIKING THE BALANCE WITH WORK & FAMILY

“The United States should introduce paid maternity and parental leave around childbirth at the federal level, to strengthen parental labour force attachment and give all American children the best possible start in life.”²⁵²

It is long overdue for Congress’s adoption of a standard for family leave, particularly parental leave upon the birth or adoption of a child, that adequately balances family values and the best interests of children against work. Thus, Congress should amend the FMLA or promulgate new legislation to provide new parents up to six months (twenty-four weeks) of parental leave, compensated at seventy-five percent of their pay for the first twelve weeks, not to exceed seventy-five percent of the national average weekly wage during those twelve weeks; compensated at sixty-five percent of pay for the subsequent six weeks, not to exceed sixty-five percent of the national average weekly wage during those six weeks; and compensated at fifty percent for the final six weeks of leave, not to exceed fifty percent of the national average weekly wage during those final six weeks of leave. The design of this system is front loaded. In front loading wage replacement to parents it simultaneously provides the needed income in the months surrounding the birth or adoption of a child, but, towards the back end of the leave entitlement the reduced wage replacement should

trump-could-change-what-its-like-to-parent-in-america/?utm_term=.3f8e35cd9e4a.

²⁵¹ The Family and Medical Insurance Act (FAMILY ACT) is a proposed bill that would create an insurance fund for paid parental and medical leave periods for up to twelve weeks. The latest action on this proposal was on March 18, 2015 when it was read twice and referred to the Committee on Finance. S. 786, 114th Cong. (2015-2016), available at <https://www.congress.gov/bill/114th-congress/senate-bill/786/text>; see also *Fact Sheet: Family and Medical Insurance Leave Act*, NAT’L P’SHP FOR WOMEN & FAMILIES (Mar. 2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf>.

²⁵² Adema, *supra* note 21, at 4.

encourage employees to return to work. Additionally, this wage replacement model is on par with that of California, New York, and the recommendations by the OECD. During the parental leave period, employees would receive approximately 66.25% of their wages at most.²⁵³ This system of paid parental leave would be employee-paid much like the New York and California statutes.²⁵⁴ Further, many of the restrictions and limitations of the FMLA mentioned above would still apply to such legislative parental leave.²⁵⁵ For instance, eligible employees must have worked for the employer for at least a year prior to taking leave, and the employer must have at least fifty employees on staff.²⁵⁶ Such legislation is a necessary means to achieve and promote work-family balance. Moreover, in comparison to countries such as the United Kingdom, Denmark, Norway, and France, these figures are not unachievable or lofty; they give children and their parents an economic boost, permit necessary time for bonding and development of relationships, and place critical value on the growth and support of families.

A. How Congress Could Implement Such a System of Parental Leave

Employee-paid legislative parental leave would necessarily involve an income tax.²⁵⁷ As it just so happens, Congress has the power to lay taxes and spend for the general welfare, and the Sixteenth Amendment permits Congress to tax all income.²⁵⁸ Further, Congressional control

²⁵³ Oh no! A Math Example: An employee makes \$100 per week, and \$2,400 in a twenty-four-week span. During the first 12 weeks, the employee would receive \$900 (1,200 x 0.75); during weeks 13-18, the employee would receive \$390 (600 x 0.65); and during weeks 19-24, the employee would receive \$300 (600 x 0.50); for a grand total of \$1,590. Using division, 1,590/2,400 = 0.6625 or 66.25% of an employee's wages.

²⁵⁴ CAL. UNEMP. INS. CODE § 3301 (West 2014); CAL. GOV'T CODE § 12945.2 (West 2016); S. Bill No. 6406, 238th Leg. (N.Y. 2015); N.Y. Workers' comp. Law § 204 (McKinney 2016); N.Y. LEGIS. 54 (2016), 2016 Sess. Law News of N.Y. Ch. 54 (S. 6406-C) (McKinney).

²⁵⁵ 29 U.S.C. § 2611(2-4).

²⁵⁶ *Id.* § 2611(2), (4).

²⁵⁷ S. Bill No. 6406, 238th Leg. (N.Y. 2015); N.Y. WORKERS' COMP. LAW § 204 (McKinney).

²⁵⁸ U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . ."); U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes

over interstate commerce, asserted similarly to the Family and Medical Insurance Act, could provide additional grounds for Congress to implement such legislation.²⁵⁹ If Congress implements a federal income tax for parental leave, comparable to the minimal tax in the New York system,²⁶⁰ of even one dollar per pay period, then parental leave has the potential to generate up to \$145 million bi-weekly and \$3.77 billion annually.²⁶¹

As of September 2016, the seasonally adjusted average weekly earnings for all employees on private nonfarm payrolls were \$887.18 or \$1,774.36 bi-weekly.²⁶² Over the course of the first twelve weeks of this proposed legislation, those utilizing parental leave would receive up to \$1,330.77 bi-weekly, for a total of up to \$15,969.24. During the six weeks at 65% pay, these new parents would receive up to \$1,153.33 bi-weekly, totaling \$6,920. Then, in the final six weeks, while receiving 50% of wages, the wage-replacement would be up to \$887.18 bi-weekly, totaling \$5,323.08. The maximum amount of wage-replacement available, even to the top 1% of earners, would be capped at \$28,212.32 over the span of six months or 24 weeks. This would provide parental leave for six months with moderate wage-replacement for up to 133,629 new parents employed full-time annually.²⁶³

on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration”).

²⁵⁹ U.S. CONST. art. I, § 8, cl. 3.

²⁶⁰ S. Bill No. 6406, 238th Leg. (N.Y. 2015); N.Y. WORKERS’ COMP. LAW § 204 (McKinney).

²⁶¹ See Chuck Vollmer, *United States Employment Analysis: Q3 2016* 8, JOBECONOMICS (Nov. 19, 2016), <http://jobeconomicsblog.com/wp-content/uploads/2011/11/Jobeconomics-U.S.-Employment-Analysis-Q3-2016-19-November-2016.pdf>. Using the figures indicating there are 145,000,000 Americans employed (113 million in the private sector and 32 million in the public sector) out of the country’s 325,000,000 population. 145 million workers each paying one dollar per pay period is \$145 million every two weeks, multiplied by twenty-six bi-weekly pay periods leads to an annual figure of roughly \$3.77 billion.

²⁶² Economic News Release, U.S. Dep’t of Labor: Bureau of Labor Statistics, Table B-3 (Dec. 2, 2016), *available at* <http://www.bls.gov/news.release/empsit.t19.htm>; *see also* News Release, U.S. Dep’t of Labor: Bureau of Labor Statistics, Real Earnings–November 2016 (Dec. 15, 2016), *available at* <http://www.bls.gov/news.release/pdf/realer.pdf>.

²⁶³ This figure assumes all new parents earn at the average weekly wage or above it.

Further, if such legislation is implemented slowly, again like the New York system, there is potential for the accumulation of funds prior to its effective date.²⁶⁴ Legislation could be enacted with an effective date two to three years in the future, while in the meantime, the available funds for parental leave would pool and accrue at an exponential rate.²⁶⁵ Moreover, in comparison to other countries such as those noted *supra* and other members of the OECD, the United States would finally be on par in terms of rate of pay during parental leave periods, and furthermore would be among the leaders in the amount of compensated leave time available to parents.

B. Why Congress Should Implement Such a System

Legislation providing longer, compensated parental leave must be implemented to truly achieve the purposes of the FMLA.²⁶⁶ Moreover, legislative parental leave is the most effective means to promote family values, is in the best interests of children, and has been recognized by the U.S. Department of Labor as an important issue the United States has yet to address.²⁶⁷

1. Family Values: Time is of the Essence

*“For an America of wisdom that honors the family,
knowing that if [as] the family goes, so goes our
civilization;”*²⁶⁸

There is a tendency of politicians to campaign promoting family values; the image of political candidates kissing a baby immediately comes to mind.²⁶⁹ Yet, rarely does the public hold U.S. elected officials accountable for the failure to improve upon the work-family

²⁶⁴ See S. Bill No. 6406, 238th Leg. (N.Y. 2015).

²⁶⁵ See *id.*

²⁶⁶ 29 U.S.C. § 2601(b).

²⁶⁷ U.S. DEP'T OF LABOR, *supra* note 77; see also Sec'y Tom Perez, *supra* note 249.

²⁶⁸ President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Feb. 6, 1985), available at <http://www.presidency.ucsb.edu/ws/?pid=38069>.

²⁶⁹ Jon Comulada, *Ever Wonder Why Politicians Kiss Babies? The Answer is Weirder than You Think*, UPWORTHY (Apr. 1, 2016), <http://www.upworthy.com/ever-wonder-why-politicians-kiss-babies-the-answer-is-weirder-than-you-think>; Dave Gilson, *Politicians Kissing Babies: A Short History*, MOTHER JONES (Jan. 17, 2012), <http://www.motherjones.com/media/2012/01/politicians-kissing-babies-brief-history>

balance and advancement of family values. True, no two families share all the same family values; indeed, some families focus and build on traditional and conservative values while many others share more contemporary and progressive values. But most families, if not all families, likely recognize the significance and the necessity of the parental caretaking functions and bonding experiences in the immediate aftermath of the birth or adoption of a child.²⁷⁰ Whether a traditional family or a contemporary family, whatever values a family builds upon, there is one overarching, constant, indispensable and irreplaceable element all families require: time together.²⁷¹ Time together sounds simple, yet the current parental leave system in the United States, the FMLA, works more to the benefit of businesses and to the detriment of budding families; forcing parents to return to work because of economic demands and hardships, rather than providing the requisite time and assistance to develop the foundation for a stable family. Vermont Senator Bernie Sanders best reverberates the notion that time together is a family value: “When a mother can’t spend time with her newborn child during the first weeks and months of life, that is not a family value.”²⁷² Furthermore, U.S. Department of Labor Secretary Perez has commented on the issue asking a simple question: “How can we say we’re for family values when so many women in the United States have to jeopardize their livelihood to take a few weeks off from work after giving birth?”²⁷³ Family values, whether traditional or contemporary, are directly influenced and promoted by longer, compensated parental leave legislation.

This article proposes increasing parental leave duration for up to twenty-four weeks, doubling the length of time permitted by the FMLA.²⁷⁴ In furtherance of family values, extended parental leave allows parents and newborns or adopted children the necessary amount of time to bond with one another, establishing the first and most essential familial relationships. Every other industrialized nation recognizes the effects parental leave has on the development, growth,

²⁷⁰ See Schneider, *supra* note 77; see also U.S. DEPT. OF LABOR, *supra* note 77.

²⁷¹ U.S. DEPT. OF LABOR, *supra* note 77.

²⁷² Bernie Sanders, *The Middle Class: It’s Time to Support Real Family Values*, BERNIE 2016 (June 17, 2015), <https://berniesanders.com/time-to-support-real-family-values/>.

²⁷³ Sec’y Tom Perez, *Guess Who’s Leading on Paid Leave? (Hint: Not Us)*, U.S. DEP’T OF LABOR BLOG (Sept. 22, 2014), <https://blog.dol.gov/2014/09/22/guess-whos-leading-on-paid-leave-hint-not-us/>.

²⁷⁴ See 29 U.S.C.A. § 2612(a)(1).

and support of families. OECD member countries provide on average 18.5 weeks of leave for mothers and nine weeks of leave for fathers by legislated maternity and paternity leave policies, while parental leave policies supplement maternity and paternity leaves.²⁷⁵

The FMLA's parental leave provision as it presently stands does not provide families enough time together, although it presupposes to. In practice, the twelve weeks of unpaid leave rush parents to return to work sooner for fear of falling behind on bills and an inability to care for dependent newborn children because of the lack of wage replacement. This policy is not only counter to the promotion of family values, but also counter to the best interests of dependent children and does not provide children or parents a satisfactory amount of leave.

2. Best Interests of Children

The best interests of children must be considered of paramount importance in parental leave legislation. As noted, *supra*, state courts and legislatures have recognized and addressed the importance of such determinations concerning virtually every proceeding where children may be involved.²⁷⁶ The most important and analogous considerations from the legislative approach to the best interest of the child determination as it pertains to parental leave include: the significance of family integrity; the health, safety, and protection of the child; adequate care and treatment for the child provided by the parents;²⁷⁷ the development of emotional relationships between the child and the parents and other household members or caregivers; the furnishing of the necessary food, clothing, and medical needs of the child and establishment of a safe home; taking care of any mental or physical health-related needs the child may have; and, the mental and physical health status of the parents.²⁷⁸ Maine, for instance, has one of the most exhaustive statutes listing relevant factors to be considered.²⁷⁹ On the issue of parental leave, perhaps the most relevant factors from the Maine statute regard: the age of the child and whether the child is being breast-fed; the relationship of the child with the parents; a desirability of maintaining continuity; the motivation and capacities of caregivers to give love and affection; adjustment to the home; a

²⁷⁵ Adema, *supra* note 21, at 73 and 77.

²⁷⁶ Kohm, *supra* note 85, at 337.

²⁷⁷ Child Welfare Information Gateway, *supra* note 109.

²⁷⁸ *Id.*

²⁷⁹ ME. REV. STAT. tit. 19-A, § 1653(3) (2004).

consideration of frequent and continuing contact between the child and the parents; the ability of the parents to learn how to cooperate in child care and child rearing; the effect on the child if one parent has sole authority regarding the child's upbringing; and all other factors having a reasonable bearing on the physical and psychological well-being of the child.²⁸⁰

Compensated parental leave for twenty-four weeks is in the best interests of children under one year of age because it allows for necessary bonding and attachment between parents and children.²⁸¹ Bonding is the formation of close personal relationships between parents and newborn children.²⁸² The formation of these close personal relationships often occurs naturally for parents, especially mothers, as they hold, gently rock, sing and talk to their newborn infant.²⁸³ The optimum time for bonding is in the first few days of life, but there are many bonding opportunities and experiences during the infant's first year of life.²⁸⁴ Furthermore, the bond between parents and infant child is vital.²⁸⁵ "Secure early bonding is the difference between the baby that grows up a secure, emotionally capable adult, and a baby that will become a depressive, anxious child, who will not cope well with life's ups and downs."²⁸⁶ Indeed, failure of parents to bond with an infant child profoundly affects future development and the child's ability to form and maintain healthy relationships in adulthood.²⁸⁷ Parents should be urged to spend as much time with infant children as possible to respond to the infant's cues, such as crying, by holding, calming, and nursing the child.²⁸⁸ Children that receive this sort of attention and

²⁸⁰ *Id.* § 1653(3)(A)-(B), (D), (F)-(I), (K), (N), (P) (2004).

²⁸¹ Mary Beth Steinfeld, *The Importance of Infant Bonding*, UC DAVIS MEDICAL CENTER (2016), http://www.ucdmc.ucdavis.edu/medicalcenter/healthtips/20100114_infant-bonding.html (last visited May 5, 2017); A. Woodward, *Bonding*, JRANK ARTICLES (2016), available at <http://psychology.jrank.org/pages/85/Bonding.html>.

²⁸² A. Woodward, *supra* note 281.

²⁸³ Steinfeld, *supra* note 281.

²⁸⁴ *Id.*

²⁸⁵ *Id.*; see also Andrea Leadsom, *Why Secure Early Bonding is Essential for Babies*, THE GUARDIAN (Sept. 12, 2012) <https://www.theguardian.com/socialcarenetwork/2012/sep/12/secureearlybondingessentialbabies>.

²⁸⁶ Leadsom, *supra* note 285.

²⁸⁷ Steinfeld, *supra* note 281; Leadsom, *supra* note 285.

²⁸⁸ Steinfeld, *supra* note 281.

adequately bond with parents tend to be more secure in their development of self, relationships with others, and view the outside world as a “friendly” place.²⁸⁹ When parents and infants bond over a period of time, that bonding establishes an attachment between them.²⁹⁰ Attachments are long-standing, close, personal and emotional bonds between an infant and its parents. They provide the infant with safety, comfort, and security.²⁹¹ The formation of healthy attachments is critical for the social and emotional development of children and is “the first social milestone of infancy.”²⁹² Legislated twenty-four-week parental leave promotes the growth of these emotional relationships between infant children and parents.

Although now a minority approach and almost completely disfavored, the tender years doctrine, and its presumption of custody to the mother, lends some support to the formation of bonds and attachments to the birth mother.²⁹³ The tender years presumption generally applied to children under the age of seven and put significant weight on the importance of the mother-child bond.²⁹⁴ Likewise, the tender years presumption emphasized a preference to breastfeed infant children.²⁹⁵ These considerations under the tender years doctrine presumed that the bonding and attachment of the infant to its birth mother was of primary importance over those bonds and attachments the infant would make with other caregivers.²⁹⁶ But, the presumption also considered the importance of the child’s growth at the most tender of ages, both physiologically and mentally; as such these considerations are of interest, here, and applicable to the best interests

²⁸⁹ Steinfeld, *supra* note 281; Leadsom, *supra* note 285; *see also* Marjorie L. Rand, *As It Was in the Beginning: The Significance of Infant Bonding in the Development of Self and Relationships*, J. OF CHILD & YOUTH CARE, Vol. 10, 4, 1-8, *available at* <http://dreamhawk.com/pregnancy-childbirth/infant-bonding-development-self-relationships/>.

²⁹⁰ OPENSTAX COLLEGE, PSYCHOLOGY, 310 (Rice University 2016) *available at* <https://d3bxy9euw4e147.cloudfront.net/oscms-prodcms/media/documents/Psychology-LR.pdf>; Steinfeld, *supra* note 281 (“When a caregiver consistently responds to an infant’s needs, a trusting relationship and lifelong attachment develops.”).

²⁹¹ *Attachment*, JRANK ARTICLES (2016) <http://psychology.jrank.org/pages/49/Attachment.html>.

²⁹² PSYCHOLOGY, *supra* note 290.

²⁹³ Elrod, *supra* note 86

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

of the child as analogous grounds for longer parental leave, especially regarding maternity leave.

The first few months of a child's life is a critical period in physical development.²⁹⁷ From the first few months of life until the age of three, the child is in a period of rapid advance and heightened vulnerability as physiological changes occur.²⁹⁸ The body experiences exponential growth during this period and the child's metabolism requires a wealth of nutrition for it to occur.²⁹⁹ Failure to provide the infant with nutritional needs can result in cognitive delays, lethargy, and an immunodeficiency.³⁰⁰ Breastfeeding provides infant children the nutritional diet necessary to facilitate physiological growth.³⁰¹ Furthermore, exclusive breastfeeding for infants is advised for the first six months, and recommendations for continued breastfeeding, past six months, reach up to two years.³⁰² However, mothers find it difficult to breastfeed beyond the first few weeks of the infant's life because of the need to return to work.³⁰³ This is significant because breastfeeding is associated to several health benefits in infants.³⁰⁴ This is due to the contents of breast milk; it contains the proteins, sugars, and fats infant children require.³⁰⁵ Breast milk also provides infants with antibodies, immune factors, enzymes, and white blood cells; all of which benefit the immune system.³⁰⁶ These offer protections against disease and infection that the breastfeeding alternative, formula, cannot.³⁰⁷

²⁹⁷ Ross A. Thompson, *Development in the First Years of Life*, THE FUTURE OF CHILD. Vol. 11, No. 1, at 23 (2001).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ AM. ACAD. OF PEDIATRICS, *Breastfeeding Benefits Your Baby's Immune System*, HEALTHYCHILDREN.ORG (last updated Jan. 1, 2006), <https://www.healthychildren.org/English/ages-stages/baby/breastfeeding/Pages/Breastfeeding-Benefits-Your-Babys-Immune-System.aspx> [hereinafter HEALTHYCHILDREN.ORG]; see also Michael Baker & Kevin Milligan, *Maternal Employment, Breastfeeding, and Health: Evidence from Maternity Leave*, J. HEALTH ECON. Vol. 27, 871, 871 (2008).

³⁰² Baker, *supra* note 301, at 871.

³⁰³ *Id.* at 872 (“Mothers report that the need to return to work is the leading reason to stop breastfeeding at longer durations.”).

³⁰⁴ *Id.* at 884.

³⁰⁵ HEALTHYCHILDREN.ORG, *supra* note 301.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

Likewise, allowing mothers to take longer leave periods to breastfeed and care for infants has been linked to reduced rates of asthma, ear infections, and other chronic illnesses.³⁰⁸ Furthermore, some associate breastfeeding with psychological benefits by offering reassurance of continued physical presence, a sense of continuity and protection, love, and encourages the growth of bonding and attachment relationships.³⁰⁹ Thus, twenty-four weeks of parental leave promotes breastfeeding and caretaking by allowing mothers the opportunity to do so until the child is approximately six months old, in line with the advised length of time for exclusive breastfeeding.³¹⁰

On top of all the physiological developments and changes infants experience, they are also mentally and cognitively developing from the moment they are born.³¹¹ During infancy, the mind is in its most malleable state, and in the course of this formative stage the foundation for cognitive growth concerning concepts, causation, memory, and problem solving develops.³¹² However, all of the cognitive growth and learning that occurs during infancy requires sensitive parenting to act as the essential catalyst.³¹³ This is true because active learning during infancy occurs in a social context.³¹⁴ “[C]hildren are active participants in their own development, the most sensitive care is that which is aligned with the child’s interests, needs, and goals.”³¹⁵ Moreover, the social context in which active learning develops starts with the most basic primary group, the family, and particularly the parents. These “. . . early relationships matter,” and “society is wise to value those who relate to young children daily.”³¹⁶ Paid parental leave for twenty-four weeks strengthens those relationships and therefore empowers early cognitive development of infant children, and is in the best interests of children.

Longer mandated parental leave provides families with stability and promotes familial continuity primarily because it allows for the growth of the emotional relationships between parents and children, as

³⁰⁸ Baker, *supra* note 301, at 884.

³⁰⁹ HEALTHYCHILDREN.ORG, *supra* note 301.

³¹⁰ Baker, *supra* note 301, at 871.

³¹¹ Thompson, *supra* note 297, at 23-24.

³¹² *Id.*

³¹³ *Id.* at 23.

³¹⁴ *Id.* at 25.

³¹⁵ *Id.* at 32.

³¹⁶ *Id.*

well as, between both parents. A time entitlement for bonding and attachment, as stated *supra*, establishes stability and continuity within the family, and promotes the emotional development of the child. Enforcing stability and continuity by way of parental leave, motivates and enhances the abilities of parents to bestow and exemplify love and affection to their children and spouse, by lessening some of the other stressors associated with parenting.³¹⁷ Moreover, an entitlement to longer parental leave reinforces the ability of new parents to learn how to perform caretaking functions cooperatively. Cooperative caretaking and parenting is essential to childrearing. Likewise, if one or both parents are required to return to work too early, it not only impedes upon the cooperative parenting function, but also may give one parent more authority over the upbringing of the child.

Upon the birth or adoption of a child, the child's best interests during such tender years is best served when parents can take leave from work to spend time bonding, establishing attachments, and taking care of the child. Longer, compensated parental leave legislation, specifically a twenty-four-week leave entitlement, if nothing else, is in the best interests of children.³¹⁸

C. Arguments Against Paid Parental Leave Legislation

Three primary arguments against legislation providing for parental leave come up: (1) who pays for the leave; (2) taxation upon those who never have children or do not wish to have children are unfair; and, (3) mandated parental leave will have a substantially negative impact on small businesses.³¹⁹ These are important questions, nevertheless they are answerable.

³¹⁷ See generally Charlyn Harper Browne, *Strengthening Families: A Protective Framework*, CENT. FOR THE STUDY OF SOC. POL'Y (2014), http://www.cssp.org/reform/strengtheningfamilies/2014/The-Strengthening-Families-Approach-and-Protective-Factors-Framework_Branching-Out-and-Reaching-Deeper.pdf.

³¹⁸ In fact, the United States Department of Labor recognized as much when they developed and released the “#LeadOnLeave” campaign in 2014. See U.S. DEPT. OF LABOR, *supra* note 77.

³¹⁹ See Hope Racine, *6 Common Arguments Against Paid Maternity Leave & The Best Ways You Can Counter Them*, BUSTLE (Aug. 4, 2015), <https://www.bustle.com/articles/101860-6-common-arguments-against-paid-maternity-leave-the-best-ways-you-can-counter-them>; Jon Gunnarsson, *Against Parental Leave*, A VOICE FOR MEN (Nov. 18, 2014), <https://www.avoiceformen.com/miscellaneous/against-parental-leave/>; Nita Ghei, *The Argument Against Paid Family Leave*, NEWSWEEK (Aug. 4, 2009) <http://www.newsweek.com/argument-against-paid-family-leave-78741>; see also

First, the system would be financed under a payroll deduction tax scheme. Therefore, all employees in the national work force pay into the fund as part of their federal income tax and thereby pay for parental leave. As explained and outlined *supra*, similar schemes have been implemented across OECD countries, California, and will soon exist in New York.³²⁰ Moreover, such policies have been and remain successful and critical to the lives of parents and their newborn or adopted children.³²¹

Second, whether such a system is fair to those taxpayers who do not have children or have chosen not to do so, at first glance taxation on this population's income may seem unfair. However, this presupposed unfairness is inconsequential in the grand scheme because parental leave is not simply for the parents and the children, the broader hope is that it has positive and lasting future effects on society en bloc. The issue in the United States is that of "American exceptionalism,"³²² where having children and raising a family is viewed less as a public good than an individual choice. This is not true because having children—population growth—is an economic

Discussion: Paid Parental Leave Benefits Everyone, REDDIT (last visited Jan. 1, 2017), https://www.reddit.com/r/PurplePillDebate/comments/46lmlm/discussion_paid_parental_leave_benefits_everyone/; *What Does Men's Rights Think About Parental Leave*, REDDIT (last visited Jan. 1, 2017), https://www.reddit.com/r/MensRights/comments/15umj0/what_does_mens_rights_think_about_parental_leave/; *In an Ideal World, How Would You Like to See Parental Leave Managed?*, REDDIT (last visited Jan. 1, 2017), https://www.reddit.com/r/childfree/comments/1v7qyx/in_an_ideal_world_how_would_you_like_to_see/; *Should Paid Parental Leave be Federally Mandated?*, REDDIT (last visited Jan. 1, 2017), https://www.reddit.com/r/FeMRADebates/comments/30227d/should_paid_parental_leave_be_federally_mandated/.

³²⁰ See Adema, *supra* note 21, at 71-91; Cohen, *supra* note 117, at 221-22; NY LEGIS 54, *supra* note 139.

³²¹ See also Steinfeld, *supra* note 281; Leadsom, *supra* note 285; see generally THE BEGINNING OF LIFE, *supra* note 23; Adema, *supra* note 21.

³²² See also Emily Tamkin, *Paid Leave and a Different Kind of American Exceptionalism*, NEW AMERICA WEEKLY (Apr. 21, 2016), <https://www.newamerica.org/weekly/120/paid-leave-and-a-different-kind-of-american-exceptionalism/>; Anu Partanen, *I Moved to the U.S. Seven Years Ago From Finland – Here's What Americans Don't Understand About Nordic Countries*, BUSINESS INSIDER (Mar. 19, 2016, 11:08 AM), <http://www.businessinsider.com/what-americans-dont-understand-about-nordic-countries-2016-3>; see generally Saul Levmore, *Parental Leave and American Exceptionalism*, 58 CASE W. RES. L. REV. 203 (2007).

necessity.³²³ Further, working taxpayers that do not claim any child dependents can be eligible for a tax refund based on the length of time the individual has paid parental leave taxes (i.e. a person who has paid for 10 years gets 25% of payments back, 20 years gets 50% back, 30 years gets 75% back, and 40+ years is exempt from the taxation).

Finally, small business will not suffer as the criteria for eligibility will not differentiate from that of the FMLA, which only applies to businesses that employ fifty or more employees.³²⁴ On this front, Michael Porter makes a compelling case for social policies like parental leave to be left for business to handle.³²⁵ The problem is business has yet to handle the issue. Prior to the FMLA, most working parents received little job protection and no wage replacement.³²⁶ Furthermore, in the twenty-three years since the enactment of the FMLA, there have been minimal changes to expand the protections and entitlements it granted, even given the changes in the family dynamic and workplace demographics. However, credit must be given to those companies that have expanded the parental leave benefits available to employees; companies such as Netflix (fifty-two weeks), the Bill & Melinda Gates Foundation (fifty-two weeks), Etsy (twenty-six weeks), Adobe (twenty-six weeks), Spotify (twenty-six weeks), Cisco (twenty-six weeks), and Ebay (twenty-four weeks) all provide twenty-four weeks or more of paid parental leave.³²⁷

³²³ See also Claire Cain Miller, *The Economic Benefits of Paid Parental Leave*, N.Y. TIMES, Jan. 30, 2015, available at http://www.nytimes.com/2015/02/01/upshot/the-economic-benefits-of-paid-parental-leave.html?_r=1&abt=0002&abg=0; Claire Cain Miller, *Obama Says Family Leave is an Economic Necessity, Not Just a Woman's Issue*, THE N.Y. TIMES, Jan. 21, 2015, available at <http://www.nytimes.com/2015/01/21/upshot/obama-says-family-leave-is-an-economic-necessity-not-just-a-womens-issue.html>; see generally Levmore, *supra* note 322.

³²⁴ See 29 U.S.C.A. § 2611.

³²⁵ See Michael Porter, *The Case for Letting Business Solve Social Problems*, TED GLOBAL (June 2013), https://www.ted.com/talks/michael_porter_why_business_can_be_good_at_solving_social_problems/transcript?language=en.

³²⁶ See generally S. REP. NO. 103-3, at 1-51 (1993).

³²⁷ See Elizabeth Trompeter, *50 Companies with great Maternity Leave*, CARE@WORK (July 27, 2016), <http://workplace.care.com/50-companies-with-great-maternity-leave>; Eric Reed & Rebecca Borison, *Eight Best Companies for Paid Parental Leave*, THE STREET (Mar. 16, 2016, 3:12 PM), <https://www.thestreet.com/story/13249442/4/7-best-companies-for-paid-parental-leave.html>.

VI. CONCLUSION

The FMLA is in dire need of an update and an expansion. The United States is in the company of only Lesotho, Swaziland, and Papua New Guinea when it comes to parental leave, and remains far behind most of the OECD member countries. The proposal set forth in this article not only promotes value of the family, but is also in the best interests of children. Likewise, this proposal brings the United States to the forefront as a global leader in parental leave.