

Home Alone: Is This the Best We Can Do? A Proposal to Amend Pending Parental Leave Legislation

Caldwell G. Collins*

INTRODUCTION

Gender inequality continues to pervade the American workplace. On average, female employees trail their male counterparts in all facets of the employment market, from salary level to job title.¹ While different factors contribute to the discrepancy, this Note focuses on one: many women take parental leave and, by and large, men do not.

Luckily, we no longer live in the days when the Supreme Court characterizes women as having a “natural and proper timidity and delicacy which . . . unfits [them] for many of the occupations of civil life.”² However, the male standpoint comprises the norm in the

* J.D. (2009), Washington University in St. Louis School of Law; B.A. (2005), Vanderbilt University. For their guidance and inspiration, I thank Karen Tokarz, Laura Rosenbury, Susan Appleton, and Jo Ellen Lewis. For their encouragement and support, I thank my husband, Bill Israel, my parents, Deaver and Rebecca Collins, and my brother Hiatt Collins. Finally, special thanks to the staff of the *Washington University Journal of Law & Policy*. This Note is dedicated to my mother: my role model, best friend, and the embodiment of female strength.

1. See Jean Kimmel & Catalina Amuedo-Dorantes, *The Effects of Family Leave on Wages, Employment, and the Family Wage Gap: Distributional Implications*, 15 WASH. U. J.L. & POL'Y 115 (2004); Press Release, Institute for Women's Policy Research, Gender Wage Gap Narrows as Incomes Rose in 2007 (Aug. 26, 2008), available at <http://www.iwpr.org/pdf/c350release08.pdf> (“‘Being female continues to jeopardize one’s economic security, and being a mother creates an additional economic disadvantage,’ noted Erica Williams, a Study Director at the Institute.”); see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) (“The most dramatic figure is that mothers who work full time earn only sixty cents for every dollar earned by full-time fathers. Single mothers are most severely affected, earning the lowest percentage of men’s average pay.”).

2. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (holding the privilege of practicing law does not apply to women).

workplace: the ideal worker is one who “works full time and overtime and takes little or no time off for childbearing or child rearing.”³ From a biological perspective, men and women cannot interchange; women bear the physical burdens of pregnancy and childbirth.⁴ By transforming that biological imperative into sole responsibility for care-work, and defining the ideal worker as one who does not take leave for pre- and post-natal care, the current parental leave patterns reinforce the stereotype that dictates women are primarily suited for the home and men suited for the office.⁵ Women must not only bear the burden of carrying and delivering children, but also must suffer job consequences.

Congress has identified this gender inequality in the workplace as a persistent problem, and has named the elimination of discrimination against those taking parental leave as a solution.⁶ However, federal legislation has been ineffective in enacting the social shift necessary to result in true gender equality in the workplace:⁷ women still are relegated to the compulsory domestic sphere,⁸ and men to the marketplace.⁹ In order to stimulate gender equality in both the

3. WILLIAMS, *supra* note 1, at 1.

4. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001). We are victims of what Katherine M. Franke calls “repronormativity”: the concept that society imposes on both genders, but particularly women, the irrefutable assumption that they will reproduce. *Id.* at 185.

5. “The ideology of domesticity held that men ‘naturally’ belong in the market because they are competitive and aggressive; women belong in the home because of their ‘natural’ focus on relationships, children, and an ethic of care.” WILLIAMS, *supra* note 1, at 1.

6. See *infra* Part II.A.

7. See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17 (2004) (arguing the Family and Medical Leave Act (“FMLA”) has granted women job security, but has been unsuccessful in de-gendering parental leave).

8. American society imposes on women the compulsory domestic sphere: the lack of choice regarding whether or not to participate in care-taking (and other domestic services) within the home. See WILLIAMS, *supra* note 1, at 1.

9. See *id.* (“Domesticity is a gender system comprising most centrally of both the particular organization of market work and family work that arose around 1780, and the gender norms that justify, sustain, and reproduce that organization.”). See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 108 (1989). Catharine MacKinnon argues that gender inequality develops from a system of gender construction that hinges on dominance through sex acts. “Sexuality . . . is a form of power. Gender, as socially constructed, embodies it, not the reverse.” *Id.* at 113. MacKinnon emphasizes that, through the social construction of male sexual dominance, men maintain a dominant position in a gender hierarchy. According to MacKinnon, women remain in a powerless position in their personal,

workplace and the home,¹⁰ parental leave—not just parental leave *legislation*—must be degendered, so that procreation results in neither negative employment ramifications for women nor decreased familial opportunities for men.¹¹

Current efforts to enact this change unfortunately reinforce the male perspective as the default for a worker, measuring women “according to our correspondence with man, [and judging] our equality . . . by our proximity to his measure.”¹² While maternity leave is a giant step in the right direction, women simply have carved a place for themselves in the male system. To ensure that both genders¹³ bear the responsibility for and reap the benefit of the births and post-natal care of their children, the ideal worker must be redefined so that the existence of care-work responsibilities is not inconsistent with success in the marketplace. To achieve this, parents must be compensated for their leave, and men must be intimately included in the push toward this result. Calling attention to the gender

social, economic, and political lives because of the dominant power exercised by men through heterosexual sex acts. *Id.* at 120. While male dominance expressed through sex acts largely influences gender construction, this Note seeks to emphasize the role of the compulsory domestic sphere in reinforcing the gender hierarchy in which males occupy a privileged position. MacKinnon’s focus on sexuality is not inconsistent with this argument; however, woman’s traditional role as the submissive in a heterosexual, coital relationship is not the *only* force behind traditional gender roles and women’s powerlessness.

10. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1047–48 (1994) (“Even when both parents are employed outside the home, women tend to carry the predominant responsibility for child care.”).

11. *See id.* at 1062 (asserting that the gender-neutral language of the FMLA will not be groundbreaking in discouraging discrimination in the workplace against women of childbearing age).

12. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 34 (1987).

13. This Note does not focus on the problems inherent in the family unit structure itself, outside gendered patterns of care. Nor does this Note assume a specific family composition (e.g., one female and one male parent, or a certain number of parents within a household). Instead, it concentrates on the current social norm—the family unit as the primary environment for care—and how to enact change for women whose careers are harmed by compulsory domesticity and for men who are forced to choose work over family. For an in-depth analysis of moving the focus away from the family and onto other sources of care (such as the state, or friends), see Katherine M. Franke, *Commentary, Taking Care*, 76 CHI.-KENT L. REV. 1541 (2001), and Laura A. Rosenbury, *Friends with Benefits?* 106 MICH. L. REV. 189 (2007). For an in-depth analysis of the gender discrimination inherent in heteronormativity, see Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 116 (2005).

inequality still present in the workplace and incorporating the needs, wants, and concerns of both genders will spark progress toward elimination of gendered patterns of care.

This Note examines why past efforts to rectify the gender disparity in the workplace have failed, and proposes changes to the most recently introduced federal legislation proposing paid parental leave. Part I examines the history of parental leave in America. Part II analyzes that history to assess its ineffectiveness in achieving the goal of gender equality in the workplace. Part III proposes a solution to the problem of gendered patterns of care as reinforced by our current system of parental leave.¹⁴ The proposal will show how legislation pending in the Senate¹⁵ suggesting amendment of the Family and Medical Leave Act can be transformed into an effective vehicle for change of the ideal worker norm, thereby increasing gender equality in the workplace.¹⁶

I. HISTORY

While a “domestic darling” mother and a “working stiff” father may have been the traditional formula,¹⁷ the American family structure has evolved.¹⁸ First, the demographics of the employment market have improved, with both genders significantly present in the workplace.¹⁹ Second, family composition has changed: single-parent

14. Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007).

15. See *infra* Part II.C.

16. With both genders taking advantage of parental leave, parents may have the opportunity to renegotiate patterns of care in the home.

17. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Id.

18. See Appleton, *supra* note 13, at 110 (“Over the last thirty years, American family law has changed dramatically, with the elimination of official gender roles emerging as perhaps the most significant and pervasive transformation.”).

19. Of the full-time wage and salary workers in the United States in 2007, approximately 43% were female. UNITED STATES BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES, available at <http://www.bls.gov/cps/cpsaat39.pdf>.

households, same-sex parent households, and other non-traditional familial arrangements have joined the conventional, nuclear family.²⁰ However, while the workforce and familial structure have progressed, gendered patterns of care lag behind, with a disproportionate amount of women simultaneously juggling careers and the majority of care-work.²¹ In the background of these demographic changes lies the evolution of the law surrounding pregnancy and childbirth and the career ramifications for women of the current parental leave system.

A. Federal Legislation

In 1908, the Supreme Court asserted that “[w]oman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence.”²² The strongly gendered language that marked early cases began to disappear as women slowly gained social equality, as well as presence in the U.S. workplace.²³ The Supreme Court first invalidated gender-based discrimination in 1971,²⁴ and in 2003 employed strong gender-neutral language concerning the “nature of the roles of men and women in our society.”²⁵ Meanwhile, lawmakers acted in kind, passing

20. See 29 U.S.C. § 2601(a)(1) (2000) (“[T]he number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly.”).

21. See generally Grossman, *supra* note 7, at 18 (acknowledging the FMLA “only accommodates women’s caretaking” and does not equalize the domestic burden between the genders).

22. *Muller v. Oregon*, 208 U.S. 412, 421 (1908). In *Muller*, the Supreme Court upheld an Oregon statute limiting a woman’s workday to ten hours due to the physical burdens related to bearing children and carrying on the species. *Id.* at 422–23. The Court found that “inherent difference[s] between the two sexes” justify legislation based on those differences. *Id.* at 423. “This is especially true when the burdens of motherhood are upon [women] . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.” *Id.* at 421. The Court held that “woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.” *Id.* at 420.

23. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

24. *Reed v. Reed*, 404 U.S. 71, 77 (1971) (“By providing dissimilar treatment for men and women who are . . . similarly situated, the challenged [statute] violates the Equal Protection Clause.”).

25. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003). Chief Justice Rehnquist wrote the opinion for the Supreme Court in gender-neutral terms, which were fairly

legislation designed to neutralize gender discrimination. This section will focus on two pieces of federal legislation that have shaped the law of parental leave in America: the Pregnancy Discrimination Act of 1978, and the Family and Medical Leave Act of 1993.

While the Supreme Court's evolving view of the genders later aided the advancement of federal parental leave legislation, a discriminatory decision in 1976 spurred Congress' action. In response to both a growing female workforce and the Court's 1976 declaration that pregnancy discrimination did *not* qualify as sex discrimination,²⁶ Congress attacked the pervasive problem of

uncharacteristic of the Chief Justice: "The FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Id.* at 728. Rehnquist cites the FMLA, 29 U.S.C. §§ 2601–2654 (2000), as a way to overcome discrimination against women. Rehnquist states that the Congressional findings accompanying the FMLA acknowledge that females bear the primary responsibility for caretaking. *Hibbs*, 538 U.S. at 729. Rehnquist calls attention to the Supreme Court's past treatment of women, which reflected the patriarchal structure of American society. "The history of many state laws limiting women's employment opportunities is chronicled in—and until relatively recently, was sanctioned by—this Court's own opinions." *Id.* at 729. "[Congressional findings] show a widening of the gender gap . . . [and] stereotype-based beliefs about the allocation of family duties remained firmly rooted . . ." *Id.* In upholding the FMLA in compliance with the Equal Protection Clause of the 14th Amendment, U.S. CONST. amend. XIV, § 1, Rehnquist employs a gender-neutral approach. However, the Chief Justice never questions the fact that responsibility for care-giving "falls on women." *Hibbs*, 538 U.S. at 729. Instead, Rehnquist complies with the Equal Protection Clause by stating that women cannot be discriminated against in the employment arena due to this unquestioned and unchanging maternal role. "By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." *Id.* at 737. But prior to this comment, Rehnquist observed that Congress found very few men *actually* take parental leave. *Id.* at 731. He describes a situation in which women ought not be discriminated against, but in which men have no incentive to stop it from happening. "State practices continue to reinforce the stereotype of women as caregivers, [and a mandated gender equality] policy would exclude far more women than men from the workplace." *Id.* at 738. At the end of the day, Rehnquist calls attention to the reality behind parental leave: parental leave is, in effect, maternity leave. For an in-depth analysis of Rehnquist's opinion in *Hibbs* as a departure from his earlier opinions, see Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006). For a suggestion of why the Chief Justice had a change of heart regarding gender-neutral parental leave, see Linda Greenhouse, *Ideas and Trends: Evolving Opinions; Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, available at <http://www.nytimes.com> (search "Linda Greenhouse 2003") ("[Rehnquist's] daughter, Janet, is a single mother who until recently held a high-pressure job and sometimes had child-care problems. Several times this term, the 78-year-old Chief Justice of the United States left work early to pick up his granddaughters from school.").

26. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976).

pregnancy discrimination in the workplace.²⁷ In 1978, Congress passed the Pregnancy Discrimination Act (“PDA”),²⁸ amending Title VII of the Civil Rights Act of 1964.²⁹ The PDA expanded the meaning of discrimination “because of sex” or “on the basis of sex” to include “on the basis of pregnancy, childbirth, or related medical conditions,” thereby prohibiting employers from discriminating against women due to pregnancy and its implications.³⁰ With the PDA, Congress took the first step toward acknowledging pregnancy as a state interest: a status in need of respect, instead of a woman’s private problem.³¹

Despite the passage of the PDA, women continued to occupy a disadvantaged position in the workplace due to the physical implications of childbirth and related gendered patterns of care-work.³² The work-life debate began to flourish as women gained the opportunity to advance their careers, but also remained primarily responsible for the home and family.³³ Congress acknowledged women’s disadvantage in the workplace due to employers’ reluctance to hire mothers³⁴ who had sole responsibility for childcare,³⁵ and sought to remedy the disparity.³⁶

27. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 167 (1992).

28. 42 U.S.C. § 2000e(k) (2000).

29. *Id.* § 2000e. In the Civil Rights Act of 1964, Congress included a prohibition against sex discrimination, known in common name as “Title VII.” Title VII makes it unlawful for an employer to refuse to hire, discharge, or discriminate against an individual on the basis of “race, color, religion, sex, or national origin.” *Id.* § 2000e-2(a)(1).

30. *Id.* § 2000e(k).

31. See Malin, *supra* note 10, at 1047 (“Questions involving workplace accommodation of family responsibilities are ‘women’s issues.’ This characterization of work-family conflicts is understandable. Following childbirth, women usually take parental leave and men usually do not.”).

32. See generally WILLIAMS, *supra* note 1, at 1 (“[The ideal-worker norm] defines the good [jobs]: full-time blue-collar jobs in the working-class context, and high-level executive and professional jobs for the middle class and above. When work is structured in this way, caregivers often cannot perform as ideal workers.”).

33. See Appleton, *supra* note 13, at 112 (“Both [stereotypes about women’s domestic roles and stereotypes presuming a lack of domestic responsibilities for men] produce harmful workplace consequences: diminished chances for success in employment for women and rare opportunities for family leaves for men.”).

34. See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued

In 1993, Congress passed the Family and Medical Leave Act (“FMLA”),³⁷ which required employers to provide twelve weeks of unpaid leave to qualifying employees.³⁸ The gender-neutral FMLA grants employees leave due to (1) the birth, adoption, or foster care of a child; (2) the need to care for a seriously ill family member; and (3) the need to tend to one’s own serious health condition.³⁹ Congress’s findings in the FMLA included that American women bear the primary responsibility for “family caretaking,” which directly affects

to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id.

35. *Cf.* MACKINNON, *supra* note 9, at 109.

36. 29 U.S.C. § 2601(a)(3) (2000) (Congress found that “the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.”).

The maternal role has had a significant negative impact on the development of women’s careers. Whereas the careers of single women without children tend to follow the male pattern, women with children often interrupt their careers, begin them later, or otherwise find that child-care responsibilities limit their career involvements. Recognition that the absence of adequate parental leave policies has inhibited women’s roles in the workplace was a major reason for the enactment of the Family & Medical Leave Act.

Malin, *supra* note 10, at 1048.

37. 29 U.S.C. §§ 2601–2654 (2000) (sections containing the FMLA).

38. *Id.* § 2612 (a)(1). The FMLA applies to those employees who have been employed for at least 12 months with an employer and have performed 1,250 hours of service during that time. *Id.* § 2611 (2)(A). The FMLA excludes federal officers, employees of an employer covered “under subchapter V of chapter 63 of Title 5,” or “any employee of an employer who is employed at a worksite” with fewer than fifty employees within seventy-five miles of the worksite. *Id.* § 2611 (2)(B).

39. *Id.* § 2612(a)(1). The language of the FMLA is as follows:

[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Id.

their careers.⁴⁰ Congress also found that the then-current employment standards discriminated against women by defining the ideal worker as one who did not take parental leave.⁴¹ In stating its purposes for passage of the FMLA,⁴² Congress asserted gender equality as its motivation: it sought to minimize “the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) . . . [and] to promote the goal of equal employment opportunity for women and men.”⁴³

While the FMLA has enjoyed some success,⁴⁴ it has not altered effectively the male-dominated workplace; women remain the primary takers of parental leave.⁴⁵ The United States Department of Labor’s 2000 survey indicated that women who are married or have children in the home comprise the majority of employees utilizing the FMLA.⁴⁶ The survey proved that the responsibility *and consequences* of procreation still fall primarily on women,⁴⁷ and thereby illustrated that the FMLA maintains a workplace standard predominantly applied to one gender.⁴⁸ In addition, the survey observed that the financial disincentives associated with taking unpaid leave were the

40. *Id.* § 2601(a)(5). The findings also stated that “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing.” *Id.* § 2601(a)(2).

41. *Id.* § 2601(a)(6). Congress found that “employment standards that apply to one gender” have the marked potential for discrimination. *Id.*

42. For an argument that legislation aimed at enacting gender equality and gender neutrality in our society will not be effective if the goals of that legislation are poorly articulated, see Mary Anne Case, Commentary, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001). Case stresses the importance of setting goals prior to enacting societal change and asking, *What is this legislation supposed to accomplish?* *Id.* at 1772.

43. 29 U.S.C. § 2601(b)(4)-(5).

44. The United States Department of Labor estimates that since 1993, thirty-five million employees have qualified for and taken advantage of FMLA leave. GEORGETOWN UNIV. LAW CTR., WORKPLACE FLEXIBILITY 2010, http://www.law.georgetown.edu/workplaceflexibility2010/law/fmlaFiles/fmla_DataPoints.pdf.

45. See Grossman, *supra* note 7, at 32–35.

46. GEORGETOWN UNIV. LAW CTR., *supra* note 44.

47. In the United States Census Bureau’s 2006 Annual Social and Economic Supplement, the Bureau reported that of the amount of workers who took substantial time off of work to care for family or a spouse, the overwhelming majority was female. UNITED STATES CENSUS BUREAU, CURRENT POPULATION SURVEY, 2006 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, available at <http://www.census.gov/aprd/techdoc/cps/cpsmar06.pdf>.

48. See *supra* note 41; see also 29 U.S.C. § 2601 (a)(6).

prominent reason workers did not take advantage of the legislation.⁴⁹ A growing number of individuals also felt their job security would be jeopardized if they took leave.⁵⁰ The PDA and FMLA have been the first steps toward gender equality in the workplace, but these statistics show that they are by no means the end of the road.

B. State Legislation

While federal parental leave remains unpaid under the FMLA,⁵¹ states have begun to acknowledge the need to compensate parents for their leave. In 2002, California became the first state to provide paid parental leave by expanding its State Disability Insurance program (“SDI”)⁵² to include parental leave.⁵³ The SDI added “pregnancy, childbirth, or related medical condition” to the list of disabilities qualifying an employee for paid leave.⁵⁴ The SDI provides for a maximum of six weeks of partial pay each year for the employee to take leave to either care for a newborn,⁵⁵ adoptive, or foster baby, or to care for a seriously ill family member or domestic partner.⁵⁶

49. GEORGETOWN UNIV. LAW CTR., *supra* note 44.

50. The 2000 survey showed an increased fear of job loss from the same 1995 survey. *Id.*

51. 2 U.S.C. § 2612 (c) (2000). Private employers may choose to pay employees for their qualifying leave. However, the FMLA only requires employers to guarantee twelve weeks of unpaid leave per year. *Id.*

52. CAL. UNEMP. INS. CODE § 2626 (West 2006).

53. In order to be eligible for the Paid Family Leave Program, one must be eligible for and enrolled in California’s State Disability Insurance program (“SDI”). *Id.* The SDI allows Californians the opportunity to take paid leave from work for qualifying disabilities. *See infra* note 54.

54. CAL. UNEMP. INS. CODE § 2626:

(a) An individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her customary work.

(b) For purposes of this section, “disability” or “disabled” includes: (1) Illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition.

Id.

55. New mothers may qualify for SDI based both on pregnancy-related issues and for paid family leave benefits. When taking leave for a pregnancy-related issue, they receive an additional six weeks paid leave after the birth of the baby in order to bond with it. The Paid Family Leave Collaborative, Ten Facts About the Law, <http://www.paidfamilyleave.org/law.html> (last visited Dec. 14, 2008).

56. CAL. UNEMP. INS. CODE § 2626. The State of California Employment Development Department administers the Paid Family Leave Program. State of California Employment

Since July 1, 2004, an estimated thirteen million workers in California who are covered by the SDI have also been covered by the Paid Family Leave Program.⁵⁷ Since amendment of the SDI, New Jersey and Washington have passed their own paid parental leave statutes,⁵⁸ and other states have begun the process as well.⁵⁹

C. Proposed Legislation

As the states begin to pass paid parental leave legislation, members of Congress have noted that the FMLA creates financial disincentives to taking leave by requiring parents to forgo up to three months of income. These disincentives often prevent qualifying employees from availing themselves of FMLA leave.⁶⁰

In 2007, Senator Christopher Dodd proposed Senate Bill 1681.⁶¹ Entitled the Family Leave Insurance Act of 2007 (“FLIA”), it would establish a federal insurance fund to provide eight weeks of paid family and medical leave to employees for the conditions permitted by the FMLA.⁶² FLIA establishes ways for those employers not covered by the FMLA also to take advantage of FLIA by allowing them to participate voluntarily.⁶³

Development Department, Paid Family Leave, http://www.edd/ca.gov/Disability/Paid_Family_Leave.htm (last visited Dec. 14, 2008).

57. State of California Employment Development Department, *supra* note 56.

58. INSTITUTE FOR WOMEN’S POLICY RESEARCH, MATERNITY LEAVE IN THE UNITED STATES 3 (2007), <http://www.iwpr.org/pdf/parentalleaveA131.pdf>.

59. The Paid Family Leave Collaborative, Paid Leave Activity in Other States, <http://www.paidfamilyleave.org/otherstates.html> (last visited Dec. 14, 2008). In addition to California, New Jersey, and Washington, other states have begun initiatives to increase the ability of both genders to be available for care-work. In Arizona, a bill that would establish a family leave insurance program has been referred to three Senate committees. *Id.* In Colorado, a grass roots effort seeks to provide parents time off to attend child school activities and to guarantee sick days to workers. *Id.* Pennsylvania is also considering a paid family leave insurance program. *Id.* For more examples of proposed paid parental leave statutes and related legislation, see *id.*

60. See GEORGETOWN UNIV. LAW CTR., *supra* note 44.

61. Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007). The bill was also sponsored originally by Senators Edward Kennedy, Patty Murray, Richard Durbin, Sheldon Whitehouse, and Ted Stevens. GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1681> (last visited Dec. 14, 2008).

62. Family Leave Insurance Act of 2007, S.1681, 110th Cong. § 103 (2007).

63. Employers included are (1) “employers” as defined by the FMLA, (2) “a small employer that has elected to participate in the Program,” (3) “a self-employed individual who

FLIA determines the amount of paid leave allowed based on annual income. It grants employees of covered employers with “an annual income of not more than \$20,000” full salary compensation while on leave.⁶⁴ From that point, the percentage of pay decreases, ending with “an employee with an annual income of more than \$97,000” receiving 40% of “the daily earnings of an employee with an annual income of \$97,000.”⁶⁵

Senator Dodd introduced the bill as a solution to the aforementioned problems with the FMLA.⁶⁶ The findings prior to the language of FLIA acknowledge that, “[d]emographic changes over the past few decades have altered the face and needs of the workforce. It is now common for both parents to be in the workforce and for men and women to also serve as the primary caregivers for elderly spouses or parents.”⁶⁷ In addition, the findings acknowledge the need for paid leave due to the large number of women in the workforce with dependent children.⁶⁸ FLIA has been introduced in the Senate and referred to the Committee on Finance.⁶⁹

D. Grass Roots Efforts

While Congress has attempted to minimize gender inequality in the workplace, the American people have initiated grass roots efforts to address gender discrimination as reinforced by the parental leave system. This section will focus on one prominent effort based in California: MomsRising.⁷⁰

In May 2006, Californians established MomsRising to address the problems of the work-life balance faced by women with careers and

has elected to so participate,” and (4) “voluntary plan employers” for which the “Secretary has approved a voluntary plan.” *Id.* § 101(2).

64. *Id.* § 103(c)(1)(A).

65. *Id.* § 103(c)(1)(E).

66. *See supra* Part II.A.

67. S.1681, 110th Cong. § 2(6).

68. *Id.* § 2. The findings state that, according to the Bureau of the Census and the Bureau of Labor Statistics, 56% of women with children under age one are in the labor force, while 71% of all women with dependent children under age eighteen are in the labor force. *Id.* § 2(7). The bill publishes no corresponding findings about fathers.

69. GovTrack, *supra* note 61.

70. MomsRising, <http://www.momsrising.org> (last visited Dec. 14, 2008).

children.⁷¹ MomsRising seeks to bring legislation⁷² dealing with “important motherhood and family issues”⁷³ to the forefront of American politics and law.⁷⁴ The organization supports effective paid parental leave programs and provides information, support, and model legislation to those committed to the passage of legislation in their own states.⁷⁵ The effort has enjoyed success, especially after California’s passage of the 2003 SDI amendment.⁷⁶ With over 150,000 citizen members, MomsRising utilizes American citizens to attack the “bias against mothers” in the workplace by expanding parental leave policies.⁷⁷ MomsRising has gained recognition from political powerhouses, such as President Barack Obama,⁷⁸ and remains a strong voice for change in gendered stereotypes.⁷⁹

E. Scholarly Theories

While legislation has shaped the legal aspect of parental leave, the societal pressures and stigma against paternal leave have influenced the reasons men are less likely to take advantage of their allowed leave. Martin H. Malin highlights potential reasons men do not take parental leave: employer and co-worker hostility, the male need to be the main breadwinner, and the idea of women as more naturally

71. MomsRising, About MomsRising, <http://www.momsrising.org/aboutmomsrising> (last visited Dec. 14, 2008). “MomsRising is working to bring together millions of people who share a common concern about the need to build a more family-friendly America.” *Id.*

72. The primary focuses of MomRising are: paid family leave; flexible work options; after-school programs; healthcare for all kids; excellent childcare; realistic, fair wages; and paid sick days for all. *Id.*

73. *Id.*

74. *Id.*

75. While MomsRising has many goals involving gender equality, one of the primary focuses is paid parental leave. Along with the piece of model state legislation, the organization provides guidelines for other efforts to use in drafting new legislation. *Id.*

76. *See supra* Part II.B.

77. MomsRising, *supra* note 71.

78. “Despite all the rhetoric about being family-friendly, we have structured a society that is decidedly unfriendly. . . . What’s missing now is a movement. What’s missing now is an organization. That’s why MomsRising is so important.” Eliza Strickland, *Mother’s Work*, SAN FRANCISCO WEEKLY, Dec. 12, 2006, *available at* <http://www.sfweekly.com/2006-12-06/news/mother-s-work/> (quoting then-Senator Barack Obama on September 28, 2006).

79. For more information on MomsRising’s ongoing campaigns fighting gendered stereotypes, see MomsRising, National Campaigns, <http://www.momsrising.org/campaigns> (last visited Dec. 14, 2008).

suited to parenthood.⁸⁰ To address the issue, feminist scholars offer proposals designed to change the gendered landscape of the American workplace, thereby allowing fathers to take parental leave. This section considers two recent theories of parental leave change.

Ariel Meysam Ayanna proposes radical parental leave legislation that focuses on paying fathers above their current salaries to take leave.⁸¹ In order to deconstruct the gender imbalance, Ayanna argues for “creat[ing] powerful incentives . . . by appealing not to men’s consciences or family values, but rather to their pocketbooks.”⁸² Ayanna argues that parents taking leave should be paid above their actual salaries.⁸³ She explains that compensation at current salary level reinforces the gender gap, because men will always be compensated above women due to the fact that men, on average, out-earn their female counterparts.⁸⁴ Ayanna concludes that, unless men are paid “above and beyond” their normal salaries, they will not enter the home.⁸⁵

Kelly M. Zigaitis points to the substantive inequality that still exists between female and male genders in the United States, and proposes shifting the focus “from an evaluation of men and women

80. Malin, *supra* note 10, at 1053–54, 1077.

81. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293 (2007); see also Case, *supra* note 42, at 1754. Mary Ann Case posits three ways to effect a change in gendered patterns of care: shift responsibility to the fathers, shift responsibility to the employers, or shift it to the state *Id.* at 1754–57. After focusing on the problems with increased responsibility placed on employers and the state, Case asserts that the solution to the burden of care is with fathers, and stringently argues against putting the burdens of childcare on those individuals who do not have children. *Id.* Case highlights the absence of fathers in the arena of caretaking and their stubborn resistance to enter it; she expresses frustration with the tendency of theorists and feminists to let fathers duck out of their parental responsibilities. “[W]e should not stop looking at the possibility of redistribution of responsibility towards fathers simply because fathers offer resistance; resistance from men is a large part of the reason women got stuck with a disproportionate burden of care in the first place.” *Id.* at 1756. Case correctly pinpoints fathers as the solution to the burden of care debate. See generally Franke, *supra* note 13 (arguing that the responsibility of family care should be shifted outside the family unit in order to spread both the burden of care and the wealth of its enjoyment). This Note argues that the gendered patterns of care-work inherent in our society’s status quo may be addressed by making care an effort of each parent within the home, regardless of gender.

82. Ayanna, *supra* note 81, at 293.

83. *Id.*

84. *Id.* at 301–03.

85. *Id.* at 307.

as separate parents” to an evaluation of the success of the family unit as a whole.⁸⁶ She proposes changes in the employment structure, such as the addition of paid leave and a shortened workweek.⁸⁷ Zigaitis focuses on necessary changes for women, and does not discuss the practical elimination of the social stigma behind paternal leave.⁸⁸

II. ANALYSIS

The FMLA reflects Congress’ desire to remedy the visible gender equality problem in the American workplace.⁸⁹ It asserts that women must not be discriminated against when balancing childbearing and careers.⁹⁰ The FMLA’s ends are legitimate. However, the means have yet to achieve them, because current parental leave is still an employment standard applied to one gender.⁹¹ The FMLA reinforces parental leave as *maternity* leave; its unpaid structure cannot be effective at minimizing the marked potential for discrimination⁹² until women’s earning power reaches the level of men’s.⁹³ The gender-

86. Kelly M. Zigaitis, *The Past, Present and Future of the Working Woman: Solutions for Substantive Inequality in the Workplace*, 81 WASH. U. L.Q. 1147, 1168 (2003). Zigaitis correctly identifies the problem of gendered patterns of care in our society. She calls for a social change, but focusing on the success of the family does not necessitate men taking more responsibility for childrearing. *Id.* at 1168–69. The change must come from incorporating male concerns into the effort so that both genders have attachment to the legislation affording them the incentives they desire and will accept. In addition, incentives for their children that will only apply if they take leave will help get men out of work and into the home.

87. *Id.* at 1169–71.

88. Both Ayanna and Zigaitis address the success of paid parental leave structures in countries such as Denmark and Sweden. Ayanna, *supra* note 81, at 304–06; Zigaitis, *supra* note 86, at 1157–59. While their points are well-founded, and these countries are excellent models to consider when discussing possible parental leave policies, the author has deliberately chosen not to address foreign parental leave. This Note focuses solely on the United States’ history of parental leave, and targets the problems currently standing in the way of our own social change, in hopes of proposing a feasible solution to the remaining American gender gap.

89. The FMLA seeks “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity.” 29 U.S.C. § 2601(b)(1) (2000).

90. The FMLA seeks “to promote the goal of equal employment opportunity for women and men.” *Id.* § 2601(b)(5).

91. *See id.* § 2601 (a)(6); Grossman, *supra* note 7, at 18, 33; *supra* note 41.

92. 29 U.S.C. § 2601(a)(6).

93. Statistically, women earn less than their male counterparts. *See* UNITED STATES BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES, *available at* <http://www.bls.gov/cps/cpsaat39.pdf>. In two-parent households, it makes good financial sense for the party with the smaller salary to take parental leave. Statistically, that party will also be the one

neutral language prohibits discrimination in the workplace, but does nothing to disrupt the social norm of parental leave as maternity leave.⁹⁴ Congress maintains men as the ultimate market actors by asserting the need for a change in women's work conditions, but not citing a need for a parallel change in men's conditions. This disadvantages both genders by relegating them either to the home or to the workplace.⁹⁵

Grass roots efforts and scholarly proposals are essential to the evolution of gender norm change and the advancement of gender-neutral parental leave. This Note seeks to identify why the current male-defined system is constantly reinforced, especially in a time when such powerful activists—such as MomsRising, Ayanna, and Zigaitis—attempt to reform the status quo. In calling attention to the remaining problem, this Note intends not to minimize the importance of such efforts, but to target the reasons they have not yet been successful. MomsRising labels itself as gendered from the outset: the organization's name and focus reinforce change for *mothers*, not for parents.⁹⁶ How can we achieve gender equality if efforts do not incorporate the concerns and viewpoints of both genders?

Ayanna's predicament is her concentration on "above and beyond" financial incentives:⁹⁷ her proposal has three main shortcomings. First, it reinforces man as the primary market actor by insinuating financial gain as his sole concern and tailoring her proposal to his needs.⁹⁸ She does not give proper weight to man's desire to be active in the home. Second, Ayanna's proposal reinforces repronormativity⁹⁹ by elevating parental leave pay above other kinds

bearing the child. *See generally id.* The financial disincentive for both parents taking leave combined with the biological realities of childbirth lead to a scenario in which it is rarely financially prudent for a man to take parental leave when finances are a concern. *See Kimmel & Amuedo-Dorates, supra* note 1, at 120–24.

94. *See Malin, supra* note 10, at 1052 ("[A]s long as parental leave remains de facto maternal leave, work-family conflicts will remain a significant barrier to women's employment and a significant source of discrimination against women.").

95. *See MACKINNON, supra* note 12; WILLIAMS, *supra* note 1.

96. MomsRising, *supra* note 70; *see supra* Part I.D.

97. Ayanna, *supra* note 81.

98. *See WILLIAMS, supra* note 1, at 1–3.

99. This proposal is repronormative; it elevates parental leave above other types of leave, and discriminates against those who do not have children. *See Franke, supra* note 4.

of leave.¹⁰⁰ Finally, Ayanna proposes paying workers more to be away from work than to contribute at work; this is not a feasible solution in the United States's market-driven economy. It ignores the concerns of employers, which hinders the effectiveness of its extremely legitimate goal.

Zigaitis focuses on what must change for women,¹⁰¹ without addressing the necessary, corresponding changes for men.¹⁰² She recognizes that society gives neither gender a chance to follow desires,¹⁰³ but phrases women's compulsory domesticity in terms of *choice*. The choice she reinforces, however, is men's: "[W]omen's decision whether or not to have children will be on par with the decisions men make."¹⁰⁴ In addition, Zigaitis undermines her goal by proposing a focus on the entire family instead of the individual parents, which fails to note the importance of a father's individual responsibility for care-work. Given our social climate, Zigaitis' proposal risks reinforcing the male ideal worker norm by giving families the opportunity to be "successful" under the current, male-dominated market system.

FLIA steps in the right direction: it offers essential compensation for parental leave and allows private employers the opportunity to

100. Given our current system, political landscape, and workplace dynamics, it is virtually impossible (and counter-intuitive) to imagine a system where employers, not to mention the government, will compensate workers more for taking leave than staying at work. *But see* Ayanna, *supra* note 81.

101. For a poignant example of a gendered push toward a gender-neutral result in another area of family law, see Tonya L. Brito, *Spousal Support Takes On the Mommy Track: Why the ALI Proposal Is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL'Y 151 (2001). Brito argues that an American Law Institute proposal provides important new compensatory benefits to working spouses who have assumed the primary caretaking role in the household. *Id.* at 151–52. Brito examines the ALI proposal as an important step toward compensating divorced women for the significant drop in their standard of living. *Id.* at 152–55. She argues that the ALI finally has acknowledged that women have an important place in the workforce and that "caretaking is the responsibility of both parents." *Id.* at 151–52. In calling attention to legislation that does benefit women, Brito highlights the compulsory care-giving role to which women are often relegated. *Id.*

102. Real change for women necessarily demands a corresponding change for men if we are to disrupt the current market actor ideal (that the ideal worker does not have childcare responsibilities). *See* WILLIAMS, *supra* note 1, at 1–3.

103. "[S]ociety measures women in terms of nurturing capacity and men in terms of earning capacity." Zigaitis, *supra* note 86, at 1168.

104. *Id.* at 1171.

participate.¹⁰⁵ However, the graduated compensation structure¹⁰⁶ presents a financial disincentive for more than one parent to take time off of work, because it requires a pay cut at the exact moment parents expand their families.¹⁰⁷ In two-parent households with at least one female parent, this reinforces the need to have the spouse with the lower salary, historically a woman, take leave, even when that woman is not physically bearing a child (i.e., in the case of adoption).¹⁰⁸ Like the FMLA, FLIA helps guarantee job security for women taking parental leave. However, FLIA reinforces the male ideal worker norm. Until those who qualify for leave are compensated at their existing salary levels, there is little hope that the new legislation will be truly effective in deconstructing gender roles and minimizing workplace consequences for females taking leave.

III. PROPOSAL

Gender equality in the workplace and the home depend on the possibility of de-gendered parental leave. In order to encourage parents to renegotiate patterns of care at the beginning of a child's life, the idea of women as the only gender naturally suited for parenthood must be deconstructed.¹⁰⁹ Instead of focusing on what could happen in a hypothetical world where money, politics, and workplace dynamics are not relevant factors, the current U.S.

105. *See supra* Part I.C.

106. The higher an employee's salary, the smaller the percentage of her pay that employee is qualified to receive. Family Leave Insurance Act of 2007, S. 1681, 110th Cong. § 103(c) (2007).

107. *See Malin, supra* note 10, at 1073 (asserting that unpaid parental leave policies pose significant barriers to fathers taking leave).

108. *See UNITED STATES BUREAU OF LABOR STATISTICS, supra* note 93 and accompanying text.

109. *See generally* Appleton, *supra* note 13, at 112:

[T]o the extent that the 'separate spheres doctrine' once regarded the family as the domestic realm assigned to women while the workplace and professional life comprised the public realm that belonged to men, we can now see home and employment as complementary but interlocking spaces. Changing the rules and norms in one affects the other

Id.

workplace structure must be altered¹¹⁰ so that the ideal worker norm can evolve.

FLIA promises the most of any recent legislation to provide real incentives for all parents to take leave.¹¹¹ However, the graduated payment structure still hinders its success.¹¹² This Note proposes four ways to transform FLIA into an effective vehicle for gender equality in the workplace and the home.¹¹³

First, FLIA will be more effective if it grants qualifying employees their then-current salaries during leave, and provides tax cuts to private businesses that participate. The financial disincentives that spawned FLIA will only dissipate if being home in the early stages of a child's life does not disadvantage employees. Even fiscal conservatives might support FLIA if it provided an incentive for businesses to participate. By providing a tax cut to those businesses, not only will they be more likely to opt in to FLIA, but employees will be attracted by knowing the advantages that come from working for a FLIA employer. Businesses also are more likely to participate if they understand the benefits of this leave: gender equality in the workplace, heightened employee loyalty and satisfaction, better-fulfilled parents, and an improvement in the care of children. In sum, businesses will be more inclined to take part in FLIA if they see this leave as an investment in a more efficient workplace.

Second, Congress can be a powerful public forum for explaining the fact that men are not taking leave and for elaborating the findings within FLIA.¹¹⁴ Congress can acknowledge not only the current status of women in the home, but also the stigmas keeping men from taking leave. FLIA can target existing social reasons behind lack of paternal

110. Again, this Note does not discount the effectiveness of paid parental leave programs in other countries. However, this Note is limited to an analysis of our local structure. *See supra* note 88.

111. *See supra* Part I.C.

112. Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007).

113. This proposal assumes no particular family composition. *See supra* note 13. By rewarding parents in a single household when *all* parents (i.e., all legal guardians, even if only one) take parental leave, this proposal attempts not to discriminate against single-parent households.

114. The findings associated with the FMLA were so powerful that even the conservative Chief Justice Rehnquist adopted their statement of the need for gender equality. *See supra* note 35.

leave: employer and co-worker hostility, peer pressure, and the concept that women are more naturally suited to parenthood, regardless of their status as birth-givers.¹¹⁵ By calling attention to the need for both genders to take parental leave,¹¹⁶ taking time off for post-natal care will become just another non-gendered reason why both genders take advantage of leave under FLIA.¹¹⁷ Publicly acknowledging every facet of compulsory domesticity and the compulsory role of men in the workplace begins to deconstruct those roles and alter the ideal worker norm so that it is not inconsistent with care-work.

Third, FLIA's lobby can better incorporate the male perspective, and establish grass roots efforts¹¹⁸ to recruit men into the passage of FLIA by not only emphasizing a woman's value in the workplace, but also stressing a man's value in the family unit.¹¹⁹ Political figures like President Barack Obama¹²⁰ can play an important role in engaging the male perspective, side-by-side with the female perspective, to give each gender ownership of parental leave.¹²¹

115. See Malin, *supra* note 10, at 1066, 1077. "Significant paternal use of parental leave removes a key barrier to fathers' involvement in child care resulting from the mothers' greater contact with the children when fathers do not take leave: differences in the actual and perceived levels of competence between fathers and mothers." *Id.* at 1059.

116. Instead of focusing solely on why mothers take maternity leave, and preventing discrimination against them for that reason, focus must shift to why fathers are *not* taking paternity leave. For the health of all families, regardless of whether they have one or two parents, same-sex parents or different-sex parents, each gender must take parental leave in order to remove the discrimination for all genders.

117. See 29 U.S.C. § 2612 (a)(1) (2000).

118. MomsRising is a remarkable example of a successful grass roots effort. Unfortunately, the effort remains gendered, focusing on the needs of women. See MomsRising, *supra* note 70. Instead, grass roots efforts must acknowledge the concerns of both genders, and take into account the fact that choice is constrained, regardless of gender. Both females and males are funneled into separate spheres: the home and the workplace, respectively. To be effective, the lobby must recruit men, real employees—fathers—and ask them why they do not take parental leave. Gender-neutral efforts that are *like* MomsRising must actually appeal to the everyday needs and concerns of both genders.

119. See Malin, *supra* note 10, at 1059.

120. "Barack Obama and Joe Biden are campaigning on their belief that men should be, can be and want to be at home for their children." Gloria Steinem, *Palin: Wrong Woman, Wrong Message*, L.A. TIMES, Sept. 4, 2008, available at <http://www.latimes.com> (search "wrong woman wrong message").

121. The lobby must get men out in public talking about what would make them take parental leave. Society needs to stigmatize *not* being there for your child's birth, adoption, or

Gender-neutral force behind the legislation might well lead to a gender-neutral effect.

Finally, FLIA will better accomplish gender-neutral leave-taking if it offers tax credit incentives for those families in which all parents avail themselves of parental leave, without elevating parents to special class status. A fine line exists between reinforcing the repronormative structure and providing effective, but not overly zealous, incentives for both genders to avail themselves of parental leave.¹²² The problem with creating extra incentives for parents when non-parents do not receive them is that those who choose to stay at work essentially are punished.¹²³ The solution to this problem is an incentive that attracts only parents: tax credits earmarked for future childcare costs.¹²⁴ The tax credits should be structured in a way so that only if each legal parent or guardian in a *family* takes parental leave (even if a single parent), the *child* would receive the benefit of this tax credit.¹²⁵ Through these credits, the federal government will

foster care. Change will come from turning the tables on the societal implications of parental leave, not focusing solely on a man's pocketbook. *But see Ayanna, supra* note 81.

122. *But see id., supra* note 81.

123. A moment of caution: in fighting to give both genders the ability to take parental leave, thereby benefiting all who have children regardless of family construction, we remove the focus from those who do not have children. "[S]o long as [women] are potentially mothers, [they] are at risk for discrimination; so long as [women] are not actually mothers, [they] get no offsetting compensation from the increased childcare benefits." Case, *supra* note 42, at 1759. Incentivizing parental leave risks creating not only animosity from those who do not take parental leave, but also risks employers not wanting to hire parents at all (or going back to favoring men because of the lack of physical burden). The reason the FMLA and California's SDI have been successful is that parental leave is only one of the reasons employees may qualify. *See supra* Part I.A and Part I.B. FLIA is the same: parental leave is compensated, but so is leave to care for sick family members, or to care for one's own physical disability or illness. The key to success is ensuring not only that mothers are not discriminated against, but also that parents are not elevated above non-parents. *But see Ayanna, supra* note 81 (Ayanna does not propose paying all persons taking leave above and beyond their salaries, but rather focuses the efforts on parents). While gender equality in the workplace is an important concern, it is doubtful that justification alone will pass political muster when it is not treating non-parents equally.

124. *See* Case, *supra* note 42, at 1765–67. Case argues that being a parent should not "be simply a ticket to a benefit. . . . [T]hose few benefits that are limited to persons with children should have monitoring designed to ensure that the benefit actually goes to the child." *Id.* at 1765–66.

125. It is important not to discriminate against single parents. This program should be enforced in a way that gives tax credits when each parent in a household (regardless of number and gender) takes parental leave.

be furthering its vested interest in the future of America's children,¹²⁶ while offering both genders an attractive incentive to take parental leave.¹²⁷

CONCLUSION

While females are now a strong presence in the workplace, women's biological role in procreation continues to disadvantage both our ability to break the glass ceiling and men's ability to fully participate in child rearing and other care-work in the home. "[W]omen can't be equal outside the home until men are equal in it."¹²⁸

In order to deconstruct gender inequality in the workplace and the home, the interests of both genders must be incorporated into the push for paid parental leave. The benefits will flow to all forms of families if gender is not the pertinent factor in the determination of care roles.¹²⁹ This will result in necessary change for both genders: This will result in a bolstered view of women's value in the workplace as well as men's value in the family unit. The result will be a transformed ideal worker who may have legitimate care-work responsibilities in addition to successful employment.

To ensure effective parental leave legislation that is parental and not maternal, the current financial disincentives to taking leave must be eliminated. With the changes proposed in this Note, FLIA has the potential to disrupt gender inequality in the workplace. With each gender present in both the workplace *and* the family, we will move closer to the deconstruction of gendered patterns of care.

126. *But see* Ayanna, *supra* note 81. Unlike Ayanna, this Note proposes benefits that flow to children, instead of into a man's pocket.

127. By attaching these benefits to the child instead of the parents, this proposal hopefully avoids Equal Protection and reprobormative concerns regarding non-parents.

128. Steinem, *supra* note 120.

129. *Cf.* Franke, *supra* note 13, at 1545. "[N]ew opportunities for political identity and for agency cannot be analyzed apart from how power is organized, since new political identities are most certainly the 'effects of rule'."