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DADDY WARRIORS

The Battle To Equalize Paternity Leave In The United States By Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis

Abraham Z. Melamed*

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 mothers¹—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

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¹ See HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE U.S.* 1 (2011).

² *Id.* (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.

⁴ 29 U.S.C. § 2612(a)(1) (2006).

⁵ Lindsay R. B. Dickerson, “*Your Wife Should Handle It*”: *The Implicit*

is individual state *paid* leave programs which have been considerably more effective than the FMLA, but have only been enacted in three states nationwide, and are only in effect in two of those states.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.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,⁸ an amendment to the FMLA requiring paid leave,⁹ or as a last resort, a movement by the remaining individual states to implement paid leave programs that could be modeled after those already in effect in other states.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 that 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.¹¹ This discrimination begins with societal stereotypes of mothers as caregivers and fathers as breadwinners.¹² As a result of these stereotypes, loving fathers who wish to spend time with their

Messages of the Family and Medical Leave Act, 25 B.C. THIRD WORLD L.J. 429, 444 (2005) (book review) (this failure is attributed to a number of deficiencies (discussed in further detail below), such as how few people the act actually covers, and the fact that it is unpaid, making it difficult for those who are covered to take the leave).

⁶ *State Family Medical Leave Laws*, NAT'L CONF. OF ST. LEGISLATURES (Dec. 2012), <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).

⁷ See ALASKA STAT. § 39.20.500 (1992); MD. CODE ANN., STATE PERS. & PENS. § 9-505 (1996).

⁸ Ashleigh Garvey & Claire Mitchell, *Who's Your Daddy? A Proposal For Paid Family Leave To Promote The Growth Of Families*, 27 HOFSTRA LAB. & EMP. L.J. 199 (2009).

⁹ *Id.* at 200.

¹⁰ Kerry A. Hoffman, *The Work Family Balance: New York's Struggle to Harmonize Domestic and Employment Spheres*, 16 CARDOZO J.L. & GENDER 93, 95-96 (2009).

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).

¹² Garvey & Mitchell, *supra* note 8, at 230.

newborn children may be denied the opportunity under the assumption that they are not fit for caregiving duties.¹³ This discrimination may occur even where a law is not drafted in an explicitly discriminatory manner but is written in a way that does not definitively spell out its gender neutrality. Such laws leave themselves open to be read in a discriminatory manner by society's typecasting eyes.¹⁴

Considering the psychological evidence detailing the importance of parents spending time with newborn children in the first few months to a year after childbirth,¹⁵ the lack of leave for men means they cannot bond with their children in the same way as mothers who are granted leave under the laws do.¹⁶ 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,¹⁷ 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.¹⁸ 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.¹⁹

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

¹³ *Id.* at 212. *But see*, Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 12 (2010) (arguing that these laws also discriminate against women in that they perpetuate 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.).

¹⁴ *See Knussman*, 272 F.3d at 639.

¹⁵ *Bonding*, ENCYCLOPEDIA OF CHILD. HEALTH, <http://www.healthofchildren.com/B/Bonding.html#b> (last visited Jan. 16 2013).

¹⁶ Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 446 (2007).

¹⁷ U.S. CONST. amend. XIV, § 1 ("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)). *See also* Legal Info. Inst., *Equal Protection: An Overview*, CORNELL U. L. SCH., (Aug. 9, 2010, 5:15 PM) http://www.law.cornell.edu/wex/equal_protection (arguing that this amendment was intended to extend the protections of the laws to all persons *equally*, be they white or black, man or woman etc.).

¹⁸ Suk, *supra* note 13, at 2.

¹⁹ *Knussman*, 272 F.3d at 636.

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 employee"²⁰ may take leave, for example, the statutes should state explicitly that "any employee, *male or female*," may take leave. The stated purposes should be as explicit as the FMLA's language, which says, "it is important for the development of children and the family unit that fathers and mothers [alike] be able to participate in early childrearing,"²¹ and the following law should therefore be enacted to apply those rights in a gender-neutral manner. 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 gender-neutral wording.

This Note will examine these issues in detail, by arguing for such amendments to the current laws, as well as proposing 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.

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.²² For women, there is the consideration of whether they will be able to carry on their work duties during pregnancy, whether they will be able to return to work after taking time off for recovery, and whether they will receive any additional time for childcare after the birth of their child.²³ For

²⁰ See, e.g., ALASKA STAT. § 39.20.500 (1992).

²¹ 29 U.S.C. § 2601 (2006).

²² Hoffman, *supra* note 10, at 93.

²³ Natasha Bhushan, *Work-Family Policy in the United States*, 21 CORNELL

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.²⁴ 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.²⁵ They all carefully consider if they will be able to raise a family while maintaining their job or career, before they can choose one.²⁶

The *Encyclopedia of Children's Health* ("Encyclopedia") outlines the importance of parents bonding with children, particularly during infancy.²⁷ American pediatricians John Kennell and Marshall Klaus conducted a study involving children who were separated from their mothers upon birth for several weeks due to health issues.²⁸ Kennell and Klaus determined that the separation immediately after birth interrupted a fundamental relationship between the mother and the new baby.²⁹ 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.³⁰ Kennell and Klaus then experimented by giving mothers of both healthy and unhealthy babies extra contact with the infants' immediately after birth and in the days following birth.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.³² Progressively, bonding research such as this led to widespread changes in hospital practices in the United States.³³ Mothers now hold their babies immediately after birth and infants often remain with their mothers throughout their hospital stay.³⁴

The *Encyclopedia* demonstrates that the most important ways to create attachment with children during infancy is through positive physical contact such as hugging, holding, and rocking.³⁵ This is because these "nurturing behaviors cause specific neurochemical

J.L. & PUB. POL'Y 677, 680-82 (2012).

²⁴ Palazzari, *supra* note 16.

²⁵ Hoffman, *supra* note 10, at 93.

²⁶ *Id.* at 94-95.

²⁷ *Bonding*, *supra* note 15.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Bonding*, *supra* note 15.

³⁴ *Id.*

³⁵ *Id.*

actions in the brain . . . [which] lead to organization of brain systems responsible for attachment."³⁶ These bonding experiences are very important because they lead to healthy relations for children in the earliest years of life.³⁷ During the first three years, when the child's brain develops to nearly its 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.³⁸ The bonding experiences need to be present at certain critical times for the brain portions responsible for attachment to develop normally.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.⁴⁰ Thus, problems with bonding and attachment can lead to a fragile biological and emotional foundation for later experiences because the relationship between the infant and his or her caregiver serves as a model for all future relationships.⁴¹

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."⁴² 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.⁴³ These positive effects are not only because the children have involved parents, but also because fathers, in particular, have shaped their development.⁴⁴

In addition, several studies also show that "[f]athers have an expectation of engaging positively with their families as a counterbalance to the stressors experienced at work,"⁴⁵ and that "fathers are increasingly viewing family involvement as an enriching, es-

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Bonding*, *supra* note 15.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Palazzari, *supra* note 16, at 446 (citing Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV 25, 28 (1998)).

⁴³ *Id.*

⁴⁴ *Id.* (arguing that fathers stimulate their children in ways that are different than mother-child interactions).

⁴⁵ *Id.* at 445 (citing Daniel A. McDonald & David M. Almeida, *The Interweave of Fathers' Daily Work Experiences and Fathering Behaviors*, 2 FATHERING J. THEORY, RES., & PRAC. ABOUT MEN 235 (2004)).

sential part of their lives and identities.”⁴⁶ Thus, fathers who are involved with their newborn children may also gain the benefit of performing better at work.⁴⁷

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 policies to help reconcile work and family obligations.⁴⁸ 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.⁴⁹ In only nine of those 190 countries is the status of paid leave for new mothers unclear.⁵⁰ There are only three countries which “definitively offer *no legal guarantee* of paid maternity leave: Papua New Guinea, Swaziland—and the United States.”⁵¹

A. *The History of Paid Maternity Leave in Other Countries*

In the late 19th century, Germany enacted the first paid maternity leave law.⁵² Other countries soon followed, and by the early 1900s, 13 other countries offered similar paid maternity leave programs.⁵³ By the 1940s, nearly all European countries provided maternity benefits.⁵⁴

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 2010.⁵⁵ The survey found that out of 190 countries surveyed, 177

⁴⁶ *Id.*

⁴⁷ *Id.* at 444.

⁴⁸ See HUMAN RIGHTS WATCH, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis added).

⁵² *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. *Id.*

⁵³ THE POLITICS OF PARENTAL LEAVE POLICIES: CHILDREN, PARENTING, GENDER, AND THE LABOUR MARKET I (Sheila Kamberman & Peter Moss eds., 2009).

⁵⁴ HUMAN RIGHTS WATCH, *supra* note 1, at 32.

⁵⁵ *Id.* at 33 (citing JODY HEYMAN & ALISON EARLE, RAISING THE GLOBAL FLOOR: DISMANTLING THE MYTH THAT WE CAN'T AFFORD GOOD WORKING CONDITIONS FOR EVERYONE (2010)).

guaranteed paid leave for new mothers.⁵⁶ Nine countries lacked sufficient information.⁵⁷ Furthermore, the International Labour Organization (“ILO”) published a report on maternity protection in 2010, surveying 167 countries.⁵⁸ The report found that 97 percent of the countries reviewed offered paid maternity leave.⁵⁹ 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.⁶⁰ By the 1990s, most European countries had adopted some form of paid paternity and parental leave.⁶¹ Since then, these countries have expanded the leave to provide for longer leave periods and greater incentives for fathers to take leave.⁶²

Recently, paternity leave programs for fathers have 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.⁶³ The number is even higher when considering the paid parental leave programs that are available for either parent to take.⁶⁴ 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

⁵⁶ *Id.* 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. *Id.*

⁵⁷ *Id.*

⁵⁸ INT'L LABOUR ORG., MATERNITY AT WORK: A REVIEW OF NATIONAL LEGISLATION v-vi (2nd ed. 2010), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_124442.pdf. http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_124442

⁵⁹ *Id.* at ix-xi.

⁶⁰ HUMAN RIGHTS WATCH, *supra* note 1, at 32.

⁶¹ *Id.*

⁶² *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.

⁶³ INT'L LABOUR ORG., *supra* note 58, at x.

⁶⁴ *Id.* at 54.

the United States does not.⁶⁵ 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.

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.⁶⁶ Although maternity leave tends to be longer than paternity leave, this is typically because mothers need time to recover from the physical hardship of childbirth.⁶⁷ 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.⁶⁸

Though paternity leave benefits tend to be shorter than maternity leave, the combined paternity and parental leaves in many countries are still substantial.⁶⁹ 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.⁷⁰ Impressively, 31 countries offer 14 or more weeks of paid leave to new fathers, and some countries even have non-transferable portions of leave so that fathers are forced to take the leave or lose the time.⁷¹ 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.⁷² A good example of this is Iceland, which offers 9 months of parental leave 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.⁷³ This is a format that guarantees the ability of each parent to take leave to care for their newborn children, while 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

⁶⁵ *Id.* at x.

⁶⁶ *Id.* at 43-50 (noting the programs in place in Iceland where fathers have non-transferable leave quotas); *See also* HUMAN RIGHTS WATCH, *supra* note 1, at 34.

⁶⁷ Garvey & Mitchell, *supra* note 8, at 210.

⁶⁸ HUMAN RIGHTS WATCH, *supra* note 1, at 34.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 31.

⁷³ *Id.* at 34.

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.⁷⁴

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.⁷⁵ 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.⁷⁶ The bill, if passed, would mandate that in the case of federal employees, four of the 12 weeks of leave already permitted under the FMLA must be paid.⁷⁷ Since the bill would only apply to federal employees, it would not be as broad as most might hope.⁷⁸ 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 H.R. 517 on February 5th 2013, and it was referred to committee, where it now sits.⁷⁹ 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.⁸⁰

Another attempt at passing paid leave that is worth noting is the Balancing Act of 2011, which was introduced in the House on

⁷⁴ *Id.* at 34-35.

⁷⁵ Suk, *supra* note 13, at 2.

⁷⁶ Balancing Act of 2011, H.R. 2346, 112th Cong., (1st Sess. 2011), *available at* <http://www.govtrack.us/congress/bills/112/hr2346/text>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Federal Employees Paid Parental Leave Act of 2011, H.R. 616, 112th Cong. (1st Sess. 2011), *available at* <http://www.govtrack.us/congress/bills/112/hr616>.

⁸⁰ Stephen Losey, *House Democrats Take Another Shot at Paid Parental Leave*, FEDERALTIMES.COM (Feb. 10, 2011), <http://blogs.federaltimes.com/federal-times-blog/2011/02/10/house-democrats-take-another-shot-at-paid-parental-leave/>.

June 23, 2011.⁸¹ 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.⁸² The proposed bill would provide for twelve weeks of family and medical leave insurance benefits for parents of newborn or newly adopted children.⁸³ The benefits amount would be calculated based on annual pay.⁸⁴

The Balancing 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*.⁸⁵ However, the Act's language applied itself to "an employee" but did not explicitly spell out "any employee, *male or female*," and thus left itself open to being read in a discriminatory manner as to apply only to mothers.⁸⁶ Like other attempts in the past, this bill was referred to committee where it died.⁸⁷ This seems to be the case with many prior attempts at creating a federal paid leave program in the U.S.⁸⁸

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

⁸¹ H.R. 616, 112th Cong. (1st Sess. 2011).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* Employees making less than \$20,000 would receive 100% of their salary. *Id.* Employees making between \$20,000 and \$30,000 would receive 75% of their salary, or 100% of the salary of someone making \$20,000. *Id.* Incomes of \$30,000 to \$60,000 receive 55% of their salary, or 75% of the salary of someone making \$30,000. *Id.* Incomes of \$60,000 to \$97,000 would receive 40% of their salary, or 55% of the salary of someone making \$60,000. *Id.* And finally, employees that make more than \$97,000 would receive 40% of the salary of someone making \$97,000. *Id.*

⁸⁵ *Id.* Discussed further in Part III(C).

⁸⁶ *Id.*

⁸⁷ Balancing Act of 2011, H.R. 2346, 112th Cong. (1st Sess. 2011), *available at* <http://www.govtrack.us/congress/bills/112/hr2346/text>.

⁸⁸ *See* Garvey & Mitchell, *supra* note 8, at 220-22 (the 2008 and 2009 attempts to pass these same exact laws have failed, as is evidenced by their repeated attempts to pass an identical bill).

off from work.⁸⁹ 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.⁹⁰ However, due to an increase in the number of working single-parent households and two-parent households in which both parents work,⁹¹ 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,”⁹² there was a need for remedial 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.⁹³ Following the 1960s and 1970s when women were no longer a minority in the workforce, the first formalized family and medical leave legislative bill was brought to the attention of legislators in 1985.⁹⁴ Surprisingly quickly, “[t]hese groups gained bipartisan 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).”⁹⁵

In the first session of Congress, these groups met fierce opposition from big business lobbying groups who asserted that the legislation would be the first step in allowing governmental mandates to control businesses, and thus fought the legislation aggressively.⁹⁶ These lobbyists succeeded in stalling the passing of the bill for some time, but eventually both chambers of Congress passed it in the 1990s.⁹⁷ However, the bill as passed had extensive amendments, particularly ensuring that the law would not apply to businesses of less than 50 employees.⁹⁸ The passing of the bill was a short-lived

⁸⁹ See Hoffman, *supra* note 10, at 93 (arguing 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).

⁹⁰ 29 USC § 2601(a)(3) (1993).

⁹¹ *Id.*

⁹² *Id.* §2601(a)(2) (emphasis added).

⁹³ *Know Your Rights: The Family and Medical Leave Act*, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/family-and-medical-leave-act/> (last visited Jan. 16, 2013).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 29 U.S.C. § 2611 (2009).

victory, as President George H.W. Bush vetoed it twice.⁹⁹ Finally, on February 5, 1993, President Clinton signed the bill into law.¹⁰⁰ This law was known as the Family and Medical Leave Act of 1993 (“FMLA”).¹⁰¹

B. *The Purpose and Benefits of the FMLA*

The purpose of the FMLA is set out in section (b) of the Act.¹⁰² 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 national interests in preserving family integrity.¹⁰³ The Act further entitles employees to take reasonable leave for the birth or adoption of a child.¹⁰⁴

The stated intention of the FMLA is to accomplish this purpose in a way that accommodates the legitimate interests of employers and is consistent with the Equal Protection Clause of the Fourteenth Amendment, “minimiz[ing] the potential for employment discrimination on the basis of sex.”¹⁰⁵ 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*,”¹⁰⁶ as well as “to promote the goal of equal employment opportunity for women and men.”¹⁰⁷

The FMLA entitles eligible employees to 12 workweeks of *unpaid* leave annually to care for a newborn or adopted child.¹⁰⁸ 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.¹⁰⁹

Furthermore, the Department of Labor provides that an employee’s “[u]se of FMLA leave cannot result in the loss of any employment benefit” that the employee earned or was entitled to before using FMLA leave.¹¹⁰ However, under the FMLA, in “spec-

⁹⁹ *Know Your Rights: The Family and Medical Leave Act*, *supra* note 93.

¹⁰⁰ Bhushan, *supra* note 23, at 686.

¹⁰¹ *Know Your Rights: The Family and Medical Leave Act*, *supra* note 93.

¹⁰² 29 U.S.C. § 2601 (1993).

¹⁰³ *Id.* § 2601(b)(1).

¹⁰⁴ *Id.* § 2601(b)(2).

¹⁰⁵ *Id.* § 2601(b)(3); (b)(4).

¹⁰⁶ *Id.* § 2601(b)(4) (emphasis added).

¹⁰⁷ *Id.* § 2601(b)(5).

¹⁰⁸ 29 U.S.C. § 2612(a)(1) (2009).

¹⁰⁹ 29 U.S.C. § 2614(a)(1) (2008).

¹¹⁰ See *Employee Rights & Responsibilities Under the Family & Medical Leave Act of 1993*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>.

ified 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."¹¹¹

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.¹¹² The failure is attributed to a number of deficiencies in the FMLA, such as how few people it covers and the fact that it is unpaid.¹¹³ As a result, many argue for amending the FMLA to provide for paid leave,¹¹⁴ or pushing for state legislation for paid leave¹¹⁵ and a variety of other remedies.

One of the biggest problems with the FMLA is how few employees nationwide are actually eligible.¹¹⁶ 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.¹¹⁷ The Act further restricts benefits to employees who have worked at least 1,250 hours for their current employer for the 12 months preceding their leave requests.¹¹⁸ 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.¹¹⁹ Furthermore, many employees who qualify for FMLA benefits do not take the leave they are entitled to because they cannot afford it.¹²⁰ These eligibility requirements disproportionately

¹¹¹ *Family Medical Leave*, BONNEVILLE JOINT SCH. DISTRICT No. 93, <http://www3.d93.k12.id.us/schools---webpages/hr/human-resources/family-medical-leave.aspx> (last visited Mar. 4, 2013).

¹¹² Garvey & Mitchell, *supra* note 8, at 206; Suk, *supra* note 13, at 5; Bhushan, *supra* note 23, at 677.

¹¹³ Dickerson, *supra* note 5, at 444.

¹¹⁴ Garvey & Mitchell, *supra* note 8, at 208.

¹¹⁵ Bhushan, *supra* note 23, at 677.

¹¹⁶ *Id.* at 687.

¹¹⁷ 29 U.S.C. § 2611(4) (2009).

¹¹⁸ *Id.* § 2611(2).

¹¹⁹ G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 362 (1994).

¹²⁰ Erin Gielow, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1546 (2002) ("Two-thirds of workers covered by the FMLA who need family leave do not take it because they cannot afford the lost wages.").

affect the poor—who are most likely to work for small employers—part time workers, and people who work multiple jobs.¹²¹

Furthermore, the FMLA does not account for non-traditional family structures such as family members other than parents.¹²² In some families the grandparents or siblings play a large role in caring for children, and they are not covered by the FMLA.¹²³ “The FMLA does not cover aunts, grandmothers, or ‘fictive kin.’”¹²⁴ 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.¹²⁵

This lack of equal protection for non-marital partners is a deficiency of the FMLA that is of increasing importance as the number of non-traditional families has risen considerably since its adoption.¹²⁶ 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 2005.¹²⁷ This is likely because it is often more convenient for couples not to get married because it can be cheaper and simpler, and as divorce rates rise in the U.S., the desire to get married is less attractive for couples uncertain of their long-term plans.¹²⁸ This number increases by at least 594,000 if same-sex partners are included.¹²⁹

Arguably the largest issue with the FMLA is the fact that it does not provide for any paid leave.¹³⁰ 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.¹³¹ This is evidenced by a study conducted by the Depart-

¹²¹ Bhushan, *supra* note 23, at 689.

¹²² *Id.* at 688.

¹²³ *Id.* at 688-89.

¹²⁴ *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 Definition*, THE FREE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/fictive+kin> (last visited Nov. 26, 2013).

¹²⁵ Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 87 (2004).

¹²⁶ Nijole V. Benokraitis, MARRIAGE AND FAMILIES: CHANGES, CHOICES, AND CONSTRAINTS 271 (6th ed. 2007).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Hoffman *supra* note 10, at 94-95.

¹³¹ Thompson, *supra* note 125, at 86-87.

ment of Labor (“DOL”) in 2000.¹³² The study found that among the workers who were eligible to take FMLA leave but failed to do so, 77.6 percent said it was because they simply could not afford to take unpaid leave.¹³³ 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.”¹³⁴

Taking 12 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.¹³⁵ Add to that the additional expenses of having a newborn, and most parents simply cannot afford to take the time off.¹³⁶ This means that workers in low-income jobs are often forced to subsidize the cost of having a newborn with loans.¹³⁷ 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.¹³⁸

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.¹³⁹ The most common reason given for not taking leave was the inability to afford it.¹⁴⁰ In fact, 87.8 percent of employees with leave needs that went unmet responded that they would take leave if at least some of it was paid.¹⁴¹

¹³² Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LAB. REV. 17, 18 (2001).

¹³³ *Id.* at 20.

¹³⁴ See Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN ST. INT’L L. REV. 439, 448 (2004).

¹³⁵ Assuming an employee receives equal pay throughout the year, 12 weeks amounts to nearly a quarter of the work year’s pay.

¹³⁶ Bhushan, *supra* note 23, at 689-90.

¹³⁷ 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).

¹³⁸ See *Impact of Family and Medical Leave on Employees*, WAGE & HOUR DIV., U.S. DEPT. OF LABOR, <http://www.dol.gov/whd/fmla/chapter4.htm> (last visited Jun. 28, 2013).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 53 (2004).

IV. STATE FAMILY LEAVE PROGRAMS AND THEIR CONFLICT WITH THE
FOURTEENTH 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.¹⁴² The state of Washington has 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 2015.¹⁴³ Several other states, including Arizona, Illinois, Maine, Massachusetts, Missouri, New Hampshire, New York, Oregon, and Pennsylvania are considering establishing paid leave programs.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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 the state's welfare system.¹⁴⁸ The California law, the Paid Family Leave Act ("PFL"), was a way in which the legislature could directly address these problems by giving both mothers and fathers the opportunity to spend time with their newborn or newly adopted children without having to completely sacrifice their wages.¹⁴⁹

¹⁴² *State Family Medical Leave Laws*, *supra* note 6.

¹⁴³ *Id.*

¹⁴⁴ Bhushan, *supra* note 23, at 691.

¹⁴⁵ Suk, *supra* note 13, at 12.

¹⁴⁶ MD. CODE ANN., STATE PERS. & PENS. § 9-505 (1996).

¹⁴⁷ *See* CAL. UNEMP. INS. CODE § 3301(a)(1) (2004).

¹⁴⁸ *Id.* § 3300(f).

¹⁴⁹ *Id.* § 3300(a)-(b)

The PFL program provides workers with six weeks of leave per year, which can be used to bond with a newborn child.¹⁵⁰ 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.¹⁵¹

During those six weeks, eligible employees receive roughly 55 percent of their regular wages,¹⁵² taken from the state's temporary disability insurance program.¹⁵³ The program is funded by a 1.2 percent employee payroll tax.¹⁵⁴ Employees who are entitled to FMLA protections are required to take both PFL and FMLA leave concurrently.¹⁵⁵

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.¹⁵⁶ Instead, all employees in the state of California who pay into the State Disability Insurance fund are eligible for the paid leave benefits.¹⁵⁷ This is an important 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.¹⁵⁸

¹⁵⁰ *Id.* § 3301(a)(1).

¹⁵¹ *Id.* § 3303.

¹⁵² *Id.* § 3301(b) (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).

¹⁵³ *Id.* § 3301(a)(1).

¹⁵⁴ See Eileen Appelbaum & Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, CTR. FOR ECON. & POL'Y RES. 7 (2011), <http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf>.

¹⁵⁵ See UNEMP. INS. § 3303.1(b).

¹⁵⁶ Garvey & Mitchell, *supra* note 8, at 214; See also UNEMP. INS. § 3303 (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.").

¹⁵⁷ Garvey & Mitchell, *supra* note 8, at 214.

¹⁵⁸ See Kevin Miller, *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/>

2. Washington

After the success of California's paid leave program, Washington became the second state to *adopt* a paid family leave program in 2007, although its implementation has been delayed.¹⁵⁹ The law was enacted in response to a legislative finding that family leave laws of the past that assisted individuals in balancing the demands of the workplace with family responsibilities were not enough, and more was needed to achieve the goals of parental bonding, workforce stability, and economic security.¹⁶⁰

Specifically, the legislature found that many individuals did not have access to family leave laws, that those who did may be financially unable to afford taking unpaid leave, and that employer-paid benefits met a relatively small part of such needs.¹⁶¹ Therefore, the legislature found it to be in the public interest to establish a paid leave program.¹⁶²

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 away from work for family leave purposes.¹⁶³ The legislature 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 work balance as well.¹⁶⁴ The Act thus established a wage replacement benefit program to be coordinated with current existing state and federal family leave laws.¹⁶⁵

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.¹⁶⁶ However, with a maximum stipend of \$250 per week,¹⁶⁷ this program was different than the program in California, which paid employees based on their salaries;¹⁶⁸ a distinction with implications for families that make more money and thus depend on a larger salary during the year. Under the California system,

blog/2011/02/04/the-fmla-old-enough-to-vote-but-with-room-to-grow/.

¹⁵⁹ WASH. REV. CODE ANN. § 49.86.005 (2007); *State Family Medical Leave Laws*, *supra* note 6.

¹⁶⁰ REV. § 49.86.005.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 49.86.050.

¹⁶⁷ *Id.* § 49.86.060(1).

¹⁶⁸ CAL. UNEMP. INS. CODE § 3301(b) (2004).

such families would be entitled to benefits commensurate with their regular wages, easing the burden on their families.¹⁶⁹ Despite this difference, 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 2015.¹⁷⁰ 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.”¹⁷¹ This wording is much better than other legislation because the language of “he or she” explicitly ensures gender neutrality by spelling out that it applies to both men and women.¹⁷²

¹⁶⁹ *Id.*

¹⁷⁰ *State Family Medical Leave Laws*, *supra* note 6.

¹⁷¹ H.R. 2044, 63rd Leg., 2nd Spec. Sess. (Wa. 2013).

¹⁷² Linda D. Wayne, *Neutral Pronouns: A Modest Proposal Whose Time Has Come*, 24 *CAN. WOMAN STUD.* 85 (2005). 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. 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, 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*, 133 S.Ct. 2675(2013). 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. *Id.* 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. 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;” “z;” “h;” “p” 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

3. New Jersey

The third state to enact a paid leave program was New Jersey.¹⁷³ The New Jersey act, which took the form of a Family Leave Insurance program, was signed into law in May of 2008.¹⁷⁴ This program went into effect with widespread support in January of 2009, likely a result of the program's provision for a long-term funding plan (one thing that differentiates the program from its Washington State counterpart).¹⁷⁵ The program has been called "one of the most far-reaching and progressive workplace reforms in many, many decades."¹⁷⁶

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.¹⁷⁷ During those six weeks, eligible employees are entitled to approximately two-thirds of their salary but the amount is limited to \$548 per week.¹⁷⁸

The program is paid for entirely by minor employee contributions that began in January 2009.¹⁷⁹ Under the plan, there is no employer contribution, so sustaining the program is a burden that falls solely on the employees.¹⁸⁰ However, the financial burden on employees is relatively insignificant according to the provisions of the law.¹⁸¹ According to a 2008 report, in 2009 employees were set to be taxed at a rate of 0.09 percent on wages up to the limit for temporary disability insurance (currently \$27,700), rising to 0.12 percent in 2010.¹⁸² Thus, the maximum annual tax would be about \$25 per employee in 2009 and \$33 in 2010.¹⁸³ More re-

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.

¹⁷³ Garvey & Mitchell, *supra* note 8, at 217.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 218.

¹⁷⁶ *Id.* at 217 (citing Work & Family Balance Campaign: Governor Corzine Signs Family Leave Insurance into Law, New Jersey Citizen Action, <http://www.njcitizenaction.org/pfl.html> (last visited Jan. 21, 2010)).

¹⁷⁷ Garvey & Mitchell, *supra* note 8, at 218.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

cently, starting January 1, 2013, workers contribute .001 percent of the taxable wage base.¹⁸⁴ For 2013, the taxable wage base is \$30,900, and the maximum yearly deduction for the Family Leave Insurance program is \$30.90.¹⁸⁵ Note, however, that the taxable wage base changes each year.¹⁸⁶

4. Alaska

Though not as extensive as the laws of California, Washington, or New Jersey, because Alaska's program does not require paid leave, Alaska provides employees with the ability to take family leave (but the leave may be unpaid if the employer so chooses).¹⁸⁷ In addition, 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.¹⁸⁸ The law provides that "[a]n employer shall permit an eligible employee to take family leave because of pregnancy and childbirth or adoption for a total of 18 work weeks within a 12-month period."¹⁸⁹

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.¹⁹⁰ 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.¹⁹¹ The act further states that pregnancy and childbirth, or the placement of a child—other than the employee's stepchild—with the employee for adoption, are within the definition of "medical reasons" set out in the Act, and thus qualify an employee to take personal leave.¹⁹²

Alaska's 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*

¹⁸⁴ *Family Leave Insurance: Cost to the Worker*, N.J. DEP'T OF LABOR & WORK-FORCE DEV., <http://lwd.dol.state.nj.us/labor/fli/content/cost.html> (last visited Mar. 3, 2013).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ ALASKA STAT. § 39.20.500(b) (1992).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 39.20.225(a).

¹⁹¹ *Id.* § 39.20.225(b).

¹⁹² *Id.* § 39.20.225(b)(4).

v. *Maryland* discussed *infra*—because it says “an officer or employee”¹⁹³ but does not specifically 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 that only applied to state personnel and did not provide for paid family leave directly but at least permitted employees to use paid sick leave for the care of newborn children.¹⁹⁴ The law as drafted permitted the use of paid sick leave by a state employee to care for a newborn child, or a child newly placed in the care of a state employee.¹⁹⁵ 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.”¹⁹⁶ 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.¹⁹⁷ The act defined primary caregivers as “an employee who is primarily responsible for the care and nurturing of a child.”¹⁹⁸ Secondary caregivers were defined as “an employee who is secondarily responsible for the care and nurturing of a child.”¹⁹⁹

This statute was the subject of litigation in the important case of *Knussman v. Maryland*, discussed *infra*. In *Knussman*, a father sued the state of Maryland and various government officials claiming that the law as applied was unconstitutionally discriminatory against fathers—since it was assumed fathers were always considered secondary caregivers, and could never be considered primary caregivers.²⁰⁰ Following this lawsuit, the law was amended.²⁰¹ 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

¹⁹³ *Id.* § 39.20.225(b).

¹⁹⁴ *Knussman v. Maryland*, 272 F.3d 625, 628 (2001) (citing MD. CODE ANN., STATE PERS. & PENS. § 7-508 (1993), amended by MD. CODE ANN., STATE PERS. & PENS. § 9-505 (1996)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 628-631.

²⁰¹ See MD. CODE ANN., STATE PERS. & PENS. § 9-505 (1996).

or adoption.²⁰² In aggregate, employees are allowed up to 40 days of such leave, not to exceed 30 days for any one of the employees.²⁰³ Thus, the amendment seems to make it clear that it is possible for a father to be one of the primary caregivers. However, even in its newly drafted form the Maryland law still has flaws, which will be discussed in detail below.

B. Fourteenth Amendment Equal Protection Clause Analysis of Paid Leave Laws in the U.S.

The Fourteenth Amendment states that “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.”²⁰⁴ The Supreme Court has interpreted this clause in the context of state gender discrimination in a number of landmark cases.²⁰⁵ The general rule is that gender discrimination that is invid-

²⁰² *Id.* § 9-505(b).

²⁰³ *Id.*

²⁰⁴ U.S. CONST. amend. XIV, § 1.

²⁰⁵ See, e.g., *Reed v. Reed*, 404 U.S. 71 (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 (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 Fourteenth Amendment's Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (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 (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 (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 Fourteenth Amendment's 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 (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).

iously discriminatory—promotes society’s 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.”²⁰⁶ Thus, a law that allows women to take time off to care for their children based on the assumption that they are meant to be at home with the children yet does 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 therefore violates the Equal Protection Clause.²⁰⁷

1. Gender Discrimination Generally

The first major case to come before the Supreme Court involving gender classifications was *Reed v. Reed*²⁰⁸ in which the Supreme Court condemned “dissimilar treatment for men and women who are . . . similarly situated.”²⁰⁹ The Court later explained this principle in *Frontiero v. Richardson*.²¹⁰ The Court 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 non-suspect [classifications] as intelligence or physical disability

²⁰⁶ *Craig*, 429 U.S. at 197.

²⁰⁷ *Virginia*, 518 U.S. at 533.

²⁰⁸ *Reed*, 404 U.S. at 77.

²⁰⁹ *Id.* Idaho Probate Code specified that males are to be preferred to females in the appointing of administrators of estates. *Id.* at 71. Two parents who were separated at the time, sought to be named the administrator of their son’s estate when he passed away. *Id.* Following the letter of the Probate Code, the father was named the administrator. *Id.* at 72-73. The mother challenged the law. *Id.* at 73. 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. *Id.* at 76.

²¹⁰ *Frontiero*, 411 U.S. 686.

... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.²¹¹

In other words, gender is a quasi-suspect class²¹² subject to intermediate scrutiny, and legislation will be upheld only if "substantially related to a sufficiently important governmental interest."²¹³

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,"²¹⁴ gender classifications that appear to rest on nothing more than conventional notions about the proper place in society for males and females have been declared invalid time and time again by the Supreme Court.²¹⁵ For example, in *Frontiero*, the Supreme Court struck down a law that permitted males in the uniformed service to automatically claim their wives as dependents for the purpose of obtaining additional benefits, 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.²¹⁶ 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.²¹⁷

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.²¹⁸ Thus, in *Stanley v. Illinois*, the Court found unconstitutional under the Equal Protection Clause a statute that presumed unmarried fathers, but not unmarried mothers, were unfit to raise children.²¹⁹ The Court determined

²¹¹ *Id.*

²¹² 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 claim alleging unconstitutional discrimination is asserted against a law, regulation, or other government action. See *Reed*, 404 U.S. at 71; *Frontiero*, 411 U.S. at 687-79; *Virginia*, 518 U.S. at 515.

²¹³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1996) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)).

²¹⁴ *Orr v. Orr*, 440 U.S. 268, 283 (1979).

²¹⁵ *Knussman v. Maryland*, 272 F.3d 625, 636 (2001).

²¹⁶ *Frontiero*, 411 U.S. at 688.

²¹⁷ *Id.* at 689-90. For more examples see *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Orr*, 440 U.S. at 283.

²¹⁸ *Stanley v. Illinois*, 405 U.S. 645, 646 (1972); See also *Caban v. Mohammed*, 441 U.S. 380 (1979).

²¹⁹ *Stanley*, 405 U.S. at 646.

that *all* parents in the state were entitled to at least a hearing on their fitness to care for the child before the child could be 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.²²⁰ *Stanley* 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.

In *Caban v. Mohammed*, the Supreme Court found that a law that gave unwed mothers, but not unwed fathers, the power to block the adoption of their children was unconstitutional under the Equal Protection Clause.²²¹ The Court rejected the argument that “a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.”²²² The Court explicitly found that a father is just as fit to raise a child as a mother, and thus it would be unconstitutional to deny the father such a right. This indicates the approach the Supreme Court will likely take when analyzing the question in the context of family leave laws. The Court would likely find that laws that are not applied equally to fathers and mothers are unconstitutional because there is no indication that a mother bears a closer relationship with her child than does a father.²²³

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 *Knussman v. Maryland*.²²⁴ 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.²²⁵ 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.²²⁶ Primary caregivers were defined as employees 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.²²⁷

²²⁰ *Id.*

²²¹ *Caban*, 441 U.S. at 382.

²²² *Id.* at 388.

²²³ *Id.* at 389.

²²⁴ *Knussman v. Maryland*, 272 F.3d 625, 628-29 (2001).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 628.

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, because his wife was still in the hospital due to a difficult birth and he was the one performing the primary caregiving functions.²²⁸ When Knussman 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.²²⁹ 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.²³⁰ After losing at each stage of the grievance process, Knussman finally brought suit in federal court alleging that his request for leave was denied as the result of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.²³¹

The U.S. Court of Appeals for the Fourth Circuit held that the state'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.²³² The court found that the irrefutable presumption applied by the state that the mother is the primary caregiver and therefore entitled to greater employment benefits while the father is the secondary caregiver and entitled to fewer benefits, was an invidiously discriminatory application of the law.²³³ The court concluded that the presumption was not substantially related to an important governmental interest and thus was impermissible under the Equal Protection Clause.²³⁴ This is a prime example that a law drafted in a seemingly gender-neutral manner can be interpreted discriminatorily simply because it does not explicitly spell out its gender neutrality.

3. How Gender Classification Leads to Unconstitutional Invidious Discrimination

Julie C. Suk, a legal scholar specializing in work-family balance, argues that "these [above] cases illustrate courts' conception of 'family responsibilities discrimination' as sex discrimination,"

²²⁸ *Id.* at 628-29.

²²⁹ *Id.* at 629.

²³⁰ *Id.* at 629-30.

²³¹ *Id.* at 631.

²³² *Id.* at 635.

²³³ *Id.* at 635-38.

²³⁴ *Id.* at 638.

that is, “[a]dverse treatment of an employee with family responsibilities amounts to sex discrimination when the employer relies on gender stereotypes about caregivers.”²³⁵ 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.²³⁶

Suk cites the 2007 U.S. Equal Employment Opportunity Commission (“EEOC”) Enforcement Guidance on Family Responsibility Discrimination Guide.²³⁷ The EEOC Guide characterizes gender stereotyping as the benchmark of these cases.²³⁸ 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, regardless of how their caregiving responsibilities actually impact their work.”²³⁹ This amounts to unconstitutional invidious discrimination.²⁴⁰ 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.²⁴¹ As a result, men may be denied parental leave or other benefits routinely afforded to female counterparts,²⁴² which also amounts to invidious discrimination.

Many men also decline to take paternity leave because they fear being ridiculed, discriminated against, and possibly losing their jobs.²⁴³ 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.²⁴⁴ Since the FMLA places an administrative burden on employers, many employers create obstacles to stop men from taking FMLA paternity leave.²⁴⁵ In fact, it was found

²³⁵ Suk, *supra* note 13, at 15-16.

²³⁶ *Id.* at 16.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* (quoting, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.pdf>).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* (quoting, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.pdf>).

²⁴³ Garvey & Mitchell, *supra* note 8, at 208 (citing Grossman, *supra* note 143, at 52-53); Gielow, *supra* note 122, at 1539.

²⁴⁴ Garvey & Mitchell, *supra* note 8, at 208.

²⁴⁵ *Id.*

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."²⁴⁶ 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.²⁴⁷ All of this perpetuates the idea that men are supposed to be at work and not at home helping with children, a stereotype that no longer reflects the realities of modern work dynamics, and one that is unconstitutional invidious discrimination.²⁴⁸

The lack of paid leave for fathers and mothers alike also perpetuates gender stereotypes about women.²⁴⁹ Women still bear more responsibility than men for domestic duties, partially because they continue to earn less than men do in the workplace.²⁵⁰ 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."²⁵¹ 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.²⁵²

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.²⁵³ However, "women's employment income has become increasingly critical to family economic stability,"²⁵⁴ and "that income suffers dramatically when women are

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Knussman v. Maryland*, 272 F.3d 625, 634-35 (2001).

²⁴⁹ Brief for The National Women's Law Center et al. as Amici Curiae Supporting Respondents, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 31444460, at *12 (citing Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1916 (1994)).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 13 (citing *The FMLA of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Mgmt. Relations of the House Comm. on Educ. and Labor*, 102nd Cong. 128 (1991)).

²⁵² *Id.* at 13-14 (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.'").

²⁵³ *Id.* at 14.

²⁵⁴ *Id.*

forced to leave their jobs altogether to care for children or other family members.”²⁵⁵ When these women finally return to the workforce, they have lower annual earnings and suffer greater long-term losses in their retirement income as compared to women who can take job-protected leave.²⁵⁶

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.²⁵⁷ It is therefore important to amend these laws to spell out an explicitly gender-neutral application 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.

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 state laws, currently drafted in ways that can be read in a discriminatory manner, to make them explicitly gender neutral, like the FMLA is for example.

A. Amendments to Current Legislation

The most common issue with the current state leave laws as they are drafted is language such as “an *individual* shall be deemed eligible,”²⁵⁸ or “an *officer* or *employee*” shall be eligible.²⁵⁹ Such vague language leaves itself open to being interpreted in whatever manner an employer might choose. An employer could decide that the Act only applies to women, or they might decide that the Act only applies to men. In other words, nothing currently stops employers from interpreting leave laws through the lens of societal stereotypes about gender roles, because the laws do not explicitly spell out to whom they do and do not apply.²⁶⁰ Vague language, the product of poor drafting,²⁶¹ has serious consequences and must be remedied.

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citing 1996 DOL Report at 52); Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV. 15 (1995) (“[W]omen 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.”).

²⁵⁷ See *infra*, Part V.

²⁵⁸ CAL. UNEMP. INS. CODE § 3303 (2004).

²⁵⁹ ALASKA STAT. § 39.20.225 (2012) (emphasis added).

²⁶⁰ *E.g.*, Knussman v. Maryland, 272 F.3d 625 (2001).

²⁶¹ As is evidenced by the redrafting of the MD law for example; See

Some scholars and experts may argue that using the terms “he or she,” as Washington State does for example,²⁶² would be a workable solution. Certainly, using “he or she” is better than legislation that does not differentiate the sexes at all, 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, using “he or she” is not a strong enough solution, as it still might lead to unconstitutional gender discrimination.

Maryland, in its amendment to the leave laws after the *Knussman* lawsuit, seemed to take these issues into consideration.²⁶³ In the definition of “primary caregivers” as provided by the Act, the law 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.²⁶⁴ Such language illustrates that men and women alike can take leave because, if men were not included, then there would be no need to explicitly 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, unlike the FMLA,²⁶⁵ does not spell out explicitly that fathers can be primary caregivers.²⁶⁶ Therefore, this law should be further amended to also explicitly state 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 “consistent with the Equal Protection Clause of the Fourteenth Amendment,” and “minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is

Knussman, 272 F.3d at 628. (citing MD. CODE. ANN., STATE PERS. & PENS. § 7-508(a)(1) (1993), amended by MD. CODE. ANN., STATE PERS. & PENS. § 9-505 (1996).

²⁶² WASH. REV. CODE ANN. § 49.86.030 (2008).

²⁶³ *Knussman*, 272 F.3d at 628 (citing STATE PERS. & PENS. § 7-508(a)(1), amended by PERS. & PENS. § 9-505. 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.

²⁶⁴ MD. CODE. ANN., STATE PERS. & PENS. § 9-505.

²⁶⁵ 29 U.S.C. § 2601 (a)(6) (b)(4) (emphasis added).

²⁶⁶ PERS. & PENS. § 9-505 (this law as amended still states “an employee” and does not add “male or female” which would be explicit of the equality).

available for eligible medical reasons (including maternity-related disability), as well as compelling family reasons.²⁶⁷ Additionally, the Act applies, on a *gender-neutral basis*, to promote the goal of equal employment opportunity *for women and men*.²⁶⁸

The language used in the FMLA accomplishes several objectives. Importantly, 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, there could be a Fourteenth Amendment Equal Protection Clause violation, and thus states that goals must be set forth in a manner that is consistent with the Equal Protection Clause.²⁶⁹ The above language in the FMLA 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 provide that the law 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, whether 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 should be adopted 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.²⁷⁰ This is something

²⁶⁷ *Id.* § 9-505(b)(4) (emphasis added).

²⁶⁸ *Id.* § 9-505(b)(5) (emphasis added).

²⁶⁹ 29 U.S.C. § 2601(a)(6), (b)(4) (2006).

²⁷⁰ *See infra* Part III.

that can be remedied by crafting legislation based on the New Jersey model, where the program is paid for exclusively by minor employee contributions.²⁷¹ 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.²⁷²

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 to be used as the parents choose.²⁷³ 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 leave time. Thus, it helps to fight societal stereotypes while still allowing the opportunity for self-determination.

Another beneficial aspect of leave programs, yet to be enacted but that should be considered for future legislation, is language that guarantees time off for non-marital partners. Such language would have largely positive implications for non-traditional family structures such as gay couples, as well as non-married cohabiting couples.²⁷⁴ This is particularly important when 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 under the law as are other heterosexual parents.²⁷⁵

²⁷¹ Garvey & Michell, *supra* note 8, at 218.

²⁷² *Id.*

²⁷³ For example the program in Iceland discussed *supra* in section II(c).

²⁷⁴ Thompson, *supra* note 125, at 87.

²⁷⁵ 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*, 133 S.Ct. 2675 (2013). 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.

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, both of which intend to apply to both women and men.²⁷⁶ There is no doubt that there will be a push to enact more state laws like those currently in effect, and hopefully to enact a federal paid leave program sometime in the future. However, it is clear that gender classifications are still a problem in modern society, where women have achieved high power positions in the workforce alongside men and men have begun taking on childrearing responsibilities traditionally held by women.²⁷⁷

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, in order to ensure that it be drafted in a manner that does not assist such unconstitutional discrimination.²⁷⁸ In the context of paid family leave laws, this means amending past legislation, and setting up guidelines when drafting new legislation, to ensure laws are drafted in an explicit gender-neutral manner consistent with the Fourteenth Amendment's Equal Protection Clause.

²⁷⁶ 29 U.S.C. § 2601(a)(6), (b)(4) (2006).

²⁷⁷ Suk, *supra* note 13, at 59.

²⁷⁸ U.S. CONST. amend. XIV, § 1.

