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WE ARE FAMILY?
EXAMINING PARENTAL LEAVE AND
NON-NORMATIVE PARENTS IN THE UNITED STATES

Abstract

This article will examine parental leave and the non-normative parent. Parental leave in the United States is currently a hot-button issue. With so much focus on the “Opt-Out” Generation, “Leaning In,” and whether women can in fact “have it all,” the issues faced by parents who are not educated, upper class, and in a heterosexual marriage relationship with the biological father are often ignored in the discussion of how the law is lacking. Instead, the discussion has focused on women at the top echelon of employment. In doing this, a large segment of the population is being completely left out of the efforts to make comprehensive change in parental leave laws.

Parental leave, as it currently stands in the United States, is a privilege rather than a right; this must change to account fully for the most comprehensive parental leave possible. In order for the entire nation to progress in this area, the needs of all must be considered in the creation and application of parental leave laws and policies. This paper will examine how laws in the United States are currently structured and applied for all parents. Specifically, it will examine how the Family and Medical Leave Act is insufficient to meet the needs of homosexual parents, single parents, and low-income parents. It will then suggest how the laws can be changed to account for the current gaps.

INTRODUCTION

“I don't want to take on the mantle of all womanhood and fight a fight for some sister who isn't really my sister because I don't even know her.”¹ This statement was not made by an early nineteenth- or twentieth-century feminist; it was made by a highly educated woman in a 2003 article entitled *The Opt-Out Revolution*.² This article, one of the most prominent articles regarding the work-life balance of the twenty-first century thus far, featured bright women who “chose” to leave their distinguished positions at top organizations to stay home with their children. The article sparked a national conversation about women as mothers and workers, and how these women who were supposed to succeed at work and instead chose to leave work reflected the women’s movement. Women featured in the article graduated with impressive degrees from the highest ranked institutions in the nation and worked for prominent organizations; and yet they noticed something missing with work and decided to stay with their children. As the quotation above shows, these women did not believe their decision reflected the women’s movement; rather, they saw it as a choice in finding fulfillment for themselves and their families.

Fast forward ten years, and a follow-up article was published explaining that many of the women featured in the original piece were now struggling at home and trying to reenter the workplace.³ Their husbands became accustomed to them being homemakers and did not approve of sharing housework or the women going back outside the home to work. These articles have sparked a broad discussion of feminism generally, and of women choosing between the home and the workplace specifically. Numerous commentators have picked up on these messages and

¹ Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>.

² *Id.*

³ Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES, (Aug. 11, 2013), http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all&_r=0.

addressed the issues brought up in these articles.⁴ But all of this discussion has focused solely on one small group: the white, educated, privileged, heterosexual married woman.

By focusing on only one group, relevant voices are being ignored. The voices of women in the highest echelons of the workplace are not the only ones. In order to have a productive discussion, parents from all positions, backgrounds, workplaces, education levels, and geographic locations must participate. Until we have this full and forthright discussion, real, impactful change will not happen. One subgroup of voices in a much larger group is in no way more important than any other; all voices are equally important and relevant. Every voice must be included and truly considered in order to bring about effective change in businesses, in homes, and in the law.

In order for the entire nation to progress in this area, the needs of all must be considered in the creation and application of parental leave laws and policies. Parental leave, as it currently stands in the United States, is a heteronormative idea; this must change to provide for the most comprehensive parental leave possible. The discussion of the manner in which to change the laws in this area remains bound in notions of privilege. The law in this area must change to reflect the needs of all families instead of just the privileged heteronormative families, and the only way this will happen is by bringing all types of voices and experiences into the efforts to change the law and the culture the law is bound in.

While it may be unclear whether the law or the culture is more likely to change first, this paper will examine the changes the law can make. Change in the law will likely sprout further change in the cultural paradigm as it exists now. It can be argued that change must happen in society before the law imposes itself on culture when such deeply seated expectations exist and are far away from

⁴ See Amanda Hess, *The New Opt-Out Revolution: Not Having Kids*, Slate.com, (Aug. 7, 2013), http://www.slate.com/blogs/xx_factor/2013/08/07/the_opt_out_revolution_revisited_instead_of_staying_at_home_the_new_opt.html; see also Deborah L. Jacobs, *Why Opt-Out Moms Can't Catch Up*, Forbes, (Aug. 12, 2013), <http://www.forbes.com/sites/deborahljacobs/2013/08/12/why-opt-out-moms-cant-catch-up/>; see also Nanette Fondas, *The Many Myths About Mothers Who Opt-Out*, The Atlantic, (Mar. 25, 2013), <http://www.theatlantic.com/sexes/archive/2013/03/the-many-myths-about-mothers-who-opt-out/274354/>.

being changed themselves. However, the law can make certain changes, and social changes can occur after these legal alterations and impositions. Attempts to change a cultural paradigm can be approached from many different angles; an attempt to change the law is one such avenue to ignite social change. Additionally, public opinion suggests that a vast majority of the American public supports stronger parental leave laws.⁵ As such, this paper will support a change in the law as a way to change the deeply embedded cultural expectations of gender, family, and the workplace. This article will argue that cultural changes will follow from the proposed legal changes advanced here.

To accomplish these tasks, section II examines the creation of the Family and Medical Leave Act (FMLA), including the feminist theory underlying its enactment. Section III shows how the FMLA applies in reality, arguing that few, if any, interests are truly served by the law as it currently stands. This section examines the impact on employers and employees generally, and the way in which the FMLA applies to homosexual, single, and low-income parents specifically. In doing so, the section shows how the law is lacking for particular groups of parents. Section IV describes how the law must change to bolster the interests of all groups of Americans. This section explains the elements necessary for any new law and suggests the mechanism by which to implement such laws in an effective manner in order to further the interests of all Americans.

I. BACKGROUND OF PARENTAL LEAVE LAWS

Parental leave is a fairly new concept in the United States.⁶ However, it is ever more important as the workforce has increased drastically over recent decades. Some reasons for this

⁵ A 2013 YouGov Poll found that 74% of Americans believe paid sick leave should be required and 61% believe paid maternity leave should be required. http://big.assets.huffingtonpost.com/toplines_paidleave_0617182013.pdf. Further, a 2012 poll conducted by Lake Research & Tarrance Group for the National Partnership for Women & Families found that 86% of Americans believed that it was very or somewhat important that the President and Congress work to create new laws that assist families with family and sick leave. http://go.nationalpartnership.org/site/DocServer/Lake_Research_and_Tarrance_Group_Omnibus_Poll_Results_fo.pdf?docID=11581.

⁶ The Family and Medical Leave Act, which was the first comprehensive law to deal with parental leave in the United States, was passed in 1993.

increase include the increase of women and minority participation, as well as a growing economy.⁷

As the number of parents participating in the workforce increases, the laws need to account for this change. Not until the passage of the Family and Medical Leave Act (FMLA) in 1993 did the federal government really pay attention to the tension between parenting and working. This section examines the laws and policies leading up to the 1993 change, the elements and purpose that the 1993 FMLA contained, and the feminist theories that grounded the law.

A. History of Parental Leave Prior to the FMLA

Prior to 1993, the only law related to childbirth at the federal level was the Pregnancy Discrimination Act (PDA). The PDA only dealt with women who, upon its enactment, could not be discriminated against because of pregnancy, childbirth, or a related medical condition.⁸ The law says nothing regarding parenting, and instead only deals with the act of childbirth. As such, someone could not legally be discriminated against for having a child, but then could not have any legal protection against discrimination to care for that same child.

Twenty-three states had their own family and medical leave laws before the FMLA was enacted.⁹ These laws acted as guideposts in the creation of the federal law. Yet none of these measures was comprehensive enough to reach families nationwide and touch upon the issues families nationwide faced when trying to both raise and support their children. With the increasing number of workers, the federal government needed to take action to change this lack of support for families.

B. The Family and Medical Leave Act of 1993

⁷ Suzanne M. Bianchi, *Changing Families, Changing Workplaces*, The Future of Child. (Fall 2011), at 15-16, available at http://futureofchildren.org/futureofchildren/publications/docs/21_02_02.pdf.

⁸ 42 USCS § 2000e *et. seq.* (2011).

⁹ NAT'L P'SHIP FOR WOMEN & FAMILIES, DADS EXPECT BETTER: TOP STATES FOR NEW DADS 4 (2012), available at http://go.nationalpartnership.org/site/DocServer/Dads_Expect_Better_June_2012.pdf.

The FMLA was signed into law by President Bill Clinton in February 1993 after over eight years of debate in Congress and two vetoes by President George H.W. Bush.¹⁰ Statistics from this time show the great need for this legislation, especially the number of women in the workforce, the number of families with both adults working, and the number of single parents.

An examination of the FMLA's language and purpose suggests that it was influenced by liberal equality theory. The goal of liberal equality theory is to maximize individual choice, without regard to gender or any other characteristic.¹¹ At the most basic level, liberal equality theory posits that men and women should be treated alike.¹² This is the most normalized and generally accepted feminist theory.¹³ The FMLA's gender-neutral language reflects liberal equality theory's goal of encouraging similar treatment regardless of gender. Additionally, in theory, the FMLA provides for maximum choice because it allows for any parent to stay home after the birth of a child, provided the relevant criteria are met. While these elements would suggest the FMLA is grounded in liberal equality theory, the application of this law as it currently stands shows that the goals of this theory are not being met.

1. *Purpose of the FMLA*

According to Congress, the FMLA was implemented in order "to balance the demands of the workplace with the needs of families, to promote stability and economic security of families, and to promote national interests in preserving family integrity."¹⁴ In order to achieve this purpose, Congress created a twelve-week unpaid job-guaranteed leave for parents and immediate family

¹⁰ Eric Daniel, Note, *Family and Medical Leave Act Reform: Is Paid Leave the Answer?*, 51 CLEV. ST. L. REV. 65, 67-8 (2004).

¹¹ See generally Mary Anne Case, *No Male or Female*, Univ. of Chicago, Public Law Working Paper No. 266 (June 2009).

¹² Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 251 (1998), also available at: <http://ir.lawnet.fordham.edu/flr/vol67/iss2/2/>.

¹³ See *id.* (explaining that other major theories of feminism arise as critiques of formal, or liberal, equality theory).

¹⁴ 29 U.S.C. § 2601(b)(1) (2011).

members to leave work due to the birth or adoption of a child or a serious health condition of an immediate family member.¹⁵

The FMLA was implemented after many years of research and data gathering. Congress found that homes in which a single parent or both parents were working had increased significantly in recent years, and that this trend was likely to continue.¹⁶ It found that children and families benefit if both parents participate in care, even though the current cultural paradigm provided that, to women's detriment, women stayed home to care for the children and men worked to financially support the family.¹⁷ It also found that parents were often forced to choose between caring for children and working because of the lack of job security around the time a child is born and parenting begins.¹⁸ A Senate Report issued during the discussion of the bill stated that: “[p]rivate 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. This failure continues to impose a heavy burden on families, employees, employers and the broader society.”¹⁹

While the policy rationales mentioned above are positive, upon close examination the law is severely lacking for multiple reasons. That is not to say the law was not a necessary first step – it was very much necessary. However, on its now twentieth anniversary, the world has continued to change and the law must also change to reflect the world it governs. The issues the law was meant to address have not changed enough, though. The gendered division of labor and provisions of support available to new parents remain important issues that all families in the United States face in one way or another. It is true that some parents are able to take time off for a newborn. However, only a small percentage of parents are able to take the recommended time off for the birth of a child

¹⁵ While serious health conditions are a critical part of the FMLA, their separation from childbirth and the initiation of parenting, where real change in habits can most easily be effectuated, puts them outside the scope of this paper. As such, serious health conditions will not be discussed at this time.

¹⁶ 29 U.S.C. § 2601(a)(1) (2011).

¹⁷ 29 U.S.C. § 2601(a)(2), (5) (2011).

¹⁸ 29 U.S.C. § 2601(a)(3) (2011).

¹⁹ S. REP. NO. 103-3, at 4 (1993).

without facing some type of consequence.²⁰ This shortcoming shows that society had many issues that the FMLA was meant to address, but that have not been corrected even twenty years after its passage. These deficiencies make it clear that the FMLA has not furthered its purpose and must be reformed to bring about real impactful change.

2. *Language of the FMLA*

To further the above-stated purpose, the FMLA uses gender-neutral language to create family and medical leave policies. To be considered an eligible employee under FMLA, the employee must have worked 1,250 hours in twelve working months, and must have worked for the employer from whom she is requesting leave for that twelve-month period.²¹ The twelve months of working for the covered employer need not be consecutive months, according to the U.S. Department of Labor FMLA Fact Sheet.²² The employee must work for an employer who employs more than fifty people within a seventy-five mile radius from that employee's work site.²³ The law only applies to employers with more than fifty employees who work each workday of a minimum twenty-week period during the calendar year.²⁴ Based on these requirements, small businesses are excluded from FMLA coverage.

A son or daughter is defined in the law as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is under eighteen years old.²⁵ Spouse, as used in the law, "means a husband or wife, as the case may be."²⁶ This has been defined as a marriage relationship as it is recognized in the state the employee resides. This is positive for

²⁰ Only about half of the nation's employees qualify for FMLA leave. Of those that do qualify but do not take leave, with the vast majority citing financial reasons. *See SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, WORKING PARENTS' LACK OF ACCESS TO PAID LEAVE AND WORKPLACE FLEXIBILITY 4* (2012).

²¹ 29 U.S.C. § 2611 (2)(A)(i),(ii) (2011).

²² U.S. DEPT. OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT (2012).

²³ 29 U.S.C. § 2611 (2)(B)(ii).

²⁴ 29 U.S.C. § 2611(4)(A)(i).

²⁵ 29 U.S.C. § 2611(12)(A). The law also considers a son or daughter to be a child over 18 years of age who is incapable of self-care due to a physical or mental disability. 29 U.S.C. § 2611(12)(B).

²⁶ 29 U.S.C. § 2611(13).

homosexual couples who live in one of the thirty-five states where gay marriage is legal, but negative for homosexual couples who live in states that do not legally recognize same-sex marriage.²⁷ In addition, certain couples – domestic partners, cohabitants, non-married couples – are obviously precluded from the definition of spouse and therefore not able to receive the benefits accorded to couples who choose to recognize their relationship in the way society deems appropriate.

Beyond these definitions, the law provides that an eligible employee is entitled to twelve weeks of job-guaranteed leave during a twelve-month period “[b]ecause of the birth of a son or daughter of the employee,” or because a child is placed with the employee for foster care or adoption.²⁸ Job-guaranteed leave means that an employee’s same job may not be provided upon return, but a job at the same level and pay grade will be guaranteed. It is important to note that, unless both the employer and employee agree otherwise, this leave cannot be taken intermittently or on a reduced leave schedule.²⁹ Because of the inherent unequal bargaining power between an employer and an employee, flexibility for an alternative leave schedule is essentially up to employers. Flexibility is also not in any way incentivized by the federal government. There is no requirement that this leave be paid; however, an employer can substitute any paid leave the employee has accrued for any portion of the unpaid leave period.³⁰ This includes vacation or sick time, thus limiting any potential paid amount based upon prior health or wellness issues. The employee is supposed to provide at least thirty days’ notice prior to the start of the leave time when the leave time is foreseeable, such as for the birth of a child or the placement of an adopted or foster child.³¹ The law

²⁷ See FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited January 16, 2014).

²⁸ 29 U.S.C. § 2612(a)(1)(A)-(B) (2011).

²⁹ 29 U.S.C. § 2612(b)(1) (2011).

³⁰ 29 U.S.C. § 2612(c)-(d) (2011).

³¹ 29 U.S.C. § 2612(e)(1) (2011).

does state that if a leave is to begin in less than thirty days the employee should advise his employer of the leave as soon as practicable.³²

II. APPLICATION OF THE FMLA

While the gender-neutral purpose and language of the FMLA have moved family leave policies in the United States in the right direction, large gaps remain. Specifically, the law does not do enough to enable parents to utilize leave or to incentivize employers to provide leave beyond that which is required. This hurts children and families, the workplace, and the nation as a whole. This section examines the way in which the FMLA applies for employers, including the benefits and obstacles to providing leave under the FMLA. It then explains how the FMLA applies for workers. This portion ends by taking a close look at how the law applies to groups often not considered in the discussion of parental leave: homosexual parents, single parents, and low-wage parents.

A. *FMLA Application for Employers*

Only about half of the nation's employees are covered by the FMLA.³³ The nuances of the law have had very real consequences – some good, some bad – for covered workplaces and their employees across the nation.

A 2012 study shows that the number of employers who provide at least twelve weeks of leave for women after the birth of a child has increased from seventy-nine percent in 2005 to ninety-one percent in 2012.³⁴ While this is a positive step, the number of leaves granted to spouses or partners of women who gave birth and employees who adopted children has decreased during that same time period.³⁵ The study did note that this decrease reflected the trend that, in part due to the

³² *Id.*

³³ Glynn, *supra* note 13, at 4.

³⁴ Kenneth Matos & Ellen Galinsky, 2012 NATIONAL STUDY OF EMPLOYERS 18 (2012); available at: http://familiesandwork.org/site/research/reports/NSE_2012.pdf.

³⁵ *Id.*

recession during that time period, employers have decreased the availability of flex-time away from the office.³⁶

Employers state that the most important reasons for granting workplace flexibility and caregiving leaves include: employee retention in general, helping employees manage work and family life, improving morale, legal mandates, retaining highly skilled employees, recruiting employees, and it being the right thing to do.³⁷ These responses reflect the combination of business decisions and the desire to help employees as the motivating factors for employers providing leave policies.

The study also asks employers to explain their biggest obstacles to providing leave programs. The reasons given for this include cost, the workload and job requirements do not allow for it, lack of staff to implement the program, a potential loss of productivity, and difficulty supervising staff.³⁸ Approximately five percent of employers respond that there were no obstacles to implementing a leave program.³⁹ These responses show that most employers are concerned about the difficulty of implementation and the potential loss of productivity.

The study also examines various factors to predict workplace flexibility based upon the responses from the employers who participated in the study. Organizations in which women represent less than twenty-five percent of total employees are more likely to be less flexible than organizations in which women constitute a larger portion of the workforce.⁴⁰ Organizations in which racial and ethnic minorities make up more than fifty percent of the workforce are more likely to have less flexibility than organizations in which racial and ethnic minorities are less than fifty

³⁶ *Id.*

³⁷ Matos and Galinsky, *supra* note 30 at 37.

³⁸ *Id.* at 38.

³⁹ *Id.*

⁴⁰ *Id.* at 41.

percent of the workforce.⁴¹ Organizations in which hourly employees are fifty percent or more of the workforce are more likely to have a lower level of flexibility.⁴²

The study concluded by stating that “employers with more diverse leadership at the top and employers that are nonprofits turn out to provide the best support for making work ‘work’ for both the employer and employee.”⁴³ However, not everyone does or could work for a non-profit company with diverse leadership. Rather, these responses are useful in that they point to ways to improve company leave through hiring and promotion rather than purely through policy changes within the company.

B. FMLA Application for Employees

As of 2012, approximately eleven percent of all workers in the United States had access to paid family leave.⁴⁴ Over sixty percent of employees eligible for FMLA leave cannot afford to take that leave because they cannot go twelve weeks without a paycheck.⁴⁵ The purpose of FMLA, balancing the demands of work and family “... seems to indicate an intention to provide all parents with an equal opportunity to take leave from work, [but] reality shows that there is a significantly disproportionate division of which workers are able to take advantage of an unpaid leave program.”⁴⁶

As these statistics demonstrate, the FMLA is not working to further its proposed purpose. Instead, the law works to maintain the status quo. As Angie K. Young explained, “[j]ust as the structure and expectations of the workplace limit women’s opportunities, the unequal division of

⁴¹ *Id.* at 38.

⁴² *Id.* (The report further stated that “there is a positive correlation... between the percentage of hourly employees and racial and ethnic minorities that may be responsible for the significant negative relationship between flexibility and the percentage of racial or ethnic minorities.”)

⁴³ Matos and Galinsky, *supra* note 30 at 48.

⁴⁴ ROBERT W. VAN GIEZEN, U.S. BUREAU OF LABOR STATISTICS, PAID LEAVE IN PRIVATE INDUSTRY OVER THE PAST 20 YEARS (2013), available at www.bls.gov/opub/btn/volume-2/paid-leave-in-the-private-industry-over-the-past-20-years.htm

⁴⁵ Daniel, *supra* note 6, at 70.

⁴⁶ *Id.* at 70.

labor in the family reflects and perpetuates this pattern.”⁴⁷ While the goal of the FMLA was purportedly to equalize this division of labor, equalization has not been the result. Instead, women remain more likely than men to utilize leave.⁴⁸ Many employers do not expect men to take parental leave, and frown upon male employees who use leave if it is available.⁴⁹

There is also the problem of the way in which inequality in the workplace impacts what type of work-family dilemma workers at different levels of the income distribution spectrum face. Those at the top levels of employment face different issues than those in middle wage jobs, who face different dilemmas than those in low-skill, low-wage jobs.⁵⁰ While women working in high-skill, high-income jobs may choose to forego a family to move ahead in their careers, women working in low-income jobs are trying to find a position that can provide enough hours to support both them and their families. Women in the middle of these two groups do not qualify for any assistance and yet cannot afford the luxuries of those in the upper class; as a result, these women are stuck without any real help.

To show that many voices are being left out of the conversation, the following sections scrutinize the way that our laws and policies are currently impacting homosexual parents, single parents, and low-income parents. While there are more groups to consider who must partake in the conversation, examining these groups is an effort to showcase some of the diverse and pressing issues facing those at a variety of points in the home and workplace. This is not meant to be a comprehensive list of those being excluded from the conversation; this is simply a starting point, and must be expanded and increased as the conversation continues.

⁴⁷ Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 120 (1998).

⁴⁸ Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 477 (2008); Men are also less likely to alter their work hours or withdraw from work than women are upon the birth of a new child. Maria Del Carmen Huerta et. al., FATHERS' LEAVE, FATHERS' INVOLVEMENT AND CHILD DEVELOPMENT: ARE THEY RELATED? EVIDENCE FROM FOUR OECD COUNTRIES 11 (OECD Publishing 2013).

⁴⁹ Young, *supra* note 40, at 116-17.

⁵⁰ See Bianchi, *supra* note 3 (providing a more thorough discussion of these various dilemmas).

1. *Application of the FMLA for Homosexual Parents*

Homosexual parents face complex issues with regard to parenting and parental leave in the United States. It is estimated that somewhere between six and fourteen million children in the United States live with at least one gay parent.⁵¹ The definitions utilized in FMLA for both “spouse” and for “son or daughter” have complex implications. “Spouse” is defined in the same way the state in which the employee resides defines it. This could be either positive or negative for homosexual parents. In states that do not recognize same sex marriage, employees cannot leave to care for each other if one had a serious health condition relating to the pregnancy. “Son or daughter” is defined fairly broadly – it includes biological children, stepchildren, adopted children, foster children, and children to which an employee stands in loco parentis. The Department of Labor recently clarified that an *in loco parentis* relationship may be established when someone provides day-to-day care for a child or financially supports the child.⁵² However, each determination of *in loco parentis* is made on a case-by-case basis dependent upon the particular facts, and an employer can request documentation to show this relationship.⁵³ As such, a homosexual employee who is not the biological parent of the child may be considered *in loco parentis* to the child depending on the facts of her relationship to the child. The problem of documentation can also come into play in these situations.

In her recent dissent in *Korte v. Sebelius*, Judge Rovner of the Seventh Circuit provided three examples of how the court’s decision regarding the application of the Religious Freedom Restoration Act to the Affordable Care Act is so expansive that it would eviscerate the protections guaranteed to workers by other federal laws.⁵⁴ One of her examples focused on a family-owned business with one-hundred employees, in which the owners were religious and felt that

⁵¹ AMERICAN CIVIL LIBERTIES UNION, *Overview of Lesbian and Gay Parenting, Adoption and Foster Care* April 6, 1999, https://www.aclu.org/lgbt-rights_hiv-aids/overview-lesbian-and-gay-parenting-adoption-and-foster-care (last visited Dec. 5, 2013).

⁵² U.S. DEPT. OF LABOR, WAGE AND HOUR DIVISION, ADMINISTRATOR’S INTERPRETATION NO. 2010-3. (2010).

⁵³ *Id.*

⁵⁴ *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 735 F.3d 654, 691-93, (7th Cir. Nov. 8, 2013) (Rovner, J., dissenting).

homosexuality was a sin. As such they denied a homosexual employee his FMLA rights to take unpaid leave for the birth and care of his adoptive daughter under the guise of religious freedom. The Seventh Circuit's decision in the case, Rovner explained, would allow such discrimination toward employees who would otherwise be protected by the FMLA.⁵⁵

In its 2011 report, Human Rights Watch shared stories of homosexual couples, including that of Marissa and her family:

“Marissa R.’s twins were born prematurely at 32 weeks, and she had Cesarean section complications. Her wound got infected and burst open, requiring emergency surgery... [her partner] was not able to support [her] for any if it... She had to continue working... Even though Marissa and her partner were legally married in California, their home state of Arizona did not recognize them as spouses, so her partner’s employer refused to grant FMLA leave from her job as a physician.”⁵⁶

On top of the trouble of defining and proving parental status, homosexual parents face other issues as well. There is no federal law prohibiting employment discrimination because of one’s sexual orientation, and this still leads to problems for homosexual employees.⁵⁷ As Judge Rovner described and Marissa’s story shows, some employers may be hesitant to provide certain benefits due to religious reasons or a lack of protection under the law. Neither the federal government nor a majority of the states provide protection against employment discrimination based on sexual orientation.⁵⁸ This is just a small sample of the issues homosexual parents face; there are many other issues homosexual parents face at home, in the workplace, and in public. All of these issues can have

⁵⁵ *Id.*

⁵⁶ HUMAN RIGHTS WATCH, FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US 40 (2011).

⁵⁷ While in November 2013 the United States Senate passed the Employment Non-Discrimination Act (ENDA), House leaders have said the bill is unlikely to pass the House of Representatives. See Thomas Ferraro, *Senate Passes Bill to Ban Discrimination Against Gay Workers*, REUTERS, <http://www.reuters.com/article/2013/11/07/us-usa-senate-gayrights-vote-idUSBRE9A617Y20131107> (last visited Nov. 10, 2013).

⁵⁸ S.M., *Democracy in America: Gay Rights in the Workplace, Indiscriminate*, THE ECONOMIST, <http://www.economist.com/blogs/democracyinamerica/2013/07/gay-rights-workplace> (July 2013).

a significant impact on homosexuals, and specifically on whether they request leave to care for their children. These parents need their voices to be heard when a new law is implemented.

2. *Application of the FMLA for Single Parents*

One problem faced by single parents is that they have a child who requires the same amount of attention and care and cost expenditures, but there is half the support available because of the fact that there is only one parent to handle all the responsibilities normally delegated between two parents.⁵⁹ These responsibilities include both financial support and care and bonding with the child. Additionally, “their co-workers appear to be picking up on their non-traditional caregiving roles and are treating them disrespectfully,” said social psychologist Jennifer Berdahl, Ph.D., from the University of Toronto.”⁶⁰

In 2011, Human Rights Watch issued a study explaining how parental leave laws in the United States were lacking for its families. It provided many examples of two-parent families who struggled to pay their bills upon the birth of their children. The study also shared Diana T.’s story:

“Diana T. is the single mother of two girls, the first born when she was 18 and living with her parents. Diana had no paid leave after her first child was born, and 60 percent of her salary (of less than \$30,000 per year) for six weeks when her second child was born. After her first baby was born, she said ‘I had nothing... I had no money for food, diapers, or clothes. I didn’t have a room in [my parent’s] house. I lived in the dining room behind a sheet. We put the crib up there.’ Although she had partial pay after her second child was born, the costs of having a new baby were high, and she incurred credit card debt. She also struggled to pay rent. A few months later, Diana was homeless.”⁶¹

⁵⁹ Bianchi, *supra* note 3 at 19.

⁶⁰ Rick Nauert, *Single Dads & Single Moms Suffer at Work: Non-Traditional Roles May Incite Workplace Bias*, PSYCH CENTRAL, <http://psychcentral.com/news/2013/06/12/single-dads-single-moms-suffer-at-work-non-traditional-roles-may-incite-workplace-bias/55944.html> (last visited Oct. 29, 2013). Berdahl recently published a study concluding that parents in non-traditional caregiving arrangements are mistreated at work. This is obviously in addition to the other struggles single parents face regarding work and home balance. See Jennifer J. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341 (2013).

⁶¹ HUMAN RIGHTS WATCH, *supra* note 48, at 58-59.

As it stands now, the FMLA does not help single parents. First, the law is lacking because the leave provided is unpaid. This means the parent would have no income compared to the usual single income supporting the household. While some single parents may have high-paying jobs with enough savings to take this unpaid time for bonding, single parents have a high rate of low-wage employment.⁶² Second, only the employee parent is eligible; as a result, no one else, such as a grandparent, aunt, uncle, or neighbor, could receive leave to assist the new parent even if they wanted to. One of these relatives or friends could only receive leave to help the single parent if the relative or friend was considered in loco parentis to the child, because they do not have the proper relationship as defined by the state.

Families managed by a single parent constitute a fairly large percentage of the population.⁶³ About forty percent of United States births are to an unmarried woman.⁶⁴ Approximately twenty-two percent of working mothers are single moms.⁶⁵ Single mothers are much more likely than married parents to work in services occupations that provide lower pay and fewer benefits.⁶⁶ Men manage about fifteen percent of single-parent households, and women manage about eighty-five percent of single-parent households.⁶⁷ These numbers suggest that single parents make up a significant portion of the workforce, and that they are especially at risk for not being able to utilize parental leave. As such, the laws must be changed to address the distinct issues that single parents face.

3. *Application of the FMLA for Low-Wage Parents*

⁶² TIMOTHY CASEY & LAURIE MALDONADO, WORST OFF – SINGLE-PARENT FAMILIES IN THE UNITED STATES: A CROSS-NATIONAL COMPARISON OF SINGLE PARENTHOOD IN THE U.S. AND SIXTEEN OTHER HIGH-INCOME COUNTRIES 8 (Legal Momentum 2012).

⁶³ Bianchi, *supra* note 3, at 19 (stating that single parent households compromise about one-quarter of those in the United States with children under age 18).

⁶⁴ Bianchi, *supra* note 3, at 18.

⁶⁵ Glynn, *supra* note 13, at 2.

⁶⁶ Glynn, *supra* note 13, at 3.

⁶⁷ Bianchi, *supra* note 3, at 19.

The issues faced by low-income parents are substantial but often ignored. These parents are the least likely to have parental leave options available to them. They have unequal bargaining power with employers.⁶⁸ They tend to have lower education and therefore fewer job opportunities available to them.⁶⁹ Many low-income jobs are unstable.⁷⁰ All of these factors fight against low-income workers. Parental leave is not even considered; it simply is not an option as unpaid leave means no paycheck and continuing expenses.

Human Rights Watch spoke with Patricia D., who was able to take an eight-week leave from her retail job, three of which were paid through vacation and sick leave pay. She explained: “[b]y the end of my leave, we were deciding do we pay the light bill or pay for formula... It’s not like parents want a month in Maui. A baby has been born. You need to have money coming in. you can’t just rely on vacation and sick time.”⁷¹

Compared with other countries, workers in the United States have a high level of low-wage employment.⁷² For those low-wage workers, “the barriers to employment . . . including low levels of education, limited work experience, and poor health, may . . . increase women’s experiences of work–family conflict.”⁷³ Factors at work, such as inconsistent hours, lack of autonomy, and flexibility, add to these pressures.⁷⁴ “Working parents with higher incomes and those who are non-Hispanic are more likely to have access to any form of paid leave compared to low-income or Latino workers.”⁷⁵ These statistics for paid leave are also true for other types of workplace flexibility: “workers with higher wages and those who are white are more likely to have flexibility than low-

⁶⁸ See generally Human Rights Watch, *supra* note 48, at 29.

⁶⁹ Heidi Shierholz, *Fix it and Forget it: Index the Minimum Wage to Growth in Average Wages*, EPI Briefing Paper, Dec. 17, 2009, available at: http://epi.3cdn.net/91fd33f4e013307415_rum6iydua.pdf.

⁷⁰ Theresa Ciabattari, *Single Mothers, Social Capital, and Work-Family Conflict*, 28 J. FAM. ISSUES 34, 38 (2007).

⁷¹ Human Rights Watch, *supra* note 48, at 48.

⁷² Casey, *supra* note 54, at 8.

⁷³ Ciabattari, *supra* note 65, at 38.

⁷⁴ *Id.*

⁷⁵ Glynn, *supra* note 13, at 4.

wage workers or people of color.”⁷⁶ These low-income workers have least amount of access to parental leave, which negatively impacts them and their children, especially with regard to their health. This can lead to even more problems for low-wage workers. The law must change to take their needs into account.

III. SUGGESTIONS FOR PARENTAL LEAVE LAWS

Changes must be made. At the most basic level, the law must be changed to make parental leave more than a “hollow right.”⁷⁷ Why focus on parental leave laws to change behavior and shift the cultural norm of gender division in the home and workplace? Childbirth is a period of change and adjustment, and “[s]haring [in] activities during a child’s first year of life may promote less stereotyped gender roles; that is, mother as exclusive caregiver and father as exclusive breadwinner . . . Early paternal involvement may lead to continued engagement and involvement and to a more equal division of work between parents.”⁷⁸

Over half the population is a parent, and everyone has been a child. People grow and learn from those experiences, and then expect that things will happen later on in life as they happened at home as a child. Allowing all parents, whether there are one or two parents within a household, to stay home immediately after the child’s birth will enable the child to see a more equalized division of care in a two parent household, or to be cared for more fully because a parent is not required to work immediately after the child’s birth. Seeing parents able to hold onto work will lead children to see all parents working if they choose, or staying home if they choose; and either decision would come from a place of true choice. This equalized division of care and labor will allow the child to

⁷⁶ *Id.* at 5.

⁷⁷ See Young, *supra* note 40, at 141 (citing Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS., 335, 341).

⁷⁸ Maria Del Carmen Huerta, et al., FATHERS’ LEAVE, FATHERS’ INVOLVEMENT AND CHILD DEVELOPMENT: ARE THEY RELATED? EVIDENCE FROM FOUR OECD COUNTRIES 16 (OECD Publishing 2013).

grow up with a more equalized perspective. Expectations of families as one breadwinner (the male) and one caregiver (the female) will decline. A more equalized household and workplace will result as generations continue to do away with these norms. With this result, alternative forms of family, such as single parents, will also become more acceptable.

This section examines the elements that are necessary for a new comprehensive legislative scheme, and the way that such a law may be implemented. The suggestions laid out here are by no means meant to be interpreted as comprehensive. They are meant to start widening the discussion to include the voices of people who are normally excluded.

A. Elements of the new law

The FMLA, even with its gender-neutral wording, does nothing to change the gendered divide between those who forego caregiving at home to stay at work and those who stop working to stay at home. The laws need to change to bring about more equalized leave usage, in addition to changing the extremely gendered notions of parenting, caring, and working.

1. Purpose

The purpose of any new parental leave law ought to be an attempt to equalize the division of both labor and care, with an emphasis on the importance of care for the child to all members of the family. The FMLA as it stands now shows that a meager attempt to alter such pervasive cultural paradigms surrounding gender will not suffice.

One of the current stated purposes of the FMLA is to limit employment discrimination on the basis of sex, and to provide for equal opportunities in the workplace for all genders.⁷⁹ A recent study explained that “the less willing a society is to tolerate gender-based discrimination, the longer the maternity leave it will provide.”⁸⁰ The United States’ current law guaranteeing twelve weeks of

⁷⁹ 29 USCS § 2601 (b)(4)-(5) (2011).

⁸⁰ Yehonatan Givati & Ugo Troiano, *Law, Economics, and Culture: Theory of Mandated Benefits and Evidence from Maternity Leave Policies*, 55 J. L. ECON. 339, 340 (2012).

unpaid leave for any parent is shorter than most paid maternity leaves provided around the world.⁸¹

The stated purpose must continue; however, the way in which this purpose is effectuated must change.

To facilitate equal opportunity, all new parents must be encouraged, perhaps even required, to stay home with their children:

“[t]he time immediately following childbirth has . . . been shown to be a critical period in shaping both men’s and women’s perceptions of parental competence and determining the long-term division of childrearing responsibilities . . . If fathers participated in infant care to the same extent that mothers did, they could debunk the myth that women have a special ‘maternal instinct’ that makes them better parents, or that the mother-infant bond is more natural and more important than the father-infant bond.”⁸²

In families in which a child has two parents, both of those parents staying home will lead to greater sharing of parental responsibilities. This has been the case in Sweden, where both parents must take at least sixty days of leave each (out of the total 480 days allotted to the family for a child’s birth), otherwise they lose those days.⁸³ It has also been true of parents in the United States who were lucky enough to be one of the eleven percent of workers who is entitled to paid leave. Highlighted in a CNN article, Joe Schroeder’s company provided him three months of paid leave from work when his daughter was born; during this time he cooked, changed diapers, took his daughter on walks, and held her for hours on end.⁸⁴ It is stories such as this that exemplify the shared caretaking that parental leave laws should promote.

Studies further support these anecdotes. Fathers who utilize leave provisions benefit greatly from the leave they take, as do the rest of their families.⁸⁵ Those fathers who take leave and then

⁸¹ World Policy Analysis Center, *Is Paid Leave Available for Mothers of Infants?*, <http://worldpolicyforum.org/global-maps/is-paid-leave-available-for-mothers-of-infants/> (last visited Nov. 10, 2013).

⁸² Young, *supra* note 40, at 123.

⁸³ Sweden Institute, *Gender Equality in Sweden*, available at <http://sweden.se/society/gender-equality-in-sweden/> (last visited Dec. 5, 2013).

⁸⁴ Emily Smith, *Paid Leave Lets Dads Build Parenting Foundation*, CNN, <http://www.cnn.com/2013/06/14/living/fathers-day-paternity-leave/index.html> (last visited Oct. 9, 2013).

⁸⁵ Huerta et al., *supra* note 67, at 8.

perform more caregiving and household work show greater overall fulfillment and happiness and experience lower divorce rates.⁸⁶ Children also benefit when both parents take leave; children who have both parents take leave and remain involved in their caregiving in a quality manner tended to perform better on cognitive tests.⁸⁷ Young was correct in her conclusion that “the evidence suggests that the role that each parent takes immediately following childbirth is critical in determining the long-term division of responsibility for childcare.”⁸⁸ These benefits would accrue to any two-parent home, whether heterosexual or homosexual, married or unmarried.

In addition to creating a more equalized division on the home front, such a leave policy would lead to a more equalized division of labor in the workplace. Currently, what Deborah J. Swiss and Judith P. Walker called the “maternal wall” impacts all women, whether they want to have children or not.⁸⁹ Employers and others automatically assume that women of a certain age will want to have children and are less serious about employment. The discrimination women face once they become pregnant is even worse.⁹⁰ Altering parental leave law to provide that any parent may leave after the birth of a child will lessen this stigmatization against women in the workplace because all parents would have the stigma that normally attaches only to women. Sharing the caretaking of children and the home will decrease the disparate treatment of women in employment. Eventually that stigmatization would cease, as reproduction is such a critical part of the human race and not all fathers could also be stigmatized. This would not only decrease the stigma that attaches to women as mothers, but it would also allow for a more active role by both parents in two-parent households.

Providing realistic leave will also work to encourage women to remain active members of the workforce. Women who are given job-guaranteed leave upon the birth of a child are more likely to

⁸⁶ *Id.*

⁸⁷ *Id.* at 10. While there was not much difference when fathers changed diapers and cleaned, there was a more significant difference when fathers read and played with their children than when they did not. *Id.*

⁸⁸ Young, *supra* note 40, at 124.

⁸⁹ *Id.* at 117 (citing Deborah J. Swiss & Judith P. Walker, *Women and the Work/Family Dilemma* 5 (1993)).

⁹⁰ Young, *supra* note 40, at 117.

remain in the workplace, whereas women who are not provided this flexibility are more likely to drop out and instead stay at home.⁹¹

The eradication of such discrimination against women in general and mothers specifically would most help single parents, the majority of whom are women.⁹² Because single parents typically do not have another supporter or caregiver, the law must especially provide for opportunities for these parents to bond with their children without fear that they will lose their jobs or be unable to pay their bills. This will help both the parent and the child with regard to their mental, emotional, and physical health and well-being.

Additionally, the final purpose of this policy should be to provide parents with true choice. Currently, many parents are forced to leave or go back to work due to the current structure of the law and family finances. However, the policy outlined below will work to provide all families with real choices. It will allow families to contemplate and be content with their choices about how they bring their families into the world and how they make family and work “work.” No one will be forced into a decision they are not comfortable with because of finances or not qualifying.

While this wording of choice may currently be seen as a privileged notion, it should not be seen as such. It is only privileged right now because real choice is not currently available to everyone – this must change. The proposals below will provide actual choice to parents and make choice in caretaking during the first few months of a child’s life a concept that is no longer privileged.

2. *Paid Leave*

In order to be effective, any leave provided must be paid. Funding for paid leave should come from a tax. This would not put too much of a burden on employers, but would instead share

⁹¹ Sarah Fass, NATIONAL CENTER FOR CHILDREN AND POVERTY, *PAID LEAVE IN THE STATES: A Critical Support For Low-wage Workers and Their Families* 4 (2009); available at: http://www.nccp.org/publications/pdf/text_864.pdf.

⁹² Bianchi, *supra* note 3, at 19 (stating that single parent households comprise about one-quarter of those in the United States with children under age 18, and that women head about eighty-five percent of single-parent households).

the burden among all workers (most of whom are parents).⁹³ The leave pay could constitute a certain percentage of a worker's salary, which would provide some income for parents to use during their parental leave.

One reason that many parents do not utilize the existing leave policies is that they cannot afford to take the necessary time off of work to care for a new child without a paycheck. Parents also have new expenses for their new baby. The combination of no paycheck and higher expenses is often too much for parents, especially those who work lower-paying jobs, to take a leave to care for their child.⁹⁴ However, this leave is critical to ensure health and bonding for both parents and children. Ensuring parents receive pay will enable parents to take leave.

Paid leave brings up the difficult question of who provides this pay. Numerous scholars have surmised as to the best practices for providing employees paid leave. Some suggest the funds come from a tax, while others suggest a subsidy, and yet others suggest a general appropriation. For the reasons stated below, a payroll tax is the most common-sense way to fund parental leaves.

A payroll tax for parental leave would come out of every employee's paycheck, just as social security funds do. In 2012, over forty-three percent of families in the United States had children under age eighteen.⁹⁵ This number does not include families who have children over the age of eighteen; however, it can be inferred that the number of families that at one point involved children is a much higher percentage.⁹⁶ As such, approximately half of the population, as a low estimate, could benefit as parents from parental leave. It is not asking those parents too much to provide a portion of their paychecks so that they and other parents can spend time with their newborn

⁹³ Over forty-three percent of all families in 2012 included children under eighteen years old. From this, it can be implied that other families have children over eighteen years of age, such that the percent of parents would increase above half the population. BUREAU OF LABOR STATISTICS, NEWS RELEASE: EMPLOYMENT CHARACTERISTICS OF FAMILIES – 2012 2 (2013).

⁹⁴ Emily Smith, *Paid Leave Lets Dads Build Parenting Foundation*, CNN <http://www.cnn.com/2013/06/14/living/fathers-day-paternity-leave/index.html> (last visited Oct. 9, 2013).

⁹⁵ Bureau of Labor Statistics, *supra* note 77.

⁹⁶ "By age 40, three-quarters of men (76 percent) and 85 percent of women have had at least one child." Glynn, *supra* note 13, at 4.

children. As the policy is implemented, all the population would have the potential to benefit at least as children under this policy. Eventually the policy benefits would trickle down such that those children, who benefited mentally and emotionally from this policy as infants, would also be able to benefit as parents themselves.

Again, this paid leave would provide options to parents. Not every parent would be required to take leave. However, paid leave provides a true option for many parents who do not currently have the option of parental leave due to their finances. It would therefore allow for any parent to stay home for a period of time after a child's birth, and then return to that job after the leave ends. This would further the purpose of creating an equitable division of both care and labor.

As previously explained, employers' biggest obstacle for providing parental leave is cost.⁹⁷ Having a tax paid by employees themselves would undoubtedly limit employer costs, thus eradicating a large portion of their obstacle to providing parental leave.

3. *Amount of time provided*

Studies differ on how much time is best or necessary for parent-child bonding; however, the twelve-week period is a sufficient standard to promote bonding and childcare, and yet still keep costs reasonable. Some studies show a longer time would be better; however, most conclude that between ten and twenty weeks of leave is best. Therefore the amount of leave time required can remain as is. Leave for medical reasons prior to the birth would not be included in this leave time. As such, this time would begin to accrue after the birth of a child and provide any parent three months at home to bond with his child and acclimate to his role as a parent.

Companies will still be free to create a longer policy. If every employer is required to provide twelve weeks of paid leave, then employers may be incentivized to provide more time to recruit and

⁹⁷ Matos, *supra* note 27, at 38.

retain employees. Some businesses currently go above and beyond the requirements of the FMLA, and this would likely remain true even if the leave laws changed.

Providing for this three-month paid leave will encourage all parents to stay home and bond with the child and share the housework. Studies show that “[f]athers who take leave, especially those taking two weeks or more, are more likely to carry out childcare related activities when children are young.”⁹⁸ Providing for both members of all couples to take leave time will increase the shared introduction to caretaking, and increase the likelihood that parents will share responsibilities in the home for a long time thereafter. This will decrease the gendered division of care that runs rampant in society.

4. *Who qualifies?*

All employers and employees should be covered by the law. There would be no distinction between who is qualified and who is not, so no employee would be uncertain about whether or not he or she is covered. This would prevent confusion and, perhaps more importantly, promote fairness.

All employers, regardless of size, should be “covered entities” under the new leave legislation. The main obstacle to providing leave that employers cite is cost; however, the funding of the pay would not solely be placed on employers. This is acceptable because payroll taxes, rather than employers, would pay for the leave. As such, employers would not have to foot the bill. Additionally, parental leave would be implemented as a company policy so companies would be prepared to handle an employee’s leave period.

The law should cover all employees. This means that even part-time workers or workers who work part-time at multiple jobs (and therefore work full-time hours) would be covered. This would enable the majority of parents who are not currently eligible to take leave under the FMLA to

⁹⁸ Huerta et al., *supra* note 67, at 4.

take parental leave. As stated earlier, whether the employee could afford leave would not be at issue. However, the employer could provide more than the employee receives from the minimum government amount.

Additionally, the law would need to account for a changed definition of “family.” This is nothing new; indeed, numerous scholars and commentators have questioned the notion of family in the past.⁹⁹ In doing so they are not “challenging the family as a valid life choice; [rather,] they are challenging the current conception of what a family's composition must be.”¹⁰⁰

As the FMLA stands now, an employee is only allowed leave for the birth of their son or daughter, or the placement of their son or daughter through adoption or foster care. This, along with the health leaves in the FMLA, support a very strict notion of family as the nuclear family composed of a man, a woman, and their dependent children. However, most Americans do not live in nuclear families; in fact, “less than thirty percent of all Americans live in nuclear families. Instead, more and more individuals are living together as unmarried heterosexual couples, gay or lesbian couples, or as other family groups such as communes or several person households.”¹⁰¹ The *New York Times* recently published an article about how the notion of the American Family is changing. The article examined families with divorced parents who remarried, families headed by homosexual parents, immigrant families, cohabiting couples, families with an incarcerated parent, and voluntary kin relationships.¹⁰² All of these variations to the typical notion of family are very real and growing within American culture. The law must account for these newer definitions of family.

⁹⁹ E.g. Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*. 15 WIS. WOMEN'S L.J. 93 (2000); Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 25, 2013, http://www.nytimes.com/2013/11/26/health/families.html?_r=0.

¹⁰⁰ Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*. 15 WIS. WOMEN'S L.J. 93, 95-6 (2000).

¹⁰¹ *Id.* at 95.

¹⁰² “Voluntary kin” refers to family relationships sprouting from friendships. Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 25, 2013, http://www.nytimes.com/2013/11/26/health/families.html?_r=0.

Many countries with much more generous leave policies than currently exist in the United States still have heteronormative notions of family at the foundation of their laws. Even Sweden, much touted as the ultimate provider of family leave, offers leave only for two-parent or single-parent families.¹⁰³ This fails to account for other alternative family arrangements and simply hurts the growing percentage of families who fit the “other” definition. The United States can rise above this by allowing a more fluid definition of family to endure, thus enabling all types of family arrangements to work and utilize leave under the law.

Making the definition of family more fluid, and therefore allowing for various types of family leave arrangements would also require changing the phrases normally used in the discussion of family leave. This paper has used the phrase “parental leave.” This was intentionally done so as not to confuse parental leave with other types of leave allowed under the FMLA. However, leave to care and bond with a newborn child should not solely be limited to parents. While the *in loco parentis* option does expand the possible “parents” of a child under the FMLA, one should not need to prove *in loco parentis* status to be able to care for a new child. The fact-based inquiry utilized for *in loco parentis* determinations is too rigid to truly account for all types of family arrangements that may be used upon the birth of a new child.

B. Implement the new law

Implementing such a new law, which must work to shift the current culture, will take a great deal of time. However, there are certain steps that will work to make this possibility a reality.

1. *Bring more voices into the discussion*

Women in high-level management positions with the ability to change policies are great, and a way to ensure women have proper policies in their workplaces. However, homosexual, single, low-

¹⁰³ Swedish Institute, *Gender Equality in Sweden*, available at <http://sweden.se/society/gender-equality-in-sweden/> (last visited Dec. 5, 2013).

income, and other parents' voices should also be heard. Allowing everyone to speak and be heard will ensure that all issues are considered, and everyone's interests and needs are taken into account.

In addition to people with different experiences, various theories and theorists should also be brought in to help ground the proposed law. Some examples of strong feminist theories that will help ensure the purposes of the law are met include relational feminism, anti-essentialist feminism, and intersectionality.

Relational feminism proposes that women are relational in that their relationships with others help define their lives and their roles within their lives. Caretaking and relationships are valued, as they provide human fulfillment and happiness; it does not matter whether these valuable traits are masculine or feminine.¹⁰⁴ The new law should consider the relational role that all people play, and should value caretaking by everyone. Fulfilling the law's proposed purpose of an equitable division of caretaking would further the goals of relational feminism. Bringing in relational feminists to discuss the possibilities of parental leave law may help expand the important relational aspect of human nature as it is reflected in the law.

Anti-essentialist feminism argues that many theorists miss a large portion of the population by only looking at the privileged members of society and the law's impact on them. Instead, anti-essentialists encourage a consideration of non-privileged groups and how they are affected by laws and theories. Anti-essentialism points out that women in positions of privilege often "ignore how their own race functions to mitigate some aspects of sexism and, moreover, how it often privileges them over and contributes to the domination of other women."¹⁰⁵ Anti-essentialists would urge the use of an intersectional approach for the creation new parental leave legislation. The problems faced by upper class, educated, heterosexual white women must not be the only problems considered.

¹⁰⁴ See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 46-9. (1999).

¹⁰⁵ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 154 (1989).

Gender and parenting do not exist in a vacuum. The issues these groups face regarding gender, parenting, and work must be considered along with other factors and other issues faced by other groups. Considering the way in which all of these factors play together to create various problems for various groups will help to create the most comprehensive and practical law as possible.

Other theories, including those outside the realm of feminist jurisprudence, should also be brought into the discussion. Non-legal thinkers, caretakers, psychologists, parents at various income levels and with different types of experiences – all of these voices ought to be invited to participate in fashioning a law that will truly work for all Americans. Pulling from different theories and experiences will be useful to bring about the most ideal legislation for all.

2. *Look to current state laws and company policies*

Currently three states offer paid parental leave.¹⁰⁶ Scholars have noted that “[e]xperience shows that state innovation can pave the way for national change . . .”¹⁰⁷ California and New Jersey both provide up to six weeks of paid family leave.¹⁰⁸ These states utilize a payroll contribution to provide partial wage replacement to workers who utilize the leave. Washington provides job-protected paid leave for parents who work both full- and part-time.¹⁰⁹ Full-time workers receive a set amount per week, and part-time workers receive a prorated amount per week. The new federal law ought to look at what has worked for these states and what has not.

Some company policies also go above and beyond the current law. Companies will do this to stay competitive and recruit the best talent in their areas. Currently some companies offer leave greater than the FMLA requires. For instance, in May 2013, Yahoo expanded its parental leave policy by providing sixteen weeks of paid leave for mothers, and eight weeks of paid leave for

¹⁰⁶ NAT’L P’SHP FOR WOMEN & FAMILIES, *supra* note 5, at 5.

¹⁰⁷ *Id.*, at 4.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 9.

fathers.¹¹⁰ And while there is always room for improvement, this is a huge leap for companies to provide such generous parental leaves. Yahoo and other companies maintain their competitive edge as companies people want to work for when they provide their workers with these types of benefits. Even if workers do not take advantage, the option will be there. Leaves will also likely increase with the increased requirements.

3. *Congress must act*

Congress will need to take swift and sweeping action. While recent events may show that Congress appears able to do anything but act, this is an important issue for all Americans. Improving the parental leave laws also has great public support. Seventy-seven percent of United States adults believe that businesses should be required to provide paid family and medical leave.¹¹¹ As recent events and the drawn out process of originally passing the FMLA show, it may take years to determine the best course of action; however, action must occur nonetheless.

More women in Congress will also likely help to bring family leave to the forefront of the political agenda, and to increase the benefits that go along with any change to the family leave laws: “[a]n increase of 1 percentage point in women’s representation in parliament is associated with an increase of 2 days in the length of mandated maternity leave.”¹¹² In 1993, there were seven women Senators and forty-eight women Representatives, or fifty-five total women in the United States Congress.¹¹³ In 2015, there are 104 women in Congress – twenty Senators and eighty-four

¹¹⁰ Ronda Kaysen, *Is Maternity Leave in America Changing for the Better?*, FORBES. <http://www.forbes.com/sites/learnvest/2013/05/09/is-maternity-leave-in-america-changing-for-the-better/> (May 2013).

¹¹¹ HEATHER BOUSHEY, CENTER FOR AMERICAN PROGRESS, *IT’S TIME FOR POLICIES TO MATCH FAMILY NEEDS: NEW POLLING DATA SHOWS WIDESPREAD SUPPORT FOR AN AGENDA TO ADDRESS WORK-FAMILY CONFLICT* 7 (2010).

¹¹² Givati, *supra* note 69, at 354.

¹¹³ CRS REPORT FOR CONGRESS, *WOMEN IN THE UNITED STATES CONGRESS: 1917 – 2008* <http://www.senate.gov/reference/resources/pdf/RL30261.pdf> (last visited Dec. 5, 2013).

Representatives.¹¹⁴ In the twenty years since the passage of the FMLA, the percent of women in Congress has increased about nine percent. It can be inferred from the increase in female representation that there will be increased support for extending and expanding parental leave, albeit a small increase.

4. *Incentives*

Both companies and individuals should be incentivized to provide and utilize parental leave. Incentivizing all parents to stay home after the birth, adoption, or foster placement of a child would lead to greater care of children by both parents. Incentivizing companies to provide policies that go above and beyond the current law will not only help those companies stay competitive; it will also benefit their bottom line as worker satisfaction and productivity increases.

Individuals should be incentivized to utilize family leave. This could involve creating a use-it-or-lose-it type system in which parents use the leave or do not receive the benefits. This is likely the only way that such a cultural shift in home care and work leave will occur. Simply providing the options as they exist now will not be enough to make any significant change in how families currently operate. These operations are so ingrained in peoples' lives that there must be strong incentives for people to change their habits and behaviors. And, as explained above, having all caretakers stay home with children after their birth provides benefits to the parents and children, including a more equalized division of responsibilities in the home.¹¹⁵

Corporations should also be incentivized to make changes to their policies and approaches to employment in general. Employees tend to stay with companies that provide leave benefits, thus reducing turnover.¹¹⁶ This can lower employer costs for recruiting and training employees.

¹¹⁴ CENTER FOR AMERICAN WOMEN AND POLITICS, WOMEN IN THE U.S. CONGRESS 2015 FACT SHEET, available at http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/cong.pdf.

¹¹⁵ Huerta et al., *supra* note 67, at 16.

¹¹⁶ See JODY HEYMANN ET AL., PROJECT ON GLOBAL WORKING FAMILIES, THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 6 (2007).

Providing benefits also increases worker productivity.¹¹⁷ While some companies currently provide policies that go above and beyond the requirements of the FMLA, about one quarter of corporations are not currently in compliance with the FMLA.¹¹⁸ Clearly, the law must be enforced in order for it to be effective. There should also be a further incentive for employers to meet and exceed the law's expectations. These incentives may come not only from the government through funding or awards, but also from other organizations and individuals. As soon as one company begins offering beneficial leave policies, its competitors will have to follow suit to remain competitive in both recruiting and retaining employees.

IV. CONCLUSION

A progressive federal law must be created to incentivize employers, workers, and parents to provide and utilize paid parental leave. To effectuate such a law, at least twelve weeks of paid leave with job protection must be guaranteed for all workers in all companies. The FMLA, which currently provides up to twelve weeks of unpaid job protected leave applies to only approximately half of the working population in the United States. Under this scheme, only about eleven percent of workers are provided paid leave. Without pay, very few employees can afford to take time off work. Even fewer can afford unpaid leave when considered with the added burden of increased expenditures that attach to having a newborn child. The law as it exists right now, despite its gender-neutral language and positive purpose, does nothing to alter the current gender roles of men and women in the home and the workplace. Changes must therefore be made to the law in order to bring about change in society.

This task will not be easy. But change must occur if the United States wishes to move forward as a nation. The United States is currently one of four countries in the world that does not

¹¹⁷ *Id.* “When workers feel supported, they have higher levels of job satisfaction that, in turn, increase their commitment to their company’s success.”

¹¹⁸ Matos, *supra* note 27, at 6.

provide some form of paid leave; the others are Liberia, Papua New Guinea, and Swaziland.¹¹⁹ This refusal to move forward cannot continue if the United States wants to be seen as a world leader, and if it truly wishes for its citizens to be able to have choice in their path and happiness with their ultimate decisions about work and family.

One small group of parents should not bear the burden of trying to change cultural norms for all parents and workers. Every voice should influence the discussion around improving parental leave laws. Comprehensive legislation and social change will only occur if everyone is included. As such, the discussion around parental leave must begin to change now. Expanding the conversation beyond only privileged heterosexual mothers is the first step. Once this occurs, the suggestions laid out throughout this paper can take form, and real change can come about.

¹¹⁹ Heymann, *supra* note 105, at 2.