DADDY WARRIORS: THE BATTLE TO EQUALIZE PATERNITY LEAVE IN THE UNITED STATES BY BREAKING GENDER STEREOTYPES; A FOURTEENTH AMENDMENT EQUAL PROTECTION ANALYSIS

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INTRODUCTION

The work-family conflict is a battle that many parents in the United States, fathers and mothers alike, fight on a daily basis. While many countries have substantially remedied the struggle between raising a family and fulfilling work requirements through extensive paid parental leave programs—which apply on a national level to both fathers and mothers alike¹—the United States lags behind as one of only three industrialized countries in the world without a federal paid parental leave program.²

That is not to say the United States is not trying. There have been two large efforts to remedy the conflict in the United States. The first effort is the Family and Medical Leave Act (“FMLA”),³ which provides parents up to twelve weeks of unpaid leave in the year following the birth or adoption of a child.⁴ However, many scholars have argued that the FMLA has largely failed to accomplish its stated purpose of resolving the conflict.⁵ The second effort is individual state paid leave programs which have been considerably more effective than the FMLA, but

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² Id. at 1 (Noting that only the United States, Swaziland, and Papua New Guinea clearly offer no guarantee of paid maternity leave to their citizens.).

³ Though the FMLA provides coverage for the care of a sick family member as well as an employee’s own illness, this note will focus on the parental leave aspects of the act.


have only been enacted in three states nationwide, and are only in effect in two of those states.\textsuperscript{6} Other states have laws that set what one would think should be a bare minimum: the ability for employees to use accrued sick leave days to care for newborn or newly adopted children.\textsuperscript{7}

In response to growing concerns over the predominant failure of the FMLA, legal scholars across a broad spectrum argue for a variety of remedies, including a proposal for a new federal paid program,\textsuperscript{8} an amendment to the FMLA requiring paid leave,\textsuperscript{9} or as a last resort, a movement by the remaining individual states to implement paid leave programs modeled after those already in effect in other states.\textsuperscript{10}

However, before other states and the federal government can use the already enacted state leave laws as models for new legislation, there is an issue with the wording of the enacted laws which must be remedied. This issue is the fact that the current language can, and in at least one instance did, lead to unconstitutional gender discrimination.\textsuperscript{11} This discrimination begins with societal stereotypes of mothers as caregivers and fathers as breadwinners.\textsuperscript{12} As a result of these stereotypes, loving fathers who wish to spend time with their newborn children may be denied the opportunity under the assumption that they are not fit for caregiving duties.\textsuperscript{13}

\textsuperscript{6} State Family Medical Leave Laws, NAT’L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/issues-research/labor/state-family-and-medical-leave-laws.aspx (California and New Jersey’s programs are currently in effect, while Washington’s program, though enacted originally to take effect in 2009, has been delayed due to state budget concerns. The program is now set to take effect in 2015.).

\textsuperscript{7} ALASKA STAT. § 39.20.500 (West 2012); MD. CODE. ANN., STATE PERS. & PENS. § 9-505 (West 2012).


\textsuperscript{9} Id.


\textsuperscript{11} See Knussman v. Maryland, 272 F.3d 625 (2001) (in which a father sued the state of Maryland challenging a law that was applied in a discriminatory manner because its language, although facially gender neutral, did not explicitly spell out its gender neutrality, and was thus applied in a gender discriminatory manner).

\textsuperscript{12} Garvey & Mitchell, supra note 8, at 230.

\textsuperscript{13} Id. Some argue that these laws also discriminate against women in that it perpetuates the stereotype that women do not belong in the workplace, and may lead to women being denied jobs because it is assumed their care for children will conflict with their jobs etc. Julie C. Suk, Are Gender Stereotypes Bad For Women? Rethinking Antidiscrimination Law And Work-Family Conflict, 110 COLUM. L. REV. 1, 16 (2010).
discrimination may occur even where a law is not drafted in an explicitly discriminatory manner but is written in a way that does not explicitly spell out gender neutrality. Such laws leave themself open to be read in a discriminatory manner by society’s typecast eyes.  

Considering the psychological evidence detailing the importance of parents spending time with newborn children in the first few months to a year after childbirth, the lack of leave for men means they do not bond with their children in the same way that mothers who are granted leave under the laws do. Not only is this a discriminatory practice that leads to the denial of a man’s right to be treated equally to a woman under the Equal Protection clause of the Fourteenth Amendment, but it also discriminates against women by perpetuating the gender stereotype that they are best fit to be home with their children, and not in the workforce. This stereotype can lead to discrimination against women in the hiring and promotion practices of employers, which amounts to a denial of their Fourteenth Amendment Equal Protection rights.

Therefore, before states begin to enact similar paid leave programs to those already in effect, and certainly before any federal proposals for paid leave are brought to the floor, it is important that the state laws already enacted be amended to clearly spell out their gender neutrality in terms that cannot be interpreted in any other way. Rather than say “any

14 See Knussman 272 F.3d 625.
17 The Fourteenth Amendment to the United States Constitution states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).” U.S. CONST. amend. XIV § 1. This amendment was intended to extend the protections of the laws to all persons equally, be they white or black, man or woman etc. Legal Info. Inst., Equal Protection: An Overview, CORNELL U. L. SCH., http://www.law.cornell.edu/wex/equal_protection.
18 Suk, supra note 13.
19 Knussman, 272 F.3d 625.
employee”\textsuperscript{20} may take leave for example, the statutes should state explicitly that “an employee, \textit{male or female},” may take leave. The stated purposes should be as explicit as the FMLA’s language, which says that “it is important for the development of children and the family unit that fathers and mothers alike be able to participate in early childrearing, and the following law should therefore be enacted to apply those rights in a gender-neutral manner.”\textsuperscript{21} Furthermore, once the state laws are amended to include this language, it is equally important to set forth guidelines for future state and federal paid leave laws, to ensure they will mimic such language which spells out explicitly that the law should be applied in a gender-neutral manner.

This Note will examine these issues in detail, and argue for such amendments to the current laws, as well as propose guidelines for future legislation. Part I of this Note will outline psychological data explaining the importance of parents spending time with their children during the first few months to a year after the child is born. Part II will discuss the lack of paid family leave in the United States, in contrast with nearly all other countries in the world. Part III will examine the FMLA, its history, what it covers, and its evident failings. Part IV will describe a number of state paid leave laws, as well as state accrued sick leave laws. This part will also address litigation that can, and has, emerged from poorly drafted state legislation, and how it might be remedied and avoided in the future. Part V will propose amendments to the current laws, as well as suggested guidelines for future proposed state and federal legislation for paid leave, in order to ensure that the statutes cannot be read in a discriminatory manner.

\textsuperscript{20} \textit{See} ALASKA STAT. § 39.20.500 for an example.
I. THE IMPORTANCE OF PARENTAL BONDING IN THE FIRST YEAR AFTER CHILDBIRTH

Before a person chooses a career, they are often forced to consider how such a career will affect the family they currently have, or the family they wish to have in the future. For women there is the consideration of whether they will be able to carry on their work duties during pregnancy, and more importantly, whether they will be able to return to work after taking time off for recovery, and any additional time for childcare after the birth of their child. For men, there is the consideration of whether they will be allowed to take time off to help with the endless tasks of caring for a newborn child, and to bond with their children, something that is extremely important in the first year after a child is born. This cost-benefit analysis is done by millions of Americans, be they wealthy or poor, male or female, young or old, single, divorced, or widowed. They all carefully consider if they will be able to raise a family while maintaining their job or career, before they can choose one.

The Encyclopedia of Children’s Health outlines the importance of parents bonding with children, particularly during infancy. A study was conducted by American pediatricians John Kennell and Marshall Klaus, involving children who were separated from their mothers upon birth for several weeks due to health issues. Kennell and Klaus determined that the separation immediately after birth interrupted a fundamental relationship between the mother and the new baby. This interruption led to a large percentage of the children not prospering at home, and mothers of these babies often felt uncomfortable with their own children. Kennel and Klaus

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22 Hoffman, supra note 10.
24 Palazzari, supra note 16.
26 Id. at 96.
27 Linwood, supra note 15.
28 Id.
29 Id.
30 Id.
then experimented with giving mothers of both healthy and unhealthy babies extra contact with the infants’ immediately after birth and in the days following birth.\textsuperscript{31} Mothers who were given more access to their children in the hospital developed better rapport with their infants, held them more comfortably, smiled at them more often, and talked to them more regularly.\textsuperscript{32} Progressively, bonding research such as this led to widespread changes in hospital practice in the United States.\textsuperscript{33} Mothers now hold their babies immediately after birth, and infants often remain with their mothers throughout their hospital stay.\textsuperscript{34}

The Encyclopedia goes on to outline that the most important ways to create attachment with children during infancy is through positive physical contact such as hugging, holding, and rocking.\textsuperscript{35} This is because “[t]hese nurturing behaviors cause specific neurochemical actions in the brain which lead to organization of brain systems responsible for attachment.”\textsuperscript{36} The bonding experiences are so important because they lead to healthy relations for children in the earliest years of life.\textsuperscript{37} During the first three years, when the child’s brain develops to nearly it’s full adult size, the brain puts in place most of the systems and structures that are responsible for future emotional, behavioral, social, and physiological functioning.\textsuperscript{38} The bonding experiences need to be present at certain critical times for the brain parts responsible for attachment to develop normally.\textsuperscript{39} These critical periods appear in the first year of life and are related to the capacity of the infant and parent or caregiver to develop a positive interactive relationship.\textsuperscript{40} Thus, problems with bonding and attachment can lead to a fragile biological and emotional

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Linwood, supra note 15.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Linwood, supra note 15.
\textsuperscript{40} Id.
foundation for later experiences. This is because relationship between the infant and his or her caregiver serves as a model for all future relationships.

Further studies show the importance of fathers in particular caring for their children by demonstrating that “at every stage of child development from infancy through adolescence, fathers’ involvement has significant positive effects on their children.” Studies have found that children of involved and loving fathers are significantly more likely to do well in school, have healthy self-esteem, exhibit empathy and pro-social behavior, and avoid high-risk behaviors such as drug use, truancy, and criminal activity. This is not only because they have involved parents, but because fathers, in particular, have shaped their development. This is because fathers stimulate their children in ways that are different from mother-child interactions.

These studies also show that “fathers have an expectation of engaging positively with their families as a counterbalance to the stressors experienced at work,” and that fathers are increasingly viewing family involvement as an enriching, essential part of their lives and identities. Thus, it seems that fathers who are involved with their newborn children may perform better at work.

II. A COMPARATIVE REVIEW OF PAID LEAVE LAWS IN OTHER COUNTRIES AND THE LACK THEREOF IN THE UNITED STATES

Immediately following the birth of a child, a parent will often take time off from work for bonding purposes. People do this around the world, and countries have begun crafting public

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41 Id.
42 Id.
43 Palazzari, supra note 16.
44 Id.
45 Id.
46 Id.
47 Id. (citing Daniel A. McDonald & David M. Almeida, The Interweave of Father’ Daily Work Experiences and Fathering Behaviors, 2 FATHERING J. THEORY, RES., & PRAC. ABOUT MEN 235 (2004)).
48 Palazzari, supra note 16.
49 Id.
policies to help reconcile work and family obligations. One of the most common work-family supports – paid maternity leave – is practically universal: academic research covering 190 countries shows that as of 2011, 178 countries guarantee paid maternity leave under national law. In only nine of those 190 countries the status of paid leave for new mothers was unclear. There are only three countries “which definitively offer no legal guarantee of paid maternity leave: Papua New Guinea, Swaziland,”—and surprisingly the United States.

A. The History of Paid Maternity Leave in Other Countries

In the late 19th century, Germany enacted the first paid maternity leave law. Other countries soon followed, and by the early 1900s, 13 other countries offered similar maternity leave programs. By the 1940s, nearly all European countries provided maternity benefits.

A recent global survey on paid leave and other workplace benefits, was published by Dr. Jody Heymann of McGill University and Dr. Alison Earle of Northeastern University—leading experts on labor conditions and social policies around the world—in 2010. The survey found that out of 190 countries surveyed, 177 guaranteed paid leave for new mothers. Nine countries lacked sufficient information. Furthermore, the International Labour Organization (“ILO”)

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50 See HUM. RTS. WATCH, supra note 1, at 1.
51 Id.
52 Id.
53 Id.
54 Id. at 32. (In 1883, as part of the invention and enactment of social insurance in Bismarck Germany, the first national social insurance law provided for health insurance, paid sick leave, and paid maternity leave.)
56 HUM. RTS. WATCH, supra note 1.
57 JODY HEYMANN & ALLISON EARLE, RAISING THE GLOBAL FLOOR 111 (2010), https://athens.indymedia.org/local/webcast/uploads/raising_the_global_floor_dismantling_the_myth_that_we_can_t_afford_good_working_conditions_for_everyone_stanford_politics_and_policy_.pdf.
58 As stated earlier, shockingly, only four of the countries surveyed did not guarantee any pay during maternity leave; Swaziland, Papua New Guinea, the United States, and Australia. Id. (Australia instituted paid parental leave in January 2011, bringing the global tally to 178 countries with laws on paid leave for new mothers.) See also HUM. RTS. WATCH, supra note 1, at 33 (2011).
59 JODY HEYMANN & ALLISON EARLE, supra note 57.
published a report on maternity protection, surveying 167 countries, in 2010. 60 The report found that 97 percent of the countries which were reviewed offered paid maternity leave. 61 These reports show that while the vast majority of countries—certainly those in the developed world—have some governmentally mandated, paid parental leave program, the United States, a country that preaches its dedication to human rights and equality, has no federal paid maternity leave program. This is unacceptable, and must be remedied.

B. The History of Paid Paternity Leave in Other Countries

After paid maternity leave was established, paid paternity leave laws began to sprout in the 1970s, starting with those enacted by Sweden. 62 By the 1990s, most European countries had adopted some form of paid paternity and parental leave. 63 Since then, these countries have expanded the leave to provide for longer leave periods and incentives for fathers to take leave. 64

Recently, paternity leave for fathers has been gaining ground. Close to 50 countries worldwide provide some form of leave that fathers can use at the time of the birth of a child, according to the ILO report. 65 The number is even higher when considering the paid parental leave programs that are available for either parent to take. 66 The Heymann and Earle study, which covers more countries than the ILO report, found that 54 of the 190 countries surveyed guarantee paid paternity leave for fathers, but the United States does not. 67 This further emphasizes the ways in which the United States lags considerably behind other countries in the developed world when it comes to parental leave programs.

61 Id.
62 HUM. RTS. WATCH , supra note 1, at 32.
63 Id.
64 Id. at 33. Examples of such incentives would be paid leave that can only be used by a father, and that would otherwise be lost if they choose not to use it. Id. at 34.
65 INT’L LABOUR ORG., supra note 60.
66 Id. at 54.
67 Id. at 38.
C. The Length of Leave in Other Countries

Not only do the countries outlined in the above studies provide paid leave, they provide leave for long durations, and in some cases in a manner intended to promote fathers taking leave to care for their children.⁶⁸ Though maternity leave tends to be longer than paternity leave, this is typically because mothers need time to recover from the physical hardship of childbirth.⁶⁹ Of 167 countries surveyed in the ILO report, 51 percent guarantee at least 14 weeks of maternity leave, 20 percent provide 18 weeks or more, and 35 percent provide 12 or 13 weeks of leave.⁷⁰

Though paternity leave benefits tend to be shorter than maternity leave, the combined paternity and parental leaves in many countries are still substantial.⁷¹ For example, Austria, the Czech Republic, France, Germany, and Sweden, all guarantee a year or more of paid leave for new fathers by combining paternity and parental leave.⁷² Impressively, 31 countries offer 14 or more weeks of paid leave to new fathers, and some countries even have non-transferrable portions of leave so that fathers are forced to take the leave or lose the time.⁷³ This is meant to encourage fathers to take time off from work, and in doing so, combat the societal notions of mothers as caregivers and fathers as breadwinners by promoting equality in caregiving.⁷⁴ A good example of this is Iceland, which offers 9 months of parental leave that is divided into thirds: one-third for the mother, which cannot be transferred; one-third for the father which cannot be transferred; and one-third to be split as the parents wish.⁷⁵ This is a format that guarantees the ability of each parent to take leave to care for their newborn children, while

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⁶⁸ For example the programs in place in Iceland where fathers have non-transferable leave quotas. Id. at 44. See also HUM. RTS. WATCH, supra note 1, at 34.
⁶⁹ Garvey & Mitchell, supra note 8.
⁷⁰ INT’L LABOUR ORG., supra note 60, at p. x.; Id. at 6.
⁷¹ HUM. RTS. WATCH, supra note 1, at 34.
⁷² Id.
⁷³ Id.
⁷⁴ Id.
⁷⁵ Id.
allowing them some flexibility to determine which parent is best suited to use the remaining time. Proof of how effective these programs are at promoting fathers taking leave is the fact that 90 percent of fathers are reported to take paid paternity leave in Denmark, Iceland, Sweden, the Netherlands, and Norway, and at least two-thirds do so in Finland, France, and Germany.76

D. Failed Attempts at Paid Federal Leave in the United States

Though there have been attempts to pass paid leave legislation in the United States in the past—two of which will be discussed below—the United States still stands in contrast with the countries mentioned above, in that it does not offer any federal paid leave program.77 The most the federal government in the United States has done to offer leave thus far, was to enact the Family and Medical Leave Act discussed infra in section III, an Act which many scholars argue has failed to accomplish its goal, due to how few people it covers, and the fact that it is unpaid.

The first notable attempt to pass paid leave legislation was on February 10th, 2011, when the Federal Employees Paid Parental Leave Act of 2011 was introduced in the House of Representatives.78 The bill, if eventually passed, would mandate that in the case of federal employees, four of the twelve weeks of leave already permitted under the FMLA must be paid.79 Since the bill would only apply to federal employees, it would not be as broad sweeping as most might hope.80 However, if the law did pass, it would make progress for federal employees, and could set a precedent for a program in the future for the entire nation. The bill was referred to committee on the day it was introduced, and that is where it died. The bill was reintroduced as

76 Id. at 34-35.
77 Suk supra note 13, at 4.
79 Id.
80 Id.
H.R. 517 on February 5th 2013, and it was referred to committee, where it now sits. However, the chances of the bill passing seem slim as it was passed by the House in the last two sessions, but died in the Senate.

Another attempt at passing paid leave which is worth noting is the Balancing Act of 2011 which was introduced in the House on June 23, 2011. The bill was the result of congressional findings that 58 percent of married families with children in the United States have both parents working full-time, 78 percent of workers who need leave do not take it because they cannot afford it, and since 2000 the cost of child care has increased twice as fast as the median income of families with children. The proposed bill would provide for twelve weeks of family and medical leave insurance benefits for parents of newborn or newly adopted children. The benefits amount would be calculated based on annual pay.

The Act also called for an amendment to the FMLA to include same sex spouses and domestic partners, which would provide a solution to one of the problems with the FMLA as it currently stands: the exclusion of non-traditional families, discussed infra. However, the act’s language applied itself to “an employee” but did not explicitly spell out “any employee, male or female,” and thus it left itself open to be read in a discriminatory manner as to apply only to

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84 Id.
85 Id.
86 Id. Employees making less than $20,000 would receive 100% of their salary. Employees making between $20,000 and $30,000 would receive 75% of their salary, or 100% of the salary of someone making $20,000. Incomes of $30,000 to $60,000 receive 55% of their salary, or 75% of the salary of someone making $30,000. Incomes of $60,000 to $97,000 would receive 40% of their salary, or 55% of the salary of someone making $60,000. And finally, employees that make more than $97,000 would receive 40% of the salary of someone making $97,000. Id.
87 Id. Discussed further in Part III(C).
mothers. Like other attempts in the past, this bill was referred to committee where it died. This seems to be the case with many prior attempts at creating a federal paid leave program.

### III. The Family and Medical Leave Act of 1993 and Its Shortcomings

Prior to the enactment of the FMLA, there was no federal law in the United States that provided workers with a guarantee of job security in case they had a child and were forced to take time off from work. Because there was no federal program, when state laws did not apply, workers often had to choose between taking time off to care for their newborn children, and keeping their jobs. However, due to an increase in the number of working single-parent households, and two-parent households in which both parents work, and considering the finding that “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing,” there was a need for legislation.

#### A. Brief History of the FMLA

Starting in the early 1900s, employers, employees, labor organizers, and social activists, realized that the issue of work-family balance needed to be addressed. Following the 1960s and 1970s, when the glass ceiling was broken and women were no longer a minority in the workforce, the first formalized family and medical leave legislative bill was brought to the attention of the legislators in 1985. Surprisingly quickly, “these groups gained bipartisan

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88 Id.
90 For example the 2008 and 2009 attempts to pass these same exact laws as are set out in Garvey & Mitchell, supra note 8, at 220-22, have failed, as is evidenced by their repeated attempts to pass the identical bill.
91 See Hoffman, supra note 10 (citing S. Rep. No. 103-3, at 4 (1993) which states that prior to the adoption of the FMLA, government policies, and federal laws did not address the issue of the difficulty parents faced when having to choose between work and caring for family.)
93 Id. at (a)(3).
94 Id. at (a)(2) (emphasis added).
96 Id.
support in both the Senate and the House of Representatives and saw their bill introduced in each session of Congress from the 99th (1985-1986) to the 103rd (1993-1994).

In the first session of Congress these groups met some fierce opposition from big business lobbying groups who felt the legislation would be the first step in allowing governmental mandates to control businesses, and fought the legislation aggressively. The lobbyists succeeded in stalling the passing of the bill for some time, but eventually it was passed by both chambers of Congress in the 1990s. However, the bill as passed had extensive amendments, particularly those that ensured the law would not apply to businesses of less than 50 employees. The passing of the bill was a short-lived victory, as it was vetoed by President George H.W. Bush twice. Finally, on February 5, 1993, President Clinton signed the bill into law. This law was known as the Family and Medical Leave Act of 1993 ("FMLA").

**B. The Purpose and Benefits of the FMLA**

The purpose of the FMLA is set out in section (b) of the Act. The FMLA balances the demands of the workplace with the needs of families, in an effort to promote the stability and economic security of families, and to promote national interests in preserving family integrity. The Act further entitles employees to take reasonable leave for the birth or adoption of a child.

The stated intention of the FMLA is to accomplish this purpose in a manner that accommodates the legitimate interests of employers, as well as accomplish its goals in a
manner that is consistent with the Equal Protection Clause of the Fourteenth Amendment, and “minimizes the potential for employment discrimination on the basis of sex”. The FMLA does this by “ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis,” as well as “to promote the goal of equal employment opportunity for women and men.”

The FMLA entitles eligible employees to twelve workweeks of unpaid leave annually to care for a newborn or adopted child. An employee is guaranteed that when they return to their job they will be restored to the same job, or a job of equal pay, benefits, and other terms and conditions of work as they held prior to taking the leave.

Furthermore, the Department of Labor provides that “[a]n employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.” However, under the FMLA, in “specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly paid ‘key’ employees after using FMLA leave (during which health coverage was maintained).”

C. The Predominant Failure of the FMLA

Though the FMLA was a step in the right direction, some argue it has failed to accomplish its stated goals. The failure is attributed to a number of deficiencies in the FMLA,

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108 Id. at (b)(4) (emphasis added).
109 Id. at (b)(5).
111 Id. at 2614 § (a)(1).
114 Garvey & Mitchell, supra note 8; Suk supra note 13; Bhushan, supra note 23, at 677.
such as how few people it covers as well as the fact that it is unpaid. As a result many offer solutions, most of which involve amending the FMLA to provide for paid leave, or pushing for state legislation for paid leave, and a variety of other remedies.

One of the biggest problems with the FMLA is how few employees nationwide are actually eligible. As a result of the changes that were made to accommodate small and medium sized businesses, the FMLA only applies to businesses with more than 50 employees. The Act further restricts the benefits to employees who have worked at least 1,250 hours for their current employer for the twelve months preceding their leave requests. As a result, “approximately ninety-five percent of all businesses and from forty to fifty percent of all United States employees” are not covered by the FMLA. Furthermore, many employees who qualify for FMLA benefits do not take leave they are entitled to because they cannot afford it. These eligibility requirements disproportionately affect the poor—who are most likely to work for small employers—part time workers, and people who work multiple jobs.

In addition, the FMLA does not account for non-traditional family structures such as family members other than parents. In some families the grandparents or siblings play a large role in caring for children, and they are not covered by the FMLA. The FMLA does not cover

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116 Garvey & Mitchell, supra note 8, at 208.
117 Bhushan, supra note 23, at 677.
118 Id. at 687.
120 Id. at § 2611(2).
123 Bhushan, supra note 23, at 689.
124 Id.
125 Id.
aunts, grandmothers, or “fictive kin.” Further, the FMLA does not guarantee time off for non-marital partners, a restriction that has largely negative implications for gay, as well as non-married, cohabiting couples.

This is a deficiency of the FMLA that is of increasing importance as the number of non-traditional families has risen considerably since its adoption. Looking just at the number of heterosexual unmarried couples in the United States, there has been a tenfold increase from about 400,000 couples in 1960 to more than five million couples in 2005. This is likely because in the United States, it is often more convenient for couples not to get married because it can be cheaper and simpler, and as divorce rates rise in society, the desire to get married is less attractive for couples uncertain of their long-term plans. This number increases by at least 594,000 if same-sex partners are included.

Arguably the largest issue with the FMLA is the fact that it does not provide for any paid leave. This means that many, if not most, of the workers that are eligible to take leave under the FMLA are unable to do so simply because it is not economically feasible. This is evidenced by a study conducted by the Department of Labor (“DOL”) in 2000. The study found that among the workers who were eligible to take FMLA leave but failed to do so, 78

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126 Id. “Fictive Kin” is defined as “people who are regarded as being part of a family even though they are not related by either blood or marriage bonds. Fictive kinship may bind people together in ties of affection, concern, obligation, and responsibility.” Fictive Kin, The Free Dictionary by Farlex, available at http://medical-dictionary.thefreedictionary.com/fictive+kin.


129 Id.

130 Id.

131 Id.

132 Hoffman supra note 10, at 94.

133 Thompson supra note 127, at 86-87.

percent said it was because they simply could not afford to take unpaid leave. Indeed, it has been noted that “the FMLA only reaches goals of job security and work-family balance for a limited group of employees: those who work for large employers and whose families can afford to lose one income for up to twelve weeks.”

Taking twelve weeks of unpaid leave from work to care for a newborn child can equal the loss of close to a quarter of an employee’s annual salary. Add to that the additional expenses of having a newborn, and most parents simply cannot afford to take the time off. This means that workers in low income jobs are often forced to subsidize the cost of the newborn with loans. Almost three out of four low-income employees who take family and medical leave are unpaid during that time, compared to one in three middle-income workers.

In the DOL survey conducted in 2000, it was determined that at least 3.5 million employees needed leave but were unable to take it. The most common reason given for not taking leave was the inability to afford it. In fact, 87.8% of employees with leave needs that went unmet responded that they would take leave if at least some of it was paid.

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135 Id.
137 Assuming an employee receives equal pay throughout the year, 12 weeks amounts to nearly a quarter of the work year’s pay.
139 Chuck Halverson, From Here to Paternity: Why Men are Not Taking Paternity Leave Under the Family and Medical Leave Act, 18 WIS. WOMEN’S L.J. 257, 265 (2003).
141 Id.
142 Id.
IV. STATE FAMILY LEAVE PROGRAMS AND THEIR CONFLICT WITH THE 14TH AMENDMENT

EQUAL PROTECTION CLAUSE

A. State Leave Laws.

Although a federal program providing for paid parental leave in the United States has yet to pass, two states, California and New Jersey, have taken the initiative and enacted legislation that offers paid, or partially paid, family and medical leave.\textsuperscript{144} Washington State also passed a paid family leave law in 2007 that was to take effect in October of 2009, but due to budget concerns the implementation of that program has been delayed until 2015.\textsuperscript{145} Several other states, including Arizona, Illinois, Maine, Massachusetts, Missouri, New Hampshire, New York, Oregon, and Pennsylvania, are considering establishing paid leave programs.\textsuperscript{146} Other states such as Maryland have enacted laws that provide an employee with the ability to use up to 30 days of accrued sick leave for a primary caregiver, and 10 days for a secondary caregiver, in the event of the birth or adoption of a child.\textsuperscript{147} Below, this Note will discuss the Maryland law in particular detail, as well as the California, Washington, New Jersey, and Alaska leave programs.

1. California

On July 1, 2004, California became the first state to enact a comprehensive paid family leave law.\textsuperscript{148} In passing the law, the California state legislature found that the majority of workers in the state were unable to take family care leave because they were unable to afford leave without pay.\textsuperscript{149} It was found that “when these workers do not receive some form of wage replacement their families suffer from the loss of income, which in turn increases the demand on

\begin{footnotes}
\footnotetext[144]{State Family Medical Leave Laws, supra note 6.}
\footnotetext[145]{Id.}
\footnotetext[146]{Bhushan, supra note 23, at 691.}
\footnotetext[147]{Id.}
\footnotetext[148]{MD. CODE. ANN., STATE PERS. & PENS. § 9-505 (West 2012).}
\footnotetext[149]{See CAL. UNEMP. INS. CODE § 3301(a)(1).}
\end{footnotes}
the state’s welfare system.” The California law, the Paid Family Leave Act (“PFL”), was a way in which the legislature could directly addressed these problems, by giving mothers and fathers alike, the opportunity to spend time with their newborn or newly adopted children without having to completely sacrifice their wages.

The Paid Family Leave program provides workers with six weeks of leave per year which can be used to bond with a newborn child. The act provides that:

an individual shall be deemed eligible for family temporary disability insurance benefits equal to one-seventh of his or her weekly benefit amount on any day in which he or she is unable to perform his or her regular or customary work because he or she is bonding with a minor child during the first year after the birth or placement of the child in connection with foster care or adoption.

During those six weeks, eligible employees receive roughly fifty-five percent of their regular wages, taken from the state’s temporary disability insurance program. The program is funded by a 1.2 percent employee payroll tax. Employees who are entitled to FMLA protections are required to take both PFL and FMLA leave concurrently.

One of the largest advantages of the California program is that, unlike the FMLA, the California family and medical leave laws do not limit coverage to those that work for businesses with 50 or more employees. Instead, all employees in the state of California who pay into the

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150 Id. at § 3300 (f).
151 Id.
152 Id. at § 3301(a)(1).
153 See CAL. UNEMP. INS. CODE § 2601 (West 2011).
154 Employees are eligible to receive roughly fifty five percent of their regular wages, broken down into weekly benefit amounts, which can be further broken down into daily amounts of one seventh of the weekly amount, as stated earlier in the act. CAL. UNEMP. INS. CODE § 3301(b) (West 2011).
155 Id.
157 See CAL. UNEMP. INS. CODE § 3303(f) (West 2011).
158 Garvey & Mitchell, supra note 8, at 214. (citing CAL. UNEMP. INS. CODE § 3303 (West 2011) to show “that the only requirements for an employee to be eligible to receive paid family leave benefits is for the employee to make” a claim for temporary disability benefits” and to show that he or she “has been unable to perform his or her regular or customary work for a seven-day waiting period during each disability benefit period”).
State Disability Insurance fund are eligible for the paid leave benefits.\textsuperscript{159} This is a wonderful aspect of the act that if applied nationwide would provide over 60 million workers with the ability to take the leave they need to care for their newborn and newly adopted children.\textsuperscript{160}

2. Washington

After the success of California’s paid leave program, in July, 2007, Washington became the second state to adopt a paid family leave program.\textsuperscript{161} The law was enacted in response to a legislative finding that family leave laws of the past which assisted individuals in balancing the demands of the workplace with family responsibilities were not enough and more needed to be done to achieve the goals of parental bonding, workforce stability, and economic security.\textsuperscript{162}

Specifically, the legislature found that many individuals did not have access to family leave laws and those who did may very well be financially unable to afford taking unpaid leave, and employer-paid benefits met a relatively small part of such needs.\textsuperscript{163} Therefore, the legislature found it to be in the public interest to establish a paid leave program.\textsuperscript{164}

The purpose of the program was to allow parents to bond with their newborn or newly adopted children by providing them with income support for a reasonable period while such an employee is away from work for family leave purposes.\textsuperscript{165} The legislature further found that such a program would reduce the overall impact on state income support programs by increasing an employee’s ability to provide caregiving services for a newborn child, while maintaining a

\begin{itemize}
\item \textsuperscript{159} Garvey & Mitchell, \textit{supra} note 8, at 214.
\item \textsuperscript{160} See Kevin Miller, \textit{The FMLA: Old Enough to Vote, but with Room to Grow}, INST. FOR WOMEN’S POL’Y RES. (Feb. 4, 2011), http://www.iwpr.org/blog/2011/02/04/the-fmla-old-enough-to-vote-but-with-room-to-grow/.
\item \textsuperscript{161} WASH. REV. CODE ANN. § 49.86.005 (2012).
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\end{itemize}
work balance as well.\textsuperscript{166} The act thus established a wage replacement benefit program to be coordinated with current existing state and federal family leave laws.\textsuperscript{167}

The program was set to entitle eligible employees to take up to five weeks of paid parental leave to care for their newborn or newly adopted children.\textsuperscript{168} However, with a maximum stipend of $250 per week,\textsuperscript{169} this program was different than the program in California which paid employees based on their salaries;\textsuperscript{170} a distinction with implications for families that make more money and thus depend on a larger salary during the year. Under the California system, such families would be entitled to benefits commensurate with their regular wages, easing the burden on their families.\textsuperscript{171} This is one superior aspect of the California program. However, it is still quite an accomplishment that Washington has a paid leave program at all.

Though the law was supposed to go into effect in 2009, due to budget concerns the implementation of the program has been delayed until 2015.\textsuperscript{172} As it stands now, the act states that “beginning October 1, 2015, family leave insurance benefits are payable to an individual during a period in which the individual is unable to perform his or her regular or customary work because he or she is on family leave.”\textsuperscript{173} This is much better than the other acts because the language of “he or she” in the act is very explicit to ensure gender neutrality, by spelling out that it applies to both men and women.\textsuperscript{174}

\textsuperscript{166} Id.
\textsuperscript{167} WASH. REV. CODE ANN. § 49.86.005 (2012).
\textsuperscript{168} Id.; WASH. REV. CODE ANN. § 49.86.010 (2012).
\textsuperscript{169} See WASH. REV. CODE ANN. §§ 49.86.050(1), 49.86.060(1).
\textsuperscript{170} CAL. UNEMP. INS. CODE § 3301(b).
\textsuperscript{171} Id.
\textsuperscript{172} State Family Medical Leave Laws, supra note 6.
\textsuperscript{173} WASH. REV. CODE ANN. § 49.86.030 (West 2012).
\textsuperscript{174} As an aside, it is worth noting that there are American citizens, deserving of the full protections of the law, who do not identify as either man or woman (Linda D. Wayne, Neutral Pronouns: A Modest Proposal Whose Time Has Come, Wilson Web, Can Woman Stud 24 no2/3 Wint/Spr 2005 WN: 0534906358028). Examples are people who are trans-gender in the pre or post operation stage, or in the middle transition period, and often do not identify as either of those two genders Id. Yet, in some instances the law has not protected such persons in an equal manner, such as in 2004, when U.S. immigration officials denied the legality of a marriage between Jiffy Javenella, a man,
3. New Jersey

The third state to enact a paid leave program was New Jersey. The New Jersey act, which took the form of a Family Leave Insurance program, was signed into law in May of 2008. This program went into effect with widespread support in January of 2009, which is likely a result of the program’s provision for a long-term funding plan, something that differentiated it from its Washington State counterpart. The program has been called “one of the most far-reaching and progressive workplace reforms in many, many decades.”

Similar to California’s system, the New Jersey program provides a maximum of six weeks of paid leave for parents to care for and bond with their children. During those six weeks, eligible employees are entitled to approximately two-thirds of their salary; however, the amount is limited to $548 per week. and Donita Ganzon, a woman who had transitioned from a man 25 years before Id. As Ann Rostow of Planet Out explained, according to the Department of Homeland Security, U.S. policy “disallows recognition of change of sex in order for a marriage between two persons born of the same sex to be considered bona fide” Id. The government cites the 1996 Defense of Marriage Act to justify their denial of residency to Javenella, based on his illegal “same-sex marriage” Id. (The issue of the federal government’s recognition of same-sex marriage was decided by the Supreme Court on June 26, 2013. United States v. Windsor, 570 U.S. __. The court held Section 3 of the Defense Of Marriage Act—which essentially states that the federal government will not recognize same-sex marriage—to be unconstitutional under the Due Process Clause of the Fifth Amendment. This landmark decision will have many positive implications, including potentially changing the outcome of cases such as the marriage of Jiffy Javenella and Donita Ganzon in the future. United States v. Windsor, 570 U.S. __). Despite all this, there is literature that uses different forms of gender neutral pronouns to describe people who do not identify with the two-size-fits-all gender standards of society, pronouns such as “sie”, “hir”, “hirs”, “hirsself”, “zi”, “hi”, “pi” etc. Id. However, while these people, including “intersex,” “inter-gender,” “non-gender,” or even “postgender” do exist, they do not as of yet exist in language Id. Thus, people who do not conform to a rigid two-sex system would still likely receive legal protection under the canopy of either “man or woman”, such as is included in the language the author has proposed in this Note be adopted and amended in paid leave laws (a proposal that is modeled after the FMLA which uses the same language of “male or female”). It must be conceded however, that if and hopefully when, there comes a time in which such people are recognized in language in the U.S., and the law in some way does not recognize them as either male or female for purposes of legal protection, it would be necessary to revisit and revise the language of these leave laws to accommodate these people who deserve the equal protection of the law as much as anyone else. The author of this Note simply hesitates to alter such language, because it serves to expand the protections of paid leave laws across all lines in a most explicit manner, and as of yet it does not exclude these people.

176 Id.
177 Garvey & Mitchell, supra note 8, at 218.
178 Id.
180 Garvey & Mitchell, supra note 8, at 218.
The program is paid for entirely by minor employee contributions that began in January, 2009. There is no employer contribution, so sustaining the program is a burden that falls solely on the employees. However, the financial burden that the program places on employees is relatively insignificant according to the provisions of the law. According to a 2008 report, in 2009 employees were set to be taxed at a rate of 0.09% on wages up to the limit for temporary disability insurance (currently $27,700), rising to 0.12% in 2010. Thus, the maximum annual tax would be about $25 per employee in 2009 and $33 in 2010. More recently, starting January 1, 2013, workers contribute .001% of the taxable wage base. For 2013, the taxable wage base is $30,900, and the maximum yearly deduction for the Family Leave Insurance program is $30.90. Note, however, that the taxable wage base changes each year.

4. Alaska

Though not as extensive as the laws of California, Washington, or New Jersey, because it does not require paid leave, Alaska provides employees with the ability to take family leave, yet the leave may be unpaid if the employer chooses so. However, the employee may choose to substitute, or the employer may require the employee to substitute, accrued paid sick leave to which the employee is entitled. The law provides that “an employer shall permit an eligible

181 Id.
182 Id.
183 Id.
185 Id.
187 Id.
188 Id.
189 ALASKA STAT. § 39.20.500 (West 2012).
190 Id.
employee to take family leave because of pregnancy and childbirth or adoption for a total of 18 workweeks within a 12-month period.” 191

Alaska law further provides that an employee may take personal leave for medical reasons, regardless of whether business permits, so long as the employee has permission from the head of the department or agency for which they work. 192 The law then states that the department or agency heads shall grant the leave for medical reasons if they are satisfied that the employee is absent for medical reasons. 193 Within the definition of “medical reasons” set out further in the act, it states that pregnancy and childbirth, or the placement of a child—other than the employee's stepchild—with the employee for adoption, is considered to be a medical reason under the act, and thus qualifies an employee to take personal leave. 194

This program is certainly a step in the right direction, and it is definitely better than most states that don’t even provide wage replacement. However, the language of this act is drafted in a way that can be read discriminatorily—just as open ended language of its kind was read in a discriminatory manner in Knussman v. Maryland discussed infra—because it says “an officer or employee” 195 but does not say “male or female”. As a result, it is possible the act could be read as applying only to mothers and not fathers, which impermissibly discriminates against fathers.

5. Maryland

In 1994, Maryland passed a law which, though only applicable to state personnel, and did not provide for paid family leave directly, at least permitted employees to use paid sick leave for the care of newborn children. 196 The law as drafted permitted the use of paid sick leave by a

191 Id.
193 Id.
194 Id.
195 Id.
196 Knussman v. Maryland, 272 F.3d 625,628 (2011) (citing MD. CODE. ANN., STATE PERS. & PENS. § 7-508(a)(1). This law has since been amended as MD. CODE. ANN., STATE PERS. & PENS. § 9-505).
state employee to care for a newborn child, or a child newly placed in the care of a state
employee.\footnote{\textit{Knussman v. Maryland}, 272 F.3d 625.} The statute permitted “primary care givers” to “use, without certification of illness or disability, up to 30 days of accrued sick leave to care for a child . . . immediately following . . . the birth of the employee’s child.”\footnote{\textit{MD. CODE. ANN., STATE PERS. \\ & PENS.} § 7-508(a)(1) (West 2012).} The law further provided secondary caregivers with the ability to use up to 10 days of accrued sick leave without providing proof of illness or disability.\footnote{\textit{MD. CODE. ANN., STATE PERS. \\ & PENS.} § 7-508(b)(1) (West 2012).} The act defined primary caregivers as “an employee who is primarily responsible for the care and nurturing of a child.”\footnote{\textit{MD. CODE. ANN., STATE PERS. \\ & PENS.} § 9-505 (West 2012).} Secondary caregivers were defined as “an employee who is secondarily responsible for the care and nurturing of a child.”\footnote{\textit{Knussman} 272 F.3d 625.}

This statute was the subject of litigation in the seminal case of \textit{Knussman v. Maryland}, discussed \textit{infra}, where a father sued the state of Maryland and various government officials, claiming that the law as applied was discriminatory against fathers—since it was assumed fathers were always considered secondary caregivers, and could never be considered primary caregivers—and was thus unconstitutional.\footnote{\textit{Id.}} Following this lawsuit, the law was amended.\footnote{\textit{Id.}} As it stands today, the statute includes its original provisions, with one important addition. In its definition of primary caregivers, the act states that if two employees are responsible for the care and nurturing of a child, both employees can use accrued sick leave to care for the child during the period immediately following his or her birth or adoption.\footnote{\textit{Id.}} In aggregate, the employees are allowed up to 40 days of such leave, not to exceed 30 days for any one of the employees.\footnote{\textit{Id.}} This amendment seems to make it clear that it is possible for a father to be one of the primary caregivers.
caregivers. This seems to have taken care of the neutrality issue.206 Perhaps that was the intent of the legislature in drafting the new law as they did. However, even in its newly drafted form, this law has flaws, which will be discussed in detail below.

B. 14th Amendment Equal Protection Clause Analysis of Paid Leave Laws in the United States.

The 14th Amendment states that “[n]o state shall … deny to any person within its jurisdiction the equal protection of the laws.”207 The Supreme Court has interpreted this clause in the context of state gender discrimination in a number of landmark cases.208 The general rule is that gender discrimination that is invidiously discriminatory—promotes societies view of what roles men and women should have, and is not based on any real differences between the sexes—is given a heightened standard of review, and such a discriminatory law will fail unless it “serve[s] important governmental objectives and [is] substantially related to achievement of those objectives.”209 Thus, a law that allows women to take time off to care for their children

206 Id.
207 U.S. CONST. amend. XIV § 1.
208 See e.g. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971) (in which the Supreme Court applied the heightened level of intermediate scrutiny and struck down a law that gave preference to men over women in appointing administrators of estates, as a violation of the 14th amendment Equal Protection Clause); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) (in which the Supreme Court applied the heightened level of intermediate scrutiny and sustained a challenge to a state law that required servicewomen to prove that their husband was dependent on them in order to be eligible for dependency allowance, but did not require the same of servicemen, as a violation of the 14th amendment Equal Protection Clause); United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264 (1996) (In which the Supreme Court applied the heightened level of intermediate scrutiny and held that Virginia Military Institute’s male-only admissions policy was unconstitutional because it failed to show an exceedingly persuasive justification for a gender-biased admissions policy, which was a violation of the Fourteenth Amendment’s Equal Protection Clause); Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 (1976) (in which the Supreme Court applied the heightened level of intermediate scrutiny and found an Oklahoma law which made the drinking age for men 21, and for women 18, unconstitutional); Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979) (in which the Supreme Court applied the heightened level of intermediate scrutiny and invalidated Alabama’s alimony laws that only required husbands to pay alimony, and not wives, as a violation of the 14th amendment Equal Protection Clause). Although this Note discusses the possibility of future federal paid leave laws, which would require an analysis of the Equal Protection Clause of the Fifth Amendment, the main focus of this note is on state leave programs, as they are the only currently enacted paid leave programs in the united states, and the most likely to pass in the future. Therefore the author chooses to focus on the Fourteenth Amendment Equal Protection analysis, which is relevant to the state laws. For an analysis of the Equal Protection Clause of the Fifth Amendment generally, see Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954). See also, Eugene Doherty, Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference, 16 OHIO N.U. L. REV. 591, 620 (1989).
209 Craig, 429 U.S. at 197.
Based on the assumption that they are meant to be at home with the children, but would not allow a father to take time off to care for his newborn or newly adopted child based on the generalization that fathers are meant to be at work, is rooted in “overbroad generalizations about the different talents, capacities, or preferences of males and females” and thus “will not suffice.”

1. Gender Discrimination Generally

The first major case to come before the Supreme Court involving gender classifications was *Reed v. Reed* in which the Supreme Court condemned “dissimilar treatment for men and women who are... similarly situated.” The court later explained this principle in *Frontiero v. Richardson*. It stated:

>[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility....” And what differentiates sex from such nonsuspect [classifications] as intelligence or physical disability ... is that the sex characteristics frequently bears no relation to ability to perform or contribute to society.

In other words, gender is a “quasi-suspect class,” subject to intermediate scrutiny, and will be upheld only if ‘substantially related to a sufficiently important governmental interest.’

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210 *Virginia*, 518 U.S. at 532.
211 *Reed*, 404 U.S. at 77.
212 *Idaho Probate Code* specified that males are to be preferred to females in the appointing of administrators of estates. Two parents who were separated at the time, sought to be named the administrator of their son's estate when he passed away. Following the letter of the Probate Code, The father was named the administrator. The mother challenged the law. The Supreme Court found that that law’s dissimilar treatment of men and women was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment because giving a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits—the administrative cost that the law claimed as its interest—was not enough to satisfy intermediate scrutiny.
214 *Id.*
215 A suspect class is defined as a classification of groups meeting certain criteria suggesting they are likely to be subject to discrimination. Some such criteria are a history of discrimination against the group, immutable characteristics, low political power etc. These classes receive closer scrutiny by courts when an Equal Protection
Since it seems that legislative classifications “which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the ‘proper place’ of women and their need for special protection.” gender classification that appears to rest on nothing more than conventional notions about the proper place in society for males and females have been declared invalid time and again by the Supreme Court. For example, in Frontiero, the Supreme Court struck down a law that permitted males in the uniformed service to automatically claim their wives, for the purpose of obtaining additional benefits, as a dependent, but barred female members from claiming their husbands unless they were able to show that their husbands were in fact dependent on them for more than half of their support. The court found that the claimed purpose of the law, administrative convenience, was based on impermissibly broad assumptions that wives are dependent upon their husbands.

Gender classifications based on generalizations about gender roles in the raising of children receive the same scrutiny, and have similarly failed to meet that burden. Thus, in Stanley v. Illinois for example, a statute that presumed unmarried fathers to be unfit to raise children, but unmarried mothers to be fit, was unconstitutional under the equal protection principle. The Court determined that all parents in the state were entitled to at least a hearing on their fitness to care for the child before the child is removed from their custody, and that denying a hearing to unwed fathers, while granting it to unwed mothers, is contrary to the Equal

Protection Clause.\textsuperscript{223} This is an example of the Court recognizing that fathers and mothers are similarly situated with regard to their ability to raise children, and it is thus unconstitutional to treat them differently.

Of closer relation to this Note’s discussion, the Supreme Court, in \textit{Caban v. Mohammed}, found that a law that gave unwed mothers the power to block the adoption of their children, but did not give the same right to unwed fathers, was unconstitutional under the Equal Protection Clause.\textsuperscript{224} The Court rejected the argument that “a natural mother, absent special circumstances, bears a closer relationship with her child…than a father does.”\textsuperscript{225} The Court explicitly found that a father is just as fit to raise a child as a mother is, and thus it would be unconstitutional to deny the father such a right. This indicates the approach the Supreme Court would likely take when analyzing the question in the context of family leave laws. The court would likely find that laws which are not applied equally to fathers as they are to mothers are unconstitutional, because there is no indication that a mother bears any closer relationship with her child than a father does.\textsuperscript{226}

2. Knussman v. Maryland

The issue of gender discrimination in the context of a father being denied leave to care for a newborn child was litigated in \textit{Knussman v. Maryland}.\textsuperscript{227} The suit began with a Maryland statute that allowed employees who were “primary caregivers” to use up to 30 days of accrued sick leave to care for a child immediately following the birth or adoption of the child.\textsuperscript{228} The act also provided for a “secondary caregiver” to be able to use up to 10 days of accrued sick leave to care for a newborn or newly adopted child.\textsuperscript{229} Primary caregivers were defined as employees

\begin{itemize}
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Caban}, 441 U.S. 380.
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Knussman v. Maryland}, 272 F.3d 625 (2001).
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.}
\end{itemize}
who were primarily responsible for the care and nurturing of the child, and secondary caregivers were defined as those secondarily responsible for the care and nurturing of a child.\textsuperscript{230}

Following the birth of his child, Knussman, who was a state employee, applied to take the 30 days leave as the child’s primary caregiver, since his wife was still in the hospital due to a difficult birth, and he was the one preforming the primary caregiving functions.\textsuperscript{231} When he applied, he was informed that only birth mothers could qualify as primary caregivers, and that fathers would only be permitted to take leave as secondary caregivers since they could not breastfeed a baby.\textsuperscript{232} Eventually Knussman took the 10 days guaranteed to secondary caregivers, and after numerous requests to take the additional time as the primary caregiver, was informed that “God made women to have babies and, unless he could have a baby, there is no way he could be the primary caregiver,” unless his wife was dead or in a coma.\textsuperscript{233} After losing at each stage of the grievance process, Knussman finally brought suit in federal court alleging, \textit{inter alia}, that his request for leave was denied as the result of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{234}

The U.S. Court of Appeals for the Fourth Circuit held that the defendant’s conduct violated Knussman’s rights under the Equal Protection Clause because it applied a facially neutral statute unequally, solely on the basis of a gender stereotype.\textsuperscript{235} The court found that the irrefutable presumption applied by the defendant that the mother is the primary caregiver, and therefore entitled to greater employment benefits, and that the father is the secondary caregiver and entitled to fewer benefits, was an invidiously discriminatory application of the law, and it

\textsuperscript{230} \textit{Id} at 628.
\textsuperscript{231} \textit{Id.} at 628-29.
\textsuperscript{232} \textit{Id.} at 629.
\textsuperscript{233} Knussman v. Maryland, 272 F.3d 625, 629-30 (2001).
\textsuperscript{234} \textit{Id.} at 631.
\textsuperscript{235} \textit{Id.} at 635.
would have to satisfy the heightened level of scrutiny.\textsuperscript{236} The court concluded that the rebuttable presumption was in fact not substantially related to an important governmental interest and was not permissible under the Equal Protection Clause.\textsuperscript{237} This is a prime example of how a law which is drafted in a seemingly gender neutral manner can be interpreted discriminatorily, simply because it is not drafted in a way that explicitly spells out its gender neutrality.

3. How Gender Classification Leads to Unconstitutional Invidious Discrimination

These cases illustrate courts’ conception of “family responsibilities discrimination” as sex discrimination, that is, “adverse treatment of an employee with family responsibilities amounts to sex discrimination when the employer relies on gender stereotypes about caregivers.”\textsuperscript{238} This is how Julie C. Suk, a legal scholar with experience in the area of work-family balance, shows that gender stereotypes lead to discrimination.\textsuperscript{239} Suk explains that such stereotypes include the assumption that women can no longer be good workers once they become mothers, or that men are not caregivers and are lying if they demand the parental or family care leave to which they are statutorily or otherwise entitled.\textsuperscript{240}

Suk cites a 2007 U.S. Equal Employment Opportunity Commission (“EEOC”) Enforcement Guidance on Family Responsibility Discrimination.\textsuperscript{241} The EEOC Guide characterizes gender stereotyping as the benchmark of these cases.\textsuperscript{242} Suk explains that, “women with caregiving responsibilities may be perceived by employers as more committed to caregiving than to their jobs, and as a result they may be perceived as less competent than other workers,

\textsuperscript{236} Id. at 635-38.
\textsuperscript{237} Id. at 638.
\textsuperscript{238} Suk, supra note 13, at 15-16.
\textsuperscript{239} Id.
\textsuperscript{240} Id. at 16.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
regardless of how their caregiving responsibilities actually impact their work."243 This amounts to unconstitutional invidious discrimination.244 The EEOC report goes on to say that male caregivers may face a societal stereotype called the mirror image stereotype, which is that men are poorly suited for caregiving, regardless of their actual abilities.245 As a result, men may be denied parental leave or other benefits routinely afforded to female counterparts,246 which would also amount to invidious discrimination.

Many men also decline to take paternity leave because they fear being ridiculed, discriminated against, and the possibility of losing their jobs.247 This is because societal conditioning in the workplace has resulted in some men not being taken seriously when they request time off for paternity leave.248 Because the FMLA places an administrative burden on employers, many employers create obstacles to stop men from taking FMLA paternity leave.249 In fact, it was found that “some workplaces have ‘unofficial rules’ about how much time is reasonable or allowed for paternity leave, and taking the full amount of time is not only frowned upon, but it is very unlikely because no employee wants to be the first person to challenge what has become customary.”250 If employers view an employee taking no time at all as appropriate, an employee who chooses to take parental leave can be taking a huge risk.251 All of this perpetuates the stereotype that men are supposed to be at work, and not at home helping out with

244 Id.
245 Id.
247 Garvey & Mitchell, supra note 8, at 208 (citing Grossman, supra note 143, at 52-53); Gielow, supra note 122, at 1539.
248 Garvey & Mitchell, supra note 8, at 208.
249 Id.
250 Id.
251 Id.
children; a stereotype that no longer reflects the realities of our time, and one that is unconstitutionally invidiously discriminatory.  

The lack of paid leave for fathers and mothers alike also perpetuates gender stereotypes about women. Women still bear more responsibility than men for domestic duties, partially because they continue to earn less than men do in the workplace. Thus, “because men generally earn more than women, often the only rational economic decision is for the mother to leave the workforce for reasons relating to parenthood.” As a result, when paid leave is not available, it is women more than men who are forced to make adjustments that allow them to balance their home responsibilities with work, either by moving to jobs that offer leave, reducing their hours, or withdrawing from the paid workforce altogether.

Another stereotype that seems to be reinforced by the lack of paid leave is that a woman’s income is merely “supplemental” to the income of her husband, and that job security is therefore less important to women than to men. However, “women’s employment income has become increasingly critical to family economic stability,” and “that income suffers dramatically when women are forced to leave their jobs altogether to care for children or other family members.” When these women finally return to the workforce, they have lower annual earnings, and suffer

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254 Id.
256 Id. (citing DEBORAH RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 174 (1989) (at time FMLA was first considered, “[o]ver half of all working women, but only 1 percent of working men, ha[d] reported dropping out of the work force at least once for family reasons.”)).
257 Id.
258 Id.
259 Id.
greater long-term losses in their retirement income, as compared to women who can take job-
protected leave.\textsuperscript{260}

This stereotyping and gender discrimination in the implementation of paid leave must
stop, and the state laws as they are currently drafted are a part of the problem.\textsuperscript{261} It is therefore
important to amend these laws to spell out explicitly that they are gender neutral, and to set forth
guidelines for future legislation, on both the state and federal level, that will be gender neutral,
and will eradicate these gender stereotypes.

\textbf{V. AMENDING CURRENT LEGISLATION, AND SETTING GUIDELINES FOR FUTURE LEGISLATION}

The first step in remedying unconstitutional gender discrimination in family leave
programs is to amend current state laws which are drafted in ways that can be read in a
discriminatory manner, to make them explicitly gender neutral, as the FMLA has for example.

\textit{A. Amendments to Current Legislation}

The most common issue with the current state leave laws as they are drafted is language
such as “an \textit{individual} shall be deemed eligible,”\textsuperscript{262} or “an \textit{officer or employee}” shall be
eligible.\textsuperscript{263} This language leaves itself open to being interpreted in whatever manner an
employer might choose. They can decide that the act only applies to women if they wish. Or,
they might decide that the act only applies to men. They could interpret the act through the lens
of societal stereotypes about gender roles, since it does not explicitly spell out who it does and
does not apply to.\textsuperscript{264} This is the product of poor drafting,\textsuperscript{265} and must be remedied.

\begin{footnotesize}
\begin{itemize}
\item[260] Brief of the National Women’s Law Center \textit{supra} note 253 (citing 1996 DOL Report at 52); Joyce P. Jacobsen & Laurence M. Levin, \textit{Effects of Intermittent Labor Force Attachment on Women’s Earnings}, MONTHLY LAB. REV. 15 (1995) (women who leave the labor force for family responsibilities often return to “much lower” earnings than women who do not leave the labor force and have comparable levels of work experience).
\item[261] See infra, Part V.
\item[262] \textit{CAL. UNEMP. INS. CODE} § 3303 (2004).
\item[263] \textit{ALASKA STAT.} § 39.20.225 (emphasis added).
\item[264] As was the case in Knussman v. Maryland, 272 F.3d 625 (2001) for example.
\end{itemize}
\end{footnotesize}
Some might argue that using the terms “he or she” as Washington State does for example would be a workable solution. This certainly seems to be better than the legislation that does not differentiate the sexes, but it is still inadequate because employers can interpret the law as applying to one gender more generously than another or as only applying to a father if the mother decides not to take leave. Therefore, this language is not strong enough, as it might lead to unconstitutional gender discrimination, and thus it must be changed.

Maryland, in its amendment to the leave laws after the *Knussman* lawsuit, seemed to take these issues into consideration. In the definition of primary caregivers as provided by the act, it states that if two employees are responsible for the care and nurturing of a child, both employees can use in aggregate, up to 40 days, not to exceed 30 days for one employee, of accrued sick leave in order to care for the child during the period immediately following their birth or adoption. This would seem to show that men and women alike can take leave because, if men were not included, then there would be no need to state that when two employees are concurrently responsible for the care of the child, they can take up to 40 days. However, even in its newly drafted form this law leaves room for the possibility of interpretation that fathers are always secondary caregivers, since the law does not spell out explicitly that

266 WASH. REV. CODE ANN. § 49.86.030 (2012).
267 *Knussman*, 272 F.3d 625, 628 (2001). (citing Md. Code. Ann., State Pers. & Pens. § 7-508(a)(1)). This law has since been amended as Md. Code. Ann., State Pers. & Pens. § 9-505 (West 2012). When compared, the only significant difference is the amendment that where more than one employee is taking care of the child, leave is provided for both, a change which explicitly recognizes the possibility that a father is charged with some of the childcare duties.
fathers can be primary caregivers\textsuperscript{269} like the FMLA does.\textsuperscript{270} Therefore, this law should be further amended to state explicitly that fathers can be primary caregivers.

It would seem the best language to be used in amendments to state legislation is the language used by the FMLA itself. The FMLA states its intention to accomplish its purpose in a manner that is \textit{“consistent with the Equal Protection Clause of the Fourteenth Amendment,”} and \textit{“minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability), as well as compelling family reasons.”\textsuperscript{271}} Additionally, the Act applies, on a \textit{gender-neutral basis, to promote the goal of equal employment opportunity for women and men.”}\textsuperscript{272}

This language accomplishes several objectives. Not only does it spells out that the Act should minimize the potential for employment discrimination on the basis of sex by ensuring the leave is available on a gender neutral basis—and in that way ensure equal employment opportunity for men and women alike. The Act goes so far as to recognize that absent such language it could lead to a Fourteenth Amendment Equal Protection Clause violation, and so it states that it must be set forth in a manner that is consistent with the Equal Protection Clause.\textsuperscript{273} This is by far the most inclusive, clear, and undeniably gender-neutral language used in family leave legislation, and it should be used in any amendments to currently enacted legislation.

For example, a state act should provide that eligible employees are entitled to paid leave that it finds to be proper, be it through a payroll tax, or employee contributions to the state insurance fund. In the intent section of the act, or included in the actual language itself, it should

\textsuperscript{269} This law as amended still states “an employee” and does not add “male or female” which would be explicit of the equality. \textit{Md. Code. Ann., State Pers. & PENS. § 9-505 (West 2012).}


\textsuperscript{271} \textit{Id.} § (b)(4) (emphasis added).

\textsuperscript{272} \textit{Id.} at (b)(5) (emphasis added).

provide that it was enacted to be set forth in a manner that is “consistent with the Equal Protection Clause of the Fourteenth Amendment”. The act should state explicitly that it will minimize the potential for employment discrimination on the basis of sex by ensuring that leave is available on a gender-neutral basis in order to promote the goal of equal employment opportunity for women and men alike. This is language that can, and must, be used to amend the current legislation enacted by individual states. It is also language that must be used as a model and guideline for all future legislation, be it on a state or federal level.

B. Guidelines for Future Legislation.

In addition to the proposal that all future legislation adopt language spelling out gender neutrality as used by the FMLA, there are other aspects of certain currently enacted legislation, as well as past proposals that have failed, that it would seem prudent to adopt as guidelines for all future legislation. First, one of the main failings of the FMLA, as pointed out earlier in this Note, is that it does not apply to businesses that employ less than 50 workers, which means that many employees nationwide are not eligible.\textsuperscript{274} This is something that can be remedied by crafting legislation based on the New Jersey model, where the program is paid for exclusively by minor employee contributions.\textsuperscript{275} This would allow employees of small businesses to be eligible to take leave just like employees of big businesses, since any employee who pays into the disability insurance fund would be eligible; yet it would not affect employers because it would be paid for exclusively by employee contributions.\textsuperscript{276}

An aspect of leave programs in other countries which should be explored in the contemplation of future legislation, is the division of time into thirds in which a portion is given to the mother exclusively, a portion is given to the father exclusively, and a third portion is given

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\item \textsuperscript{274} See infra Part III.
\item \textsuperscript{275} Garvey & Michell, supra note 8, at 214.
\item \textsuperscript{276} Id.
\end{itemize}
\end{footnotesize}
to be used as the parents choose.277 This creates an incentive for fathers to take leave, because if they don’t, they lose the time. It also affords the parents some leeway to determine who is best suited to take the remaining time. Thus, it helps to fight societal stereotypes while still allowing the opportunity for self-determination.

Another aspect of leave programs that has yet to be enacted, but should be used as a guideline for future legislation, is language that guarantees time off for non-marital partners; something that would have largely positive implications for non-traditional family structures such as gay couples, as well as non-married cohabiting couples.278 This is particularly important considering the rising number of non-married heterosexual couples, and same-sex couples in the United States. It is also important because a number of states have legalized same-sex marriage, and children are born to these couples through adoption and surrogacy. Thus, it is increasingly important to ensure that same-sex parents are afforded the same protections of the law as are other heterosexual parents.279

CONCLUSION

The United States is one of the only countries in the world that does not have a federal paid family leave program, something that must be remedied. Attempts to resolve the work-family conflict include the FMLA, as well as state paid leave programs, intended to apply to both women and men.280 There is no doubt that there will be a push to enact more state laws like those in effect, and hopefully to enact a federal paid leave program sometime in the future.

277 For example the program in Iceland discussed supra in section II(c).
278 Thompson, supra note 131, at 87.
279 It is worth noting that the issue of the federal government’s recognition of same-sex marriage was decided by the Supreme Court on June 26, 2013. United States v. Windsor, 570 U.S. __. The court held Section 3 of the Defense Of Marriage Act (which essentially states that the federal government will not recognize same-sex marriage) to be unconstitutional under the Due Process Clause of the Fifth Amendment. This landmark decision will have many positive implications for the legal rights of gay couple throughout the country, and could affect the application of federal legislation in the area of paid leave in the future.
However, it is clear that gender role classifications are still a problem in modern society where women have broken the glass ceiling and achieved high power positions in the workforce alongside men, and in which men have begun taking on childrearing responsibilities traditionally held by women.\textsuperscript{281} Perhaps Congress is not in a position to completely eradicate societal invidious stereotypes. However, Congress does have the ability, and is in fact required, to take care when enacting legislation, to ensure that it be drafted in a manner that does not assist such unconstitutional discrimination.\textsuperscript{282} In the context of paid family leave laws, this means amending past legislation, and setting up guideline when drafting new legislation, to ensure they are drafted in a manner that spells out their explicit gender neutrality, and intent to be applied in a manner consistent with the Fourteenth Amendment’s Equal Protection Clause.

\textsuperscript{281} Suk, supra note 13.
\textsuperscript{282} U.S. CONST. amend. XIV § 1.