Assesing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children

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ASSESSING THE FAMILY AND MEDICAL LEAVE ACT 
IN TERMS OF GENDER EQUALITY, WORK/FAMILY 
BALANCE, AND THE NEEDS OF CHILDREN

Angie K. Young*

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* Strategy consultant at The Kalchas Group/CSC Index. B.A. in Philosophy and Honors in the Ethics in Society Program, 1997, Stanford University. The author would like to thank Debra Satz, Susan Okin, and Michael Blake of Stanford University.
Introduction

The Family and Medical Leave Act (FMLA) of 1993 provides up to twelve weeks of unpaid leave per year for all eligible employees. The FMLA applies to men and women under the following circumstances: after the birth of a baby; after the adoption of a child or the placement of a foster child; when a serious health condition renders the employee unable to perform his or her job; or in order for an employee to care for a spouse, parent, or child who has a serious health condition. The passage of the FMLA raises many important questions: What purpose is the FMLA intended to serve? To what extent does it help working Americans balance responsibilities at work and at home? Who is likely to use the leave? Does the legislation mark the beginning of more “family-friendly” policies in the future? Does it further gender equality? Should feminists celebrate its passage? How can it be improved? What criteria do we use to make such improvements?

While recognizing that parental leave is only one aspect of the FMLA, this Article concentrates on the provision allowing leave to parents in order to care for their children. Before analyzing the FMLA in detail, it is helpful to explore what aims a parental-leave policy should have. The purpose of this Article is to propose and defend three goals that parental-leave legislation should strive to meet: equality of career opportunities for men and women, the right to participate in both work and family, and meeting the needs of children. After articulating what parental-leave legislation should aim for in theory, this Article examines the FMLA’s success in meeting these aims.

3. See FMLA § 2.612(a)(1)(A)–(C) (to the exclusion of leave for caring for one’s spouse or parent).
I. EQUALITY OF CAREER OPPORTUNITIES FOR MEN AND WOMEN

A. The Problem: Women's Unequal Opportunity in the Workplace

While women have been entering the work force in record numbers since the 1950s, the assumption that childrearing is "her problem" has not changed much. As a consequence, women have gained new responsibilities without relief from traditional ones. As Alison Jaggar and Paula Rothenberg suggest: "[C]hanges in the socially acceptable roles currently available to women have come largely through adding on new responsibilities and possibilities to those already assigned to them rather than through structural changes in social institutions or interpersonal relationships."

A study by Sharon Y. Nickols and Edward Metzen found that from 1968 to 1973, wives who became employed reduced their weekly average hours spent on housework from thirty-five to twenty-three, but their husbands continued to average approximately two hours per week. Given the demanding and often conflicting responsibilities in the workplace and in the home, society has expected women to make a choice between the two, or to manage both—somehow. The injustice and inequality lie in the fact that men, for the most part, remain immune to this dilemma.

Statistics confirm that women currently bear the primary responsibilities of parental leave and childcare. As a result, many women have made career sacrifices to take on this primary responsibility. "Over half of all working women, but only one percent of working

men, have reported dropping out of the work force at least once for family reasons.\(^8\) Other women have sacrificed having a family to pursue their careers. As Deborah L. Rhode points out,

Studies of lawyers and business executives during the 1980s revealed that almost a third of the women, but only 6–8 percent of the men, had never married. The vast majority of males in upper-level corporate positions have had children and a nonworking spouse. Most successful female executives have had neither.\(^9\)

**B. Gender-Based Assumptions in the Workplace and the Home**

Once women enter the work force, both company policies and the workplace environment perpetuate the pattern of greater female than male involvement in parental leave and childcare. In an extensive study preceding the FMLA, the research group Catalyst found that only thirty-seven percent of 322 employers who responded to a survey offered parental leave to men, while nearly fifty-two percent offered such leave to women.\(^10\) Only nine of those companies reported that such leave had been taken by even a single male employee,\(^11\) demonstrating that even when companies formally offer paternity leave, men rarely take it. A 1993 study by DuPont found that only five percent of the 1,000 participants in DuPont's family leave program were men.\(^12\) Of those companies that formally offered parental leave prior to the FMLA, many failed to inform male employees of the policy, so many men were unaware of its availability.\(^13\)

Even in the case where a new father is aware that his company offers parental leave, barriers may prevent him from taking advantage

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9. See Rhode, supra note 8, at 175. For a survey of materials regarding this phenomenon, see supra note 8, at 175 n.37.
11. See Malin, supra note 10, at 1050 (citing Catalyst, National Study, supra note 10, at 37.
13. See Malin, supra note 10, at 1072.
of the policy. "According to one representative survey of companies providing paternity leaves, over 40 percent of personnel directors indicated that the appropriate amount of time for a father to take off at childbirth was 'no time.'"14 The Catalyst study found that even among large employers that offer parental leave to fathers, forty-one percent considered use of parental leave by a man unreasonable.15 As Martin Malin noted, "[I]t appears that many employers extend parental leave to fathers so that they can give the appearance of gender-neutral policies, but never intend for fathers to use it."16 Studies have also shown that companies are more accommodating of parental-leave requests from women than from similarly situated men.17 The fact that paid paternal leaves are even rarer than paid maternal leaves also poses a substantial financial deterrent for men to take leave.18

Just as companies assume that men have wives at home to care for their children, they assume that women who decide to have children will no longer be "serious" or "committed" workers. Deborah J. Swiss and Judith P. Walker have coined the term "maternal wall" to refer to the career penalties imposed on expectant mothers.19 Manifestations of the maternal wall include job loss, altered professional responsibilities, difficulty in arranging leave, problems with reentry, hostile and career-derailing behavior of colleagues and bosses, and a constant struggle for acceptance.20 The following are a few examples from the Swiss and Walker survey of 902 women, ages thirty-three to forty-five, who had graduated from Harvard Business School, Harvard Law School, or Harvard Medical School:

[F]emale residents reported that, when they returned from maternity leave, they found themselves omitted from hospital committees and from lists for conferences and departmental social events. Some recalled that, once they became pregnant, other physicians stopped talking informally to them in the halls or dropped them from their

14. RHODE, supra note 8, at 122.
15. See Malin, supra note 10, at 1078 (citing CATALYST, NATIONAL STUDY, supra note 10, at 66).
17. See Malin, supra note 10, at 1078.
18. See Malin, supra note 10, at 1073.
mentoring group. What appeared, at first glance, to be short-term professional snubbing quickly translated into long-term career penalties in advancement and promotions.

In business, many MBAs have noticed that offers of plum assignments diminish with each month of pregnancy.21

Many pregnant women “reported verbal harassment from male colleagues whose wives did not work outside the home and from single women who did not have children.”22

Such reactions penalize a woman for being pregnant, regardless of her actual level of commitment to her career. Such attitudes can permanently damage a woman’s professional status. As Swiss and Walker observed, “Even women with topflight professional credentials feel frustrated when others make mistaken assumptions about them and their professional options. Unless a woman is willing to take the risks that come with fighting back, her career and her self-esteem can be devastated if she lets others define her work ethic.”23

The birth of a first child is a turning point in many women’s careers and life paths. Swiss and Walker’s survey of professional women revealed that eighty-five percent of respondents believed reducing hours of work to be detrimental to a woman’s career, yet seventy percent of the mothers reduced their working hours after the birth of their first child.24 Of the 594 respondents who were mothers, fifty-three percent changed jobs or specialties to accommodate family responsibilities.25 This turning point is especially apparent in the business world, where twenty-five percent of MBAs left the workplace entirely, “many feeling that they had been forced out of the best jobs once they became mothers.”26

Another survey in 1995 of 461 women ages thirty-five to sixty-five who hold titles of Vice President and above (i.e. Executive Vice President, President, and CEO) at Fortune 1000 companies showed similar patterns.27 Of these senior female executives, only sixty-four

22. Swiss & Walker, supra note 19, at 27.
23. Swiss & Walker, supra note 19, at 35.
percent had children, compared to eighty-five percent of American women as a whole and ninety-one percent of senior male executives. Thirty-five percent of the senior female executives had no children, and eleven percent were single. Even more revealing than the participants’ status were their responses to inquiries about how they balanced their careers and personal lives. Their responses reflected careful and strategic reactions to the work/family dilemma: eighty-five percent employed domestic help, twenty-six percent postponed having children, ten percent did not marry, twenty percent decided not to have children, fifteen percent took leaves of absence, and only seven percent worked part-time on flex hours. Ninety-three percent of the women with children used childcare services.

In contrast, some women respond to the work/family dilemma by dropping out of the work force entirely. Such an action carries a stigma, as Swiss and Walker found in their interviews:

Some of the smartest women in the country said that they’re too embarrassed to attend their reunions at Harvard Business School if they have dropped out of the work force, left the fast track by choosing part-time work, or decided to follow anything other than the standard male career path.

Of those Harvard graduates who became full-time homemakers, many explained that the stress of trying to balance career and children was “simply not worth the personal toll on the family, on the marriage, and on themselves.” Some women left their jobs because the severe illness of a child presented no alternative other “than for one

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out over 1200 questionnaires and obtained 461 valid responses. See Catalyst, Progress and Prospects, supra at 7.

29. See Catalyst, Progress and Prospects, supra note 27, at 48 (citing Korn/Ferry International & UCLA Anderson Graduate School of Management, Korn/Ferry International’s Executive Profile: A Decade of Change in Corporate Leadership).
31. See Catalyst, Progress and Prospects, supra note 27, at 45–49.
32. See Catalyst, Progress and Prospects, supra note 27, at 52.
33. See Catalyst, Progress and Prospects, supra note 27, at 45.
34. Swiss & Walker, supra note 19, at 65.
35. Swiss & Walker, supra note 19, at 167.
parent to leave the work force." Other women said they were forced out of careers that dictate either sixty-hour weeks or failure.

Just as the structure and expectations of the workplace limit women's opportunities, the unequal division of labor in the family reflects and perpetuates this pattern. While dual-income families have become the norm, Susan Deller Ross points out that "the newest version of [the traditional sex-based division of labor consists of] the part-time, low-earning, low-status Mom and the more than full-time, higher-earning, higher-status Dad." Carolyn P. and Phillip A. Cowan point out the inequities of how family responsibilities affect the careers of women and men:

Women ... are going to great lengths to make adjustments in their work outside the family so that their family lives will feel more nurturant and less frantic. By contrast, when fathers make shifts in their jobs, it is to keep them moving up the career ladder. These moves feel especially important, the men say, now that they are supporting a family.

Even when a couple decides to use childcare, mothers are the ones who take responsibility for this burden. Cowan and Cowan report:

With a few notable exceptions, it was the mothers in our study who gathered all the information about child-care resources, made most of the visits, and spent hours worrying about alternatives. ... Even though most of the women seem to assume that this is their job, many resent the responsibility, particularly since the choices are so difficult and seem to have such far-reaching consequences.

The burden of childrearing will affect almost all women, regardless of how individual women ultimately arrange their lives (whether

36. Swiss & Walker, supra note 19, at 167.
37. See Swiss & Walker, supra note 19, at 167.
40. Cowan & Cowan, supra note 39, at 130.
or not they have children). Full-time homemakers who view any job as incompatible with rearing children and tending to a home represent one extreme of the work/family dilemma. Professional women, such as business executives and lawyers, who strategically forego marriage and/or children to pursue a demanding career represent the other extreme. The choices of other women to take part-time jobs or jobs that do not require extended hours or inflexible schedules also exemplify reactions to this dilemma. The assumption that women will take the primary role in childrearing and housework—that this obligation is “her problem” if it conflicts with her career aspirations—affects not only the women who eventually choose this role but also those who do not.

C. Inequalities of Gender as Inequalities of Disparate Freedoms

While there is some intuitive unfairness in the differing degrees of freedom that men and women have to pursue their careers, it is important to provide a theoretical framework that addresses this unfairness. In *Inequality Reexamined*, Amartya Sen offers such a framework. He argues that gender inequalities can best be understood as inequalities of disparate freedoms or capabilities, as opposed to inequalities of income or resources. Capabilities refer to the freedom to choose from possible livings, whereas resources are the means to such freedom.

Freedom of choice plays a central role in Sen’s theory. Sen draws a distinction between actual achievement and freedom to achieve. Actual achievement refers to what we manage to accomplish (i.e., what positions in society women occupy, how much they earn), while freedom to achieve is the real opportunity to accomplish what we value (i.e., what positions they could have occupied, how much they could have earned). If we are concerned with the latter, then freely “choosing a lifestyle is not exactly the same as having that same lifestyle no matter how chosen, and one’s well-being depends on how

42. See SEN, *supra* note 41, at 122.
43. See SEN, *supra* note 41, at 36, 40.
44. See SEN, *supra* note 41, at 56.
that lifestyle happened to emerge." For example, Sen points out the substantial difference between someone who starves because he chooses to fast and someone who starves because he lacks the means to get food. Similarly, choosing to take parental leave is not the same as taking leave because one’s spouse is not entitled to it and childcare arrangements are unavailable. Choosing to slow down one’s career after the birth of a child is not the same as having a “mommy track” imposed by an employer and colleagues. Choosing to be a single, childless female executive because one has no interest in raising a family is not the same as sacrificing marriage and children for the sake of one’s career. Dropping out of the labor force to care for a child with a prolonged illness when leave is available is not the same as dropping out when leave is not available. Choosing traditional domestic arrangements is not the same as accepting those arrangements by default after the mother has taken a parental leave. How women make choices about family and work and what other choices are available to them at that time make all the difference between “real” and “forced” choices. As Sen says, “[c]hoosing may itself be a valuable part of living, and a life of genuine choice with serious options may be seen to be—for that reason—richer.”

Once we agree that freedom of choice is important, we must still decide which freedoms we value most. Most people would agree that the freedom to reproduce without losing one’s job is important. Before the Pregnancy Discrimination Act (PDA), men had the freedom to reproduce without jeopardizing their employment, while women did not (since most women cannot conceal pregnancy). According to Rhode, “[u]ntil the mid-1970s, employers routinely dismissed pregnant workers once their condition became apparent.... Most state unemployment and insurance programs excluded pregnancy from coverage. . . .” The PDA states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same . . .

47. Sen, supra note 41, at 52.
48. See Sen, supra note 41, at 52.
49. The “mommy track” refers to the diminished career opportunities which are imposed upon women once they become mothers. It is based on the unwarranted assumption that once a woman has children, she is no longer “serious” or “committed” to her career.
50. Sen, supra note 41, at 41.
52. Rhode, supra note 8, at 118.
as other persons not so affected but similar in their ability or inability to work." Hence, the PDA addresses a disparity in the freedoms that men and women can enjoy. In order to guarantee women the same freedom that men have to work as parents, we are justified in intervening by passing such legislation.

Currently, men enjoy the freedom to have children without taking primary responsibility for their children's daily needs. This freedom is made possible largely by the unpaid domestic labor of wives. One female senior vice president of a health care organization draws attention to this male privilege by saying:

I think every woman ought to have a wife, if you're going to dedicate this much energy and strive to continue in a position like the one I'm fortunate to have. You can't have it all, and if there's a woman out there that says you can, she's crazy, she hasn't looked around.

Since it is impossible for every woman to "have a wife," one way to ensure that women can have the same freedom as men is to provide universal access to reliable high-quality childcare. Perhaps some women will choose not to exercise this freedom. Some mothers may want more time with their children than the typical father currently spends with his children, but providing this option would reduce the current disparity between the freedoms that women and men enjoy.

While both men and women stand to benefit from the availability of child care, for women it is a matter of equal opportunity in the workplace. As Lucinda Finley asserts:

Certainly more workplace responsiveness to family life and expanded availability of child care will benefit both men and women workers, fathers as well as mothers. But since men have not been disadvantaged in the employment market by their family roles, child care, while important for both men

54. The absence of such legislation does not indicate non-intervention. The state cannot remain neutral to the issue of pregnancy and parental leaves. Whether it has a formal policy or not, the government makes choices about how to allocate resources. Therefore, a lack of policy does not indicate neutrality or non-intervention. See Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Reform 835 (1985).
55. CATALYST, PROGRESS AND PROSPECTS, supra note 27, at 50–51.
and women, is an equal employment opportunity issue only for women.\textsuperscript{56}

Given that childrearing burdens continue to create disparities in the career opportunities of men and women, equal employment opportunity calls for a redistribution of childrearing responsibilities.

\section*{D. Why Focus on Parental Leave?}

Parental leave marks a turning point in women's career opportunities. The time immediately following childbirth has also 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.\textsuperscript{57} One reason to focus on parental leave is precisely because of this potential. 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.

Parenting seems to be more a function of practice and opportunity than of maternal instinct. Though a first-time mother and father may begin with the same level of parenting skills, the perception that mothers have greater skills can be a self-fulfilling prophecy.\textsuperscript{58} If only the mother stays home after childbirth, both parents are likely to perceive her as more knowledgeable and skilled in childcare.\textsuperscript{59} A sociologist's study of middle-class couples in Scotland shows that such perception leads to mothers taking on the primary caregiving role. The duties undertaken by the twenty-two mothers in the study included arranging for baby-sitters and supervising the fathers' care of the children. Consequently, these children perceived that their mothers were constantly available to them.\textsuperscript{60} Thus, when fathers do not take parental leave after a child is born, they rapidly fall behind mothers in

\begin{itemize}
\item \textsuperscript{56} Lucinda M. Finley, \textit{Legal Aspects of Child Care}, in \textit{Parental Leave}, supra note 38, at 125, 146–47 (hereinafter Finley, Legal Aspects).
\item \textsuperscript{57} See Malin, supra note 10, at 1056–1057.
\item \textsuperscript{58} See Malin, supra note 10, at 1056.
\item \textsuperscript{59} See Malin, supra note 10, at 1056 (citing Katherine C. Backett, Mothers and Fathers (1982)).
\item \textsuperscript{60} See Malin, supra note 10, at 1054 (citing Backett, supra note 59).
\end{itemize}
gaining experience. As Cowan and Cowan describe it: “And once men step out, it becomes hard for them to get back in.”

Evidence from parental-leave policies in Sweden shows that when fathers do take parental leave, they are “significantly more likely to be perceived as having child care skills that [are] equal to or greater than those of their wives.” These fathers are also “more likely to share in ... specific child-care tasks, including preparing food, shopping, laundry, diapering, bathing, getting up at night, reading, comforting, and taking the child to the doctor.” Hence, 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.

II. BEYOND GENDER EQUALITY

Thus far, this Article has discussed the nurturing of children only in the context of how it currently places a burden on women’s opportunities to pursue a career. If our only concern is to relieve women of this burden, perhaps we should look for ways to equalize the burden so that neither mothers nor fathers have to take time off with a newborn or work part-time to care for a young child. This part illustrates that such an approach neglects the importance of family life and the needs of children. It then argues for an alternative model—one that values not only gender equality, but also work/family balance and the needs of children.

A. The Assimilation Model

Whereas employers have traditionally assumed that a worker had “someone at home” tending the home and raising children, one goal for the future could be to replace this model with mothers and fathers at work and the state taking care of the children. Alternatively, employers could assume that when they hire an employee (male or female), the employer will provide all necessary childcare, allowing the

62. Malin, supra note 10, at 1059 (emphasis added) (citing Linda Haas, EQUAL PARENTHOOD AND SOCIAL POLICY at 159 (1992)).
63. Malin, supra note 10, at 1058 (citing Haas, supra note 62, at 158).
parents to work full-time and devote all their energy into work—free from childcare worries.

This model of equal opportunity would solve the problem of diminished career opportunities for women. If it were successfully implemented over several generations, women would no longer face family-related career difficulties because their role in the family would be essentially the same as that of present-day men. The family would remain intact; only the gendered division of labor would disappear. Because everyone would expect the state and/or employers to provide full-time infant and childcare, girls would no longer adjust their career aspirations in anticipation of maternal responsibilities. Boys and girls alike would be encouraged to develop the same traits (probably aggressiveness, competitiveness, and ambition) and to pursue the same career fields based on individual talent, rather than gender stereotypes. Some families today already resemble this model: two career-driven parents who have chosen full-time childcare for their children. The mother takes a day off to give birth, but she goes back into the office the next day, assuring her boss that her family obligations will not interfere with her commitment to work. The gender-specific “mommy track” would no longer exist in this model. The female executive would no longer feel compelled to forego childbearing. Similarly, the executive couple would no longer feel compelled to forego having children. The double-income-no-kids (“DINK”) couple would be replaced by the double-income couple with kids but with minimal childcare responsibility.

These examples illustrate a particular vision of equality—one in which men and women do enjoy equal career opportunities. Men and women enjoy the same freedoms and pay the same price for having a family. Essentially, women have been “assimilated” into the workplace which is designed for men. For the sake of this thought experiment, assume that occupational segregation is no longer a problem and roughly equal numbers of men and women are childcare workers (i.e., childcare is no longer classified as “women’s work”).

64. While some feminists may argue that the devaluation of childcare and nurturing as an occupation presents problems whether the care is performed by women or men, such arguments are beyond the scope of this Article. For the sake of this discussion, it would be acceptable if childcare remained an occupation with low pay and low prestige, as long as men and women performed it in equal numbers. In other words, the issue is not unequal positions in society but occupational segregation. Just as some
This vision of equality is probably not too appealing for most people, including feminists. This thought experiment is intended to show that even if the most substantive versions of equal opportunity can capture the interests of men and women as workers who happen to have children, these scenarios fail to appreciate the importance of family life for parents and for children. If this type of gender equality is our only goal, then it justifies neither parental-leave legislation nor any major restructuring of the demands and expectations at work.

Nancy Dowd poses the challenge of finding a better solution, a model of gender equality that values family. “Goals often implicitly enshrine a single model. Is it possible to promote diversity, a range of combinations of work and family, rather than to mandate a shift from traditional gender roles to requiring market work, full-time, for all adults? The latter, I would suggest, values work but not family.”

How can we transcend the assimilation model that “values work but not family”? In thinking about parental leave, policymakers must consider the rights of women and men to participate in both the workplace and the home, as well as the needs and welfare of both parents and children.

The assimilation model of gender equality forces us to consider what kind of gender equality we want to achieve. Virginia Woolf posed the following questions to the daughters of educated men: “For we have to ask ourselves, here and now, do we wish to join that procession, or don’t we? On what terms shall we join that procession? Above all, where is it leading us, the procession of educated men?”

The desirability of the assimilation model should be questioned for women of all classes. In her new book, The Time Bind, Arlie Hochschild worries that women have entered the workplace on “male terms” that include long hours. She says, “[i]t would be less problematic for women to adopt a male model of work—to finally enjoy privileges formally reserved for men—if the male model of work were one of balance. But it is not.”

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Hochschild points out the necessity of looking beyond issues of justice to issues of culture when formulating the goals of parental-leave policies. She identifies two kinds of just families: the work-centered just family and the family-centered just family.\(^69\) By “just” families, she is referring families in which men and women have equal career opportunities.

To encourage the formation of the work-centered just family, we can strive to guarantee women the same career opportunities provided to men. Such opportunities may limit participation in family life and childrearing. In this assimilation model, women could receive the goods that men have traditionally received (i.e., money, prestige, economic security, power/influence, a meaningful career) by doing the things that men do, such as devoting themselves to a career, valuing breadwinning over childrearing, and not allowing family commitments to interfere with job expectations. Hence, men and women would be equal to the extent that they pursue career ambitions, sacrificing any family commitments that may interfere.\(^70\)

At the other end of the spectrum lies the family-centered just family. Family-centered does not necessarily entail making the family primary while neglecting the importance of work. It simply means making the workplace more family-oriented than is now the case. By supporting a family-centered just family, the government would acknowledge that there is something important about workers—men and women equally—spending time to care for their children. This path would call for a reorganization of the workplace to make it more compatible with parenting.

A call for a reorganization raises questions of scope. While there is a range of options, for the sake of simplicity, this Article explores a minor versus a major reorganization. A minor reorganization would involve many of the accommodations that have been made for working mothers, such as the “mommy track” and other options for parents who want to spend more time at home: lower pay, lower job security, less prestige, less opportunities for advancement. In the gen-

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69. Interview with Arlie Russell Hochschild, Professor of Sociology, University of California, Berkeley, in Berkeley, Cal. (Feb. 25, 1997).
70. I developed these ideas during my interview with Hochschild, supra note 69.
der-equal world, however, the "mommy track" would be replaced by the "parent track." Men and women would take parental leaves with the same frequency and be equally likely to choose the "parent track." In other words, all individuals who wanted to take an active role in the raising of their children would be required to make substantial sacrifices in their career expectations and achievements.

Alternatively, we could imagine a major reorganization of the workplace that would eliminate the career costs of parenting so that those who chose to take parental leaves would be on the same track as those who chose not to take them. The "parent track" would cease to exist. Parental leave would become a normal and acceptable occurrence for both mothers and fathers in all ranks of a company. Based on its 1990 evaluation of Fortune 500 companies' leave policies, Catalyst recommends the following:

- Create a climate that encourages open communication between employees and supervisors.
- Establish a mentoring program for leavetakers.
- Respond to the needs of women who have atypical/difficult pregnancies.
- Recognize and reward the contributions of high performers who choose to work during leave; however, do not hold this out as an expectation of all leavetakers.
- Continue to monitor demographic trends within the company to be able to fine-tune parental leave policies and programs and measure their utilization rates.\(^7^1\)

All of these suggestions would reflect a company's recognition that employees (both men and women) have family commitments. Having male and female role models of leave-takers at all levels of the company would also go a long way toward legitimizing parental leave.

\(^7^1\) Catalyst, The Corporate Guide to Parental Leaves 5 (Revised ed. 1992) [hereinafter Catalyst, Corporate Guide].
C. The Right to Participate in Both Family and Career

Justification of a major, rather than a minor, reorganization of the workplace requires articulation of some sort of "right" for both men and women to participate in childrearing without sacrificing their career. Many of Susan Okin's suggestions promote not only gender equality, but also the right to participate in both work and family. Okin argues that justice requires the workplace to accommodate parents by restructuring demands (especially in the most demanding professions where tenure or partnership coincides with childbearing years) and by providing flexibility through the use of day care, flextime, and gender-neutral parental leaves. Hochschild calls for a restructuring of corporate incentives to establish a balance between work and family. For example, Hochschild suggests the need for a "movement for the reform of work time" to pressure the Commerce Department to include the effectiveness of a company's family-friendly policies (as measured by utilization rates) among the criteria for performance awards. Each of these proposals would facilitate shared parenting.

Just as the Pregnancy Discrimination Act (PDA) ostensibly protects the rights of women to bear children without sacrificing their careers, we must protect the rights of both men and women to participate in childrearing without sacrificing their careers. The intent behind the PDA and any parental-leave legislation should be similar. Senator Williams, a co-sponsor of the PDA, stated that "[t]he entire thrust... behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." The PDA was one necessary step. Adequate parental leave and childcare constitute the next necessary steps.

We must question why, in this society, spending significant time with family translates into a low-paying, low-status job. The underlying message is that if a woman wants children and plans to personally care for them, she must do so at her own peril. In contrast to the

72. See Okin, supra note 6, at 175–77.
73. See Okin, supra note 6, at 176–77.
74. See Hochschild, Balance, supra note 68, at 14.
75. Hochschild, Balance, supra note 68, at 14.
woman who sacrifices a meaningful career to have children, stands the single, childless female executive who chooses career success over children, family, and personal time. The possibility of firing a woman because she becomes pregnant forces her to "choose" between career and family. Assuming that a woman voluntarily chooses to become pregnant, she should not have to face unemployment as a consequence. If forcing women to choose between career and family is unfair, then parental-leave and childcare legislation which applies equally to men and women is justified, even called for. In other words, even if the choice between career and family were imposed equally on men and women, neither should have to make this choice.

While a few occupations may be completely incompatible with taking parental leave or raising small children, the vast majority of occupations need not be. Some military or secret service jobs, for example, may require constant travel for the sake of national security. Most occupations in academia, science, law, medicine, and business, however, can be made compatible with taking leave and having family responsibilities. The parents who currently manage to balance the demands of work and home serve to support this claim. This is not to say that what they do is easy or that it does not involve sacrifices; many individuals, especially career women, sacrifice sleep, leisure, friendships, and personal time in order to manage work and family.77 Their struggles testify to the fact that many of the above-mentioned occupations are currently hostile to expecting parents or parents with young children. These difficulties result more from the current organization of the workplace and work schedule than from the inherent demands of the job. To put it another way, there are plenty of ways to make most occupations more compatible with parenthood. For example, some universities allow parents to "stop the clock" for tenure evaluation for a year after the birth of a child.78 According to Sandra Johnson, Assistant Dean of Faculty at Princeton University, most Ivy League universities and Stanford have a policy similar to Princeton, which allows an untenured faculty member to extend the time for tenure evaluation by one year per child (including adopted children) for up to two children.79 At Princeton, both mothers and fathers can

77. See Catalyst, Progress and Prospects, supra note 27, at 44–53; Hochschild, Second Shift, supra note 7, at 9; Swiss & Walker, supra note 19, at 55.
78. Telephone interview with Sandra Johnson, Assistant Dean of Faculty at Princeton University (Nov. 21, 1997).
79. Interview with Sandra Johnson, supra note 78.
request this extension, even if they are not the primary caregiver. Such policies allow parents to have children during their childbearing years without sacrificing their career.

**D. Considering the Needs of Children**

Thus far, this Article has made an argument promoting family life from the perspective of parents who want to participate in childrearing. In addition to weighing the rights of women and parents in general, a parental-leave policy should also aim to meet the needs of children. Nancy Dowd emphasizes the need to think about family policy from a family or child perspective, rather than from an adult perspective: “A family perspective suggests that the goal of these policies is to provide support to ensure that children’s caretakers have structures within which to nurture their families, rather than structures that are premised on implicit conflicts between work and family.”

A child’s needs (both physical and emotional), in and of themselves, may not warrant parental leave; parents are not necessarily the only persons qualified to care for a newborn. However, the combination of a child’s needs and a parent’s desire to care for his/her child builds a strong argument to provide both parental-leave and childcare options, as opposed to only childcare (as within the pure equal opportunity or assimilation model). Hochschild raises “the question of how women can truly become men’s equals in a more child-oriented and civic-minded society.” This question illustrates the need to consider gender equality in the context of valuing family and community.

Parental-leave and childcare provisions are even more crucial in light of divorces and single-parent households. Single-parent house-

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80. Interview with Sandra Johnson, *supra* note 78.


83. For example, in a case where both parents wanted to go back to work and leave the child with day care workers, nannies, or relatives, a child’s need to be with his/her parents may not necessarily trump the parents’ preferences.

holds made up thirty percent of all families in 1993. Myra Strober’s research shows that “[a]bout ninety percent of all children of divorce are cared for by their mothers. Yet almost two-thirds of these mothers do not receive child support payments.” Since the pattern of poverty in many single-parent households tends to harm the well-being of children, it is especially urgent to enable these parents, who are mostly women, to care for their children while holding on to a job, by means such as universal access to parental leave and affordable child-care.

III. OBJECTIONS

Now that three main goals for parental-leave legislation have been established—equal career opportunity for both sexes, the right to participate in both work and family, and the needs of children—this part examines and responds to two likely objections to these goals. The first objection comes from those who defend the traditional model of the family consisting of a male breadwinner and female homemaker. The second objection comes from those who defend forms of the family which depart from the monogamous, heterosexual model. Both objections pose the same challenge, namely, whether the state should promote some lifestyles over others.

A. Objection from Defenders of the Traditional Family

Some critics argue that promoting equal opportunities for women in the work force by providing childcare options promotes the egalitarian model of the family at the expense of the traditional model. These expenses are both moral and economic. Phyllis Schlafly argues

85. See Dowd, supra note 65, at 342.
87. As Dowd points out, “[s]ingle-parent families are more likely to be poor, and children of poor families are more likely to experience health, education, and employment risks.” Dowd, supra note 65, at 354.
that the FMLA discriminates against homemakers by providing a benefit to working women which is unavailable to homemakers. 88

Childcare legislation has been criticized as a threat to the traditional family. President Richard Nixon vetoed the Comprehensive Preschool Education and Child Day Care Act, 89 which would have "authorized publicly supported child care programs open to all parents." 90 He stated, "[I will not] commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against [sic] the family-centered approach." 91 In the early 1970s, Senator Walter Mondale, who sponsored a childcare bill, was "widely denounced at the time as an enemy of traditional values and the nuclear family, and his bill soon died." 92

There are several reasons why these objections are erroneous. First, merely providing women with more choices for childcare does not force them to use these options. Women can still choose traditional roles without being penalized for that choice. Phyllis Schlafly correctly asserts that not everyone benefits equally in terms of resources. 93 The current lack of an adequate childcare policy, however, is hardly neutral. 94 More importantly, providing childcare options is necessary to ensure choice for all women. As Lucinda Finley points out, "[i]t seems a curious and tenuous leap from the government's

90. Finley, Legal Aspects, supra note 56, at 135–36.
93. See Haase, supra note 88, at 354.
94. Recall Olsen’s argument that the state cannot remain neutral about how to allocate resources. See Olsen, supra note 54. The lack of universal parental leave as well as childcare subsidies for those who cannot afford it does not indicate neutrality or nonintervention. For examples of how current and past laws are not neutral or noninterventionist regarding childcare, see Finley, Legal Aspects, supra note 56, at 125–61.
ensuring a greater supply of a service many people want to the government's compelling people who do not want that service to use it."

Second, traditional values should not be imposed on women, but should be something that men and women may choose from among other viable alternatives. Finley asserts:

For those who are concerned about preserving and defending that vanishing breed, the "traditional" family, fear of government support for child care seems especially misplaced. Increased availability of child care is not the reason this family form is in decline. While it is no doubt true that some of the "ideal" mothers who do not work are at home because of the lack of child care, this arrangement cannot confidently be proclaimed their true or natural choice.... Economic and psychic need, ambition, intelligence, curiosity, and desire for social stimulation will all play a role in their decisions to work.

Even if traditional families could survive only by continuing to constrain women's freedoms, the government would be unjustified in permitting such constraint. Additionally, we have reason to believe that traditional families can survive without such constraints on women's freedoms. Some women (born-again Christian fundamentalists, for example) choose a traditional lifestyle after experiencing other lifestyles.

As shown in Part I, many couples currently adopt the pattern of a traditional family by default for economic reasons, workplace policies (both formal and informal), and gender-based stereotypes. Parental-leave legislation and childcare options would not provide financial incentives for women to choose one lifestyle over another; such policies would merely raise the egalitarian option to the current level of the traditional option. Such a policy would create a level playing field, so to speak. Even if the actual outcome (percentages of traditional and egalitarian families) remained the same, the existence of meaningful, viable choices makes all the difference.

95. Finley, Legal Aspects, supra note 56, at 141.
96. Finley, Legal Aspects, supra note 56, at 141.
B. Objection from Defenders of Alternative Forms of the Family

In addition to the objection from defenders of traditional families, there is an objection from defenders of alternative families. Some liberals contend that passage of legislation protecting the institution of the family promotes a particular type of family—namely, the monogamous, heterosexual family—while excluding alternative family arrangements.

In *Rethinking the Family*, Will Kymlicka criticizes Okin for assuming “that child-rearing in a just society will be done within traditional groupings—monogamous heterosexual couples.” He asserts that this assumption can be seen in Okin’s usage of “adult members of the family,” “parents,” “both parents,” “couple,” and “mothers and fathers” as synonymous. In particular, Kymlicka criticizes Okin’s assumption “that children will not develop the required sense of justice... unless they are equally mothered and fathered.”

Kymlicka questions: “[W]hat has happened to single mothers and lesbian couples, whose children are not being fathered?” In relation to parental responsibility, Kymlicka takes Okin’s assumption of heterosexual partners to its logical extreme by asking: “[W]hy should we not make shared parenting legally mandatory?”

Kymlicka’s criticism is valid. For moral, as well as empirical reasons, we need to let go of the belief that children need both mothering and fathering to develop a sense of justice. The assumption that children need male role models in their family tends to marginalize single mothers and lesbian parents. Similarly, the assumption that children need mothering devalues single fathers and gay parents. In any case, it has not been conclusively established that children need both maternal and paternal involvement to develop a sense of justice.

Kymlicka’s criticism goes deeper than this. He also criticizes Okin for assuming that men’s responsibility for both childcare and

104. It may even turn out that children (whether male or female) who grow up watching a single mother struggle for survival may be more sensitive to issues of gender equality and social justice than children who grow up with both a mother and a father at home.
economic support in a gender-equal society is tied to their roles as biological fathers. While Okin says that we can “start out with the reasonable assumption that women and men are equally parents of their children, and have equal responsibility for both the unpaid effort that goes into caring for them and their economic support,” Kymlicka questions whether this assumption is reasonable. He points out that if fathers have such responsibilities to their biological children, then they can cite their legal responsibility as grounds for “demanding visitation or custody rights” or obtaining “injunctions against women’s aborting ‘their’ babies.”

He states, “[i]ndeed, to tie child support to paternity is to reinforce compulsory heterosexuality—it tells women that the socially recognized way of raising a child involves the support and presence of a man.”

Kymlicka raises complicated and difficult questions, many of which go beyond the scope of this Article. This part addresses some of them in the context of parental-leave legislation. First, the needs of children can be addressed without exclusively promoting the monogamous, heterosexual family. The state should shoulder a greater responsibility to ensure the welfare of children by parental-leave legislation, as well as legislation mandating adequate and affordable childcare options. Such legislation would not favor heterosexual couples; it would help single-parent families and homosexual couples as well.

Unlike policies in other countries that offer specific incentives to encourage sharing of childcare responsibilities between a mother and father in a family, parental-leave policies such as the FMLA do not

105. Okin, supra note 6, at 175–76.
106. Kymlicka, supra note 98, at 85.
107. Kymlicka, supra note 98, at 86.
108. For example, Swedish family law was changed in 1979 to explicitly state that “spouses should share breadwinning, housework, and child care.” Linda Haas, Equal Parenthood and Social Policy: Lessons from a Study of Parental Leave in Sweden, in Parental Leave, supra note 38, at 375, 384 (hereinafter Haas, Equal Parenthood) (citing Statens Offentliga Utdenningar [Government Official Reports], 1982). Sweden’s parental leave policy also offers specific financial incentives for couples to share parental leave. See Swedish Institute, Fact Sheet on Sweden: Child Care 1 (Aug. 1996) (providing non-transferable paid leave time for each parent). Sweden even uses blood-testing to ensure the involvement of biological fathers:

Swedes assume that children need good, close contact with both parents. Since the 1970s, Swedish law has prohibited distinguishing between children born inside wedlock from those born outside, placing emphasis on quickly identifying fathers through a centralized and sophisticated blood-
assume a monogamous, heterosexual family. The FMLA allows leave for the birth or adoption of a son or daughter; it also provides employees with leave to care for a spouse, son, daughter, or parent. A spouse is defined as "a husband or wife as recognized under state law, including common law marriages in states where they are recognized." The FMLA broadly defines "parent" and "son or daughter" "to include in loco parentis relationships." These definitions allow an employee who has "actual day-to-day responsibility for a child to take family leave," even if no biological or legal relationship exists. These definitions permit a flexible understanding of family in which homosexual parents can use family leave to care for non-biological children as well as their own elderly parents. The FMLA’s definition of "parent" of an employee specifically excludes in-laws, leaving unmarried couples with no less benefit.

Homosexual couples could be included in family leave policies in at least two additional ways. First, if homosexual marriages were legally recognized, then a homosexual partner could take a leave to care for his/her same-sex spouse. This solution points to the inadequacy of our legal definition of marriage, rather than to an inadequacy in parental-leave legislation. Another option would be to make the FMLA more inclusive by recognizing domestic partnerships or other de facto marriages at a federal level.

IV. DESIGN OF THE FMLA

This part will evaluate how well the FMLA meets the three objectives proposed in this Article: equal career opportunities for the sexes, integration of work and family life, and meeting the needs of children. The FMLA is a modest beginning in resolving the work/family dilemma.

testing system so that they can take their place in children’s lives regardless of whether the father and mother are married.


109. See Craig, supra note 2, at 67.
111. Sholl & Krupp-Gordon, supra note 110, at 19.
112. Sholl & Krupp-Gordon, supra note 110, at 19.
It nonetheless fails to foster equal career opportunities for women and
does not adequately provide for the needs of children. This part
concludes by using empirical research to evaluate the strengths as well
as the weaknesses of the FMLA.

The Family and Medical Leave Act is the first national parental-
leave policy in the United States. The Act also covers medical leave
and leave to care for a spouse or parent with a serious illness. The
FMLA states that all eligible employees (male or female) must be al-
lowed to take up to twelve weeks of unpaid leave per year in the
following circumstances: within twelve months of the birth of a baby
or the adoption of a child; when a serious health condition renders the
employee unable to perform his or her job; or to care for a spouse,
parent, or child who has a serious health condition. A serious health
condition is defined as "an illness, injury, impairment, or physical or
mental condition that involves: inpatient care in a hospital, hospice,
or residential medical care facility; or continuing treatment by a health
care provider."

Examples of serious health conditions include but are not
limited to heart attacks, heart conditions requiring heart by-
pass or valve operations, most cancers, back conditions
requiring extensive therapy or surgical procedures, strokes, se-
vere respiratory conditions, spinal injuries, ... severe nervous
disorders, ... ongoing pregnancy, miscarriages, complications
or illnesses related to pregnancy, such as severe morning sick-
ness, the need for prenatal care, childbirth and recovery from
childbirth.

Employers covered by the FMLA include "all private employers
who engage in interstate commerce and have fifty or more employ-
ees." Employees are eligible if they "have been employed [by a
covered employer] for at least twelve months and worked at least 1250
hours in the previous twelve month period. . . ."

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103-8, pt. 1, at 40 (1993)).
117. Craig, supra note 2, at 66.
118. Craig, supra note 2, at 66.
The FMLA stands in contrast to previous legislation (i.e., the PDA) that approached childbirth and childrearing only in the context of its disabling effect upon female workers, and whether pregnancy should be considered the same as or different from other health conditions that may prevent an employee from working. In *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, Paolo Wright-Carozza commends the FMLA because it “begin[s] to break out of the dominant conceptual cage” of sameness and difference of disabilities.\(^\text{119}\) He says, “It recognizes that employees are also family members, and that family relationships demand care and entail responsibilities.”\(^\text{120}\)

While the FMLA is a step in the right direction in terms of recognizing the work/family conflict, its provisions are meager. The eligibility requirements exclude many employees, the majority of whom are women.\(^\text{121}\) For example, the FMLA does not apply to employers with fewer than fifty employees, thereby excluding forty percent of the work force.\(^\text{122}\) Even though the leave is unpaid, small businesses are exempted based on the reasoning that the mere absence of an employee can cause undue strain (economic or otherwise).\(^\text{123}\) Presumably, larger businesses can better cope with such leaves.

Even among those who are eligible to take leave, many cannot afford to do so. Since it is unpaid, almost the entire financial burden of using leave is placed on individuals and their families. While individual employers may offer more generous leaves or elect to substitute any accrued paid leave,\(^\text{124}\) the FMLA does not mandate any form of paid leave.


\(^\text{120. Wright-Carozza,} \text{supra} \text{note} \text{119, at} \text{589}.\)

\(^\text{121. See Karen Judd & Sandy Morales Pope,} \text{The New Job Squeeze: Women Pushed Into Part-time Work, Ms., May/June 1994, at} \text{86–87}. \text{Part-time workers are less likely to have worked at least 1250 hours in the previous twelve months, and women constitute an estimated two-thirds of the "contingent" work force, which includes part-time, temporary, freelance, and consultant workers. See Judd & Pope,} \text{supra} \text{at} \text{86–87}.\)

\(^\text{122. See Craig,} \text{supra} \text{note} \text{2, at} \text{66 (citing Joseph P. Ritz,} \text{New Family Leave Doesn't Help Everybody, Buff. News, Aug. 7, 1993, at B9).}\)

\(^\text{123. This exclusion is an example of an accommodation in the FMLA made for "the legitimate interests of employers." See FMLA § 2601(b)(3).}\)

\(^\text{124. See Craig,} \text{supra} \text{note} \text{2, at} \text{74. Accrued paid leaves may include vacation leave, personal leave, or sick leave. Interestingly, an employer may require use of accrued leave as a substitute for FMLA time. Though this requirement equals paid time, it fore-} \)
Many have criticized the lack of wage replacement as creating a disparity between those who can and those who cannot afford to take an unpaid leave. Ellen Bravo, National Executive Director of 9-to-5 National Association of Working Women, commented that “[the FMLA] will be a shadow benefit if people cannot afford to use it.”

Bravo argues that “[s]eventy-seven percent of women work in lower-paying non-professional jobs, which means they cannot afford to take unpaid leave even if it is desperately needed.” Nancy Dowd has pointed out that while the absence of paid leave hurts lower-income families the most, other families suffer as well:

[T]he lack of wage replacement strikes very broadly, given the predominance of dual-wage-earner families, and the essential contribution of both wage-earners to family income. For most dual-wage-earner families, family leave without wage replacement is a hollow right, at most an ultimate safeguard to prevent job loss, but hardly a support structure to ensure healthy family formation.

The FMLA will only be useful to those families who can afford to lose three months of one salary, excluding households where two incomes are crucial for survival and most single-parent households. Single-parent households made up thirty percent of all families in 1993 and were predominantly headed by women. For those who cannot afford to take such leave, the FMLA does little to resolve the work/family conflict.

Since the FMLA does not resolve the work/family conflict for most parents, it does not adequately provide for the needs of most children. Because at least forty percent of American employees are not eligible, the children of those working parents are not provided the opportunity for adequate bonding time. Dowd denounces the lack of coverage, saying, “[t]he resulting discrimination against children unfortunate enough to have parents who work for employers not covered...
by state or federal legislation is intolerable if a primary goal of family leave is to provide all children with a solid beginning and adequate support in the event of serious medical crisis.\textsuperscript{129}

Children of single parents are especially vulnerable. Even if a single mother is eligible to take leave, she may be forced to choose between leaving her child without care or facing impoverishment. In either case, her children are likely to suffer from the absence of paid leave.

For those children whose parents are eligible, the FMLA provides a total of twelve weeks for both pregnancy and parental leave. The Act specifically limits parents to twelve weeks in a twelve month period for both the mother’s “serious health condition”\textsuperscript{130} and time to care for a newborn child; parents are not entitled to twelve weeks for each event.\textsuperscript{131} Consequently, the earlier a mother begins her pregnancy leave, the less time she has for bonding with her baby. If a mother has a particularly difficult or complicated pregnancy or other serious health condition, then she may use up most of her leave before the baby is born. Such a situation may not leave “sufficient time to establish a foundation for the parent-child relationship.”\textsuperscript{132} According to Dowd, “studies suggest that a minimum of three months should be provided post-pregnancy, with a more desirable minimum of six months.”\textsuperscript{133} Without engaging in a debate about precisely how much time is necessary, it suffices to say that by allocating only three months to both pregnancy and parental leave, the FMLA runs the risk of depriving infants of enough time with their parents. If we are interested in promoting the goals of work/family balance and meeting the needs of children, we should push for adequate time for parent-child bonding.

The FMLA also fails to meet the needs of sick-but-not-deathly-ill children. The Act does not entitle a parent to take a day off, paid or unpaid, to care for a child with the chicken pox or to take a child to a doctor's appointment. Leave may be taken only for a “serious health condition,” defined as “an illness, injury, impairment, or physical or

\textsuperscript{129} Dowd, \textit{supra} note 65, at 352.
\textsuperscript{130} This includes but is not limited to ongoing pregnancy, miscarriages, complications or illness related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. \textit{See} Craig, \textit{supra} note 2, at 71 n.178.
\textsuperscript{131} \textit{See} Craig, \textit{supra} note 2, at 67.
\textsuperscript{132} Dowd, \textit{supra} note 65, at 348.
\textsuperscript{133} Dowd, \textit{supra} note 65, at 348.
mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. Some types of serious health conditions for which leave is available are heart conditions, cancer, spinal injuries, and severe nervous disorders. Furthermore, "an employer may require certification from a health care provider" for the serious illness of the employee or family member.

While the FMLA does little to resolve the work/family conflict for parents or provide adequate care for children, it does even less to promote equal opportunity for women in the workplace. The FMLA is gender-neutral, giving fathers at least the legal right to take parental leave, but beyond that, provides little incentive for fathers to take advantage of the provision. Since men, on average, earn more than women do, they are unlikely to take unpaid leave. Dowd argues that "pay is also a gender issue. Income replacement encourages men, who generally earn more than women, to take leave." The lack of wage replacement perpetuates the newest version of the traditional sex-based division of labor: "the part-time, low-earning, low-status Mom and the more than full-time, higher-earning, higher-status Dad." For example, if a couple is deciding who should take unpaid leave (assuming both are eligible) or work part-time, financial considerations would predispose the spouse who earns less—most likely the wife—to curtail her career. While financial considerations may not be the only issue for couples, it is likely to be a decisive one, especially for poorer families.

Several other aspects of the FMLA reduce the likelihood that men will take parental leave. The Act excludes "key employees" by allowing employers "to deny restoration of an employee's job position if (1) the employee is salaried and among the highest paid [ten] percent of the

134. Craig, supra note 2, at 70 (quoting 29 U.S.C. § 2612 (1994)).
135. See Craig, supra note 2, at 71 n.178.
136. Craig, supra note 2, at 68.
137. There is, however, at least one aspect of the FMLA that encourages men to take leave. Since the leave to care for an elderly parent only applies to an employee's own parents, not to a spouse's parents, the Act provides some incentive for men to take an unpaid leave to care for their own parents. This may take some pressure off women to care for their parents-in-law, since they are not legally entitled to such time off. In the absence of the FMLA, the only options may be for one spouse (most likely the wife) to work part-time or quit.
138. See Dowd, supra note 65, at 347.
139. Dowd, supra note 65, at 347.
140. Ross, supra note 38, at 93.
employer's work force'; and (2) a 'denial is necessary to prevent substantial and grievous economic injury to the employer.' Some commentators have claimed that the Act discriminates against the poor, but others argue that it discriminates against highly paid employees. By excluding "key employees," the Act sends a message that the workplace cannot and need not accommodate twelve weeks of unpaid bonding between "key employees" and their children. In a corporation, this can send a powerful message to all other male and female employees: If you want to be part of the highest paid bracket, do not expect to take parental leave. This exclusion also deprives many men of the most visible role models at the highest ranks of a company. Imagine the impact if the male CEO or vice president of a corporation took parental leave. In addition, this exclusion exacerbates the disturbing trend of childless, single female executives. (This trend is not disturbing in and of itself, but because it suggests that these women sacrificed having a family as a strategy to attain a certain level of success.)

Another provision of the FMLA states that spouses employed by the same employer must aggregate twelve weeks for the birth or adoption of a child. While this provision is designed to eliminate employer incentive to discriminate against married couples in hiring, it further reduces the likelihood that a father will take leave, since the father is eligible for only the portion of leave which remains after the mother has taken a pregnancy leave and recovered from childbirth.

A. Strengths of the FMLA

Having assessed the FMLA in terms of the three objectives, this part examines some of the chief strengths of the FMLA, as well as key areas for improvement. The Act's main strengths include its gender-neutrality, its inclusiveness of types of leave besides parental leave (e.g., leaves to care for spouses, parents, and other relatives), and its establishment of a federal minimum standard.

141. Craig, supra note 2, at 75.
142. See Craig, supra note 2, at 75.
143. See Craig, supra note 2, at 74.
144. See Rhode, supra note 8, at 121; Craig, supra note 2, at 75 (citing 29 U.S.C. § 2612(f) (Supp. V 1993)); Wright-Carozza, supra note 119, at 574–75.
1. Gender Neutrality

The FMLA is a gender-neutral policy, meaning that both male and female employees can take leave for a serious health condition or to care for a newborn, a newly adopted child, or an immediate family member with a serious health condition. While pregnancy-related disabilities would only be applicable to women, they fall under a broader category of serious health conditions that apply to both sexes. Furthermore, while a man could not take pregnancy leave for his wife's pregnancy, he could take family leave to care for her while she suffers from a serious health condition. Neither the language nor the content of the FMLA assumes mothers will or should be the primary caregivers for children. Moreover, the FMLA does not give women or mothers privileges or special treatment compared to men or fathers.

For years, feminists and legal scholars have debated whether pregnancy should be treated the same as or different from any other disability. A gender-neutral or sameness approach requires that if employers offered any disability leave, then they would have to offer pregnancy leave, but if they did not offer any disability leave, then they would not be obligated to offer pregnancy leave. Because there was no federal legislation for disability leave in the late 1980s, at the time of such debates, a woman working for an employer who did not offer disability leave could be fired for taking a pregnancy leave. Under the “special treatment” or difference approach, employers would be required to allow pregnancy leave even if they did not allow any other disability leave. Defenders of this separate protection for pregnant workers argued that women are burdened disproportionately under a no-leave policy, because while both sexes have non-reproductive illnesses and injuries, only women have the additional pregnancy disability.

On the other hand, those against special treatment put forth three persuasive arguments. First, special treatment “would make female employees less desirable and thus increase the likelihood of

145. See Craig, supra note 2, at 67.
146. While some feminists object to categorizing pregnancy as a disability, “disability” is used here in the sense of a condition that incapacitates a worker from performing his/her job.
147. See RHODE, supra note 8, at 120–21.
148. See RHODE, supra note 8, at 120.
discrimination against women in the hiring process." Second, special treatment "perpetuate[s] the separate spheres ideology—specifically the idea that a woman is 'unique and separate, with a special reproductive role in which the state has sufficient interest to single her out for special treatment.'" Third, special treatment "shift[s] attention away from the injustice of inadequate employer benefit plans and focuses attention on the fact that some women have special benefits, thereby producing resentment of female workers and a split between male and female workers."

In her study of the data from the Current Population Surveys of May 1979 and May 1983, Eileen Trzcinski cites empirical evidence which supports her hypothesis "that the special treatment approach tends to undermine the compensation and employment position of women of child bearing age, while the equal treatment approach tends to improve the relative economic position of women." She reports that "women of childbearing age who lived in states with mandatory maternity leave statutes were significantly less likely to be covered by pension programs or health insurance than women in other states." She also mentions that the negative compensation effects of such statutes were confined to female employees; the level of compensation for men did not vary among states with or without mandatory leave statutes. Furthermore, mandated pregnancy leaves reduced the years of tenure (time spent working for an employer) for women who lived in

150. Gibson, supra note 149, at 1171.
151. Gibson, supra note 149, at 1171. Susan Deller Ross has also pointed out that women suffer in the absence of disability leave:

Employers who refuse to provide any sick leave, paid or unpaid, will fire a woman for a broken leg, an appendectomy, or a serious heart condition just as readily as for childbirth. It does this woman's children little good to preserve her job when she has a baby, only to let her employer fire her when she is hospitalized for some other serious medical condition. The same is true, of course, for fathers.

Ross, supra note 38, at 100.
those states, while it had no effect on men’s tenure.\textsuperscript{155} Trzcinski reports that an equal treatment approach tended to “improve the labor market” for women and that “temporary disability statutes have a direct positive effect” on women’s compensation, including wages and the probability of pension coverage and health insurance.\textsuperscript{156} Such research suggests that “if a law or policy singles out maternity-related disabilities, women of childbearing age will be singled out for discrimination.”\textsuperscript{157} Hence, any parental-leave policy that singles out women is suspect.

While some arguments attempt to support the provision of parental leaves only for women, the disadvantages of such a policy outweigh the benefits. These arguments include: an “urgent needs of working women” argument, an “allocation of limited resources” argument, and a “potential for misuse” argument.

Finley argues that “laws that require employers to make reasonable maternity leave available to those who want it are designed to foster the inclusion,” rather than exclusion, of women.\textsuperscript{158} This approach seems to take a “women and children first” approach as a temporary solution to the immediate needs of many women, especially single mothers. Because women suffer more than men in the absence of family leave, Finley says:

\begin{quote}
Even though paternity leave is an important provision to push for, it seems foolish to oppose policies that, while perhaps not going far enough toward challenging the separation of the home and work spheres for both sexes, definitely provide something that women badly need. A policy that provides adequate leave for women, while not yet addressing leave for men, can be a liberating step so long as pressure continues for adopting policies that would break down the home-work separation for men, too. Indeed, as the
\end{quote}

\begin{itemize}
\item \textsuperscript{155} See Trzcinski, \textit{Separate v. Equal}, supra note 152, at 11. Tenure is significant because increases in job tenure with an employer can increase wages and promotions.
\item \textsuperscript{156} Trzcinski, \textit{Separate v. Equal}, supra note 152, at 21.
\item \textsuperscript{157} Trzcinski, \textit{Separate v. Equal}, supra note 152, at 12.
\item \textsuperscript{158} Lucinda M. Finley, \textit{Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate}, 86 \textit{COLUM. L. REV.} 1118, 1174 (1986) [hereinafter Finley, \textit{Transcending Equality Theory}].
\end{itemize}
experience in Europe illustrates, once leave for women is accepted, it may be easier to achieve leave for men. ¹⁵⁹

Finley argues that women should take advantage of "mother-friendly" policies, since they are sorely needed and can pave the way for more "father-friendly" policies.

Other theorists argue that employers who cannot afford to provide leave for both men and women should favor women:

[Employers, when faced with the economic costs of providing childrearing leave, may well decide to provide these leave benefits where they are most needed and where they are most cost-effective—to women who may be disadvantaged and who may become underrepresented in the work force if childrearing leave is not provided.¹⁶⁰]

The response to these first two arguments, namely, the "urgent needs of working women" and the "allocation of limited resources" arguments, is the same. While some employers may be interested in making the workplace hospitable to working mothers, this is not true of all employers, especially those primarily concerned with the bottom line. If employers perceive women as more "expensive," they will be less likely to hire them, as shown in states with "special" pregnancy leave legislation.¹⁶¹ Furthermore, although favoring women in parental leaves may help working mothers in the short term by providing for those most in need, such a policy would inevitably perpetuate the stereotype of women as "caretakers of newborn infants."¹⁶² Finally, even though women take the majority of parental leaves, another argument against providing parental leaves for women only is that it discriminates against men; this argument was made in Schafer v. Board of Public Education.¹⁶³ In 1981, "Gerald Schafer, a Pittsburgh school teacher, requested a year-long unpaid leave of absence in order to care for his infant son;" since the Pittsburgh Federation of Teachers union allowed such leaves only to women, "Schafer resigned from his em-

¹⁵⁹. Finley, Transcending Equality Theory, supra note 158, at 1174–75.
¹⁶¹. See supra notes 152–57 and accompanying text.
¹⁶². Keyes, supra note 160, at 323.
ployment, citing as justification his inability to find appropriate child
care for his son."\textsuperscript{164} The Third Circuit ruled that the district court had
wrongly interpreted an earlier Supreme Court decision\textsuperscript{165} "by allowing
preferential treatment of female employees without a simultaneous
showing of disability related to childbirth."\textsuperscript{166}

The "potential for misuse" argument says that gender-neutral
policies leave open the possibility that men will abuse the policy,
thereby exacerbating gender inequality. For example, when some uni-
versities consider offering parental leaves equally to both men and
women, one concern is that, while women would use their leave to
care for children, men might use it to pursue other activities such as
writing books. Such abuse might be especially likely among those men
whose spouses take primary responsibility for their child.\textsuperscript{167} This con-
cern is flawed. First, the situation is highly unlikely given the stigma
attached to parental leave for men.\textsuperscript{168} Second, any entitlement policy
brings some risk of abuse. The risk in this case does not seem particu-
larly high. Third, precautions can reduce the potential for misuse.\textsuperscript{169}

2. More Inclusive Versus Less Inclusive Types of Family Leaves

Not only should leaves to care for children be provided for both
men and women on the same terms, they should also be part of a
more inclusive nurturing leave, one that allows care for family mem-
bers besides children.\textsuperscript{170} The FMLA is an example of a more inclusive

\begin{itemize}
\item \textsuperscript{164} Melissa B. Kessler, Recent Decisions, 64 \textit{Temp. L. Rev.} 1047, 1048 (1991).
\item \textsuperscript{165} California Fed. Sav. and Loan v. Guerra, 479 U.S. 272 (1987).
\item \textsuperscript{166} Kessler, \textit{supra} note 164, at 1050 n.25.
\item \textsuperscript{167} Susan Okin of Stanford University provided this example.
\item \textsuperscript{168} Even if some men did take parental leaves for illegitimate reasons, the precedence (of
more men taking parental leave) alone might increase legitimate use.
\item \textsuperscript{169} In the case of a university policy, the leave-taker might be required to sign a contract
stating that the leave will be taken primarily to care for a child. Such a contract
would be similar to an honor code. Though there may be more effective measures to
verify that a parent was actually caring for a child (i.e. interviews, videotaping, testing
whether the parent can change the baby's diapers, and so forth), the intrusiveness and
logistical problems make such methods undesirable.
\item \textsuperscript{170} More inclusive leaves can also be interpreted as allowing leaves for purposes other
than parenting, such as education or military service. Catalyst has recommended that
companies provide leaves for various purposes in order to avoid the concern about
being perceived as favoring one group (parents) over another (non-parents). \textit{See}
\textit{Catalyst, Corporate Guide \textit{supra} note 71, at 11. Such leaves are not covered by}
the FMLA; whether such leaves should be covered is beyond the scope of this Article.
\end{itemize}
family leave since it allows leave to care for a sick spouse or parent, as well as for a sick child or a newborn or newly adopted child.\textsuperscript{171} A less inclusive policy might only allow leave to care for a newborn. While Trzcinski cites gender equality as a reason for more inclusive leave,\textsuperscript{172} it may not be the strongest reason.

Trzcinski reasons that whereas women are more likely to request newborn or child care leaves, both men and women are likely to request leaves to care for elderly parents or relatives.\textsuperscript{173} By legislating more inclusive leaves, she argues, employers will no longer have an economic incentive to discriminate against women or mothers when hiring; women will no longer be perceived as "more costly" to employers.\textsuperscript{174}

In the absence of empirical evidence about the compensation and employment effects of parental leaves, Trzcinski's argument hinges on the assumption that men are \textit{as likely as} women to take a nurturing leave. While this is a valid assumption in the case of disability leaves, since a disability is involuntary, the voluntary aspect of caretaking leave casts some doubt on whether men would be as likely as women to take a nurturing leave. If a man injures himself on the job and cannot work, he would be forced to take a disability leave. On the other hand, if his elderly father is ill, the man still has a choice over whether he takes time off from work. Even though the FMLA provides the legal entitlement to care for his elderly parent, he could still ask his wife to make the necessary adjustments to her career, especially if his employer would disapprove of his taking leave. Women may still be statistically more likely to care for the elderly. While both men and women are equally likely to have frail parents or sick relatives, it may be the case that women are more likely than men to care for elderly parents: both her own and her in-laws. Because of the economic disincentives for men to take FMLA leave, women may still decide to work part-time or quit in order to care for an in-law.

\textsuperscript{171} See Craig, supra note 2, at 67.
\textsuperscript{172} See Trzcinski, Separate v. Equal, supra note 152, at 21.
\textsuperscript{173} See Trzcinski, Separate v. Equal, supra note 152, at 13. Trzcinski argues that more inclusive leave "greatly minimizes employers' use of statistical discrimination against women of childbearing age" since "all individuals can fall ill" and "since middle-aged and older employees are the most frequent caregivers for frail elders." Trzcinski, supra note 152, at 13.
\textsuperscript{174} See Trzcinski, Separate v. Equal, supra note 152, at 13.
Trzcinski seems confident that more inclusive parental leaves will break down gender stereotypes. She asserts that limiting family leaves to infant care “reinforces the link between caregiving and women’s biological functions in bearing children, whereas leaves for nurturing across the life cycle that are available to men as well as women break down assumptions about what caregiving is and who should provide it.” The empirical question remains as to whether merely having the option to take a family leave would break down assumptions about who should provide caregiving.

Research indicates that women currently provide most of the caregiving for elderly parents and parents-in-law, and such caregiving restricts women’s employment opportunities just as child care does. Researchers have found that wives, adult daughters, and daughters-in-law spend an average of three to 22.7 hours a week caring for elders between the ages of forty and sixty-nine years old. As Taub points out: “In forty percent of the cases in which an impaired adult lives with an adult child, the child’s caregiving time is equivalent to a full-time job.”

Given that women tend to carry the burden of caregiving for both children and the elderly, more inclusive nurturing leaves would help women handle these responsibilities without sacrificing their employment. Taub asserts that leaves intended to “minimize the conflict between work and home” should “accurately reflect the wide range of burdens experienced by women.” Taub also cites changing demographics as a reason to include eldercare leave as part of family leave: “By the year 2025, the number of older people needing health care will be more than twice the number of children under five years old. Thus, in terms of sheer numbers, the care needs of older people will vastly exceed those of infants in the first year of life.”

Even if women continue to take more family leaves than men, more inclusive family leaves are preferable to less inclusive ones (pure

175. See Trzcinski, Separate v. Equal, supra note 152, at 12.
176. Trzcinski, Separate v. Equal, supra note 152, at 12.
178. See Taub, supra note 177, at 387 n.26 (citations omitted).
180. Taub, supra note 177, at 389.
181. Taub, supra note 177, at 386 (footnote omitted).
parental leaves). More inclusive leaves better address a broader range of caregiving and better serve the needs of the elderly.

3. A Federal Minimum

During the Congressional hearings for the FMLA, opponents (mostly representing the interests of businesses) agreed with the goal of helping working parents balance time constraints between work and family, but argued that a "one-size-fits-all" legislative approach was not the correct strategy. These opponents argued that a federal minimum would hinder the ability of employers and employees to devise flexible solutions.

Instead of preventing companies from negotiating flexibility, however, the FMLA serves as a baseline or minimum standard to ensure at least some workers the right to take leaves. A minimum is necessary because most workers lack bargaining power. As Ellen Bravo asserts: "most workers ... do not engage in negotiations with their employers over wages and benefits. Fewer than one in five workers is in a union; eighty-seven percent of all female workers have no collective bargaining agreement. Requesting leave is very different from having power to negotiate for leave." Robert Weisenberg, owner of Effective Management Systems, testified in favor of family-leave legislation, saying that it falls within "that limited category of basic employee rights that must be guaranteed for everyone."

Representative Patricia Schroeder, a co-sponsor of the FMLA, cited the "arbitrary and inconsistent" parental-leave policies in different states as reason for a national policy. Said Schroeder:

[The federal government has both the authority and the obligation to take the lead in establishing uniform minimum

182. Precisely how inclusive the policy should be becomes a tricky issue. While it should include one's own parents as opposed to only children, including in-laws may eliminate one aspect of the FMLA that encourages men to take leave. See supra note 137.
185. Bravo, supra note 184, at 169.
standards for a family leave policy, providing states a model to build upon. Under the Constitution, Congress has the right to regulate interstate commerce and to set minimum standards to protect the health, safety, and welfare of workers.\textsuperscript{187}

Since legislation serves as a normative and legitimizing force, recognition that workers have the right to unpaid, job-protected leave to care for family members can help lay the foundation for more extensive benefits. For example, before the Fair Labor Standards Act in 1938 restricted the work week to forty hours and established a minimum wage, such restrictions were perceived as illegitimate interference with the "right to purchase or to sell labor."\textsuperscript{188} Laws against sexual harassment are a more recent example of a legal response to behavior, once perceived as unfortunate, that is now recognized as unacceptable. As Martha Mahoney has noted, "law itself funnels and shapes consciousness and resistance to oppression."\textsuperscript{189}

By setting a minimum standard on the federal level, the FMLA does not deny employers flexibility. Just as the minimum wage does not prevent employers from offering wages above the minimum, the FMLA does not prevent employers from offering more generous family leaves. In fact, some companies already go above and beyond the federal requirements of the FMLA.\textsuperscript{190}

\textbf{B. Ways to Improve the FMLA}

Although the FMLA has some strengths, it can be improved in several ways: (1) it should provide wage replacement; (2) the maximum leave period should be lengthened beyond twelve weeks; (3) wage replacement should be funded by taxes; and (4) the FMLA should cover a greater portion of employees. By making such improvements, the FMLA can better promote gender equality, the integration of work and family life, and the needs of children. While these suggestions are by no means exhaustive, they are intended to

\textsuperscript{187} Schroeder, \textit{supra} note 186, at 329.
\textsuperscript{188} Bravo, \textit{supra} note 184, at 166 (quoting \textit{Lochner v. New York}, 198 U.S. 45 (1905)).
\textsuperscript{190} For examples of actual policies, see \textit{Catalyst, Corporate Guide}, \textit{supra} note 71.
represent four significant changes that merit further discussion and debate in Congress.

1. Wage Replacement

The FMLA should include some system of wage replacement to further both gender equality and the right of every worker to participate in both work and family. Wage replacement should be at a level sufficient to remove the financial disincentives for leave-taking by men and by the working class. Many experts have suggested wage replacement at seventy-five percent of pre-leave income. Since women tend to earn less than men, "pay is also a gender issue." If we want to give both men and women a fair chance at taking family leave, as opposed to just the formal right to take this leave, then making it financially feasible for a husband to take family leave is key. By offering a reasonable amount of wage replacement, employers can take some of the traditional burden off of men to work longer hours as "provider" and "breadwinner" during the critical period immediately after the birth of a child. The participation rate of fathers in the Swedish parental-leave program suggests that a parental-leave program in the United States should have two features: it should be available to fathers beyond the months mothers typically spend breastfeeding, and it should be paid. In her study, Haas found that Swedish fathers participated more when the paid leave was extended beyond six months, and less when six months or less was available. By contrast, they participated less overall when poorly compensated leave was extended. In addition to enabling more fathers to participate, wage replacement would also make parental leave more than a "hollow right" for most dual-earner and single-parent households.

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191. See Recommendations of the Yale Bush Center Advisory Committee on Infant Care Leave, in Crisis, supra note 186, 343, 345 (recommending income replacement at 75% for three months); Task Force Recommendations on Parental Leave and Child Care, in Parental Leave, supra note 38, at 463, 464 (suggesting income replacement at 75%).

192. Dowd, supra note 65, at 347.


2. Increased Length of Leave

The FMLA should offer family leaves beyond twelve weeks. Experts suggest a minimum period of six months for family leave. While the FMLA currently combines leave time for both medical and family leave in the cases of pregnant women, it is important to separate these entitlements and establish different criteria for each. Since no generally applicable line exists between where pregnancy-related medical leave ends and nurturing parental leave begins, the duration of a pregnancy disability leave should be based upon the judgment of the woman’s physician and the woman herself. By lumping both pregnancy and parental leave together, the FMLA penalizes women who have to take more time off before childbirth for medical reasons. For example, a women who suffers from severe morning sickness may use up most of her leave before the baby is born.

If the FMLA were revised to offer both mothers and fathers six months of paid parental leave each, such revision would encourage men to take more leave and also encourage both parents to take the leave simultaneously for at least part of the leave. A leave that allows both parents time to adjust to a newborn may be crucial to involving fathers in the period immediately after the birth of a child. This time is critical to continued paternal involvement, as illustrated by the long-term effects of Swedish fathers taking leave when their children are born. But the revised FMLA would be an improvement even to the Swedish policy, since parents would not have to share the leave time; it would reduce the competition between the mother and father for leave time. A longer, paid leave would help single parents as well.

3. Government Financing

In advocating paid leave, particularly for an extended period, the next question becomes how to finance such a program. Equal opportunity
for the sexes in the workplace, the right of parents to have both work and family lives, and the needs of children are all social goals. Since society has a collective interest in these goals, the cost should not fall upon individual families or employers alone. Some argue that employers should share the financial responsibility for the leave since they, too, are “beneficiaries of the social good of caregiving.” After all, caregiving is necessary to produce the next generation of productive employees.

A closer examination, however, reveals that a taxation system (such as payroll tax) would be preferable to placing the burden on employers. Taub posits three objections to employer financed family leave. First, the purpose of the paid parental leave is to “recognize and facilitate work performed outside the workplace for the benefit of society in general, rather than for the employer in particular. Imposing the cost on the employer tends to undercut society’s endorsement of the activity.” Second, imposing costs on employers will tend to promote sex segregation. Because more women are likely to take parental leave (at least in the near future), employers may perceive women as more costly to employ. Thus, such employers will be less likely to hire and promote women. Finally, the ability of employers to pass on the cost of parental leave “depends in large measure on the nature of their product or service and the structure of the industry,” thus creating the potential for substantial inequities.

Taub’s first objection is particularly convincing in the context of more inclusive leaves. The costs associated with caring for children and the elderly go beyond the scope of an employer’s obligations as well as means. As an unpaid leave may place some burden on employers (especially small businesses), adding the burden of financing a leave is likely to result in resistance. Trzcinski points out that the major opposition to family and medical leave was put forth by business organizations, such as the U.S. Chamber of Commerce and the National Federation of Independent Business. If employers are forced to pay the costs of parental leaves, then they will most likely find a way to avoid these costs. While companies may offer more generous

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201. Taub, supra note 177, at 401.
202. See Taub, supra note 177, at 401.
203. Taub, supra note 177, at 401.
204. See Trzcinski, Feminist Critique, supra note 200, at 8.
benefits to executive women, they are more likely to cut corners with part-time workers, leaving them especially vulnerable. For example, many companies are already replacing full-time clerical workers with part-time workers to avoid mandated benefits. The result is that women, who make up the majority of the “disposable workforce,” end up without worker protections such as minimum wage, health care, pension benefits, occupational health and safety regulations, and legal protection from sexual harassment.

In sum, if we are interested in protecting the welfare of those who perform the caregiving in our society, then we should neither entrust this responsibility to, nor impose this burden on, employers.

4. Toward Universal Coverage

The issue of financing is also related to eligibility. The FMLA does not apply to small companies (those with fifty or fewer employees), leaving at least forty percent of employees without coverage. However, if family leave is within “that limited category of basic employee rights that must be guaranteed for everyone,” the government must provide incentives for small businesses to accommodate family leave, rather than exempting small businesses from the requirement. These incentives could take the form of tax breaks or subsidies. As Dowd argues, “[u]niversal coverage can only be accomplished in conjunction with financing and support for business expenses that is society-wide, rather than limited to the resources of individual businesses.” The government should finance medical and family leave as a matter of principle as well as for the pragmatic reason that not all businesses can afford to provide them.

205. See Judd & Pope, supra note 121, at 86–87.
206. See Judd & Pope, supra note 121, at 86–87.
208. See supra note 122 and accompanying text.
209. Bravo, supra note 184, at 169.
210. Dowd, supra note 65, at 352.
C. The Expense Objection

Those who argue that longer, paid leaves are too expensive fail to account for the long-term benefits of such a proposal. While a detailed economic analysis of the costs of implementing such a program is beyond the scope of this discussion, this Article will address some economic benefits that are too often overlooked. Society has a vested interest in the well-being of its children. As Finley has argued:

Enhanced knowledge about childhood development and socialization has produced awareness about the connection between quality child care when children are young and the prevention of abuse, delinquency, dropping out, and poverty later. This connection has become one of the principal justifications for a governmental role in providing child care assistance. States have found that every dollar spent on quality programs for young children leads to many more social service dollars saved later.211

In Unnecessary Losses, Roberta Spalter-Roth and Heidi Hartmann argue that an absence of parental leave costs workers, taxpayers, and businesses: "In addition to the earnings losses that are sustained by workers because of childbirth and illness and lack of job-protected leave for these events, absence from work for these reasons involves substantial outlays by taxpayers, including employers, for unemployment compensation, welfare payments, Supplemental Security Income, and so forth."212

In The Corporate Guide to Parental Leaves,213 Catalyst also mentions several ways that businesses stand to benefit from instituting generous and flexible parental-leave programs for a variety of jobs, including managerial and professional positions. Catalyst found that responsive policies provide several distinct advantages for the employer:

- "It has been estimated that the turnover for any position can cost close to 93 percent of a first-year salary. . . .

211. Finley, Legal Aspects, supra note 56, at 139 (citations omitted).
213. CATALYST, CORPORATE GUIDE, supra note 71.
The costs of turnover far outweigh the costs of a generous, flexible leave policy.\textsuperscript{214}

- "The Census Bureau . . . reports that for women with a college education, there is a 68 percent chance of return to work. If a company policy is based on the assumption that the employee will return, she will be more likely to do so."\textsuperscript{215}

- If women on the fast track "are not given the time they need to return refreshed, free of guilt, secure in their child-care arrangements and eager to return to work, they may soon leave."\textsuperscript{216}

- "[Providing flexible work] arrangements to employees will encourage them not only to return, but to do so at an earlier date than . . . expected and at a higher level of productivity."\textsuperscript{217}

- Companies with such policies "will earn the loyalty of a far greater number of its employees."\textsuperscript{218} "Also, supervisors who are flexible may expect flexibility in return. The employee may be amenable to taking on an extra task or working overtime when there is a crisis at work."\textsuperscript{219}

- By developing strategies in advance, companies can "make use of leavetakers' absences as cost-saving opportunities to train and develop other employees."\textsuperscript{220}

- "When parental leave is a natural event in the life of a company, the lives of managers, their subordinates and support staff run much more smoothly."\textsuperscript{221}

These examples show that parental leaves can be a good investment for both businesses and taxpayers. However, the main justifications for parental leave should focus on issues of justice and the importance of the family. As Okin puts it:

\begin{itemize}
  \item 214. CATALYST, CORPORATE GUIDE, supra note 71, at 11 (emphasis omitted).
  \item 215. CATALYST, CORPORATE GUIDE, supra note 71, at 60.
  \item 216. CATALYST, CORPORATE GUIDE, supra note 71, at 12.
  \item 217. CATALYST, CORPORATE GUIDE, supra note 71, at 24.
  \item 218. CATALYST, CORPORATE GUIDE, supra note 71, at 67.
  \item 219. CATALYST, CORPORATE GUIDE, supra note 71, at 63.
  \item 220. CATALYST, CORPORATE GUIDE, supra note 71, at 10.
  \item 221. CATALYST, CORPORATE GUIDE, supra note 71, at 59.
\end{itemize}
But even if my suggestions would cost, and cost a lot, we have to ask: How much do we care about the injustices of gender? ... How much do we care that those who raise children, because of this choice, have restricted opportunities to develop the rest of their potential, and very little influence on society’s values and direction?^{222}

While some of the suggestions in this final part may seem unrealistic, given the political influence of businesses and the conservative right wing, one hope is that as women become more involved in mainstream politics, the government will become more likely to pass such legislation. Women in both Italy and Sweden played a crucial role in the passage of parental-leave policies. In Italy, women were involved in drafting the constitution that laid the philosophical basis for the later policies. In 1974, the year the Swedish parental-leave legislation was passed, “women made up twenty-one percent of the Parliament—at that time the highest female representation in any democracy or socialist state.”^{223} Thanks to legislators such as Pat Schroeder, who have succeeded in passing the first parental-leave act in the history of the United States, legislators in the future can build upon and improve the FMLA.

Conclusion

The recent passage of the FMLA should continue to provoke discussions about the kind of society in which we would like to live. It should inspire us to imagine and fight for a society where men and women enjoy the same freedoms, where both fathers and mothers strive to balance work and family, and where children receive adequate care.

Both the workplace and the law have been too slow in responding to the daily conflicts between the workplace and the home. Women now occupy jobs that were designed for an employee unencumbered by family responsibilities. At the same time, women are still expected to fulfill their traditional role as the primary parent. As long as men and women, as well as employers and colleagues, perceive conflicts between work and family as each woman’s personal problem instead

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222. Okin, supra note 6, at 186.
223. See Wright-Carozza, supra note 119, at 538–39.
of as a public issue, women will continue to be at a disadvantage to men in terms of career opportunities. The assumption that childrearing is "her problem" will continue to be a self-fulfilling prophecy.

The situation is unfair because the burden of childrearing restricts the freedom of all women and girls to some extent, but not those of men and boys. Although some might argue that women would choose to become primary parents anyway, having a genuine choice—complete with viable alternatives—makes all the difference between "real" and "forced" choices, fair and unfair choices. Discussions surrounding parental leave present a key opportunity to address these issues since leave-taking decisions mark a turning point in many women's careers and influence the long-term division of labor in the family.

Although gender equality is an important goal, this Article has demonstrated the importance of other goals, namely, the right to participate in both work and family and meeting the needs of children.\(^\text{225}\) It has exposed the limitations of valuing merely equal opportunity by showing that it leads to the assimilation model or the work-centered just family, in which both men and women place work above everything else. While men and women should be free to choose between the work-centered just family and the family-centered just family (among other choices of family arrangements), the former tends to preclude the latter. As long as the workplace continues to value and reward workaholics who keep any family life out of sight, while penalizing those who deviate from this work ethic, individuals will be forced to choose between work and family. A "family-friendly" approach, on the other hand, need not exclude traditional or alternative families.\(^\text{226}\)

Based on these goals, this Article has analyzed the strengths and weaknesses of the FMLA. The gender-neutral approach of the FMLA is necessary to avoid the perpetuation of gender stereotypes and discrimination that are byproducts of policies that offer "special protection" to women. By including leaves to care for elderly parents as well as infants, the FMLA better addresses the broad range of caregiving that must be provided in our society. The FMLA also serves a normative purpose. It asserts that family leave should be considered

\(^{\text{225}}\) See supra Part II.

\(^{\text{226}}\) See supra Part III.
within "that limited category of basic employee rights that must be guaranteed for everyone." 227

This Article has suggested four ways of improving the FMLA: wage replacement, longer leave time, government financing, and universal coverage. It has also briefly mentioned some economic benefits of policies that help Americans balance work and family. These reasons, however, are secondary to the philosophical and ethical reasons for supporting adequate parental leave policies.

Many of the objections against parental leaves can be deflected by considering the big picture. Everyone has a stake in the quality of parental-leave legislation. For many women, it can mean the difference between dropping out of the work force or continuing to be in the running for partnerships, tenure tracks, and leadership positions. For girls, it can mean the difference between choosing to pursue being an elementary school teacher or a university professor. For fathers, it can mean the opportunity to bond with a newborn in her first few days of life. For single parents, it can mean the difference between going on welfare and taking a paid parental leave. For children, it can mean the difference between neglect and proper care. §

227. Bravo, supra note 184, at 169.