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Rona Kaufman Kitchen
Assistant Professor of Law

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MISSING THE MARK: HOW FMLA’S BONDING LEAVE FAILS MOTHERS

Rona Kaufman Kitchen∗

INTRODUCTION

In the two decades since it was adopted, the Family and Medical Leave Act1 (hereinafter “FMLA” or “the Act”) has been consistently criticized for its failure to achieve its stated goal of enabling workers “to balance the demands of the workplace with the needs of families.”2 Since it was signed into law in 1993, legal scholars and women’s rights groups, while applauding the accomplishments of the Act, have expressed their dissatisfaction with the status of family and medical leave law in the United States.3 It has been argued that the FMLA

∗ Assistant Professor, Duquesne University.

2. Id. § 2601(b)(1); Arianne Renan Barzilay, Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act, 6 HARV. L. & POL’Y REV. 407, 412-13 (2012) (“[T]he actual projections provided by the FMLA fall short of the interests discussed in the preamble. Not surprisingly, the FMLA, under its current form, has not significantly ameliorated the work-family conflict.”); Nina G. Golden, Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies, 8 J.L. & FAM. STUD. 1, 1 (2006) (“Providing twelve weeks of unpaid leave to workers whose employers have at least fifty employees, the Family and Medical Leave Act has had significantly less impact than anticipated.”); Rona Kaufman Kitchen, Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously, 26 WIS. J.L. GENDER & SOC’Y 167, 185 (2011); Marianne DelPo Kulow, Legislating a Family-Friendly Workplace: Should It Be Done in the United States?, 7 NW J.L. & SOC. POL’Y 88, 92-95, 114-115 (2012); Michael Selmi, Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA, 15 WASH. U. J.L. & POL’Y 65, 67 (2004) (“[T]en years after the FMLA’s implementation, it is clear that the statute has not accomplished its goals with respect to combating stereotypes or discrimination against women in the workplace. To the extent it has had any effect at all on these issues, the statute has likely exacerbated both, though probably only to a socially insignificant degree. And . . . those portions of the statute that have proved most effective have not been the portions originally considered central during the legislative debate. By far, the FMLA is most frequently used by employees for their own serious illness—a fact that has effectively transformed the statute from one involving family leave to one involving sick leave.”); Natasha Bhushan, Note, Work-Family Policy in the United States, 21 CORNELL J.L. & PUB. POL’Y 677, 687-690 (2011).
3. NAT’L F’SHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS 10 (2d ed. 2012); Maxine Eichner, Square Peg in a
should be expanded to cover more workers, for more reasons, for longer periods of time, and to provide for income replacement and a right to return to work on a part-time basis.4

I echo the calls for more comprehensive job-protected leave.5 However, in this article, I focus exclusively on how the FMLA’s bonding leave fails mothers. Specifically, FMLA bonding leave poses several primary and subsidiary problems for mothers, mother-infant bonding, and attachment. First, the FMLA poses accessibility problems through its stringent coverage limitations, eligibility requirements, and lack of income replacement.6 Due to these accessibility issues, the FMLA excludes most mothers from accessing its job-protected bonding leave, frustrating the primary congressional intention behind the bonding leave provision.7 Second, the FMLA poses subsidiary applicability problems due to the length, inflexibility, and vulnerability of the leave. The inflexible twelve-week bonding leave entitlement is therefore substantively lacking. It falls short of providing an environment that would facilitate healthy parent-infant bonding as intended by the Act.8 As a result of these primary and subsidiary dilemmas, FMLA’s bonding leave fails to address the bonding and attachment needs of mothers and infants.

This article is part of my larger Misconceived Motherhood project, in which I explore the legal conceptualization of motherhood and the mother-infant relationship. In my next article I will consider whether the FMLA’s failure to provide a bonding leave entitlement consistent with the needs of mothers reflects a larger legal failure to properly understand motherhood and the mother-infant relationship. In other articles, I will explore other instances when law and motherhood intersect and consider

Round Hole: Parenting Policies and Liberal Theory, 59 OHIO ST. L.J. 133, 148-49 (1998) (“Yet the support to parenting actually afforded by the FMLA is minor. The twelve weeks of leave that it allows constitutes only a fraction of the time necessary to raise sound children. Moreover, the FMLA provides for no wage replacement during that time. As a result, the majority of employees cannot afford to make use of the leave. In addition, the statute applies only to employees who work for companies with fifty or more employees... Finally, the FMLA confines the conditions of leave to care for children to circumstances involving the birth or adoption of a child, or to situations involving a severe medical emergency.”).

6. See Barzilay, supra note 2, at 413-14.
7. See infra Part II.
8. See infra Part III.
whether these intersections produce just results.

This article will proceed in three parts. Part I reviews congressional intentions in adopting family and medical leave and briefly discusses the coverage, eligibility, and substantive provisions of the Act. Part II discusses the primary problem of FMLA accessibility. Part III discusses the subsidiary application problems that inhibit the Act’s effectiveness even for mothers who are able to take bonding leave. Finally, in Part III, I will propose guiding principles for a better bonding leave law.

I. CONGRESSIONAL INTENTION AND THE FAMILY MEDICAL LEAVE ACT

The FMLA was signed into law in 1993 by President Bill Clinton to address multiple concerns, including the acknowledgement of the care vacuum that had developed as a result of the rapid and unyielding entry of women into the paid labor market. In 1975, only 32.6% of married mothers with children under the age of three participated in the paid labor market, but by 1992 the market participation rates of these women had increased to over fifty-seven percent. In the 1990s, single mothers had even higher participation rates with over sixty percent in the labor market and single-parent families with female heads of household represented 22.7% of all families with children under the age of eighteen. In fifty-nine percent of married, dual-income families with children under the age of eighteen, both parents were working in the paid market. These workplace demographic shifts increased the prevalence of work-family conflict. With the help of women’s advocacy groups, especially the Women’s Legal Defense Fund (now known as the National Partnership for Women and Families), concern over work-family conflict inspired congressional action.

9. The FMLA was adopted in recognition of the “importance of the ‘development of children and the family unit’; the needs of ‘fathers and mothers [to] be able to participate in early child rearing’ without being forced ‘to choose between job security and parenting’; the national interest in preserving ‘family integrity’; and the goal of equal opportunity for men and women.” Eichner, supra note 3, at 148 (quoting 29 U.S.C. § 2601 (2006)).


11. Id. at 11.


14. Id. at 12.

15. See, e.g., History and Timeline, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES,
workplace demographic shifts and their effects on families, Congress adopted the FMLA. Thus, a primary goal of the FMLA, especially its bonding leave provision, was to ensure that parents, mothers in particular, would not be forced to choose between caring for their children and maintaining paid employment.

Congress had other goals in establishing the FMLA as well. It sought to align U.S. work policy with that of other industrialized countries, where family and medical leave had long been the norm. Congress also wanted to increase fathers’ commitment to family care work. Finally, Congress aimed to achieve the goals of the Act without increasing the likelihood of employment discrimination against women due to their caregiving. Thus, though job-protected family leave was adopted primarily to ease work-family conflict experienced by women, it was part of a broader scheme of helping families in various ways.

Pursuant to § 2611 of the Act, an employee is “eligible” for FMLA coverage if the employee “is employed at a worksite at which such employer employs [at least] 50 employees . . . within 75 miles of that worksite,” “for at least 12 months” and “for at least 1,250 hours of


17. See 29 U.S.C. § 2601(a)(2), (3), (5) (2006) (“Congress finds that . . . (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions; (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting . . . (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . . .”).

18. See H.R. REP. NO. 103-8, pt. 2, supra note 10, at 12. (“All Western and Eastern European countries require employers to grant such leave, as Dr. Sheila Kamerman of Columbia University School of Social Work has documented, and all provide for a period of leave longer than that proposed in title II of H.R. 1.”).

19. Id. at 14 (“As importantly, Federal policy is designed to afford all Americans equal employment opportunities based upon individual ability. While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities in providing immediate physical and emotional care for their families.”).

20. Id. (“The committee recognizes that a special ‘maternity leave’ requirement may have the effect of denying women job opportunities. The knowledge that job-protected leaves were required for working mothers, and working mothers only, may encourage employing agencies to be reluctant to hire or promote women of child-bearing age. However, since employers would be required under H.R. 1 to provide job-protected leave for all employees, they would have little incentive to discriminate against women.”).
service with such employer during the previous 12-month period.”21
Simplified, in order to be FMLA-eligible, an employee must work for a
single, large employer for at least twelve months and 1250 hours during
those twelve months. Such eligible employees have the right to take
job-protected leave for qualifying medical and family reasons.22
In addition to providing job-protected bonding leave, the FMLA
provides eligible employees with four other types of job-protected leave:
medical self-care leave, medical family-care leave, qualifying exigency
leave, and servicemember family leave.23 The FMLA’s self-care
provision entitles eligible employees to leave “[b]ecause of a serious
health condition that makes the employee unable to perform the
functions” of the employee’s job.24 Its family-care provision entitles
employees to take leave to care for a spouse, son, daughter, or parent
with a “serious health condition.”25 The FMLA’s qualifying exigency
leave provision entitles employees to take leave “[b]ecause of any
qualifying exigency . . . arising out of the fact that the spouse, or a son,
daughter, or parent of the employee is on covered active duty (or has
been notified of an impending call or order to covered active duty) in the
Armed Forces.”26 Finally, the FMLA provides “an eligible employee
who is the spouse, son, daughter, parent, or next of kin of a covered
servicemember with leave” to care for the servicemember.”27 All types
of FMLA leave, except the servicemember leave, entitle eligible
employees to a maximum of twelve-weeks of unpaid, job-protected
leave. FMLA servicemember leave entitles eligible employees to a total
of twenty-six workweeks of unpaid, job-protected leave.28 Importantly,
an employer must maintain an employee’s health insurance while that
employee is on any type of FMLA leave.29
FMLA bonding leave is available on a gender-neutral basis to all
eligible employees. It enables a mother or father of a newborn, recently
placed foster child, or adopted child to take up to twelve weeks of

employee is one who has worked for a covered employer for at least twelve months, has worked at
least 1,250 hours during the previous twelve months, and has been employed at a worksite where
there are [at] least fifty or more employees within a seventy-five mile radius.”).
24. § 2612(a)(1)(D).
25. § 2612(a)(1)(C).
27. § 2612(a)(3).
29. § 2614(c)(1).
unpaid, job-protected leave to bond with that child. Congress settled on twelve weeks of job-protected bonding leave based on its determination that “12 weeks-approximates the period of time that child development experts suggest as the very minimum for newborns and new parents to adjust to one another.” FMLA bonding leave must be taken within twelve months of the child’s birth or placement. Once the leave is commenced, it must be completed within twelve weeks’ time. Unlike FMLA bonding leave, FMLA medical leave may be taken on an intermittent or reduced-schedule basis. No such right exists for those who take bonding leave. An employee may only take bonding leave on an intermittent basis if the employee’s employer agrees to it. Though FMLA’s bonding leave provision has had some important beneficial effects, its impact has been largely constrained due to the accessibility and application problems discussed in Parts II and III.

II. ACCESSIBILITY

While the FMLA was intended to alleviate the work-family conflict experienced in American families, particularly by women, due to demographic shifts at work and in the family, its coverage and eligibility requirements make that goal largely unachievable. A significant portion of the American workforce is excluded from any FMLA coverage. Over forty percent of America’s workers have no right to FMLA leave.

30. § 2612(a)(1)(A)-(B).
32. § 2612(a)(2).
33. § 2612(a)(1), (b)(1).
34. § 2612(b).
35. § 2612(b)(1). For instance, Wisconsin’s family leave law “allows an employee to take partial absence leave (that is, to take leave in noncontinuous increments) in connection with childbirth or adoption, as long as such leave does not unduly disrupt the employer’s operations.” Robert K. Sholl & Geri T. Krupp-Gordon, *Family & Medical Leave Acts: Where Lie the ‘Greater Rights’?*, 66 WIS. LAW. 18, 20 (Aug.1993).
Though women are almost as likely to work at FMLA-covered worksites as men, they are significantly less likely than men to be eligible to take FMLA leave.\textsuperscript{38} Women are also much more likely than men to have an unmet need for leave.\textsuperscript{39} Almost sixty percent of all workers are covered by the FMLA, but only forty-six percent of working mothers are covered.\textsuperscript{40} Earlier studies found that “[t]wo-thirds of steadily employed mothers had no FMLA coverage at all.”\textsuperscript{41} Even worse, eighty percent of new mothers have no FMLA rights.\textsuperscript{42} Thus, though FMLA bonding leave was primarily intended to ensure that new mothers would be able to take time away from work to bond with their children, its coverage and eligibility requirements work to exclude the overwhelming majority of them.\textsuperscript{43}

The greater likelihood that mothers will be excluded from the FMLA’s coverage than fathers, though certainly not consistent with congressional intentions behind the Act, is fully consistent with the Act’s design.\textsuperscript{44} The FMLA’s coverage and eligibility requirements favor employees who work full-time, for long periods, for a single, large employer. These eligibility requirements essentially mirror the work patterns of the traditional male breadwinner, not those of the modern day

\begin{footnotesize}
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\item[38.] U.S. DEP’T OF LABOR, WAGE & HOUR DIV., THE 2000 SURVEY REPORT, Impact of Family and Medical Leave on Employees, (2000) [hereinafter Impact of Family and Medical Leave on Employees], available at http://www.dol.gov/whd/fmla/chapter4.htm (74.5% of female workers with young children and 75% of male workers with young children work at FMLA-covered worksites. 56.3% of such female workers and 66.7% of such male workers are eligible to take FMLA leave).
\item[42.] See Mary Kay Henry, Celebrating 20 Years of the FMLA, SERVICE EMPLOYEES INT’L UNION (Feb. 5, 2013), http://www.seiu.org/2013/02/celebrating-twenty-years-of-the-fmla.php (“[T]oday approximately one-fifth of all new mothers are covered by [the] FMLA. . . . The majority of new mothers who worked through their pregnancies return to work before the allotted 12 weeks, with more than a half a million women each year going back to work in 4 weeks or less.”).
\item[43.] Id.
\item[44.] See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a) (noting the importance of providing leave for women in light of the social reality that “primary responsibilities for family caretaking often falls on women.”); Bhushan, supra note 2, at 690 (“[A] woman with young children is ten percent less likely to meet the employee-eligibility requirements than a man with young children.”).
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working mother. Traditionally, men worked, full-time, for a single employer for many years without taking a break for childbearing or childrearing. It remains true today that men continue to follow these traditional working patterns more often than women. For example, men are more likely than women to work full-time and they are almost half as likely as women to work part-time. While only 13.4% of men work part-time, 26.6% of women work part-time. Because the FMLA’s coverage and eligibility requirements reward full-time employees who work for a single, large employer, they inevitably favor male workers. Thus, by design, FMLA’s coverage and eligibility requirements result in a greater likelihood of coverage for fathers than mothers.

In addition to favoring male work patterns, FMLA’s coverage and eligibility requirements also prefer workers who conform to the marriage norm. Although married and single individuals are similar in their labor participation rates, married employees are much more likely to be covered by the FMLA than single employees. In fact, almost seventy percent of FMLA-eligible workers are married. That means that only about thirty percent of FMLA-eligible workers are single. A recent

45. Women and men have different work patterns. A 2003 United States General Accounting Office Report to Congress determined that “women have fewer years of work experience, work fewer hours per year, are less likely to work a full-time schedule, and leave the labor force for longer periods of time than men.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS 2 (2003) [hereinafter GAO REPORT], available at http://www.gao.gov/assets/250/240547.pdf.


47. See id. at 2-3.


50. Id.


52. United States Dep’t of labor, Employment Status of the Population by Sex, Marital Status, and Presence and Age of Own Children Under 18, 2012-2013 annual averages, bls.gov (last modified April 25, 2014), http://www.bls.gov/news.release/amee.t05.htm#cps_fn_pchld.f3 (Approximately 81% of married individuals with their own children participate in the labor market while approximately 78% of single individuals with their own children participate in the labor market.).


54. Id.
Pew research study found that just barely half of all adults are married.\(^{55}\) Thus, though approximately half of all workers are single, they only account for thirty percent of all FMLA-eligible workers.

This preference for married employees is at odds with the Congressional intention to alleviate work-family conflict for the growing number of single-mother families.\(^{56}\) This is an especially important concern because single-parent families are more representative of families today than they were when the Act was passed. A 2012 Center for American Progress report noted that in 2011 single parents head one in three households.\(^{57}\) Today, millions of children are being raised in single-parent households. In 2012, thirty-five percent of children, accounting for almost 25 million boys and girls, were being raised in single-parent households.\(^{58}\) This trend shows no signs of slowing. In recent years, approximately forty percent of babies were born to single mothers.\(^{59}\) The decrease in marriage rates and increase in single-parent households have important ramifications for the FMLA’s impact. With single individuals less likely to be covered by FMLA than married workers, a growing percentage of families are left out.

In addition to being less likely to be covered by FMLA due to their marital status, single mothers are also less likely to be covered due to their greater likelihood of engaging in low-wage work. Approximately forty percent of working single mothers are employed in low-wage work.\(^{60}\) Low-wage workers are less likely than other workers to be covered by the FMLA.\(^{61}\) While only thirty-nine percent of workers with

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family incomes of less than $40,000 a year are covered by FMLA, approximately sixty percent of workers with family incomes over $40,000 a year are covered.62

As the statistical data concerning FMLA coverage demonstrates, FMLA is less likely to cover workers who are mothers, single, or low-wage earners. As a result, single-mothers, the very group Congress sought to help by passing the FMLA, are often left without access to bonding leave. FMLA was adopted in response to demographic shifts in the workplace (more women participating in the paid market) and in the home (more dual-income families, more single mothers). Therefore, even though FMLA was intended to benefit mothers who were combining paid market work with their family care obligations, it was designed to exclude many of those mothers from its protections. This intention/design mismatch is an engineering flaw that plagues FMLA’s coverage and eligibility requirements. It mutes the effectiveness of the FMLA because it denies access to job-protected leave to so many of those Congress intended to help. The impact of the coverage and eligibility design defect is further exacerbated by substantive design defects in the FMLA.

The FMLA provides unpaid job-protected leave. Though some states provide wage replacement to eligible employees who take family or medical leave,63 and some workers receive paid leave from their employers,64 the FMLA does not provide for any paid leave or income replacement option.65 Because FMLA leave is unpaid, many employees who would otherwise take FMLA leave are unable to do so.66 According to a recent 2012 research study, nearly half of all FMLA-eligible workers could not afford to take leave.67 Women are more

65. See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(c) (2006); DelPo Kulow, supra note 2, at 93.
66. Due to FMLA’s other coverage limitations, including the requirement that the employer employ at least fifty workers within a seventy-five mile radius and that to establish eligibility an employee must have worked at least 1250 hours in the twelve months prior to the FMLA leave, only approximately sixty percent of American workers are eligible for FMLA leave at all. See DelPo Kulow, supra note 2, at 93; 29 U.S.C. § 2611(2)(A)-(B).
67. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, A LOOK AT THE U.S. DEPARTMENT OF LABOR’S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE
likely to forgo their needed leave than men, with sixty-four percent reporting that they did not take leave because they could not afford to.\(^6\) Moreover, fifty percent of those who did take leave agreed that “their leave ended and they returned to work because they could not afford to take more time off.”\(^6\) Meanwhile, nearly a third of workers reported “they had to cut their leave short because of the financial strain of reduced or no pay.”\(^7\) Therefore, research findings support the conclusion that even among the eligible, FMLA leave is often inaccessible.

Reports that FMLA-eligible employees forgo or cut short their leave due to the lack of an income replacement provision are further supported by research findings that show employees are more likely to take leave when they have access to income replacement. One such study examined how California’s paid family leave program affected leave taking by mothers following childbirth.\(^8\) The authors concluded that California’s paid leave program doubled both the likelihood that mothers would take maternity leave, and the length of leave they took.\(^9\)

One need only look to the benefits that flow from paid leave programs to grasp why the FMLA’s unpaid leave is inferior. In an article examining the effects of California’s paid family leave program upon mothers following childbirth, the authors reached the following conclusions:

California PFL program increased leavetaking among all groups of new mothers, citing evidence that overall maternity leave use more than Atypically took about 3 weeks of maternity leave. . . .

\(^6\) See A LOOK AT 2012 FMLA SURVEYS, supra note 67, at 2.
\(^7\) Id.
[A]fter the implementation of the PFL program, overall use of maternity leave increased by an average of 3 to 4 weeks, with new mothers taking an average of 6 to 7 weeks of leave.\textsuperscript{73} The authors also noted that California’s paid leave program increased the likelihood that a new mother would take leave.\textsuperscript{74} While only 6.1\% of women took maternity before it included income replacement, 7.4\% took it after the program was implemented.\textsuperscript{75} Therefore, the FMLA’s entitlement to unpaid leave has had “only limited success in accomplishing [its] goal” of allowing mothers “to have more time at home following the birth of a child.”\textsuperscript{76} It is clear that the FMLA’s failure to provide paid leave or another mechanism for income replacement has compromised the Act’s effectiveness.

As a result of the coverage limitations, eligibility requirements, and lack of paid leave established by the Act, mothers have been unable to realize the benefits of FMLA bonding leave. A recent report concluded “sixteen percent of new moms took only one to four weeks away from work after the birth of a child.”\textsuperscript{77} Another thirty-three percent of new mothers took “no formal time off at all,” returning to work almost immediately after giving birth.\textsuperscript{78} Meanwhile, there is evidence that the FMLA has not had any statistically significant effect on the likelihood that a mother will take bonding leave or on the duration of the leave she takes.\textsuperscript{79}

Due to the coverage and eligibility requirements, the FMLA is inaccessible to the majority of those who were intended to benefit from its bonding leave entitlement. Additionally, the fact that the FMLA provides unpaid leave, limits the number of mothers who, though covered and eligible, can afford to take FMLA bonding leave. Thus, the

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\textsuperscript{73} See How Paid Family Leave Affects Mothers in the Labor Force, supra note 71, at 66; Rossin-Slater et al., at 1.
\textsuperscript{74} How Paid Family Leave Affects Mothers in the Labor Force, supra note 71, at 66.
\textsuperscript{75} See id.; Rossin-Slater et al., supra note 72, at 13.
\textsuperscript{76} See Rossin-Slater et al., supra note 72, at 18.
\textsuperscript{78} Id.
\textsuperscript{79} Charles L. Baum, Has Family Leave Legislation Increased Leave-Taking?, 15 WASHT. U. J.L. & POL'y 93, 96, 112-114 (2004) (“My results suggest that family leave legislation has no effect on the incidence of leave-taking. There is some evidence that such legislation increases the number of weeks of maternity leave taken, however, even where statistically significant, the effects of the legislation are small.”). Meanwhile, Baum found that the length of the mandated leave did have a small, but statistically significant, positive effect on the length of maternity leave women take. Id. at 112-114.
\end{flushleft}
FMLA’s coverage and eligibility limitations are further exacerbated by its lack of income replacement, ultimately denying job-protected bonding leave to mothers of newborns.

III. APPLICABILITY

In addition to the primary problems of coverage, eligibility, and affordability discussed above, there are aspects of the FMLA’s substantive bonding leave entitlement that pose subsidiary problems for mothers. Specifically, the length of leave time, the inflexibility of bonding leave, and the failure to separate medical from bonding leave have resulted in a failure to realize the important goal of providing mother-infant pairs with sufficient time to establish healthy mother-infant bonding and attachment.80

The substantive bonding leave entitlement established by the FMLA poses the following subsidiary problems: (1) a twelve week work-leave is an insufficient period of time to establish healthy mother-infant bonding and attachment; (2) interruption of the bonding and attachment process when the infant is twelve weeks old (or less) so that the mother can return to her pre-leave, full-time work schedule is detrimental to mother-infant bonding and attachment; and (3) FMLA’s failure to separate medical and bonding leave may force a mother to forego her bonding leave in order to care for herself or a family member with a serious health condition.81

The FMLA’s bonding leave provision entitles eligible employees to twelve weeks of job-protected leave upon the birth of a child.82 Once a mother exhausts her twelve weeks of leave, she must return to work or risk adverse employment action.83 A mother who is terminated for failing to return to work after twelve weeks of FMLA leave has no legal recourse against her employer.84 Similarly, a mother who refuses to return to her pre-work schedule at the expiration of her bonding leave, is not protected from adverse employment action.85 The FMLA’s bonding leave entitles eligible employees to twelve weeks of job-protected leave,

80. Rosanne Clark et al., Length of Maternity Leave and Quality of Mother-Infant Interactions, 68 CHILD. DEV. 364, 374 (1997).
84. Id.
not a day more.\textsuperscript{86} Employees have no right to take this leave intermittently.\textsuperscript{87} This limitation is specific to the FMLA’s bonding leave.\textsuperscript{88} Under both the self- and family-medical care provisions, employees are entitled to take their leave on an intermittent basis.\textsuperscript{89} Thus, once an employee has begun her bonding leave, she must return to her pre-leave work schedule within twelve weeks.\textsuperscript{90} Where an employee does not return to work at the expiration of her twelve week bonding leave, she is no longer protected by the FMLA and can be terminated or subject to other adverse employment action.\textsuperscript{91}

Additionally, because FMLA’s twelve week job-protected leave runs concurrent with any other FMLA leave taken by the employee, the length of an employee’s bonding leave is directly decreased by any family- or self-care leave the employee takes during the same twelve month period.\textsuperscript{92} In other words, where an employee takes FMLA leave for self- or family-medical care during the nine months leading up to the birth of her infant or during the twelve month period following the infant’s birth, her bonding leave entitlement will be decreased by the number of weeks leave she has taken for such self- or family-care.\textsuperscript{93} Therefore, if a mother takes self-care medical leave to tend to her own serious health condition during her pregnancy, she may have no right to bonding leave upon the birth of her infant.\textsuperscript{94} Similarly, to the extent a mother exhausts her twelve weeks of FMLA leave to care for her prematurely-born or seriously ill infant, her right to take leave to bond with her infant will be limited.\textsuperscript{95} In these instances, even though a mother is an eligible employee working for a covered employer and can afford to take unpaid leave, she is barred from taking job-protected

\textsuperscript{86} \S 2612(a)(1).
\textsuperscript{87} \S 2612(b)(1).
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} \S 2612(a)(1).
\textsuperscript{91} \S 2612(b)(1)(C); Anderson, 589 F. Supp. 2d at 537 n.9.
\textsuperscript{92} Palao v. Fel-Pro., Inc., 117 F. Supp. 2d 764, 769 (N.D. Ill. 2000).
\textsuperscript{93} Under California’s Paid Family Leave Act, an employee is entitled “to take family leave after taking pregnancy disability leave, instead of taking the two leaves concurrently.” Golden, supra note 2, at 2.
\textsuperscript{94} Palao, 117 F. Supp. 2d at 769 (employee was not entitled under FMLA to reinstatement after she took eight weeks of maternity leave, where she had taken eleven weeks of disability for shoulder surgery five months earlier).
bonding leave due to recently having taken medical leave.

Ultimately, these subsidiary problems preclude otherwise covered, eligible mothers from taking "reasonable leave for . . . the birth or adoption of a child" as congressionally intended. These problems exemplify the consequences of adopting bonding leave law that is incongruent with the bonding and attachment needs of mothers and their infants. A better bonding leave law would be one that reflects the bonding and attachment needs of mother-infant pairs. The following basic discussion of the mother-infant relationship illustrates why a 12-week bonding leave is insufficient to establish healthy mother-infant bonding and attachment.

Though the terms bonding and attachment are often used interchangeably, they actually refer to two distinct but interrelated processes. "Bonding" refers to the emotional investment a parent has in her infant. Bonded mothers are more responsive and nurturing to their infants and respond to their infants quickly and with sensitivity. Bonded mothers are more likely to be nurturing caregivers and engage in behaviors that have long been associated with mothering. For example, bonded mothers are observed interacting with their babies by holding, gazing, singing, rocking, nursing, communicating, and

96. § 2601(b)(2) (emphasis added).
98. Lane Strathearn et al., Does Breastfeeding Protect Against Substantiated Child Abuse and Neglect? A 15-Year Cohort Study, 123 PEDIATRICS 483, 483-84 (2009). “Human and animal research suggests that early physical contact between a mother and her offspring is important in stimulating and maintaining maternal behavior, which may help protect against maternally perpetrated maltreatment. Breastfeeding may enhance maternal responsiveness by stimulating oxytocin release, which is associated with reduced anxiety and elevated mood, a blunted physiological stress response, and more-attuned patterns of maternal behavior, presumably through its central nervous system activity. A recent report showed that increases in peripheral oxytocin levels during pregnancy were associated with increased maternal-fetal attachment. Another study reported not only that breastfeeding mothers perceived less overall stress but also that breastfeeding, compared with bottle feeding, resulted in a significant reduction in negative mood.” Id. at 484.
99. See id. at 490; Feldman et al., supra note 97, at 965.
100. See Feldman et al., supra note 97, at 965.
touching. Thus, the term “bonding” refers to the maternal aspect of the mother-infant relationship. Maternal bonding is especially important for infants because it invites them to securely attach to their mothers.

“Attachment” refers to the infant aspect of the mother-infant relationship as well as to the internal social development of the infant. Attachment has been identified as characterizing the infant’s tie to his mother. John Bowlby, the founder of attachment theory argued that “attachment was an innate biological system promoting proximity-seeking between an infant and a specific attachment figure, aiming to increase the likelihood of survival to a reproductive age.” According to Bowlby, an infant’s attachment to his mother was central to his healthy emotional development, his ability to function properly in society, and his success in forming other personal bonds. This view has been widely affirmed and restated since Bowlby first theorized it.

In The Science of Evil, Professor Simon Baron-Cohen describes his version of Bowlby’s theory as follows:

[w]hat the caregiver gives their child in those first few critical years is like an internal pot of gold. The idea—which builds on Freud’s insight—is that what a parent can give his or her child by way of filling the child up with positive emotions is a gift more precious than anything material. That internal pot of gold is something the child can carry inside him or her throughout

101. Id. (“The mother-infant bond, the primary bond across mammalian species, is expressed in a clearly defined set of maternal postpartum behaviors that emerge or intensify during the bonding stage. These behaviors include proximity seeking, touch, and contact. Additional maternal bonding behaviors in humans are gaze at the infant, ‘motherese’ vocalizations, positive expression, and adaptation to cues expressed by the infant.”).

102. Id.

103. Id.

104. Id.


their life, even if they become a penniless refugee or are beset by other challenges. This internal pot of gold is what gives the individual the strength to deal with challenges, the ability to bounce back from setbacks, and the ability to show affection and enjoy intimacy with others, in other relationships.\textsuperscript{110}

Thus, secure attachment is understood to be a critical building block in human development.\textsuperscript{111}

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111. There seems to be universal recognition of the importance of mother-infant bonding and attachment, such that it is virtually impossible to find any researcher in any discipline who will claim otherwise. Even those who look critically upon research findings that have the effect of crediting a child’s success (and blaming failure) on maternal behavior, cannot discount the importance of the mother-infant relationship during the first year of life. There can be no question that the interplay between the infant and the primary caretaker in the first year of life represents a significant psychological experience for both child and mother. The day-by-day interchange in feeding, dressing, and other caretaking activities, in play and other social interaction, all contribute to the establishment and elaboration of emotional and cognitive attachments between the infant and his mother. Stella Chess, Mothers Are Always the Problem – or Are They? Old Wine in New Bottles, 71 PEDIATRICS 974, 975 (1983). Chess is rightfully concerned about the possibility of mother-blaming:

We are back to the professional ideology of the 1950s and 1960s, by now fortunately outmoded, in which the causation of all psychopathology, from simple behavior problems to juvenile delinquency to schizophrenia itself, was blamed on the mother. Then the mother’s fault lay in her anxious actions during her child’s first few year of life and the attitudes, both conscious and unconscious, that determined them – emotional rejection, rigid childcare practices, “double-bind” messages, etc. Now the fault lies in what the mother fails to do, namely failure to establish skin-to-skin contact with her baby. Further, the time of danger has now been moved back to the first few hours, or enlarged to the first weeks after birth.

Id. at 974-75. I do not make light of Chess’s concern. Nevertheless, I do not find cause with revealing truths about motherhood, the mother-infant relationship, and the mother-child relationship. Rather, I believe that cause lies with the unwarranted reactions to such truths. There is no rule that states that acknowledging the importance of mother-infant and mother-child relationships must result in the exclusion of mothers from the public sphere (though history has shown this to be the case). It is my hope that embracing these truths will instead prompt dramatic structural and policy shifts that will enable mothers to participate in the paid labor market while simultaneously tending to their infants and children. Nevertheless, I understand that my commitment to the significance of the mother-infant relationship may put me at odds with other feminists. Justice Ginsburg articulated the concern well. Coleman v. Court of Appeals of Md., 132 S.Ct. 1327, 1343 (2012) (Ginsberg J. dissenting) (quoting 1989 House Hearing 248 American Bar Association Background Report) (“Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be.”). Ultimately, my view is
Maternal bonding and infant attachment are the basis of a special relationship shared between mothers and their infants. Anthropologist Meredith Small describes this relationship:

"[t]he word “entrained” is often used to explain this relationship. Entrainment is a kind of biological feedback system across two organisms, in which the movement and patterns of one influence the other. Entrainment, in this context, means physiology of the two individuals is so entwined that, in a biological sense, where one goes, the other follows and vice versa."

The mother-infant relationship is initially developed through physical proximity, including connection through touch, sight, sound, and scent. The connection is also physiological as demonstrated by synchronization of heart rate between infant and parent. Experts recognize the importance of this relationship and its role in establishing healthy infant attachment.

Both nature and nurture play important roles in establishing a healthy mother-infant relationship. Small explains, “[t]he parent-infant bond is the product of interaction and mutual attention. Like any human attachment, the initial biological attraction between adult and child brings them together, but it is the process of interacting together that builds a bond. In that sense, any time spent together is critical time.” Researchers have found a strong biological and evolutionary basis for the mother-infant relationship. Mothers are biologically and

that the prevailing ideology identified by Ginsburg is wrong—in fact, I believe that women’s commitment to motherhood and work are not at odds with each other. Rather, they are complimentary. Moreover, I am not willing to deny truths about women and motherhood out of concern that those truths will be used by others to justify discrimination against women. I believe it is appropriate for legal scholars to embrace the special, meaningful, and natural connection that mothers have with their children.

113. Id. at 35. I will be working with the concept of entrainment in connection with new findings concerning fetal-maternal microchimerism in another article in which I challenge the legal conceptualization of mother and infant as two separate, autonomous, rights-bearing individuals.
114. Id. at 35-39.
115. Id. at 38.
116. Id. at 37 (“When babies and adults interact, they are partners in an interactive social dance in which they jointly regulate each other, and this dance is essential for the baby’s social and psychological development.”).
117. Id. at 25. “So there is nothing necessarily automatic about maternal behavior, even if there is an instinct to be open to the attachment. Clearly the mother-infant bond, while primed to occur, needs interaction over time to be truly strong.” Id. at 29.
evolutionarily primed to bond with their infants and infants are similarly driven to attach to their mothers. One maternal behavior that has been found to be especially predictive of a healthy mother-infant relationship is breastfeeding. Studies have shown that, “[a]mong other factors, breastfeeding may help to protect against maternally perpetrated child maltreatment, particularly child neglect.”\textsuperscript{118} Also, breastfeeding mothers “displayed greater sensitivity in dyadic interactions with their infants 3 month postnatally than those who chose to bottle feed.”\textsuperscript{119} Additionally, even the intention to breastfeed prenatally, “correlated with sensitivity 3 months postpartum.”\textsuperscript{120}

In addition to increasing the likelihood that a mother will bond with her infant, breastfeeding has other important benefits. Researchers have determined

babies breastfed for less than 4 weeks are 5 times more likely to die of SIDS than infants breastfed for more than 16 weeks. . . . Babies breastfed 2 months or less are almost 4 times more likely than babies breastfed for more than a year to be obese when they enter elementary school.\textsuperscript{121}

Thus, breastfeeding is an important aspect of mother-infant bonding and attachment. Because breastfeeding promotes maternal bonding and maternal bonding promotes infant attachment, consideration of how a bonding-leave law will impact breastfeeding may be an appropriate measure for how it will impact infant attachment.

In order to establish healthy attachment, Bowlby determined it was critical to protect the mother-infant relationship during the first two years of the infant’s life.\textsuperscript{122} Since Bowlby expressed these views, many have attempted to determine exactly how much time the mother-infant pair needs together to establish healthy bonding and attachment. Though experts have varying opinions on the ideal length of bonding leave, there seems to be consensus that twelve weeks is insufficient.\textsuperscript{123} A recent European study determined that paid leave of approximately forty weeks was best for lowering child mortality rates.\textsuperscript{124} A 1997 study

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\item \textsuperscript{118} Strathearn et al., supra note 98, at 483.
\item \textsuperscript{119} Britton et al., supra note 105, at 436.
\item \textsuperscript{120} \textit{id.}
\item \textsuperscript{122} Bowlby, supra note 106, at 369.
\item \textsuperscript{124} Sharon Lerner, \textit{Is 40 Weeks the Ideal Maternity Leave Length?}, SLATE (Dec. 22, 2011,
examining the length of maternity leave and the quality of mother-infant interactions, determined that shorter leaves were associated with lower quality interactions. The authors found:

a direct association between shorter length of leave and more negative affect and behavior in maternal interactions with their infants. Infant and mother stressor/protective variables added significantly in predicting the quality of the mother-infant relationship. There were also significant interaction effects between the length of leave and these variables. Mothers who either reported more depressive symptoms or who perceived their infant as having a more difficult temperament and who had shorter leaves, compared with mothers who had longer leaves, were observed to express less positive affect, sensitivity, and responsiveness in interactions with their infants.

The National Partnership for Women & Families reported that “an international study of paid family leave [found that] a 10-week extension in paid leave was predicted to decrease infant mortality by as much as four percent.” Regardless of how much longer an ideal bonding leave would be, it is clear that

[the current Family and Medical Leave Act, mandating only 12 weeks of maternity leave, unpaid no less, is only one example of the failure of contemporary American society to recognize the reality of mothers’ lives and their need for social support in order to meet the nutritional, immunologic, psychological, developmental, and cognitive needs of their babies.

Congressional records indicate that legislators had some understanding regarding bonding and attachment prior to the FMLA’s passage. Associate Professor of Pediatrics at Harvard Medical School, Dr. T. Berry Brazelton, testified to Congress regarding the importance of

http://www.slate.com/articles/double_x/doublex/2011/12/maternity_leave_how_much_time_off_is_healthiest_for_babies_and_mothers_.html; see also EDWARD ZIGLER ET AL., TIME OFF WITH BABY: THE CASE FOR PAID CARE LEAVE 115 (2012) (analyzing several studies of how longer parental leave is associated with child health and child development).

125. See Clark et al., supra note 80, at 364.
126. Id.
protecting bonding and attachment:

> [w]hen parents are deprived too early of the opportunity to participate in the baby’s developing ego structure, they lose the opportunity to understand the baby intimately and to feel their own role in development . . . We need to prepare working parents for their roles in order to preserve the positive forces in strong attachments – to the baby and to each other. We certainly must protect the period in which the attachment process is solidified and stabilized by new parents. . . . As a nation, we can no longer afford to ignore our responsibilities toward children and their families.\(^{129}\)

Brazelton recommended “four months [for bonding leave], explaining that the early months of adjustment to a newborn infant are a crucial opportunity for family bonding.”\(^{130}\) The Advisory Committee on Infant Care Leave of the Yale Bush Center in Child Development and Social Policy recommended “leave for a minimum of six months.”\(^{131}\) Nevertheless, Congress settled on its twelve-week entitlement. Given the importance of establishing a healthy mother-infant relationship, for mothers, infants, and later generations, I propose the adoption of a better bonding leave law, one based on mothers’ demographic realities and the bonding and attachment needs of mothers and infants.

**IV. A BETTER BONDING LEAVE LAW**

A better bonding leave law would be one precisely designed to facilitate bonding and attachment. It would establish coverage and eligibility requirements that reflect an understanding of the work patterns of mothers and other primary caregivers,\(^{132}\) thereby capturing its target beneficiary group. It would ensure that eligible mothers would have the financial ability to exercise their job-protected leave thereby assuring access to its benefits. And, it would rely on scientific and maternal understandings of bonding and attachment to create a substantive leave entitlement that would facilitate mother-infant bonding.

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132. See supra Part II; Wolf, supra note 121, at 2008.
A better bonding leave law would be one that is consistent with the needs bonding and attachment needs of mothers and infants. As compared with the FMLA, it would provide paid leave to all mothers, for a longer period, with a right to intermittent leave, and a return to work on a reduced-hour schedule upon expiration of the leave. Such a bonding leave law would achieve the Congressional goals that ostensibly guided the FMLA’s passage of “reasonable leave.”

To this end, I propose the following four factors be used to establish a better bonding leave law: universality, generosity, flexibility, and accessibility.

(1) Universality. It is abundantly clear that all mother-infant pairs need an opportunity to establish a healthy relationship, and that future social relationships and civic participation is dependent on the success of this foundational human experience. Therefore, all working mothers should be entitled to bonding leave. There should be no employer coverage limitations or special eligibility requirements. Mothers should be entitled to bonding leave regardless of whether they used other leave during the preceding twelve months.

(2) Generosity. There is consensus that the FMLA’s short twelve-week bonding leave entitlement is incongruent with the bonding and attachment needs of mothers and infants. Mothers should be entitled to an initial six-month leave from work consistent with the World Health Organization’s recommendation that infants be exclusively breastfed for the first 6 months. Linking initial leave duration with recommendations for exclusive breastfeeding is also worthwhile because of the links between breastfeeding, maternal bonding, and infant health.

(3) Flexibility. Research shows that the mother-infant relationship develops over many days, weeks, months, and even years. Therefore, while it is especially important that the mother-infant pair have an initial six-month period of time during which they can focus exclusively on establishing the foundation for their relationship, it is also important that the relationship continue to develop over subsequent months and years through frequent contact and continued intimacy. Mothers should be entitled to work-time flexibility at the expiration of their initial leave. Mothers should be entitled to return to work at the expiration of their initial leave on a reduced-time schedule. Mothers who exercise their right to work on a part-time basis in order to continue to provide

134. See supra Part II. This factor addresses the following design defects I identified in Part II: (1) coverage, (2) eligibility, (6) dedicated bonding leave.
important care to their young children, should be entitled to be compensated on a pro rata basis. They should also be entitled to a pro rata share of benefits.

(4) Accessibility. It is clear that unpaid bonding leave is inaccessible to many mothers. This is especially true for single mothers who do not conform to the traditional view of motherhood. It is also clear that paid bonding leave increases both the likelihood that a mother will take bonding leave and the duration of her leave. Therefore, a federal right to bonding leave should include an income replacement mechanism, both California and New Jersey’s paid leave programs provide examples of such mechanisms.

CONCLUSION

The FMLA’s bonding leave is inherently flawed. By design it fails to fulfill its purpose. Its stringent coverage and eligibility requirements work to automatically exclude the majority of its intended beneficiaries from its protections. Its lack of income replacement makes bonding leave inaccessible even to those who are legally entitled to coverage. The meager twelve weeks of leave provided to the minority of mothers who are able to access it is an insufficient time period in which to establish a healthy mother-infant relationship. The inflexibility of the leave and work-return requirements further hampers mother-infant bonding. Finally, the inseparability of bonding leave from medical leave disadvantages those mother-infant pairs who need leave the most. It is clear that FMLA’s bonding leave needs to be reformed if Congressional goals for mothers are ever to be achieved. FMLA’s bonding leave has neither released mothers from being forced to choose between employment and motherhood, nor facilitated a healthy mother-infant relationship. In sum, FMLA’s bonding leave has failed in every way.

With two decades passed since its enactment, the time has come to seek a better bonding leave law. A better bonding leave law would be one that acknowledges and accounts for the demographic realities of mothers’ lives as well as the scientific findings concerning the mother-infant relationship. Leave should be universally available; all working mothers should have a federal right to take job-protected bonding leave. The bonding leave period should be generous; it should be long enough to ensure a healthy start to the mother-infant relationship. The work leave should be flexible; intermittent leave should be available and mothers should be entitled to return to work at the expiration of their leave on a reduced schedule. Finally, the bonding leave should be
accessible; income replacement should be available so that all mothers, rich and poor, married and single, can take the time needed to bond with their infants. A better bonding leave law that conforms to these suggested guidelines would achieve the Congressional goals of enabling women to be both workers and mothers, and protecting family integrity by facilitating healthy mother-infant bonding and attachment.