

**ENCOURAGING WORK-FAMILY BALANCE
TO CORRECT GENDER IMBALANCE:
A COMPARISON OF THE FAMILY AND
MEDICAL LEAVE ACT AND THE ICELAND
ACT ON MATERNITY/PATERNITY
AND PARENTAL LEAVE**

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She deserves to have a baby without sacrificing her job. A mother deserves a day off to care for a sick child or sick parent without running into hardship—and you know what, a father does, too. It’s time to do away with workplace policies that belong in a “Mad Men” episode. This year, let’s all come together—Congress, the White House, and businesses from Wall Street to Main Street—to give every woman the opportunity she deserves. Because I firmly believe when women succeed, America succeeds.

– President Barack Obama¹

I. INTRODUCTION

Despite President Obama’s recent call for enhanced work-family balance policies in the United States, since its passage over 20 years ago, persistent concerns remain regarding gaps in the Family Medical Leave Act of 1993 (FMLA), with some of the strongest criticisms leveled at its failure to mandate

1. President Barack Obama, State of the Union Address (Jan. 28, 2014).

paid maternity and paternity leave.² In fact, this failure continues to make the United States an extreme outlier among industrialized nations in terms of provision of policies designed to facilitate work-family balance.³ The United States is one of four nations in the world that does not have a law mandating some form of paid maternity leave, a reality made more surprising by the fact that the United States is the only high-income nation maintaining this policy.⁴ This problem is compounded by the reality that pregnancy-related healthcare is more costly in the United States than in any other industrialized country.⁵ As one possible consequence of the failures of FMLA, the 2013 Global Gender Gap Report ranks the United States twenty-third internationally in gender equality,⁶

2. See, e.g., Natasha Bhushan, Note, *Work-Family Policy in the United States*, 21 CORNELL J.L. & PUB. POL'Y 677, 689 (2012) (arguing that many families who are eligible to take leave under FMLA choose not to because they cannot afford to take time off); see also Annie Pelletier, Note, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall so Far Behind Europe?*, 42 GONZ. L. REV. 547, 558–60 (2006) (positing that the burden caused by unpaid leave may fall more heavily on men than women due to the male's traditional role as breadwinner, as well as on working class parents who likely cannot support a family based on a single income for an extended period of time).

3. Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185, 187, 232 (2009).

4. YUKO HARA & ARIANE HEGEWISCH, INST. FOR WOMEN'S POLICY RESEARCH, MATERNITY, PATERNITY, AND ADOPTION LEAVE IN THE UNITED STATES 1 (May 2013), available at <http://www.iwpr.org/publications/pubs/maternity-paternity-and-adoption-leave-in-the-united-states-1>.

5. Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, N.Y. TIMES, July 1, 2013, at A1 (showing that the average amount paid for childbirth in 2012 is higher in the United States than in Switzerland, France, Chile, Netherlands, Britain, and South Africa).

6. WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT 8 tbl.3a (2013), available at http://www3.weforum.org/docs/WEF_GenderGap_Report_2013.pdf. Global Gender Gap rankings are derived from four factors: economic participation and opportunity, educational attainment, health and survival, and political empowerment. This measure is particularly useful for assessing the relationship between work-family leave policies and gender equality because, while each of the four Gender Gap factors may reflect a nation's work-family leave policies to some extent, the existence of these policies is not directly included in the calculation of any of the factors. The variable under investigation, extent of work-family leave policies, is not conflated with Gender Gap rankings. *Id.*

and number seventeenth among countries classified as “high income.”⁷ Alarminglly, the gender gap in the United States is greater than the gender gap in the lower-middle income nations of the Philippines, Nicaragua, and Lesotho and even greater than the low-income nation of Burundi.⁸

By comparison, Iceland has distinguished itself as a leader in gender equality for several years. Iceland consistently has been ranked first in gender equality in the Global Gender Gap Report since 2009.⁹ It has been suggested in popular and academic literature that Iceland also has one of the most progressive work-family policies in the world.¹⁰ As such, a comparison of Iceland’s work-family law to FMLA may inform strategies for addressing FMLA’s weaknesses in an effort to remedy the persistent gender inequality in the United States.

This Comment will explore the linkages between the deficiencies of the FMLA and the persistent presence of gender inequality in the United States, utilizing Iceland as a comparator for methods to facilitate greater gender balance through the structure of family leave laws. After discussing existing research on the relationships between family leave laws and societal gender inequality, I will discuss the provisions of the FMLA most relevant to family leave. I will then provide an overview of Iceland’s Act on Maternity/Paternity and Parental Leave. Then I will discuss key differences between the two laws and offer suggestions for how Iceland’s law may be incorporated into US law and policy. Finally, I will close with a discussion of the

7. *Id.* at 17 tbl.4.

8. *Id.*

9. *Id.* at 8–9 tbl.3a.

10. See Dwyer Gunn, *How Should Parental Leave Be Structured? Ask Iceland*, SLATE (Apr. 3, 2013, 1:17 PM), http://www.slate.com/blogs/xx_factor/2013/04/03/paternity_leave_in_iceland_helps_mom_succeed_at_work_and_dad_succeed_at.html (arguing that Iceland is at the forefront of policy movements in favor of nontransferable paternity leave); see also Guðný Björk Eydal & Tine Rostgaard, *Gender Equality Revisited – Changes in Nordic Childcare Policies in the 2000s*, 45 SOC. POL’Y & ADMIN. 161, 174 (2011) (describing Iceland’s shared parental leave policy as progressive among Nordic countries and likewise, influential outside the region); Katrin Bennhold, *Paternity Leave Law Helps to Redefine Masculinity in Sweden*, N.Y. TIMES, June 15, 2010, at A6 (noting that Iceland has gone the furthest in reserving three months of paternity leave for fathers).

possibility of incorporating these changes, in particular considering such possibility in light of the climate for change fueled by the Patient Protection and Affordable Care Act, which includes new protections for pregnant women and is currently in the early stages of implementation. As a note on terminology, the use of the term “family leave” throughout this Comment refers to maternity and paternity leave in an undifferentiated form.

II. THE RELATIONSHIP BETWEEN GENDER INEQUALITY AND FAMILY LEAVE LAWS IN THE UNITED STATES AND EUROPE

Much research has focused on why the United States falls behind the rest of the industrialized world in family leave policy, frequently citing the idea that more progressive European models are based on the notion that maternity leave from employment is an assumed right in most of Europe.¹¹ One suggested reason for the differences between US and European maternity leave policies is the differing goals of the US and European feminist movements.¹² In the United States, the feminist movement has historically focused on equality between the sexes through treating men and women the same; in Europe, particularly in Scandinavian states, feminism has focused more on recognizing the differences between men and women and tailoring public policy to promote gender equality through accommodating those differences.¹³ European, and particularly

11. Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105, 105 (1994).

12. See Sandra Simpson, *The Elusive Quest for Equality: Women, Work, and the Next Wave of Humanism*, 48 GONZ. L. REV. 279, 289, 293, 303 (2012) (highlighting how the US and European feminist movements both support equal pay and antidiscrimination laws, and emphasizing that the European movement goes further by recognizing the special position that women, as mothers, hold in society).

13. See *id.* at 303 (discussing how Scandinavian countries' encouragement of men taking on equal roles in domestic work and child care has led to a cultural shift away from traditional male and female societal roles); Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 460, 472 (2008) (stating that the American feminist movement's efforts were directed towards equal employment for women).

Scandinavian, family leave laws in particular tend to reflect this variation on the goals of feminism.¹⁴

Gender inequality is arguably fueled by law and policy related to maternity and paternity as these roles conflict with employment.¹⁵ Employers' failure to support parents—especially mothers—during and after a pregnancy places new parents at a distinct disadvantage in the labor market.¹⁶ Many commentators argue that strong maternity leave policies function to combat gender inequality in a manner similar to affirmative action; by recognizing and supporting women's unique needs regarding the balance between employment and childbirth, progressive maternity leave policies serve to establish and maintain gender equality in the workplace.¹⁷

However, a number of shortcomings of family leave law and policy in the United States prevent the attainment of such gender equality. For example, one study found that, while maternity leave legislation, including FMLA, increased new mothers' likelihood to return to their pre-pregnancy jobs after giving birth, the implementation of such legislation did not have a significant effect on mothers' likelihood to take maternity leave.¹⁸ As will be more fully discussed, one explanation for this

14. Simpson, *supra* note 12, at 304.

15. See *id.* at 305 (noting that men, unlike women, "are not forced to choose between caring for children and a fruitful career").

16. See *id.* at 293 (arguing that after giving birth, women face numerous economic disadvantages that may cause women to earn less money, take unpaid time off to care for a sick child, or upon reentering the workforce, only be able to acquire a position that pays less); see also Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 417 (2011) ("Childbearing may cost a parent lost investment in human capital, when they forego education or career advancement to perform caregiving in the home.").

17. See Rangita de Silva de Alwis, *Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation*, 18 DUKE J. GENDER L. & POL'Y 305, 305–07, 314–15, 320, 326 (2010) (positing that a substantive equality paradigm can inform egalitarian work-family policy, but cautioning that legislation based on gender stereotypes may reinforce caregiving as a role of women and not of men); see also Julie C. Suk, *Are Gender Stereotypes Bad For Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 49–50 (2010) (discussing European laws that distinguish maternity from other disabilities and therefore grant pregnant women special protections in the workplace).

18. Charles L. Baum II, *The Effects of Maternity Leave Legislation on Mothers'*

result may be that leave policies currently mandated by law in the United States are not practically feasible for permitting women to take family leave without experiencing negative employment-related consequences.¹⁹ The more specific failures of US family leave law and policy will be discussed further below.²⁰

III. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family Medical Leave Act of 1993 covers most federal work-family policy in the United States.²¹ FMLA was enacted upon Congress' recognition that many households require two incomes to maintain financial stability.²² Work-family laws were first enacted at the state level, beginning with Massachusetts in 1972.²³ It was 21 years before President Clinton, as one of his first official acts as President, signed the federal FMLA into law.²⁴ Although 35 states had already enacted their own laws governing parental leave,²⁵ the signing of FMLA was considered an "historic occasion."²⁶

Labor Supply After Childbirth, 69 S. ECON. J. 772, 793 (2003).

19. See discussion *infra* Part III.A.

20. See discussion *infra* Part III.A.

21. See Bhushan, *supra* note 2, at 685 ("[The FMLA] encompasses most of the U.S. federal work-family policy.")

22. See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)-(b) (2012) (finding that the number of households where both parents work is "increasing significantly" and that one of the purposes of the Act is to "promote the stability and economic security of families"); see also Bhushan, *supra* note 2, at 686 (discussing the need for dual income households resulting from stagnant wages and high inflation rates beginning in the 1970s); Maureen Porette & Brian Gunn, *The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values,"* 8 J. CIV. RTS. & ECON. STABILITY 587, 597 (1993) ("Traditionally in America, women have stayed at home and men supplied the primary source of income. However, because of the rising cost of living and the need for personal fulfillment, many women have chosen to pursue careers outside of the home.")

23. Bhushan, *supra* note 2, at 686.

24. *Writing the Next Chapter of the Family and Medical Leave Act: Building on a 15-Year History of Support for Workers: Hearing on S. 110-851 Before the S. Subcomm. on Children & Families of the Comm. on Health, Educ., Labor, & Pensions*, 110th Cong. 1 (2008) [hereinafter *Hearing on S. 110-851*] (statement of Sen. Christopher Dodd, Chairman, Subcomm. on Children & Families).

25. Bhushan, *supra* note 2, at 686.

26. *Hearing on S. 110-851*, *supra* note 24.

Comparatively, during the years leading up to the implementation of FMLA in the United States, the international community had likewise begun to recognize the importance of maternity leave, particularly during the 1960s and 70s as many industrialized countries experienced surges of female participation in the workforce.²⁷ Leave policies implemented internationally frequently were based on an understanding that leave is meant to benefit not only new mothers, but infant development as well.²⁸ In 1992, the year before the enactment of FMLA, the European Union mandated 14 weeks of paid maternity leave.²⁹

The bill to create FMLA had faced great opposition prior to its enactment, including two Presidential vetoes before it was signed into law.³⁰ During the formulation of FMLA, there was skepticism, largely from the industrial sector, that mandatory family leave would negatively impact businesses through decreased worker productivity.³¹

Congress responded to these concerns by declaring that the purposes of FMLA were to be fulfilled “in a manner that accommodates the legitimate interests of employers.”³² Many of the negative opinions promulgated by businesses stemmed from reliance on sex stereotypes, which dictated that employees ought to depend on their spouses, rather than their employers, to provide necessary support during and after pregnancy.³³ The concerns raised by the business sector have generally proven false.³⁴ In fact, FMLA has had some positive effects on

27. SHEILA KAMERMAN & SHIRLEY GATENIO, THE CLEARINGHOUSE ON INT’L DEVS. IN CHILD, YOUTH & FAMILY POLICIES, COLUMBIA UNIV., MOTHER’S DAY: MORE THAN CANDY AND FLOWERS, WORKING PARENTS NEED PAID TIME-OFF 3 (2002), available at <http://www.childpolicyintl.org/issuebrief/issuebrief5.htm>.

28. *Id.*

29. *Id.*

30. *Hearing on S. 110-851, supra* note 24, at 2.

31. Bhushan, *supra* note 2, at 687.

32. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(3) (2012).

33. See Anthony, *supra* note 13, at 471 (describing the business perspective that the idea of the “ideal worker” was still based upon the male standard of someone who has a spouse available to take care of the domestic and caregiving needs of the family”).

34. See Bhushan, *supra* note 2, at 687 (noting that contrary to the business community’s beliefs, employee productivity has increased since the passage of FMLA);

businesses, creating lower turnover rates and higher retention and productivity rates, as well as improving employee morale.³⁵

FMLA provides eligible employees up to twelve weeks of unpaid leave to care for a new child, as well as to attend to serious illness afflicting the employee or an immediate family member.³⁶ FMLA is gender-neutral, so men and women may both take a full twelve weeks of parental leave.³⁷ FMLA was written in gender-neutral terms in part in response to a California law that required employers to provide only maternity leave, which was struck down in 1984 because it discriminated against men by failing to grant paternity leave.³⁸

In addition, FMLA provides restoration of the employee's previous position, or an equivalent position, upon their return to work, as well as protection of benefits accrued by the employee before taking leave.³⁹ FMLA mandates minimal requirements for covered employers; states and private employers may enact more protective work-family policies at their discretion.⁴⁰ Currently, six states have their own laws providing for paid

see also Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169–70 (2004) (detailing employers' initial fears that FMLA would have negative economic impacts on businesses, would be inconvenient because of the need to temporarily fill position while employees were on leave, and that FMLA may eventually mandate paid leave. Although concerns about the future possibility of paid leave remain, most employers have adjusted to current FMLA mandates.).

35. *Hearing on S. 110-851, supra* note 24, at 3 (“FMLA has been good for businesses, as well, with lower turnover and a boost of morale, retention rates, productivity rates—ninety percent of employers told the Department of Labor in 2000 that they had a neutral or positive effect on the profits of their company.”).

36. 29 U.S.C. § 2612(a)(1)(A)-(D), (c). Although FMLA also provides leave for medical reasons unrelated to pregnancy, the scope of this Comment is limited to an analysis of leave to care for a new child.

37. *See* Bhushan, *supra* note 2, at 685 (noting that the underlying purposes of the FMLA identified by Congress are based on ideals of gender-neutrality).

38. *See* Lauren J. Asher & Donna R. Lenhoff, *Family and Medical Leave: Making Time for Family is Everyone's Business*, 11 THE FUTURE OF CHILDREN 115, 115–16 (2001) (describing the origins of the FMLA and the recognized need to “establish a national family and medical leave that was comprehensive and gender-neutral”).

39. 29 U.S.C. § 2614(a)(1)-(2).

40. *See id.* § 2651(b) (“Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”).

family leave, all of which require payment of less than the employee's usual salary.⁴¹

The stated purpose of FMLA includes facilitating work-family balance through “minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis; and . . . to promote the goal of equal employment opportunity for women and men . . .”⁴² This goal was affirmed by the U.S. Supreme Court, which has expressly recognized that FMLA was necessary to combat the longstanding stereotype that men are primary breadwinners and women are primary caregivers.⁴³ Because FMLA applies to both women and men, employers cannot avoid providing family leave simply by, for example, refusing to hire women.⁴⁴

A. Notable Problems with FMLA in Practice

Despite some of the positive effects FMLA has had on encouraging work-family balance, it still fails to provide for American workers with families in a number of ways. FMLA's application only to employers with 50 or more employees, as well as its requirement that employees have worked for the employer for at least a year before taking leave, means that many employees are not covered by FMLA.⁴⁵ Further, because FMLA leave is unpaid, many employees who may be covered do not take leave because they cannot afford to do so.⁴⁶ Finally, although FMLA covers both mothers and fathers, the gender-neutral

41. WORLD ECON. FORUM, *supra* note 6, at 72 tbl.E1.

42. 29 U.S.C § 2601(b)(1),(4)-(5).

43. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003). While the Supreme Court's discussion of the purpose of FMLA is noteworthy, the primary holding of this case is beyond the scope of this Comment. In brief, the Court determined that state employees may recover monetary damages from an employer for violations of the family-care provision of FMLA. *Id.* at 724.

44. *Id.* at 737.

45. Bhushan, *supra* note 2, at 687.

46. *Hearing on S. 110-851*, *supra* note 24, at 3–4 (noting that financial burdens have kept many families from taking their “earned family medical leave”).

language of FMLA does little to encourage fathers to take paternity leave, doing little to aid working mothers in practice.⁴⁷

1. *Limited applicability*

FMLA has stringent eligibility requirements, applying only to employers with 50 or more employees.⁴⁸ This requirement is quite strict compared to, for instance, Title VII of the Civil Rights Act of 1964, which forbids employment discrimination based on protected class status, and applies to employers with only 15 or more employees.⁴⁹ Moreover, in order to be eligible for FMLA leave, employees must have worked at least 1,250 hours for their employer in the previous 12-month period.⁵⁰ Due to these restrictive eligibility requirements, in 2005, only 54% of the workforce was eligible for FMLA leave.⁵¹ Furthermore, FMLA only provides for twelve weeks of leave per year.⁵² This is a relatively short length of time compared to family leave laws of many industrialized nations.⁵³

The applicability of FMLA only to employees of larger companies disproportionately impacts lower-income employees who are more in need of maternity and paternity protection, as smaller employers tend to pay lower wages and provide fewer paid benefits than employers covered by FMLA.⁵⁴ Furthermore, requiring employees to work for a single employer for 1,250 hours disregards the reality that many younger workers in

47. See, e.g., Bhushan, *supra* note 2, at 689–90 (asserting there is little evidence to indicate that the FMLA has had any bearing on men’s paternal leave taking or leave lengths and perpetuates “stereotypes of women and caregivers and restrict[s] their employment opportunities and advancement”).

48. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611(4)(A)(i) (2012).

49. Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006).

50. 29 U.S.C. § 2611(2)(A)(i)-(ii).

51. Bhushan, *supra* note 2, at 687.

52. 29 U.S.C. § 2612(a)(1).

53. See WORLD ECON. FORUM, *supra* note 6, at 66–86 tbl.E1 (outlining the length of maternity and paternity leave offered by each country analyzed in the report, including dozens of countries offering more than twelve weeks of maternity leave).

54. See Heather Boushey, *The Role of Government in Work-Family Conflict*, 21 THE FUTURE OF CHILDREN 163, 174 (2011) (explaining that a law which only covers workers in firms with fifty or more employees excludes a third of all U.S. workers, particularly those who tend to earn less).

childbearing years perform part-time work, temporary work, or work multiple jobs concurrently, all of which decrease the likelihood that such employees will satisfy the minimum hour requirement of FMLA.⁵⁵

Although smaller employers who are not covered by FMLA may choose to provide family leave, only half of employers not covered by the law offer a full twelve weeks of family leave to their employees.⁵⁶ This evidence suggests that employers are unlikely to offer benefits that are at least as minimal as those mandated under FMLA unless they are directly required to do so by law.⁵⁷

2. *Unpaid leave*

FMLA's failure to guarantee paid family leave is perhaps its most glaring omission compared to the widespread existence of paid family leave policies in most of the industrialized world.⁵⁸ Even among nations considered close comparators to the United States such as Australia, Canada, the United Kingdom, and New Zealand, the United States is the only country that does not provide any paid family leave; until recently, Australia did not provide paid leave either, but now provides up to 18 weeks of leave paid at minimum wage.⁵⁹ This comparison makes it all the more surprising that the U.S. legislature has not recently expressed any clear intention to try to institute a paid family leave program.⁶⁰

55. *See id.* at 174–75.

56. Asher & Lenhoff, *supra* note 38, at 118.

57. *See Pelletier, supra* note 2, at 554 (noting that a 1990 survey of 253 U.S. corporations revealed that 62% of firms without parental leave programs “would only offer such a program if required by the state or federal government”).

58. *See id.* at 558–59 (describing leave under FMLA as a “hollow right” because of its unpaid nature, as the right is protected by law yet inaccessible to employees who cannot afford to take it, and claiming that the United States employs a “radically different approach to maternity leave than the rest of the developed world”).

59. White, *supra* note 3, at 185, 223; DEP'T OF SOC. SERV., AUSTRAL. GOV'T, PAID PARENTAL LEAVE SCHEME (Aug. 29, 2014, 10:35 AM), <http://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/paid-parental-leave-scheme>.

60. *See White, supra* note 3, at 223 (noting that, as of 2009, “although a number of state-based initiatives have emerged in recent years,” the United States has made no significant progress at the federal level to implement paid family leave).

Many employees, even those eligible for leave under FMLA, choose not to take leave because they cannot afford to miss time from work without pay.⁶¹ Additionally, although employees have traditionally been permitted to substitute accrued paid leave (e.g., sick leave or vacation leave) for unpaid FMLA leave, in 2008 the Department of Labor passed new regulations prohibiting employees from using their accrued paid leave under FMLA unless they had specifically complied with their employer's leave-taking policies.⁶² The implementation of this additional hurdle to use of FMLA leave for employees who otherwise would have access to paid family leave suggests that provision of paid leave is not a priority under current US policy.⁶³

Paradoxically, although FMLA was intended to alleviate work-family conflict, it fails on both the work-enhancing and the family-enhancing dimensions, in large part because leave is unpaid.⁶⁴ On the work-enhancing side, there is no evidence that FMLA has increased employment equality between men and women.⁶⁵ On the family-enhancing side, many employees are unable to take advantage of the opportunity to spend time with new children because taking unpaid leave is not feasible.⁶⁶ From

61. Bhushan, *supra* note 2, at 689 (noting that among eligible employees who did not take leave under FMLA, 78% based that decision on their inability to take unpaid time off from work).

62. *Recent Regulation—Employment Law—Family and Medical Leave Act of 1993—Department of Labor Regulations Alter Substitution of Paid Leave Provision Under the FMLA.—FMLA Final Rule, 73 Fed. Reg. 67,934 (Nov. 17, 2008) (codified at 29 C.F.R. pt. 825 (2009))*, 123 HARV. L. REV. 604, 604 (2009).

63. *Cf. id.* at 607 (noting that, despite employee advocate objections that the revision would disadvantage employees who cannot afford to take unpaid leave, the Department promulgated the regulation and stated that “the FMLA is an unpaid leave statute that does *not* convey the right to the paid leave that workers may have accrued”).

64. See 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, 412–14 (2012) (arguing that although the FMLA intended to “protect caretaking when in conflict with market work,” it fails to alleviate caretaking conflicts because eligible employees cannot afford to take unpaid leave, and it fails to alleviate workplace conflicts because it perpetuates women's second-class status in the workforce).

65. *Id.* at 433.

66. *Id.* at 432.

this perspective, FMLA is failing to fulfill its purpose of “balanc[ing] the demands of the workplace with the needs of families.”⁶⁷

Furthermore, unpaid family leave perpetuates the problem of female poverty in the United States.⁶⁸ Women continue to carry more of the burden of childcare responsibilities, yet women are also less likely than men to have access to paid parental leave.⁶⁹ Women also tend to have lower incomes than men, so taking unpaid leave is more burdensome for women who are at a financial disadvantage even before taking leave.⁷⁰ As a result of these factors, although women are more likely than men to need leave during and after pregnancy, women are less likely to be able to take leave without facing harsh financial consequences; the realities for households run by single mothers are particularly dire.⁷¹

3. *Gender neutrality*

In addition to the resistance of the business sector during the formulation of FMLA, much debate likewise focused on the bill’s gender inclusivity, particularly regarding concerns of implementing a family leave law that would discriminate against men.⁷² Historically in the United States, the passage of laws that benefit women in order to remedy some aspect of gender inequality frequently has not occurred without extending equal benefits to men.⁷³ This notion highlights the unfortunate

67. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(1) (2012).

68. See Anthony, *supra* note 13, at 477 (explaining various ways in which the deficiencies of FMLA tend to harm women more than men with the result being “the feminization of poverty”).

69. *Id.*

70. *Id.*

71. *Id.* at 477–78; see also Simpson, *supra* note 12, at 300 (noting that due to the fact that FMLA leave is unpaid, FMLA has only resulted in a small increase in leave-taking among college-educated women, and has had virtually no impact on leave-taking among women without a college education).

72. See Anthony, *supra* note 13, at 470–71 (explaining that because family leave policies were more likely to apply to women, men received discriminatory treatment).

73. *Id.* at 471 (“At times, equal treatment for women is interpreted as discrimination against men.”).

irony of the push to maintain gender neutrality in FMLA,⁷⁴ juxtaposed with the reality that men continue to use family leave at much lower rates than women.⁷⁵

Noting another irony, although FMLA was developed to address the need for two-income households,⁷⁶ because leave is unpaid, FMLA actually perpetuates the longstanding stereotype that a woman who takes family leave ought to have a male partner to support her financially while she is on unpaid leave.⁷⁷ There is a longstanding perception in the United States that motherhood and employment are incompatible and, furthermore, that a man's proper role in the family is to serve as the breadwinner who compensates for his wife's lower earning potential, relegating him to a position of the secondary caregiver in the household.⁷⁸ As a consequence of these perceptions, although the provisions of FMLA are stated in gender-neutral terms, meaning men and women may both take leave to care for a new child, FMLA's gender neutrality has had little effect on men's decisions to take paternity leave, which they do with much less frequency than women take maternity leave.⁷⁹ Of

74. See *id.* (noting that measures aimed to reduce the effects of gender inequality "cannot pass without reference to the benefits expected by men").

75. See Kathryn Kroggel, Comment, *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, 440 (2004) (describing in detail the reasons behind men's failure to take family leave under FMLA).

76. See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)(1) (2012) ("Congress finds that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly . . .").

77. See Bhushan, *supra* note 2, at 689 (arguing that the shortfalls of FMLA reinforce gender inequalities due to disparities between men's and women's abilities and decisions to take leave); see also Dinner, *supra* note 16, at 441–42 (noting that FMLA's gender neutrality has, in practice, served to reinforce the stereotype of the father as the breadwinner because mothers continue to be more likely than fathers to take leave).

78. See De Alwis, *supra* note 17, at 313–14 (describing negative perceptions of working parents, such as the perceptions that working mothers are bad employees and neglectful mothers, and working fathers do not need caregiving benefits because they are viewed as secondary caregivers); see also Anthony, *supra* note 13, at 477 (describing the complementary problem that "most work schedules still operate on the male breadwinner model, which assumes that employees do not have family demands that must be addressed").

79. See Bhushan, *supra* note 2, at 689–90 (noting that prior to FMLA, women frequently took time off from work to care for newborns while men rarely did so, and

note, however, in developing FMLA, Congress recognized that “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,”⁸⁰ but it resisted creating a law that would only serve to benefit women due to corresponding concerns of the threat of workplace discrimination against women, particularly in hiring.⁸¹ Although FMLA has not achieved greater work-family balance for both genders, Congress’s recognition of women’s disproportionately imbalanced work-family demands evidences its intention to correct this imbalance.⁸²

The primary problem with a gender-neutral law is that it is unlikely to change longstanding sex stereotypes regarding work and family roles in our society; without crafting a law that considers the differing needs of men and women with respect to childbirth, society will default to sex stereotypes in determining how to balance work and family demands between men and women.⁸³ Traditionally, men have been successful in the breadwinner role precisely because women have assumed the homemaker role.⁸⁴ So long as FMLA’s gender neutrality reinforces this system, as manifested in men taking paternity leave with less frequency than women take maternity leave, gender imbalance in employment will persist.⁸⁵

after the passage of FMLA, some women were more likely to take maternity leave while men did not correspondingly take leave more frequently).

80. 29 U.S.C. § 2601(a)(5).

81. *See id.* § 2601(a)(6) (“[E]mployment standards that apply to one gender may have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.”).

82. *See Anthony, supra* note 13, at 473 (demonstrating Congress’s “understanding that when there is not leave policy, women suffer more from that deficiency as a result of their socially imposed roles” and its subsequent attempt to remedy the “gender-discriminatory impact of not having employer family leave policies”).

83. *See id.* (“A law that refuses to take gender into account is effective only if the private social structure does not *itself* perpetuate women’s inequality, regardless of what the law says. The United States is nowhere near that point.”).

84. *See id.* at 490. (“Women’s homemaking role allows men to fulfill their employment responsibilities[.]”).

85. *See id.* at 490–91 (noting that “the gender-neutral character of the FMLA serves to mask” continued imposition of traditional social structures on women which facilitates attainment of increased public individuality for men).

The failure of men to take paternity leave in part may be attributed to some men's unawareness that they are eligible to take leave when a child is born.⁸⁶ One study found that 91% of eligible women were aware of their rights under FMLA, while only 72% of eligible men were aware that they were eligible for family leave under FMLA.⁸⁷ Changing the language of FMLA to clarify that men and women are both eligible to take family leave may serve to raise men's awareness and encourage them to take paternity leave with greater frequency.⁸⁸

Finally, the gender-neutral language of FMLA not only symbolically, but also practically, fails to recognize and provide support for women's and men's divergent needs related to pregnancy and childbirth.⁸⁹ In addition to its failures to provide for women who cannot afford to take unpaid leave, FMLA does not adequately provide for women's ongoing needs upon their return to work, such as the need for accommodations for breastfeeding.⁹⁰

In sum, FMLA has failed working parents—and especially working mothers—in an abundance of ways. Some of the persistent failures are more obvious, such as the failure to

86. See Chardie L. Baird & John R. Reynolds, *Employee Awareness of Family Leave Benefits: The Effects of Family, Work, and Gender*, 45 SOC. Q. 325, 343 (2004) (“Due to workplace norms or normative beliefs about gender, men may simply see themselves as ineligible for family leave regardless of federal mandates.”).

87. *Id.* at 325.

88. See Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 270 (2003) (noting one possible way to encourage men to take FMLA leave is to amend the FMLA purpose statement).

89. See Anthony, *supra* note 13, at 481 (noting how the FMLA's gender-neutrality not only fails to take into account men and women's divergent biological and innate situations, but also fails to consider social norms that burden women more than men in regards to private family life).

90. See *id.* at 480 (noting that “[o]ccupational standards often fail to take account of familial ties and care giving responsibilities”); see also Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities*, 44 MCGEORGE L. REV. 515, 529 (2013) (identifying breastfeeding as an example of an activity that, if given reasonable accommodations to perform, would help not to force a woman to “choose between maintaining her health, or her child's, and obtaining equal employment opportunities”).

provide for paid family leave.⁹¹ Other deficiencies are less obvious, such as FMLA's limited applicability, which disparately impacts low-income parents who are more likely to work for employers who are not covered by FMLA,⁹² and FMLA's gender-neutrality, which serves to perpetuate longstanding sex stereotypes related to work and family.⁹³

IV. THE ICELAND ACT ON MATERNITY/PATERNITY AND PARENTAL LEAVE

An examination of family leave law in Iceland reveals a number of ways in which FMLA could be altered to better fulfill its purpose of aiding parents in balancing work and family.⁹⁴ Family leave from employment in Iceland is governed by the Iceland Act on Maternity/Paternity and Parental Leave ("Iceland Act").⁹⁵ This act was implemented in 2000 and has been amended a number of times, with the most recent amendment in 2012.⁹⁶ The stated aims of the Act are "to ensure a child's access to both his/her parents" and to "enable both women and men to reconcile work and family life."⁹⁷ The law was intended to promote gender equality by facilitating equal participation of both genders in the workplace and in managing childcare duties.⁹⁸ Through this act, the Icelandic government

91. See Pelletier, *supra* note 2, at 558–60 (noting that the majority of Americans cannot afford to take unpaid leave, and discussing the hardships of working mothers).

92. See, e.g., Anthony, *supra* note 13, at 474–75 (stating that employees who work for businesses not covered by FMLA tend to be less affluent and those who are more financially stable tend to work for larger establishments that are covered by the statute).

93. See *id.* at 472–73 (noting that there is a stereotypical belief that childcare is "women's work only").

94. See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(1) (2012) (stating that one purpose of the FMLA is to balance workplace demands with family needs).

95. Act on Maternity/Paternity Leave and Parental Leave (Act No. 95/2000) (Ice.) [hereinafter Iceland Act].

96. *Id.* (indicating the last amendment to be No. 143/2012).

97. *Id.* § I, art. 2.

98. See Svala Jonsdottir, *National Report on the Icelandic Experience of Parental Leave Provision*, in REPORTS: THE PARENTAL LEAVE SYSTEM IN ICELAND 6, 9 (2008) (noting that one of the stated goals of the Act was to "ensure that children get to spend time with both parents"); see also Act on Equal Status and Equal Rights of Women and Men (Act No. 10/2008), § 1, arts. 1(e), 21 (Ice.) ("promot[ing] gender equality in all

has likewise demonstrated a commitment to preventing parents' financial instability due to childbirth by ensuring that parental leave is paid.⁹⁹

The original law provided for three non-transferrable months of leave for each parent independently and three months jointly to be distributed as the parents chose.¹⁰⁰ In 2012, this provision was extended to provide five months of leave for each parent and two jointly shared months that parents may allocate between themselves.¹⁰¹ This change is being enacted gradually, and the full 5-5-2 plan will take effect in 2016.¹⁰²

Prior to the enactment of the Iceland Act in 2000, Iceland's family leave law did not grant an independent right to paternity leave to fathers.¹⁰³ Instead, in order for a father to receive paid leave, the mother had to elect to provide payments to the father out of payments allocated to her under the law.¹⁰⁴ Currently, the right to family leave is non-transferrable, so each parent must take his or her allotted time or forfeit the right.¹⁰⁵ This non-transferrable right to maternity and paternity leave has been termed "the most egalitarian system in the world,"¹⁰⁶ and the granting of an independent right to paternity leave "has

spheres of society" by "enabling both women and men to reconcile their work and family life" and mandating that employers "facilitat[e] the return of employees to work following maternity/paternity or parental leave").

99. See generally Guðný Björk Eydal & Ingólfur V. Gíslason, *Iceland 2012—Revised Law on Paid Parental Leave* (2013), http://thjodmalastofnun.hi.is/sites/thjodmalastofnun.hi.is/files/skrar/eydal_and_gislason_paid_parental_leave_in_iceland_2012_dvelopmen_ts-1.pdf (explaining that, although the amount of pay has been altered throughout the life of the law due to economic crisis in Iceland, paid leave has never been entirely eliminated since the law's enactment).

100. *Id.* at tbl.1.

101. *Id.* at tbl. 3; see also Iceland Act, *supra* note 95, § IV, art. 8 (detailing parents' rights for maternity/paternity leave).

102. Eydal & Gíslason, *supra* note 99, at tbl.4.

103. Jonsdottir, *supra* note 98, at 8–9.

104. *Id.* at 9.

105. See Iceland Act, *supra* note 95, § IV, art. 8 (stating the "entitlement shall not be assignable"); but see *Maternity/Paternity Leave and Parental Leave*, ISLAND.IS (Aug. 25, 2014), https://www.island.is/en/family/having_a_baby/maternity_paternity_leave_and_parental_leave (explaining that in special circumstances, leave time may be transferred due to death, disease, or incarceration).

106. HARA & HEGEWISCH, *supra* note 4, at 11.

been the largest step Iceland has taken towards gender equality.”¹⁰⁷

Perhaps the most marked feature of the Iceland Act is that it sets up a Maternity/Paternity Leave Fund that is administered by the government and is financed through the collection of an insurance levy paid by employers.¹⁰⁸ Leave paid from the Fund is 80% of the employee’s regular salary.¹⁰⁹ Partly in response to a financial crisis in 2008, a ceiling on wages eligible to be paid was reduced, and some high-income parents were limited to 75%, rather than 80%, of their regular salary.¹¹⁰ This change was also made because of an unexpectedly high number of fathers taking leave, which resulted in rapid depletion of the leave fund.¹¹¹ This ceiling affected about 50% of fathers and 20% of mothers.¹¹² Nonetheless, the 2012 revisions that extended the length of combined leave to twelve months also raised the ceiling and restored the original 80% of regular salary,¹¹³ however, the Iceland Act still mandates that the maximum monthly pay a parent may receive during family leave is ISK 350,000.¹¹⁴

The Iceland Act provides for maternity and paternity leave from salaried employment due to birth, adoption of a child under eight years of age, or permanent foster care of a child under eight years of age.¹¹⁵ The right to take leave generally begins with birth or introduction of an adopted or foster child into the home, but a mother must take at least two weeks of leave after the child’s birth, and either parent may begin taking leave one

107. Áslaug Skúladóttir, *Iceland: The Parental Revolution*, NORDIC LAB. J. (Sept. 1, 2005), <http://www.nordiclbourjournal.org/nyheter/news-2005-a/article.2013-01-18.9942994457>.

108. Iceland Act, *supra* note 95, § II, art. 4; *see also* Jonsdottir, *supra* note 98, at 11 (noting an increase in the leave levy in order to fund the levy).

109. Iceland Act, *supra* note 95, § IV, art. 13.

110. Eydal & Gislason, *supra* note 99.

111. Jonsdottir, *supra* note 98, at 11.

112. Eydal & Gislason, *supra* note 99.

113. *Id.*

114. Iceland Act, *supra* note 95, § IV, art. 13.

115. *Id.* § III, art. 7(a)-(c).

month before the expected birth.¹¹⁶ Apart from those provisions, leave can be taken all at once or spread out over a 24-month period, so long as periods of leave are at least two weeks in duration.¹¹⁷ Mothers and fathers may take leave concurrently or separately.¹¹⁸ Single parents are entitled to the full 12 months of leave.¹¹⁹ The law applies to homosexual couples in the same manner as heterosexual couples.¹²⁰

Eligible employees are those in salaried positions “in the service of others” working at least 25% of full-time employment each month, as well as self-employed persons who contribute to the Maternity/Paternity Leave Fund through the insurance levy.¹²¹ An employee is eligible for leave pay from the Fund if they have been employed in the Icelandic labor market for six consecutive months before taking leave.¹²² Unemployed students who are enrolled in at least 75% of full-time enrollment may also receive a government grant that functions similarly to pay for family leave.¹²³

V. KEY DIFFERENCES BETWEEN THE ICELAND ACT AND FMLA

A number of features of Iceland’s law could be incorporated into FMLA in order to remedy some of the problems with FMLA identified above.¹²⁴ Because Iceland’s law is broadly applied to nearly anyone who is employed, as well as to unemployed

116. *Id.* § IV, art. 8.

117. *Id.* § IV, art. 10.

118. Jonsdottir, *supra* note 98, at 10.

119. Iceland Act, *supra* note 95, § IV, art. 8.

120. *See* Jonsdottir, *supra* note 98, at 10 (noting that Iceland was the second European country to permit same-sex partners to adopt each other’s children and that, as of 2006, same-sex couples have complete rights to artificial insemination and adoption).

121. Iceland Act, *supra* note 95, § III, art. 7.

122. *Id.* § IV, art. 13.

123. *Id.* §§ III, art. 7, VI, art. 19; *see also Applications for Payments from the Maternity/Paternity Leave Fund*, FÆDINGARORLOFSSJÓÐUR, <http://www.faedingarorlof.is/umsoknir-eydublod/application-for-payments-from-the-childbirth-leave-fund/> (last visited Feb. 2, 2014) (providing links to applications for payments from the Maternity/Paternity Leave Fund for mothers and fathers, as well as applications for childbirth subsidies for unemployed parents and students).

124. *See* discussion *supra* Part IV.

persons and students, it could serve as a model for extending FMLA protection to a greater number of families.¹²⁵ Additionally, Iceland's provision of paid family leave serves as one method by which paid leave could be enacted in the United States.¹²⁶ Lastly, the Icelandic law provides an interesting model for implementing a family leave law that is not expressly gender-neutral, yet provides a system by which both parents can take leave in a manner that is most suitable for their individual family.¹²⁷

A. *Broad Applicability*

Iceland's law has broader applicability than FMLA in that it applies to nearly all parents who are employed and even to parents who are not active in the labor market, as well as to parents who are unemployed students.¹²⁸ To qualify for payments from the Maternity/Paternity Leave Fund under the employment provisions, employees need only to have worked for any employer in the labor market for six consecutive months, rather than the twelve months with the same employer required by FMLA.¹²⁹

In Iceland, the duration of leave that will be permitted between parents when the 2012 amendments fully go into effect—one year¹³⁰—is twice as long as the maximum possible aggregate duration of six months in the United States,¹³¹ supporting the Iceland Act's stated goal of giving children access to both parents.¹³² One study found that the majority of Icelandic fathers who took paternity leave believed taking the

125. See discussion *infra* Part V.A.

126. See discussion *infra* Part V.B.

127. See discussion *infra* Part V.C.

128. See Iceland Act, *supra* note 95, § I, art. 1 (detailing the scope of the Iceland Act).

129. *Id.* § IV, art. 13; Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611(2)(A)(i) (2012).

130. See Iceland Act, *supra* note 95, § IV, art. 8 (stating that each parent is individually entitled to five months of paternity leave with a joint entitlement of two months, totaling twelve months of maternity/paternity leave).

131. 29 U.S.C. § 2612(a)(1) (assuming both parents are eligible for FMLA leave and both choose to take the full three months).

132. Iceland Act, *supra* note 95, § I, art. 2.

leave helped them better understand their children's needs and feel more emotionally connected with their children, suggesting the Iceland Act is achieving its goal in this area.¹³³ As a probable result of the enactment of the Iceland Act, Iceland's birth rate is the highest in Europe, at 2.10 children per woman.¹³⁴ This high birth rate has been attributed to the fact that the Iceland Act not only covers both women and men, but that leave is paid for all parents, so parents believe they are well-equipped to give birth to and raise more children.¹³⁵

B. Paid Leave

Iceland's Maternity/Paternity Leave Fund exists to ensure that both parents may take paid leave to care for a new child.¹³⁶ This provision is intended to promote a dual earner/carer model in which mothers and fathers both take equal responsibility for earning income and caring for the child.¹³⁷

As a possible result of the provision of paid leave to both parents, in the years since the implementation of the Iceland Act, studies indicate that marriage and childbirth no longer decrease women's interest in workplace promotions.¹³⁸ Another study reported that most surveyed respondents believed the Iceland Act had "significantly improved women's position in the

133. See Jonsdottir, *supra* note 98, at 17.

134. WORLD ECON. FORUM, *supra* note 6, at 220; see *Iceland Tops European Birth Rate Chart*, EXPATICA (Mar. 21, 2009), http://www.expatica.com/es/news/local_news/Iceland-tops-European-birth-rate-chart-50817.html (stating that Iceland's 2008 birth rate of 2.14 children per woman was not only the highest birth rate in Europe that year, but also Iceland's highest birth rate since 1960).

135. See *Iceland Tops European Birth Rate Chart*, *supra* note 134 (noting that the "more advantageous compensations for both mothers and fathers on leave had also contributed to the [birth rate] increase"); see also Eydal & Rostgaard, *supra* note 10, at 164 (stating that Nordic welfare policies seem to enable an improved fertility rate).

136. See Iceland Act, *supra* note 95, §§ II, art. 4, IV, art. 8 (stating that both parents shall have an independent entitlement).

137. GUÐNÝ BJÖRK EYDAL & TINE ROSTGAARD, *Toward a Nordic Childcare Policy—The Political Processes and Agendas*, in PARENTAL LEAVE, CHILDCARE AND GENDER EQUALITY IN THE NORDIC COUNTRIES 149, 151, 158–61 (Ingólfur V. Gíslason & Guðný Björk Eydal eds., 2011).

138. See Jonsdottir, *supra* note 98, at 12 (showing that "women's attitudes towards promotions and management position changed between 1994 and 2006").

labour market.”¹³⁹ However, a 2008 study found few couples believed the Iceland Act creates more equality between parents, as mothers are still primarily responsible for housework and childcare.¹⁴⁰

As a notable comparison to FMLA, the Iceland Act also provides for thirteen weeks of unpaid parental leave for each parent, which may be used to attend to various childcare duties before the child is 18 years old.¹⁴¹ However, one survey revealed that only 34.7% of parents were aware of their right to take this leave, and of those who were aware, only 25.5% had utilized it.¹⁴² This miniscule usage rate is quite telling regarding the value to parents of paid versus unpaid leave, as paid leave for the birth or adoption of a new child has been widely successful, while the unpaid leave for later childcare responsibilities appears to be quite unpopular.¹⁴³

C. Recognition of Gender

The fact that, unlike FMLA, the language of Iceland’s law is not gender-neutral actually contributes to its promotion of gender equality.¹⁴⁴ As previously noted, some commentators suggest that FMLA’s gender-neutral quality is more damaging than the gendered laws of Iceland and much of the rest of Europe, even though many gendered laws developed in response to reliance on gender stereotypes.¹⁴⁵

139. *Id.*

140. *Id.* at 17–18 (referring to a study conducted by Auour Ama Arnardottir and Margret Jonsdottir from Reykjavik University).

141. See Iceland Act, *supra* note 95, § VII, art. 24 (detailing parents’ right to take parental leave).

142. Jonsdottir, *supra* note 98, at 10 (referring to the Capacent Gallup survey).

143. See *id.* at 19 (suggesting that greater publication of the availability of this parental leave is unlikely to increase usage so long as it is unpaid).

144. See Eydal & Rostgaard, *supra* note 10, at 174 (arguing that Iceland’s provision for a father’s quota of paid paternity leave has promoted “equal sharing of parental leave between men and women”).

145. See, e.g., Anthony, *supra* note 13, at 460–61, 473–74, 477, 481, 491 (discussing that a gender-neutral law such as the FMLA is ineffective in a country like the United States, where the private social structure itself perpetuates women’s inequality); see also Act on Equal Status and Equal Rights of Women and Men (Act No. 10/2008), § IV, art. 24 (expressly stating that, in Iceland, “[s]pecial consideration to women in connection with

In Iceland, men take paternity leave at higher rates than in the United States, suggesting that taking maternity leave may not disparately affect women in the Icelandic labor market, as problems associated with taking leave from work are equally faced by men and women alike.¹⁴⁶ The extensive use of paternity leave is likely attributable to Iceland's innovative use-it-or-lose-it provision of leave to fathers.¹⁴⁷ In 2001, Icelandic men took paternity leave at a rate of 82.4% of the rate at which women took maternity leave; that percentage increased to 89.9% in 2004.¹⁴⁸ Although women generally take the period of leave that may be split between the parents, the percentage of men who took more than their allocated three months rose slightly from 14.5% in 2001 to 17.1% in 2004;¹⁴⁹ this percentage further increased to 21.2% by 2007.¹⁵⁰ Anecdotally, it was reported that within one month of implementation of the Iceland Act, Reykjavik, the capital of Iceland, "was filled with fathers

pregnancy and childbirth shall not be regarded as discrimination"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that the Equal Protection Clause precluded states from relying on "overbroad generalizations about the different talents, capacities, or preferences of males and females").

146. See JAFNRETTISSTOFA, CENTRE FOR GENDER EQUALITY ICELAND, GENDER EQUALITY IN ICELAND: INFORMATION ON GENDER EQUALITY ISSUES IN ICELAND 16–17 (2012), available at http://eng.fjarmalaraduneyti.is/media/Gender_Equality_in_Iceland_012012.pdf (noting that in 2007, fathers used an average of 101 days of paternity leave, and mothers used an average of 181 days of maternity leave); see also Gunn, *supra* note 10 (discussing that the Icelandic policy of giving both parents nontransferable parental leave has resulted in fewer women taking extended maternity leave, the effect of which has been a decrease in the long-term income and promotion disparity between men and women, because the total amount of parental leave is now more evenly shared).

147. Eydal & Rostgaard, *supra* note 10, at 165.

148. Jonsdottir, *supra* note 98, at 16.

149. *Id.* at 17.

150. GUÐNÝ BJÖRK EYDAL, EQUAL LEGAL RIGHTS TO PAID PARENTAL LEAVE—THE CASE OF ICELAND 13 tbl.4 (2009), available at http://www.espanet-italia.net/conference2009/paper2/2A%20-%20G_Eydal.pdf [hereinafter EQUAL LEGAL RIGHTS] (showing that in 2007, 21.2% of fathers in Iceland used more than their basic rights); see also Thorgerdur Einarsdóttir & Gyda Margrét Pétursdóttir, *Iceland*, http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/Iceland.published.oct_2010.pdf (last visited Feb. 2, 2014) (asserting that 21.2% of "fathers took some of the parents' joint rights").

strolling with their babies,” and community “mother’s meetings” soon became “parents’ meetings.”¹⁵¹

By contrast, in the United States, men are unlikely to take paternity leave due to many families’ inability to sacrifice the father’s income (which is usually higher than the mother’s), social stigma of men taking leave from employment to care for children, or men’s concerns that temporarily leaving the workforce will interfere with the possibility of promotion.¹⁵² Adoption of a plan similar to Iceland’s that designates a period of paid leave as only for fathers could address some of these concerns by encouraging men to use the leave to which they alone are entitled, thereby gradually removing the social stigma and increasing the expectation that taking paternity leave will not socially or financially disadvantage an employee.¹⁵³ As a result, men’s more frequent use of paternity leave should likewise help to balance the inequities faced by women while taking maternity leave.¹⁵⁴

One unintended consequence of the implementation of paternity leave in Iceland was that some men had the unfortunate experience of being terminated after taking paternity leave.¹⁵⁵ Although this was certainly not the goal of

151. Skúladóttir, *supra* note 107. Notably, regarding the shift to “parents’ meetings,” one interviewee stated, “[t]his is perhaps not what matters most, but it still does matter, words can say so much,” highlighting the important symbolic nature of the terminology used when discussing parenthood. *Id.*

152. See Kroggel, *supra* note 75, at 440; see also Beth A. Burkstrand-Reid, *Dirty Hairy Meets Dirty Diapers: Masculinities, At-Home Fathers, and Making the Law Work For Families*, 22 *TEX. J. WOMEN & L.* 1, 33–34 (2012) (noting that men’s failure to take leave under FMLA is largely because caregiving is not perceived as masculine in our society).

153. See Burkstrand-Reid, *supra* note 152, at 36 (suggesting that paid leave may encourage more men to take leave, and that more men taking leave may remove the social stigma associated with taking paternity leave).

154. See Gunn, *supra* note 10 (highlighting that the result of the system of nontransferable maternity and paternity leave in Iceland was to reduce the number of women who faced negative employment-related consequences as a result of taking off extended periods of time as opposed to shared parental leave); Simpson, *supra* note 12, at 304 (discussing the European systems of work-life balance as enhancing “equality of mothers in the workplace, allowing them to balance their lives with more vacation time, flexible schedules, funded child care options, leave provisions for both parents, health care, and encouragement of fathers involvement in domestic tasks and child care”).

155. See Jonsdottir, *supra* note 98, at 12.

the Iceland Act, and is in fact an illegal practice under the Iceland Act, these occurrences likely served to raise men's awareness about a problem that had previously only affected women who took maternity leave.¹⁵⁶ It may be hypothesized that as such workplace injustices become experiences shared by both genders, the motivation to remedy such occurrences will strengthen.¹⁵⁷

D. Cautionary Notes

Although the Iceland Act provides insight into ways to amend FMLA to improve American families' access to family leave, it should be noted that Iceland still has problems in some areas of gender equality. Of note, Iceland is not leading in every factor of the Global Gender Gap Report, and it even falls behind the United States on some factors.¹⁵⁸ In particular, Iceland ranks 22nd globally in women's economic participation and opportunity and 97th in women's health and survival; the United States ranks 6th and 33rd on these dimensions, respectively.¹⁵⁹ Iceland's lower rankings on these dimensions suggest that even in the presence of a more progressive family leave law, women's economic participation and access to quality healthcare have been unaffected or slow to improve since the implementation of the Iceland Act.¹⁶⁰

Moreover, despite its progressive family leave law, Iceland still displayed a gender pay gap in 2005—5 years after the

156. *See id.* at 16 (stating that a trade union report found that both parents suffered illegal termination while on maternity/paternity leave, but that fathers were illegally terminated more frequently after the Act was implemented than before the Act was implemented).

157. *See id.* (asserting "that an injustice that previously was directed only towards women, is now more equally distributed between men and women").

158. *See generally* WORLD ECON. FORUM, *supra* note 6 (comparing various gender-based statistics of numerous countries, including Iceland and the United States).

159. *Id.* at 12 tbl.3b.

160. *See* Eydal & Rostgaard, *supra* note 10, at 174 (describing Iceland's shared parental leave policy as progressive among Nordic countries and likewise, influential outside the region); *see also* WORLD ECON. FORUM, *supra* note 6, at 220–21, 370–71 (noting Iceland and U.S. rankings globally in women's economic participation and opportunity and women's health and survival).

passage of the Iceland Act.¹⁶¹ It seems that the introduction of the Iceland Act may have contributed to reducing this gap somewhat, as women's income compared to men's income increased from 56.7% in 1998 (before the introduction of the family leave law) to 63.7% in 2005 (five years after the implementation of the family leave law).¹⁶² It is estimated that the adjusted wage gap, accounting for factors such as occupation, education, and work experience, is much smaller at 8–18%, but there is still no clear explanation for this remaining gap.¹⁶³ Iceland's relatively poor gender gap rankings in economic participation and health and survival, as well as its persistent wage gap, indicate that while Iceland can provide the United States with valuable insights into policies that may alleviate gender inequality to some extent, Iceland does not yet have an ideal solution in place to resolve all gender discrepancies.¹⁶⁴

Notably, Iceland also does not have the most generous family leave law in the world. Several industrialized nations provide for greater lengths of leave or greater percentages of pay.¹⁶⁵ For instance, Germany, France, and New Zealand each provide 100% of pay during maternity leave.¹⁶⁶ In Denmark, 52 weeks of leave are provided, of which 32 weeks may be divided between the mother and father; the full length of leave is paid at

161. See Jonsdottir, *supra* note 98, at 7 (stating that in 2005, women's income was 63.7% of men's income, and 79% of men's income when the number of working hours was taken into consideration).

162. See *id.* (describing Iceland's gender pay gap in 2005 compared to 1998). *But see id.* at 8 (asserting that Iceland's gender pay gap has not changed since 2000, despite a 2006 study in which the majority of respondents said parental leave laws significantly improved women's position in Iceland's labor market).

163. *Id.* at 7.

164. See *id.* at 7–8 (“There is not much indication that the gender pay gap is getting smaller in Iceland. In general, studies show that the gender pay gap has remained the same in recent years or is even increasing.”); WORLD ECON. FORUM, *supra* note 6, at 16, 18–19 tbl.5 (providing, as examples of how Iceland still experiences gender discrepancies, that Iceland ranks twenty-second with respect to closing the gender-gap in economic participation and opportunity, and ninety-seventh with respect to closing the gender disparity in health and survival).

165. See Ben Shore, *Maternity and Paternity Leave: The Small Print*, BBC NEWS (Oct. 20, 2010), <http://www.bbc.co.uk/news/business-11587797> (comparing the maternity and paternity leave of six countries).

166. Document 33 *Id.*

100% of the employee's salary.¹⁶⁷ In Norway, mothers may take 46 weeks at 100% pay or 56 weeks at 80% pay, and fathers may take ten weeks at 100% pay.¹⁶⁸ However, the United States may be more open to adoption of a system similar to Iceland's, as it would represent a less dramatic shift in policy than adoption of a more generous plan.

VI. RECOMMENDED CHANGES TO FMLA BASED ON THE ICELAND ACT ON MATERNITY/PATERNITY AND PARENTAL LEAVE

As discussed, the Iceland Act presents a number of key differences from FMLA and could serve as a model for amending FMLA to better promote work-family balance in American families.¹⁶⁹ This section will specifically address changes that could be made to FMLA and provide an analysis of how these changes would facilitate greater work-family balance for working parents in the United States.

A. *Equality Does Not Mean Neutrality*

The first change I recommend based on an analysis of Iceland's law is to amend FMLA so that, rather than being gender-neutral, it provides that mothers and fathers have an independent, non-transferrable right to take a specified length of leave.¹⁷⁰ Furthermore, the amendment should clarify that a parent loses the opportunity to take such leave if it is not used within the one-year timeframe currently granted by FMLA.¹⁷¹ The United States could also mirror the Icelandic law by providing an additional period of leave that parents may allocate

167. WORLD ECON. FORUM, *supra* note 6, at 78–79 tbl.E1.

168. Anne Chemin, *Norway, the Fatherland: Paternity Leave Law Helps to Create More Equal Households*, THE GUARDIAN (July 19, 2011), <http://www.theguardian.com/money/2011/jul/19/norway-dads-paternity-leave-chemin> (stating that Norwegian parents can divide up to 46 weeks of paternity leave at full pay or 56 weeks at 80% pay and that the time reserved just for fathers is ten weeks).

169. See discussion *supra* Part V (proposing the Iceland Act serve as a model for future amendments to the FMLA).

170. See Iceland Act, *supra* note 95, § IV, art. 8 (noting each parent has “an independent entitlement to maternity/paternity leave”).

171. Compare *id.* (indicating that each parent's independent entitlement to leave is not assignable), with Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(a)(2) (2012) (noting the expiration of FMLA leave after 12 months of birth or placement).

between themselves as they choose, which would treat parenting couples as partners in the childbearing endeavor.¹⁷² By contrast, in FMLA's current form, the only provision that acknowledges spouses jointly is the provision that addresses spouses employed by the same employer.¹⁷³ Distressingly, this provision actually serves to limit parents' access to leave, as it states that spouses employed by the same employer may be limited to an aggregate of twelve weeks of family leave, meaning each parent's individual entitlement to leave could be split in half.¹⁷⁴

Instead, a system like Iceland's would grant a desirable balance between a gender-neutral law and a gendered law that unfairly discriminates against one gender, while recognizing the roles of both parents as partners in the childbirth process.¹⁷⁵ Allowing parents to allocate a period of leave between themselves would uphold a sense of autonomy in permitting families to determine the allocation of leave that works best for their individual situation.¹⁷⁶ It is the combination of "use-it-or-lose-it" leave for each parent in conjunction with the gender-neutral personal allocation period of leave that makes the Iceland Act especially attractive as something that could be adapted in the United States.¹⁷⁷ These provisions encourage

172. See Iceland Act, *supra* note 95, § IV, art. 8 (providing parents with an additional three months leave to divide up if and as they see fit).

173. See 29 U.S.C. § 2612(f)(1) (detailing leave requirements for spouses employed by same employer).

174. *Id.*

175. *But see* Act on Equal Status and Equal Rights of Women and Men (No. 10/2008) (Ice.), § IV, art. 24 (stating that "[s]pecial consideration to women in connection with pregnancy and childbirth shall not be regarded as discrimination" in Iceland, which suggests that Icelandic laws regarding gender discrimination would not be offended by disparate impact if the shared months were more frequently taken by women than by men).

176. See Jonsdottir, *supra* note 98, at 16–17 (suggesting that Icelandic parents are allocating family leave in the manner most advantageous for their particular family's economic situation because, although women typically take the full length of the shared leave, men who take the shared leave tend to have incomes considerably higher than average).

177. *But see* Gunn, *supra* note 10 (suggesting that an evenly split "6-6 policy" is advantageous because any shared time between parents is likely to have the effect of continued uneven distribution of parental duties, as women are more likely to take the shared leave and thereby develop superior parenting skills).

both men and women to take leave and engage in work-family balance, while recognizing that within each individual family, it may be most reasonable for either the mother or the father to take a longer period of leave.¹⁷⁸

In practice, removing the gender-neutral language of FMLA as recommended would not actually change the rights granted by the current law.¹⁷⁹ Currently, women may take twelve weeks of leave and men may take twelve weeks of leave to care for a new child.¹⁸⁰ However, this amendment would have a strong symbolic effect of granting recognition to women's and men's individual needs related to employment and childbirth.¹⁸¹ Additionally, FMLA already has a built-in "daddy quota," as men (and women) who fail to take family leave within the specified one-year timeframe do in fact forfeit that opportunity.¹⁸² However, clarifying this function, as done by the Icelandic law, could raise awareness of both parents' abilities to take leave,¹⁸³ as well as encourage eligible fathers to take the paternity leave to which they are entitled rather than give up that right.¹⁸⁴

B. Paid Family Leave

A second, and certainly more challenging, change I recommend is to provide for paid family leave. Clearly, the most difficult question to answer in implementing such a program is

178. See Jonsdottir, *supra* note 98, at 16–17 (describing the various ways Icelandic families distribute parental leave based upon their economic circumstances).

179. See Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(a)(1) (2012).

180. 29 U.S.C. § 2612(a)(1).

181. See Simpson, *supra* note 12, at 302–04 (arguing that the strengthening of work-life balance for women in Scandinavian countries has involved not only changes in law, but shifts in cultural values relating to gender).

182. 29 U.S.C. § 2612(a)(2); see also Barzilay, *supra* note 64, at 434 (explaining that the daddy quota provides parental leave specifically to fathers and is wasted if the father refrains from using it).

183. See Baird & Reynolds, *supra* note 86, at 336 (describing men's lesser awareness of the availability of paternity leave).

184. See Jonsdottir, *supra* note 98, at 16 (indicating that the percentage of Icelandic fathers who took paternity leave rose 90% in the four years following the passage of the Iceland Act).

how to fund paid family leave.¹⁸⁵ However, several states are already experimenting with such programs.¹⁸⁶ For instance, California and New Jersey provide some amount of paid family leave through state-level Temporary Disability Insurance, and Washington has implemented a stand-alone paid family leave program.¹⁸⁷ On the federal level, one suggestion is to extend the already-existing Social Security program by creating an additional Social Security fund dedicated to family leave.¹⁸⁸ This approach most resembles the Icelandic approach of creating the Maternity/Paternity Leave Fund.¹⁸⁹

C. *Wider Applicability*

A final recommendation is to amend FMLA to provide coverage to a greater percentage of the workforce.¹⁹⁰ Although pushback from the industrial sector is anticipated, many small businesses successfully model their work-family policies after FMLA, and a few states have already extended FMLA coverage to apply to midsize businesses.¹⁹¹ Until FMLA functions to provide access to family leave for employees in all employment

185. See generally Susser, *supra* note 34, at 169 (discussing businesses' opposition to paid family leave); see also Boushey, *supra* note 54, at 175 (discussing the failure of the market to respond to the need for paid family leave).

186. See Boushey, *supra* note 54, at 176 (discussing the paid family leave programs in California, New Jersey, Washington, Hawaii, New York, and Rhode Island).

187. *Id.*; see also KAMERMAN & GATENIO, *supra* note 27 (noting that the primary problem with such TDI programs is that they do not protect the right to return to work after taking leave).

188. Boushey, *supra* note 54, at 177.

189. Compare *id.* (describing the proposed funding of paid leave for FMLA through the Social Security Administration), with Iceland Act, *supra* note 95, § II, art. 4 (providing that the Maternity/Paternity Leave Fund shall be financed through an insurance levy).

190. See Asher & Lenhoff, *supra* note 38, at 119 (arguing that expanding FMLA to include businesses with 25–49 employees would give 13 million more workers access to job-protected leave).

191. See *id.* (noting that while proposals to expand FMLA coverage to firms with 25–49 employees have been routinely rejected due to “influential business interests” and political polarization, many small businesses as well as the District of Columbia, Oregon, and Vermont have willingly adopted the FMLA into their own policies); see also HARA & HEGEWISCH, *supra* note 4, at 4 (describing policies of several states that apply FMLA protections to smaller businesses, such as Maine’s law which covers businesses with 15 or more employees).

sectors, it will continue to adversely impact not only working mothers, but also low-income employees who are more likely to work for smaller companies, for shorter periods of time, and in part-time positions—all of which could disqualify an employee from taking FMLA leave.¹⁹²

VII. TAKING ADVANTAGE OF A CLIMATE FOR CHANGE: THE INFLUENCE OF THE AFFORDABLE CARE ACT

The longstanding gender gap perpetuated in part by the shortcomings of FMLA may be remedied by amending FMLA based on the Iceland Act, as an initiative taken in conjunction with the implementation of the Patient Protection and Affordable Care Act (ACA).¹⁹³ The ACA, signed into law on March 23, 2010, is targeted toward providing health insurance to all Americans in order to increase access to affordable healthcare.¹⁹⁴ It has been argued that reforming FMLA ought to be the next step in healthcare reform, as the aim of the ACA—to provide a personal sense of security in healthcare—mirrors FMLA’s goal of providing security in employment during periods of medical interference with work.¹⁹⁵

In addition to creating a number of programs aimed at improving the health of pregnant women, such as smoking cessation programs and increased delivery options for women on Medicaid, the ACA also provides state grants for community services fostering ease of pregnancy and childcare for low-income mothers.¹⁹⁶ In the workplace, the ACA requires any employer covered by the Fair Labor Standards Act to provide breaks and proper locations for new mothers to express breast

192. See Asher & Lenhoff, *supra* note 38, at 118, (noting that the FMLA tends to exclude vulnerable groups of workers such as “low-wage workers, part-time workers, and women leaving welfare for work”).

193. The Patient Protection and Affordable Care Act, Pub L. No. 111–148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18031 (2012)).

194. Nicole Moody, Comment, *Health Reform and the Plight of the Uninsured Pregnant Woman*, 90 OR. L. REV. 643, 672 (2011).

195. See April G. Dawson, *A Next Step in Health Care Reform: Ensuring the Protection of Employee Rights Under the Family and Medical Leave Act*, 56 ST. LOUIS U. L.J. 1, 4 (2011) (comparing the goals of the ACA to those of the FMLA).

196. See Moody, *supra* note 194, at 672 (discussing the family services afforded to women under the ACA).

milk.¹⁹⁷ In spite of strong Republican opposition to implementation of the ACA¹⁹⁸, one may envision the ACA working in conjunction with an amended FMLA to provide much greater work-family balance for all American mothers by removing barriers to expensive pregnancy-related healthcare, protecting women's employment during and after pregnancy, and encouraging men to shoulder an equal share of childcare duties.¹⁹⁹

Prior to the introduction of the ACA, women faced a number of obstacles to obtaining health insurance coverage for maternity care.²⁰⁰ For instance, for a number of reasons, women have historically been more likely than men to rely on the individual health insurance market, which frequently has blocked women from attaining health coverage in the first place and often does not provide maternity care coverage.²⁰¹ The ACA provides a starting point for remedying these problems because it requires insurers to cover maternity and newborn care and prohibits insurers from discriminating based on sex when determining insurance premiums.²⁰²

197. See HARA & HEGEWISCH, *supra* note 4, at 4 (discussing break requirements for nursing mothers under the ACA).

198. See, e.g., Moody, *supra* note 194, at 673 (“[T]he Republican Party has started a movement to repeal the entire ACA on the grounds of unconstitutionality.”).

199. See, e.g., NAT'L P'SHIP FOR WOMEN & FAMILIES, *Why the Affordable Care Act Matters for Women: Health Insurance Coverage for Lower- and Moderate-Income Pregnant Women*, at 2 (2014), available at <http://www.nationalpartnership.org/research-library/health-care/lower-and-moderate-income-pregnant-women.pdf> (asserting that qualified health plans carry cost-sharing protections for maternity care services); see also HARA & HEGEWISCH, *supra* note 4, at 3 (noting that FMLA “ensures that eligible employees who are pregnant or new parents receive a guarantee of return to the same or an equivalent job”); Bhushan, *supra* note 2, at 691–92 (discussing policies that minimize risk for employers, increase flexibility for employees, and encourage greater caretaking among fathers as important goals of FMLA reform).

200. See Kyla Davidoff, *Time to Close the Gap: Women in the Individual Health Insurance Market Deserve Access to Maternity Coverage*, 25 WIS. J. L. GEND. & SOC'Y 391, 392–94, 396 (2010) (stating that healthcare coverage obtained through the individual insurance market rarely covers maternity care, and that women are at a greater risk of turning to the individual market because they are more likely than men to hold part-time jobs with no employer-sponsored insurance and are more likely to be insured through their spouses).

201. *Id.* at 395–98.

202. Patient Protection and Affordable Care Act (PPACA) of 2010, 42 U.S.C.

Regarding employer-sponsored health insurance, the ACA penalizes employers of 50 or more employees for failing to offer affordable and adequate insurance to full-time employees.²⁰³ However, this mandate suffers from a flaw shared with FMLA, as women are more likely than men to work part-time, so even with the ACA in place, women's access to health insurance through their employers will continue to be disproportionately limited.²⁰⁴

As a more positive development, the ACA offers a tax credit to small businesses that contribute over half the cost of their employees' insurance premiums.²⁰⁵ Although this measure still does not resolve the problem of a lack of mandated family leave for employees of small businesses, it will ease the financial burden of such employees who could not previously afford health insurance, which is particularly necessary during pregnancy and childbirth.²⁰⁶

Some research suggests that capitalism contributes to health disparities, and welfare-state intervention can curb this negative effect.²⁰⁷ Iceland's Maternity/Paternity Leave Fund is an example of a welfare-state intervention policy that has been successfully used to diminish gender disparities in healthcare.²⁰⁸

§ 18022(b)(1)(D) (2012) (essential health benefits shall include maternity and newborn care); 42 U.S.C. § 18116(a) (2012) (insurance plans may not discriminate based on a ground prohibited under Title IX of the Education Amendments of 1972); *see* Education Amendments of 1972 Tit. IX, 20 U.S.C. § 1681(a) (2012) (prohibiting discrimination based on sex for any activity receiving federal financial assistance); *see also* Moody, *supra* note 194, at 675 (detailing healthcare reforms to the individual health insurance market that affect pregnant women).

203. 26 U.S.C. § 4980H(a)(1), (c)(1), (2)(A) (2012).

204. *See* Moody, *supra* note 194, at 674.

205. *Id.* at 674–75.

206. *See id.* (“If small businesses choose to utilize the tax credit and offer employer-sponsored health insurance, pregnant women employed by small businesses will be able to access affordable health care coverage through their employer—an insurance option widely unavailable under the pre-ACA insurance regime.”).

207. *See, e.g.,* Sigrun Olafsdottir, *Fundamental Causes of Health Disparities: Stratification, the Welfare State, and Health in the United States and Iceland*, 48 J. HEALTH & SOC. BEHAV. 239, 241 (2007) (noting that “inequality in capitalist societies creates and sustains health disparities”).

208. *Id.* at 242, 249 (suggesting that Iceland's extensive maternity/paternity leave benefit policy is “female friendly,” eliminating the link between single motherhood,

Given the ACA's posture as a move toward a welfare-state intervention in healthcare, it may be possible to borrow Iceland's Maternity-Paternity Leave Fund as a model for the amendment of FMLA, prompted by enthusiasm for healthcare reform created by the introduction of the ACA.²⁰⁹

VIII. ASSESSMENT OF FEASIBILITY OF CHANGE

Although the Iceland Act seems like a highly progressive measure compared to FMLA, introduction of some provisions of the Iceland Act to the United States may not be out of reach. Perhaps surprisingly, despite the progressive nature of the Iceland Act, it was passed while a conservative government was in power.²¹⁰ This suggests that regardless of general conservative opposition to social welfare programs in the United States, the United States may be open to legislation designed to promote the dual earner/career model supported by Icelandic policy.²¹¹ Although resistance to progressive changes to FMLA can be anticipated, it should be noted that the United States already has social welfare programs in place to provide or supplement the income of retired individuals, workers experiencing a period of unemployment, and disabled workers.²¹² As such, it is not far-fetched to envision a similar government

poverty, and poor health outcomes and further indicating that such welfare policies may be "successful in eliminating vulnerabilities related to gender").

209. See Sara Rosenbaum, *Realigning the Social Order: The Patient Protection and Affordable Care Act and the U.S. Health Insurance System*, 7 J. HEALTH & BIOMEDICAL L. 1, 1, 19, 30–31 (2011) (suggesting that the passage of the Affordable Care Act signifies a fundamental shift in the relationships underlying the American Health Care system, which may one day create a "new normal" regarding our social expectations about healthcare).

210. JOHANNA LAMMI-TASKULA ET AL., PARENTAL LEAVE, CHILDCARE AND GENDER EQUALITY IN THE NORDIC COUNTRIES 13, 27 (Ingólfur V. Gíslason & Guðný Björk Eydal eds., 2011) ("[I]n Iceland a centre-right government brought about a quite radical change toward the individualisation of parental leave.").

211. See Anthony, *supra* note 13, at 484 (discussing American hostility to social welfare programs due to pervasive values of individualism and limited government). *But see* Bhushan, *supra* note 2, at 690–91 (arguing that political opposition is likely to prevent the implementation of a family leave policy similar to Iceland's law in the United States).

212. Boushey, *supra* note 54, at 172–73.

program providing income assistance to parents who need employment leave in order to care for newborn children.²¹³

A likely explanation of Iceland's ability to implement its work-family laws is the fact that, in the Global Gender Gap Report, it ranks first in political empowerment.²¹⁴ The United States, on the other hand, ranks sixtieth in political empowerment, making this dimension one of the largest United States-Icelandic discrepancies.²¹⁵ Improved visibility of women in positions of political power in the United States may serve to strengthen the likelihood of beneficial changes to FMLA.²¹⁶

In reference to the expectation of business sector resistance to changes to FMLA, it has been suggested that family leave legislation can correct market-driven problems associated with employers' decisions to offer more protective family leave than what is required by law.²¹⁷ Because voluntarily offering more generous family leave may attract employees who are more likely to take leave, to the detriment of the employer, legally mandating a certain standard for family leave should remove this market effect.²¹⁸ Thus, amending FMLA to cover a greater number of employers, for instance, should eliminate concerns that small and mid-size businesses may have about remaining competitive while offering family leave.²¹⁹

213. *See id.* at 176, 177 (citing existing Temporary Disability Insurance (TDI) laws in five states that provide for paid caregiver leave, along with a proposed federal law to establish a national family leave insurance program).

214. WORLD ECON. FORUM, *supra* note 6, at 12 tbl.3b.

215. *Id.*

216. *See* S. LAUREL WELDON, WHEN PROTEST MAKES POLICY: HOW SOCIAL MOVEMENTS REPRESENT DISADVANTAGED GROUPS 57–58 (2011) (noting that extant scholarship suggests that the presence of women in government influences development of parental leave policy).

217. Baum, *supra* note 18, at 796.

218. *Id.*

219. *See id.* (“If MLL [maternity leave legislation] mandates that all employers offer maternity leave benefits, then the problem of adverse selection is eliminated. MLL would then benefit those employers who were willing to assume the cost of maternity leave in exchange for the benefits of retaining that work but were unwilling to bear other costs such as attracting a disproportionate number of leave takers.”); *see also supra* notes 217–18 and accompanying text (legislation mandating that all employers offer maternity leave will eliminate the problem of “adverse selection,” whereby employers who voluntarily offer maternity leave tend to attract employees who are disproportionately

Note, however, that over the FMLA's two decades of existence, experimental attempts have been made to create a paid parental leave system in the United States, all of which have failed thus far. For example, in 1999, the Clinton administration proposed a regulation that would permit states to provide paid family leave from unemployment compensation funds.²²⁰ Despite strong opposition from the business sector, the Department of Labor promulgated this final rule in 2000.²²¹ However, no state chose to implement the experimental program, and in 2003, the George W. Bush administration rescinded the regulation, largely due to the objection that such a regulation created a misuse of unemployment compensation funds, which are not intended for persons who are not actually unemployed, but merely on temporary leave.²²² Nonetheless, despite failed attempts in the past, if the ACA proves to be a successful healthcare reform, it may set the stage for revisiting the possibility of reforming FMLA as well.

likely to take such leave).

220. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (proposed Dec. 3, 1999) (codified at 20 C.F.R. pt. 604); *see also* Susser, *supra* note 34, at 179–80 (stating that the Clinton administration published a Notice of Proposed Rulemaking that would allow the adoption of “rules providing wage replacement through the unemployment compensation system for certain family-related leaves” in states that administer unemployment compensation programs).

221. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604); *see also Unemployment Compensation and the Family Medical Leave Act: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 106th Cong. 49, 51 (2000) (statement of Eric J. Oxfeld, President, UWC-Strategic Services on Unemployment & Workers' Compensation) (asserting that many business organizations are opposed to using unemployment insurance for paid voluntary leave); Susser, *supra* note 34, at 182–83 (purporting that business groups object to the use of unemployment insurance to fund paid FMLA leave, in part, because it means that “jobless workers and employers will no longer be able to count on the protections afforded by [unemployment insurance]”).

222. Unemployment Compensation—Trust Fund Integrity Rule; Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003) (codified at 20 C.F.R. pt. 604) (arguing that unemployment compensation is designed for individuals who are “able and available” to work, while individuals taking voluntary parental leave are “unavailable for work” and so do not meet requirements to be eligible to receive unemployment funds); *see also* Susser, *supra* note 34, at 185–86 (noting that the Bush Administration rescinded the “BAA-UC regulations”).

IX. CONCLUSION

In spite of its good intentions, FMLA is a rather alarming example of an area of law in which the United States falls far behind most of the industrialized world.²²³ Reforming FMLA would serve to facilitate work-family balance for all working parents and to expand opportunities for mothers in the workplace, a policy goal that President Obama recently endorsed as a method of helping all Americans.²²⁴

One recent study clearly highlights the particular importance of work-family balance in women's lives.²²⁵ It was found that women with three or more children reported being treated more uncivilly in the workplace than women with few or no children.²²⁶ However, when faced with uncivil treatment, women with more children also reported more positive psychological outcomes such as greater job satisfaction and lower rates of depression.²²⁷ The researchers suggest that although having a strong identity as a mother leaves a woman vulnerable to poorer treatment in the workplace, the motherhood identity also serves as a facilitator of positive outcomes and a buffer against negative outcomes in the face of poor treatment, implying that motherhood is at once a strain on female employees yet also a role to be celebrated for its positive effects on working mothers.²²⁸

223. See *Hearing on S. 110-851*, *supra* note 24, at 4 (noting "the European standard is 10 paid months" and the United States is only in the company of Swaziland, Liberia and Papua New Guinea in denying paid maternity leave).

224. See President Barack Obama, *supra* note 1 (arguing that a mother "deserves to have a baby without sacrificing her job" and "deserves a day off to care for a sick child or sick parent without running into hardship").

225. See Kathi N. Miner, Amanda D. Pesonen, Amber L. Smittick, Michael L. Seigel & Emily K. Clark, *Does Being a Mom Help or Hurt? Workplace Incivility as a Function of Motherhood Status*, 19 J. OCCUPATIONAL HEALTH PSYCHOL. 60, 70-71 (2014) (arguing that having multiple roles, e.g., as worker and a mother, may help buffer the negative effects of women's negative interpersonal experiences at work).

226. *Id.* at 68.

227. See *id.* at 62 (according to theories of multiple role involvement, "having multiple roles [is] associated with lower rates of depression among women" as well as "increased career satisfaction and job performance" and claiming that women with fewer children have "more negative reactions to incivility than women with more children").

228. *Id.* at 68; see also HARA & HEGEWISCH, *supra* note 4, at 11-12 (summarizing research related to positive outcomes associated with providing paid family leave, including perhaps less obvious effects such as increased child vaccination rates, lower

As a result of the importance of promoting work-life balance, and the mounting evidence that FMLA is doing a poor job of fulfilling this goal,²²⁹ U.S. lawmakers need to continue seeking a solution for FMLA reform. The Iceland Act is merely one example of a law that has great potential to succeed where FMLA fails.²³⁰ The broad applicability of the Iceland Act, its recognition of differing needs of mothers and fathers in its design, as well as the fact that it provides for ample paid family leave are all features that could remedy some of the problems associated with FMLA.²³¹ Beyond Iceland, a number of other industrialized nations have engineered innovative ways to resolve work-life strain among their employees.²³² Continued examination of other nations' laws that are successfully achieving this goal is warranted until the United States discovers a solution that is workable for American employees and businesses alike.²³³

rates of postpartum depression, increased duration of breastfeeding, lower divorce rates among parents, and better educational performance by children).

229. See Bhushan, *supra* note 2, at 687–89 (describing many of the pervasive deficiencies of FMLA).

230. See, e.g., Iceland Act, *supra* note 95, § IV, arts. 13, 18, 19 (detailing Icelandic maternity/paternity leave rights for parents); see also discussion *infra* Part VI (discussing the recommended changes to the FMLA based on the Iceland Act); *Hearing on S. 110-851*, *supra* note 24, at 61 (statement of Sen. Hillary Clinton) (“We should be strengthening the FMLA to cover more working families and provide paid sick leave, as well as enact other measures to give employees the flexibility they need to care for themselves, their children, and their loved ones.”).

231. See Iceland Act, *supra* note 95, arts. 13, 18, 19 (detailing parents' rights to payments from the Leave Fund and grants to a parent not active in the labor market or to a parent enrolled in full-time education programs).

232. See, e.g., Pelletier, *supra* note 2, at 560–71 (comparing the French, German, and Swedish models of family leave laws, each chosen because of its “thriving economy and generous maternity and paternal leave benefits,” to FMLA); see also White, *supra* note 3, at 205–20 (examining the family leave laws of Australia, Canada, New Zealand, and the United Kingdom as compared with the law of the United States).

233. See Kamerman & Gatenio, *supra* note 27 (“[P]olicies covering about a year of fully job-protected leave and targeted on parents with strong prior labor force attachment, with benefits covering close to full wage replacement, and with a guaranteed place for a child in good quality, affordable, out-of-home care appear to be achieving both support for ‘parental choice’ and support for child well-being. The United States stands apart from this growing international trend . . . [W]e continue to hold back from putting policies in place that will allow working mothers, and fathers, to succeed in both the workplace and at home.”).