TAKING STOCK OF THE FAMILY AND MEDICAL LEAVE ACT AFTER THIRTY YEARS: LESSONS FROM INTERSECTIONAL FEMINISM

Pammela S. Quinn* & Sarah E.S. Stone**

Abstract

Since 1993, Americans have relied on the Family and Medical Leave Act ("FMLA") as their primary source of entitlement to parental and caretaking leave. The FMLA was designed to combat workplace gender discrimination stemming from women's disproportionate need to take time off from work to recover after giving birth and to care for family members. Through this legislation, Congress took important first steps toward leveling the playing field for all American workers needing medical and/or caretaking leave.

In its design and implementation of the FMLA, however, Congress focused on gender in isolation from other characteristics that overlap and perpetuate gender discrimination, namely socioeconomic status, race and ethnicity, and age. Applying an intersectional feminist lens to the statute shows that these multiple characteristics converge and compound gender discrimination. Intersectional feminism helps to illuminate why millions of the most vulnerable Americans remain in some cases underserved, and in others unserved by the FMLA's restrictive leave provisions, amplifying the FMLA's inefficiencies as a remedial workplace leave statute.

While calls for FMLA amendments or overhauls have frequently focused on significant modifications, such as guaranteed paid leave, lessons from intersectional feminism demonstrate that smaller changes may still have a powerful impact. Carefully tailored, targeted amendments could make a big difference for those who are most in need of protection. Moreover, understanding the intersectional implications of various proposals may help policymakers from both parties understand how to evaluate which parts of their proposed amendments are the most important to achieve their stated (or unstated) goals.

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* Associate Professor, Drexel University Thomas R. Kline School of Law.
** J.D., Drexel University Thomas R. Kline School of Law.

Introduction

In 2017, tennis great Serena Williams famously endured serious complications during and directly after giving birth to her first child, forcing her to undergo life-saving surgery.[1] As her husband (Reddit co-founder Alexis Ohanian) reported, when she was eventually able to leave the hospital and return home, "Serena had a hole in her abdomen that needed bandage changes daily. She was on medication. She couldn't walk."[2] To take care of their newborn daughter, Ohanian took sixteen weeks of caretaking leave.[3] This was in

[1] Alexis Ohanian, *Paternity Leave Was Crucial After the Birth of My Child, and Every Father Deserves It*, N.Y. Times (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/parenting/alexis-ohanian-paternity-leave.html [https://perma.cc/EK64-6QCX]; Emily Dwass, *Serena Williams Saved Her Own Life*, MedPage Today (Aug. 12, 2022), https://www.medpagetoday.com/popmedicine/popmedicine/100194 [https://perma.cc/AZ9T-C655].

[2] Ohanian, *supra* note 1.

[3] *Id.*

sharp contrast, he pointed out, to the single day off from work that his own father took when he was born.[4]

Aside from the famous names attached to it, this story is far from exceptional. In fact, it is a common story for many American workers—including, increasingly, men who are becoming parents in an age where shifting gender roles have led to greater involvement by fathers' caring for their spouses and children. It is precisely the *raison d'être* of the Family and Medical Leave Act of 1993 ("FMLA"),[5] which provides protection for all workers, regardless of gender, who need to take time off work for medical and caretaking leave.

Ohanian used his family's experience and his privileged position as a well-known and successful CEO to advocate passionately for a legal right to paid parental leave.[6] Wearing his business hat, Ohanian expertly made the case that employers, not just employees, benefit from paid family leave because of the interconnectivity between work and home.[7] In theory, by giving families guaranteed time to settle into their new family dynamic, they can return to work undistracted and motivated to produce their best work product, providing a mutual benefit for families and employers.[8] This argument is reflected in the many attempts to provide a paid leave entitlement as part of an amended FMLA that would align the U.S. with the rest of the industrialized world.[9]

Ohanian's arguments, which champion the changing cultural norms around co-parenting and caretaking by male partners, are similar to those made by the Supreme Court in cases it has decided interpreting the statute. In *Nevada Department of Human Resources v. Hibbs*,[10] for example, in concluding Respondent was unlawfully terminated for taking leave to care for his

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[4] *Id.*

[5] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

[6] Ohanian, *supra* note 1. Many companies, including Reddit, Ohanian's company and employer at the time, offer paid leave. In Ohanian's case, he was entitled to be paid for the full sixteen weeks he took after his wife's delivery of their child. However, this benefit is not legally mandated, and many Americans would not be entitled to make the same choice as Ohanian, much less be paid their salary after doing so. *See* Molly Weston Williamson, *The State of Unpaid Family and Medical Leave in the U.S. in 2023*, Ctr. for Am. Progress (Jan. 5, 2023), https://www.americanprogress.org/article/the-state-of-unpaid-family-and-medical-leave-in-the-u-s-in-2023/#:~:text=Workers%20in%20the%20United%20States,in%20relation%20to%20workplace%20leave [https://perma.cc/DKG9-5SVM].

[7] Elissa Strauss, *Alexis Ohanian, aka Mr. Serena Williams, On Why Parental Leave Is Good for Men*, CNN (Jan. 14, 2022), https://www.cnn.com/2022/01/14/opinions/alexis-ohanian-parental-leave-wellness/index.html [https://perma.cc/P5HF-L37Z].

[8] *Id.*

[9] Leigh Ann Caldwell, *Senate, House Combine Bipartisan Efforts to Advance Paid Leave*, Wash. Post (Dec. 13, 2023) https://www.washingtonpost.com/politics/2023/12/13/paid-family-leave-congress/ [https://perma.cc/K6FY-WX36] ("The United States is one of the few countries that does not offer a paid parental leave program for new mothers. A growing number of nations are also now offering paid leave for new fathers, leaving the United States far behind most countries around the world."); Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, Pew Rsch. Ctr. (Dec. 16, 2019), https://www.pewresearch.org/short-reads/2019/12/16/u-s-lacks-mandated-paid-parental-leave/ [https://perma.cc/QBH7-GNBD].

[10] Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 725 (2002).

ailing wife, the Court emphasized that remedying gender discrimination was advanced by leave policies on which men, as well as women, could depend.[11]

Yet, these accounts overlook or obscure the reality that it is not just gender, but also overlapping racial identities and socioeconomic status, which impact how these issues affect American workers and their families. Black women particularly, regardless of their socioeconomic status, have a higher rate of serious pregnancy complications and are three to four times more likely to die during childbirth than their white counterparts.[12] Even Williams, an internationally respected sports legend with incredible resources and a known medical history of blood clots, was initially dismissed by a nurse who thought her "medication may have been confusing her" while Williams was gasping for breath during delivery—or what is known now as "medical gaslighting."[13]

Taking into account additional factors compounding discrimination, such as education and economic factors, the disparity in maternal and infant health outcomes becomes even worse.[14] These disparities not only correlate with significantly higher mortality rates, but also impede the ability of a startling number of Black women to take medically necessary parental leave.[15] While Black women have the highest rate of labor force participation per capita, this participation disproportionately finds them in lower-paid jobs that leave them unable to afford to take the full FMLA unpaid leave option, meaning they forgo taking family leave altogether.[16] This inability to take needed caretaking leave is compounded by their limited participation in jobs with private employers[17]—the Reddits and the Metas of the world—where the FMLA is largely irrelevant given the typically far more robust policies in place.[18]

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[11] *Id.* at 737.

[12] *See, e.g.*, Allyson Chiu, *Beyoncé, Serena Williams, Open Up About Potentially Fatal Childbirths, a Problem Especially for Black Mothers*, Wash. Post (Aug. 7, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/07/beyonce-serena-williams-open-up-about-potentially-fatal-childbirths-a-problem-especially-for-black-mothers/ [https://perma.cc/N265-J3LL].

[13] *Id.* Williams herself described "[g]iving birth to" her first "baby" as "a test for how loud and how often I would have to call out before I was finally heard." Serena Williams, *Fighting to Be Heard*, *in* Arrival Stories: Women Share Their Experiences of Becoming Mothers 12, 12 (Amy Schumer & Christy Turlington Burns eds., 2022).

[14] *See, e.g.*, Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 4, 2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/ [https://perma.cc/E5PX-T23A].

[15] Jessica Milli, Jocelyn Frye & Maggie Jo Buchanan, *Black Women Need Access to Paid Family and Medical Leave*, Ctr. for Am. Progress (Mar. 4, 2022), https://www.americanprogress.org/article/black-women-need-access-to-paid-family-and-medical-leave/ [https://perma.cc/28KX-8Y6Y].

[16] *Id.*

[17] *Occupational Segregation of Black Women Workers in the U.S.*, Nat'l Emp. L. Project (Apr. 9, 2024), https://www.nelp.org/insights-research/occupational-segregation-of-black-women-workers-in-the-u-s/ [https://perma.cc/YF78-UYYS].

[18] *Paid Leave in the U.S.*, KFF (Dec. 17, 2021), https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/ [https://perma.cc/JLT4-44FG]; Kim Lachance Shandrow, *19 Companies and Industries with Radically Awesome Parental Leave Policies*, Entrepreneur (Apr. 12, 2017), https://www.entrepreneur.com/science-technology/

Thirty years ago, of course, when the FMLA was enacted, private companies were less likely to offer these types of policies—and more likely to lay off workers for using them—so legislation was important to establish a baseline for the right to take caretaking leave.[19] This was especially so given women's dramatic increase in workforce participation[20] throughout the 1970s and 1980s, with no federal law protecting American workers from being fired for taking maternity or caretaking leave. The FMLA was drafted to balance the workplace's economic interests with the nation's interests in preserving the family unit by providing unpaid, "reasonable" leave to both male and female workers.[21]

The Supreme Court in *Hibbs* described and confirmed the FMLA's importance. Specifically, the Court emphasized that the statute was passed as a broad, remedial measure to combat gender stereotypes and dismantle resulting discrimination based on them.[22] The *Hibbs* Court reached this conclusion in a noteworthy and surprising way: the majority opinion was authored by Chief Justice Rehnquist, a conservative jurist who had been "an opponent of the Equal Rights Amendment (ERA) while serving in the Nixon Justice Department—and, more than any other Nixon appointee, a vocal critic of the Court's sex discrimination jurisprudence in his first decade on the Court."[23] The Chief opined for the Court that the FMLA was enacted, in part, because "[s]tates continue to rely on invalid gender stereotypes in the employment

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19-companies-and-industries-with-radically-awesome-parental/249467 [https://perma.cc/SD6J-N2SG].

[19] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

[20] A note regarding the terminology used throughout this article: we use the gendered terminology of "men" and "women" to reflect the terminology throughout the FMLA and its associated legal interpretations. Yet, we understand that binary gender denotations do not fully encapsulate the issues regarding the FMLA's current efficacy, and the authors are aware of the limitations of this language and the efforts currently being undertaken to draft more gender-inclusive legislation. *See DOL Policies on Gender Identity: Rights and Responsibilities*, U.S. Dep't of Lab., https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity [https://perma.cc/62QN-V745]; Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislative Drafting in a Non-Binary World*, 48 Cap. Univ. L. Rev. 103, 106–08 (2020).

[21] *See* U.S. Dep't of Lab., Fact Sheet #28: The Family and Medical Leave Act (*revised* Feb. 2023); 29 U.S.C. § 2601(b)(2); S. Rep. No. 103-3, at 45 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.

[22] *Hibbs*, 538 U.S. at 734.

[23] Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Sex Discrimination in* Hibbs, 58 Stan. L. Rev. 1871, 1872–73 (2006) ("Any reader of . . . early Rehnquist sex discrimination opinions, or Rehnquist's more recent opinions restricting Congress's power to enforce the Fourteenth Amendment surely would not have predicted that he would conclude his time on the bench writing a pathbreaking opinion upholding provisions of the Family and Medical Leave Act (FMLA) as a valid exercise of Congress's Section 5 power."); *see also* Adam Liptak, *Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter*, N.Y. Times (June 16, 2014), https://www.nytimes.com/2014/06/17/us/judges-with-daughters-more-often-rule-in-favor-of-womens-rights.html [https://perma.cc/Q3DD-337H] ("Chief Justice Rehnquist, who had long championed states' rights, had not been expected to be sympathetic to the idea" that "workers could sue state employers for violating a federal law that allowed time off for family emergencies.").

context, specifically in the administration of leave benefits."[24] The Chief bolstered the Court's opinion by citing evidence of disparate treatment of men and women in the workplace resulting from the existence of "pervasive sex-role stereotyping that caring for family members is women's work."[25]

The acknowledgment that gender stereotyping was intrinsically linked to sex discrimination was a remarkable late-career epiphany for the Chief Justice.[26] His colleague Justice Ginsburg later described his opinion in *Hibbs* as a "delightful surprise" and attributed his embrace of feminist principles in *Hibbs* to his "life experience," namely the fact that "one of his daughters was a recently divorced mother with a demanding job."[27] Indeed, to help her juggle her work and parenting responsibilities, during "the term he wrote the opinion, [Chief Justice Rehnquist] sometimes left work early to pick up his granddaughters."[28]

Of course, the Chief's life experience involved a daughter who was (is) a white woman with an elite education and a high-level professional job.[29] At the time *Hibbs* was pending, Janet Rehnquist was serving as the Inspector General of a federal agency.[30] Unlike many workers, Ms. Rehnquist also had the benefit of a parent who had complete flexibility in setting his work schedule and was therefore able to help her with childcare whenever needed.[31] These privileges associated with high-level professional attainment echoed those enjoyed by the 103rd Congress who passed the FMLA, with the vast majority of members previously working in high-paying industries, such as banking and finance, and very few members identifying as people of color.[32]

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[24] *Hibbs*, 538 U.S. at 730.

[25] *Id.* at 731.

[26] Siegel, *supra* note 23, at 1872–73.

[27] Liptak, *supra* note 23.

[28] *Id.* (quoting Justice Ginsburg's view that "[w]hen [Rehnquist's] daughter Janet was divorced . . . the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed").

[29] *About Janet Rehnquist*, Rehnquist Law PLLC, https://www.rehnquistlaw.com/about [https://perma.cc/K3R9-TRGV].

[30] U.S. Gov't Accountability Off., GAO-03-685, Department of Health and Human Services: Review of the Management of Inspector General Operations (2003) (noting that Janet Rehnquist served as the Inspector General for the United States Department of Health & Human Services from 2001 to 2003).

[31] *See* Liptak, *supra* note 23; *see also* Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 72 U. Cin. L. Rev. 365, 374–75 (2004).

[32] Forty members of the 103rd Congress were African American (though only one was a Senator), seven were Asian American, and seventeen were Hispanic American; less than 15% of members reported having trade or "miscellaneous" occupations before joining Congress. *See* Brookings, Demographics of Members of Congress, at 1, 49, 51, 53 (2017), https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch1_full.pdf [https://perma.cc/2CYQ-UK6L]. In 1990, George H.W. Bush vetoed an iteration of the FMLA, which Congress failed to overrule. Steven A. Holmes, *House Backs Veto of Family Leave Bill*, N.Y. Times (July 26, 1990), https://www.nytimes.com/1990/07/26/us/house-backs-bush-veto-of-family-leave-bill.html [https://nyti.ms/3QiXKU7]. Even when it finally passed, several female Congresspeople (including one of the six female Senators in the Senate at that time) voted against it. *See H.R. 1 (103rd): Family and Medical Leave Act of 1993*, GovTrack.us (Feb. 4, 1993) https://www.govtrack.us/congress/votes/103-1993/s11 [https://perma.cc/ZK3L-57SG] (listing Sen. Nancy Kassebaum as voting against the FMLA); Clerk for U. S. House of Representatives, *Roll Call 22, Bill Number: H.R.1*

This view of gender as a monolithic category reflects the privileged experiences with which the Chief Justice and the Congress that passed the FMLA were most familiar. It was also consistent with the non-mainstream status of intersectionality at the time.[33] Yet, as Kimberlé Crenshaw noted in her groundbreaking article, "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."[34] Likewise, the FMLA's failure to account for the experiences of people of color, as well as workers from lower socioeconomic groups and younger parents (including teenagers)—and especially those who identify with multiple categories simultaneously—obscures the greatest deficiencies of the statute.

Unsurprisingly, the most vulnerable Americans are the least likely to benefit from the protections of the FMLA.[35] This is so not just in terms of their ability to qualify for coverage, but also in terms of their ability to fully utilize the benefit even when they do.[36] Notably, the FMLA not only fails to provide paid leave but also applies only to a narrow category of employers and to an even narrower category of eligible employees meeting specific statutory requirements.[37] This renders its unpaid job protection far from universal, thus failing to provide workers with the legal protections and entitlements that Americans across the political spectrum overwhelmingly support.[38]

Looking at the discrimination faced by caretakers through an intersectional lens allows the relationships between "overlapping, concurrent forms

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(Feb. 3, 1993), https://clerk.house.gov/Votes/199322 [https://perma.cc/SG2X-QWNY] (listing Representatives Barbara Vucanovich, Deborah Pryce, and Jennifer Dunn as voting against the FMLA).

[33] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 138, 140 (arguing for an expansion of discrimination analysis beyond a single-axis framework that "erases Black women in the conceptualization, identification and remediation of race and sex discrimination"). Indeed, the concept of intersectionality described by Professor Crenshaw in this groundbreaking 1989 article barely pre-dated the enactment of the FMLA.

[34] *Id.*

[35] *See Balancing Work, Health, and Family: The Case for Expanding the Family and Medical Leave Act: Hearing Before the H. Subcomm. on Workforce Prot. of the H. Comm. on Educ. & Lab.,* 116th Cong. 2, 46–49 (2020) (statement of Elisabeth Jacobs, Senior Fellow, Urban Institute).

[36] Zara Abrams, *The Urgent Necessity for Paid Parental Leave*, Am. Psych. Ass'n (Apr. 1, 2022), https://www.apa.org/monitor/2022/04/feature-parental-leave [https://perma.cc/NV9T-RYH8]; *see also* Pamela Joshi et al., DiversityDataKids.org, The Family and Medical Leave Act Policy and Equity Assessment 9 (2020), https://www.diversitydatakids.org/sites/default/files/2020-01/ddk_policyequityassessment_fmla_2020_2_0.pdf [https://perma.cc/9VYB-4TFQ].

[37] *See* U.S. Dep't of Lab., Fact Sheet #28, *supra* note 21 (noting what employers and employees are covered by the FMLA); *see also* 29 U.S.C. § 2601.

[38] Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ over Specific Policies*, Pew Rsch. Ctr. (Mar. 23, 2017), https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-snupport-paid-family-and-medical-leave-but-differ-over-specific-policies/ [https://perma.cc/U6FG-FY77].

of oppression" to illuminate a broader range of inequalities, stereotypes, and obstacles to be addressed.[39] This in turn creates opportunities for new and more nuanced conversations around policy—and ideally generates solutions that may be more effective and impactful across the entire population of workers (including workers currently excluded from the workforce because of leave-taking discrimination).[40]

Focusing on the most vulnerable, and on the ways that intersecting forms of discrimination exacerbate this vulnerability, may identify previously hidden pathways and solutions with the potential to break the political stalemate that has in recent years left Congress seemingly unable to find a way to move forward with needed amendments to the FMLA.[41] This Article aims to begin a new and overdue reframing and expansion of the conversation around caretaking leave discrimination.

The Article proceeds as follows. First, Part I discusses the background of the FMLA, including precursor legal protections, the Act's legislative history, and the most notable case law interpreting it. Part II then provides an explanation of intersectional feminism—its meaning, goals, and tools—and uses this lens to explore the FMLA and highlight the gaps obscured by a monolithic

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[39] *Intersectional Feminism: What It Means and Why It Matters Right Now*, U.N. Women (July 1, 2020), https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters [https://perma.cc/85KX-88VF].

[40] *See id.*; *see also* United Nations P'ship on the Rights of Persons with Disabilities, Intersectionality Resource Guide and Toolkit 9 (2022), https://www.unwomen.org/sites/default/files/2022-01/Intersectionality-resource-guide-and-toolkit-en.pdf [https://perma.cc/9NYE-NAZY]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 42 Stan. L. Rev. 1241, 1242 (1991) (explaining that "social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction").

[41] *See generally* Emilie Shumway, *Beyond the FMLA: Will a Federal Paid Leave Law Ever Come to Pass?*, HR Dive (Mar. 6, 2023), https://www.hrdive.com/news/beyond-fmla-will-federal-paid-leave-law-ever-come-to-pass/644239/ [https://perma.cc/26Q6-JG42] ("Paid family leave has been reduced or dropped from legislation five times since March 2020."); Alexia Fernández Campbell, *The GOP's Deeply Flawed Paid Family Leave Plan, Explained*, Vox (Mar. 13, 2019), https://www.vox.com/policy-and-politics/2019/3/13/18263790/paid-family-leave-bill-cradle-act [https://perma.cc/85EZ-TBRX] (describing the pitfalls of the family leave act proposed by Republican Senators in 2019, in contrast with the Democratic party's version); Matthew Bruenig, *Both Parties Are Getting It Wrong on Parental Leave*, Politico (July 26, 2022), https://www.politico.com/news/magazine/2022/07/26/both-parties-are-wrong-on-parental-leave-00047448 [https://perma.cc/BM3D-62RP] ("Like the Cassidy-Sinema plan, the Rubio-Romney New Parents Act also relies on parents paying back the benefits they received in order to finance the program. But in the New Parents Act, this is accomplished by docking parents' Social Security checks when they retire."); Chabeli Carrazana, *The U.S. Was Close to Universal Paid Leave. with the Collapse of Build Back Better, It's All Fallen Apart*, The 19th (Dec. 20, 2021), https://19thnews.org/2021/12/us-universal-paid-leave-build-back-better/ [https://perma.cc/BH8K-JMNH] (describing the failure of the paid leave provision in the Build Back Better Act after Senator Joe Manchin announced he would not join fellow Democrats and support the bill but instead "wanted to pass paid leave as separate, bipartisan legislation" in the future); Jane Farrell & Sarah Jane Glynn, *The FAMILY Act: Facts and Frequently Asked Questions*, Ctr. for Am. Progress (Dec. 12, 2013), https://www.americanprogress.org/article/the-family-act-facts-and-frequently-asked-questions/ [https://perma.cc/4UX4-V8GZ] (summarizing the Family and Medical Insurance Leave Act proposed by Democratic legislators in 2013).

focus on gender remediation. This second Part illustrates how socioeconomic status, race, ethnicity, and age work in tandem with gender (and each other) to create enhanced and specific inequities that continue to be rendered invisible in the contemporary debate over amending the FMLA. Part III then details the existing critiques of the FMLA and the political failures that have thwarted recent attempts to make needed changes. Part IV offers a new approach that harnesses intersectionality to begin the project of building legal protections to help the most vulnerable.[42]

I. The Family And Medical Leave Act of 1993: Statutory Background

The FMLA is the most significant and well-known legislation providing legal protection for workers taking caretaking leaves of absence in America today.[43] The passage of the FMLA represented the culmination of over seventy years of advocacy for legal protections for maternity leave.[44] The FMLA is a compromise between the needs of working families to take caretaking leave without fear of losing their jobs, and Congress' concern for the financial impact of leave entitlements on business interests.[45] While framed in gender-neutral terms, it is clear Congress intended for the statute to remediate historical discrimination based on gender.[46]

A. History of Caretaking Leave Advocacy and Policies

The notion that legal protections for maternity leave are critical to workers' rights dates back over a century.[47] The International Labour Organization

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[42] *See, e.g.*, Caldwell, *supra* note 9 (noting that some congresspeople feel a sense of urgency to pass a paid family leave law in the wake of the Supreme Court's overturning *Roe v. Wade*).

[43] By "caretaking leaves," we are talking about leaves to take care of oneself (especially after childbirth) and others (including a spouse, child, parent, or other family member) as covered by the statute. 29 U.S.C. § 2601; *see also Paid Leave in the U.S.*, *supra* note 18 (summarizing "federal, state, and local policies on paid family and medical leave and paid sick leave").

[44] Kumar Ramanathan, *The Anti-Discrimination Roots of "Family and Medical Leave"*, Gender Pol'y Rep. (Nov. 5, 2021), https://genderpolicyreport.umn.edu/the-anti-discrimination-roots-of-family-and-medical-leave/ [https://perma.cc/A7HX-SAF5] (describing how anti-discrimination reasoning has been used to support arguments for and against maternity leave).

[45] 139 Cong. Rec. 2009 (1993).

[46] S. Rep. No. 103-3, at 18 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3 (denying that the law provides "special protection to women or any defined group" but citing multiple studies regarding inequalities suffered by working women and mothers); *see also Hibbs*, 538 U.S. at 736.

[47] *History of the ILO*, Int'l Lab. Org., https://www.ilo.org/about-ilo/history-ilo [https://perma.cc/K5PV-A54T]. The Preamble to the ILO Constitution provides: "And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world

(ILO), founded in 1919 at the end of World War I as part of the Treaty of Versailles,[48] quickly adopted the Maternity Protection Convention.[49] The Convention prohibited working mothers, inter alia, from working for six weeks after giving birth[50] and forbade employers from terminating the mother's employment during this period.[51] Additionally, the Convention provided for women to "be paid benefits sufficient for the full and healthy maintenance of herself and her child,"[52] and even the right of nursing mothers to "be allowed half an hour twice a day during her working hours for this purpose."[53]

Soon after the ILO made these recommendations through the Convention, a number of industrialized nations began to adopt maternity leave policies and programs, typically through social insurance mechanisms funded by the state using tax revenues.[54] But despite their efforts to achieve similar legal protection for maternity leave in the United States, American activists had little success.[55]

During the 1940s, some U.S. states created "temporary disability insurance" programs, but "these generally excluded pregnancy and no national program was enacted."[56] Despite continuous efforts from labor groups and feminist activists, as of 1960, no U.S. state had enacted a law offering job protection for those taking maternity leave, with "six [states] even requir[ing] mandatory leave for pregnant women without any job security or pay.

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are imperilled; and an improvement of those conditions is urgently required; as, for example, by . . . the protection of children, young persons and women, [and] recognition of the principle of equal remuneration for work of equal value." *ILO Constitution*, Int'l Lab. Org., https://www.ilo.org/about-ilo [https://perma.cc/BYL7-BLZ4].

[48] Treaty of Peace with Germany (Treaty of Versailles) art. 23, June 28, 1919, 2 Bevans 43.

[49] Convention Concerning the Employment of Women Before and After Childbirth, Nov. 29, 1919, 38 U.N.T.S. 53.

[50] *Id.* art. 3(a).

[51] *Id.* art. 4.

[52] *Id.* art. 3(c).

[53] *Id.* art. 3(d).

[54] Ramanathan, *supra* note 45; Int'l. Lab. Org., Maternity at Work: A Review of National Legislation, at vii (2010), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_124442.pdf [https://perma.cc/X3MZ-ZWXD] (noting that at least seventeen countries had ratified the Maternity Protection Convention, 2000 (No. 183), with its mandatory fourteen-week maternity policy, within ten years of its entry into force in 2002 and that sixty-three countries are now a party to at least one maternity protection convention); *Ratifications of C183 - Maternity Protection Convention, 2000 (No. 183)*, Int'l. Lab. Org., https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328 [https://perma.cc/6G9J-BK3Q] (listing 44 ratifications as of 2025); Int'l. Lab. Org., Maternity and Paternity at Work: Law and Practice Across the World 23–29 (2014), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_242615.pdf [https://perma.cc/B6QK-YFRJ] (A majority of countries in Latin America, the Caribbean, and Africa fund their maternity policies at least in part by social insurance, while European countries like Norway, Denmark, and Germany conversely have modified their social insurance policies to increase employer payments).

[55] Ramanathan, *supra* note 44.

[56] *Id.*

As such, employers frequently dismissed pregnant workers without a guarantee that they could return to their job[s]."[57]

The Civil Rights Act of 1964, which prohibits sex-based employment discrimination, gave proponents for maternity leave an opportunity to argue that employers should be considered legally obligated to provide maternity leave, as women required such leave to maintain their employment.[58] One such argument, from the Citizens Advisory Council on the Status of Women, argued that absence from work because of childbirth and recovery from pregnancy complications are, for job-related purposes, temporary disabilities.[59] As such, the Council argued, pregnancy should be treated as any other temporary disability by any health insurance or employer-provided leave plan, and for it not to be included was discriminatory based on sex.[60] As the agency in charge of enforcing Title VII, the Equal Employment Opportunity Commission (EEOC) adopted this argument in 1972 to permit sick leave policies to apply to pregnant workers, with many states following suit.[61] However, in *General Electric Company v. Gilbert*,[62] a much-younger Justice Rehnquist wrote a majority opinion for the Supreme Court holding that employers may, within reason, exclude any condition, including pregnancy, from a disability plan.[63] Writing for the Court, Justice Rehnquist rejected the EEOC's policy that excluding pregnancy from disability plans was sex discrimination; according to his analysis, the relevant classifications were pregnant people and non-pregnant people, both of which groups included women.[64]

The first major legislative victory for feminist labor advocates was the passage of the Pregnancy Discrimination Act of 1978.[65] The Act prohibited discrimination in hiring, pay, and promotions, but the protections were limited to the duration of pregnancy and did not address job protections after pregnancy.[66]

Thus, by the late 1970s, working mothers began to earn some legal protections at the federal level. However, while some women were lucky to work for employers who offered them paid and unpaid maternity leave,[67] most had

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[57] *Id.*

[58] 42 USC § 2000(a); *see generally* Ramanathan, *supra* note 44 (describing the anti-discrimination roots of maternity leave).

[59] Citizens' Advisory Council on the Status of Women, Women in 1970, at 6 (1971).

[60] *Id.*

[61] Ramanathan, *supra* note 44.

[62] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134–35 (1976).

[63] *Id.*

[64] *Id.* at 135; Ramanathan, *supra* note 44.

[65] 42 U.S.C. §§ 2000e et seq.

[66] *Id.* § 2000e-2 (prohibiting discrimination in "compensation, terms, conditions, or privileges of employment"); *id.* § 2000(k) (defining "because of sex" to include "on the basis of pregnancy, childbirth, or related medical conditions").

[67] Jerrianne Sullivan, *U.S. Companies with the Best and Worst Family Leave Policies*, FamilyMinded (Dec. 17, 2019), https://www.familyminded.com/s/american-companies-best-worst-family-leave-5aebb709e35d4acc [https://perma.cc/P9BL-YS6X] (listing IBM as one of the best family leave policies and noting that it "offers both childbirth recovery leave and parental leave like most companies at the top of this list," that "leave is provided

no legal protections for taking leave to care for themselves or a child after becoming a parent.[68] This began to change first at the state level.

B. State Laws Predating the FMLA

The 1978 Pregnancy Discrimination Act required employers who offered temporary disability coverage to extend that coverage to pregnant workers.[69] Even before the FMLA was enacted, a handful of states already required employers to provide a specified period of protected leave *after* pregnancy, separate from other benefits offered.[70] These states—California, Connecticut, Maine, Massachusetts, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin—along with the District of Columbia, required some private employers to offer maternity coverage, with specifics varying by state.[71] Five states (California, Hawaii, New Jersey, New York, and Rhode Island) enacted state-sponsored temporary disability leave statutes separate from the federal requirements.[72] These state plans provided the first preliminary models for insurance plans sponsored by employee and employer contributions that could fund maternity leave.[73] Naturally, they were not enacted without opposition.[74] States faced pushback from pro-business groups that claimed these state statutes violated the equal treatment of pregnant

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to all employees that are salaried, hourly, work in the field or part-time" and that "[t]he company's parental leave is available for all kinds of parents, including birthing, non-birthing, adoptive, etc."); Kawther Haciane, *Juggling Home and My Career: My Experience as a Working Mom*, LinkedIn (June 11, 2020), https://www.linkedin.com/pulse/juggling-home-my-career-experience-working-mom-kawther-haciane/ (noting that IBM has been on list of top places for working mothers for 33 years in a row); *see also* Sullivan, *supra* (listing the 10 worst large employers for family leave, but disclosing that even most of these offer some paid leave to their employees; for example, she notes that General Motors "does offer some benefits in regard to maternity and paternity leave" but describes them as "basic at best" because, although "[n]ew moms who gave birth can access six to eight weeks of [paid] leave," they can only do so "if they're salaried employees — so that's not including the company's many hourly employees").

[68] Mark DeRosa, *History of Maternity Leave in the US*, VantagePoint Benefit Adm'rs (June 21, 2018), https://vantagepointbenefit.com/history-of-maternity-leave-in-the-us/ [https://perma.cc/7BSE-7YB5].

[69] Lawrence M. Berger & Jane Waldfogel, *Maternity Leave and the Employment of New Mothers in the United States*, 17 J. Pop. Econ. 331, 332 (2004).

[70] *Id.*; Ramanathan, *supra* note 44.

[71] Berger & Waldfogel, *supra* note 69, at 332; Women in 1970, *supra* note 59, at 21.

[72] *See Annual Statistical Supplement, 2011: Temporary Disability Insurance Program Description and Legislative History*, Soc. Sec. Off. of Rsch., Evaluation & Stats., https://www.ssa.gov/policy/docs/statcomps/supplement/2011/tempdisability.html [https://perma.cc/7KS2-L45Z] (relating the history of U.S. state and territorial short-term disability insurance programs).

[73] DeRosa, *supra* note 69 (noting that the first state paid-leave laws, in California, New Jersey, New York, and Rhode Island, use "temporary disability insurance programs [that had already existed in those states]" and are funded "through employee tax deductions").

[74] Women in 1970, *supra* note 59, at 21; Ramanathan, *supra* note 44.

people, as mandated by the Pregnancy Discrimination Act of 1978, by requiring employers to provide "special benefits" for pregnant workers.[75]

For example, when California worked to pass a state statute (California's Fair Employment and Housing Act[76]) to protect workers taking maternity leave, it was challenged by business groups because it went much further than the Pregnancy Discrimination Act by requiring employers to offer women four months of unpaid leave and to reinstate employees upon their return to work.[77] A legal challenge from one employer claimed that the statute was preempted by the PDA and eventually made its way to the United States Supreme Court.[78]

In *California Federal Savings & Loan Association v. Guerra*, the Court upheld California's statute, concluding the statutory entitlement to four months of unpaid pregnancy leave was lawful and not preempted by the federal Pregnancy Discrimination Act.[79] Thus, all covered businesses—nearly all that operated in the state of California—were required to abide by its terms.[80] State statutes like the one at issue in *Guerra* assisted in paving the way for the FMLA.

C. The Legislative History of the FMLA

Congress intended the FMLA to "promote the goal of equal employment opportunity for women and men."[81] It concluded that "it is important for the development of children and the family unit that [both] fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions" and that parental leave protections that only

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[75] Ramanathan, *supra* note 44; *see also* Megan A. Sholar, Getting Paid While Taking Time: The Women's Movement and the Development of Paid Family Leave Policies in the United States 170–71 (2016) (noting that "business interests typically oppose [paid maternity leave] mandates, believing they will reduce profits and impede companies' ability to compete" and "the organizations that . . . represent the interests of [American business] executives are the primary opposition to paid family leave legislation"); Megan A. Sholar, *The History of Family Leave Policies in the United States*, Org. of Am. Historians (Nov. 2016), https://www.oah.org/tah/november-3/the-history-of-family-leave-policies-in-the-united-states/#:~:text=The%20United%20States%20has%20historically,passage%20was%20a%20major%20accomplishment [https://perma.cc/EPR2-4PJN] ("There are a number of reasons that the United States remains the only industrialized country without paid family and medical leave at the national level. One of the most compelling explanations is that business interests generally oppose such government mandates because they fear a loss of profits and lowered ability to compete, even though evidence shows that such concerns are unfounded.").

[76] Cal. Gov't Code § 12945 (2022).

[77] Ramanathan, *supra* note 44.

[78] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 274–75 (1987).

[79] *Id.* at 292.

[80] *Id.* at 272, 276. Because the California statute applies to any private, public, and government employer who maintains a minimum of five employees, the impact on the state was significant. *See* Cal. Gov't Code § 12945 (2022); *see also Leave for Pregnancy Disability and Child Bonding: Quick Reference Guide*, Cal. C.R. Dep't, https://calcivilrights.ca.gov/employment/pdl-bonding-guide/ [https://perma.cc/MB2N-EMXE].

[81] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

applied to women would "have serious potential for encouraging employers to discriminate against [female] employees and applicants for employment."[82] Thus, the FMLA sought to "balance the demands of the workplace with the needs of families, to promote stability and the economic security of families, and to promote national interests in preserving family integrity" by providing protected parental leave opportunities for both men *and* women.[83] Congress recognized that many American families struggled with putting their careers and incomes in jeopardy because of the need to care for their family members in times of vulnerability.[84] The FMLA solved this problem by entitling employees to take "reasonable" medical leave for reasons including the "birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[85]

Congress understood that modern American families were evolving. At the time it enacted the FMLA, a significant shift away from two-parent/one-income households was well underway, with both single-parent households and two-working parent households growing with no signs of slowing down.[86] At the time of enactment, the number of children under the age of eighteen living in single-parent households had steadily increased from 9.1% in the 1960s to 16% in 1975—and up to 27% in 1992.[87] Likewise, dual-income households were steadily increasing—rising from 30% in the 1960s to an estimated 48% of American households by 1992.[88]

These statistics reveal women's participation in the workplace was on the rise; yet, women still predominantly shouldered the burden of being the "primary family caregiver," balancing work commitments with family responsibilities more so than men.[89] Thus, American women and families needed an equalizing measure to distribute the burdens more evenly to keep pace with modernizing family dynamics.[90] The FMLA was passed in 1993 with bipartisan

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[82] *Id.* § 2601(a)(2), (6).

[83] *Id.* § 2601(b)(1).

[84] *Id.* § 2601(a); 139 Cong. Rec. 2016 (1993).

[85] 29 U.S.C. § 2601(b)(2); S. Rep. No. 103-3, at 45 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.

[86] 29 U.S.C. § 2601 (a)(1); S. Rep. No. 103-3, at 6 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.

[87] Judith A. Setzler, *Family Change and Changing Family Demography*, 56 Demography 405, 415 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6450727/ [https://perma.cc/3XHH-NL99]; *see also* Presidential Statement by President William H. Clinton upon Signing H.R. 1, 1993, 29 Weekly Comp. Pres. Doc. 145 (Feb. 5, 1993) [hereinafter Presidential Statement by President William H. Clinton].

[88] Presidential Statement by President William H. Clinton, *supra* note 87; *see also* Jeremy Horpedahl, *US Households Have a Lot More Income than 1967, and It's Probably Not Just Because of the Rise of Dual-Income Households*, Economist Writing Everyday (June 22, 2022), https://economistwritingeveryday.com/2022/06/22/us-households-have-a-lot-more-income-than-1967-and-its-probably-not-just-because-of-the-rise-of-dual-income-households/ [https://perma.cc/94RM-FNCZ].

[89] *Hibbs*, 538 U.S. at 736.

[90] Presidential Statement by President William H. Clinton, *supra* note 87, at 145; *see* 139 Cong. Rec. 1998, 2016 (1993); *see also* Jane Waldfogel, *Family Leave Coverage in the 1990s*, Monthly Lab. Rev. 13, 15 (1999), https://www.bls.gov/opub/mlr/1999/10/

support to distribute these burdens and eliminate employment discrimination based on the need for parental leave.[91] Remediating gender discrimination allowed both men and women to take protected leave under the FMLA.[92]

While the FMLA enjoyed bipartisan support, concerns arose during the drafting process around the potential impact of the legislation on businesses.[93] As such, only employers that met certain requirements were included in the definition of a "covered employer" required to offer leave, and employees had to meet further requirements to qualify as an "eligible employee" to receive unpaid leave even from these employers.[94]

Specifically, under the statute, a "covered employer" is defined as: (1) a private-sector employer, currently employing fifty or more employees over the span of twenty or more workweeks in the calendar year (current or preceding), which includes joint employers and successors in interest to a covered employer; (2) a public agency (at the local, state, or federal level) regardless of the number of employees; or (3) a public or private elementary or secondary school, regardless of the number of employees.[95]

Further, the statute requires, for one to be considered an "eligible employee" qualifying for FMLA protection, that the person work (1) for a "covered employer"; (2) for a minimum of twelve months (non-consecutively is acceptable); (3) for at least 1,250 hours for the twelve months "immediately preceding" the qualifying leave; *and* (4) at a workplace of the covered employer that employs "at least 50 employees within 75 miles."[96] Once eligibility is established, the FMLA provides tangible employment benefits for those employees seeking to take caretaking leave.[97] Qualifying employees may take up to twelve weeks of unpaid leave without losing their jobs or being demoted, with extended provisions provided for military personnel.[98] Upon employees' return from leave, employers must restore employees to roles with equivalent "pay, benefits, and other terms and conditions of employment."[99] So long as the position is "equivalent," employers are permitted to adjust an employee's role upon return as needed by the organization.[100] Employers are

art2full.pdf [https://perma.cc/SD5Y-VH87] (describing an increase in employers providing parental leave after 1993).

[91] *See* 139 Cong. Rec. 1998, 2018.

[92] *See* Cong. Rsch. Serv., R44289, The Family and Medical Leave Act (FMLA): Background and Supreme Court Cases 6 (Nov. 30, 2015).

[93] 29 U.S.C. § 2601(b)(3); *see* 139 Cong. Rec. 2007, 2024.

[94] Fact Sheet #28, *supra* note 21, at 1. Complicating matters, an "eligible employee" must work for a "covered employer" to qualify for coverage, even if they otherwise meet the initial definition's requirements. *See id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 1–2.

[99] *Id.*; *see also Can Employers Change an Employee's Job Duties, Schedule or Work Location Without His or Her Consent or Prior Notification?*, Soc'y for Hum. Res. Mgmt., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/canemployerschangejds,schedorworklocalswithoutnotification.aspx [https://perma.cc/8RGR-G2VK].

[100] *See id.*; *see also* Fact Sheet #28, *supra* note 21.

also required to maintain insurance for the employee as if the employee has never taken leave.[101] Finally, employers cannot retaliate against employees for using or requesting FMLA-protected leave.[102]

Although the FMLA secured these legal protections, it represented a compromise.[103] Supporters of the FMLA indicated the bill merely set a "minimum labor standard."[104] The fact that the FMLA only provided for unpaid leave was its most contentious component; advocates decried the lack of paid leave, arguing that unpaid leave protections did not go far enough and that, in a country with such abundance, there were other options to pay for leave, such as refundable tax credits or increased taxation on goods such as cigarettes.[105] Others were concerned with the selectivity of the FMLA's reach, advocating that leave—especially unpaid leave—should be available to all working Americans, and not a select few.[106] The statute only covered 5% of employers, and of those employers, only about 50% of their employees.[107] Finally, the choice of a twelve-week annual limit was heavily debated; advocates noted it paled in comparison to what other modernized nations offered.[108]

Congress ultimately sided with those concerned with the impact on employers.[109] At the time of the FMLA's passage, pro-business proponents in Congress continued to argue that leaving parental leave policies entirely at the discretion of employers was the best way to protect business interests.[110] The legislative history reflects that the FMLA ultimately represents a compromise between employer and employee interests.[111] For example, Representative John T. Myers (a Republican from Indiana) expressed heavy concern for small businesses already burdened by international competition and feared further bankruptcy incidents.[112] Representative James Bunning (a Republican from Kentucky) further noted that the FMLA's provisions could restrict businesses' ability and motivation to grow, as businesses could self-impose hiring caps to remain below the FMLA's fifty-employee threshold.[113] By contrast, Representative Steny Hoyer (a Maryland Democrat) focused on the inability of most American workers to take unpaid leave, regardless of the leave

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[101] Fact Sheet #28, *supra* note 21.
[102] *Id.*
[103] Mel Leonor Barclay & Grace Panetta, *A 1993 Family and Medical Leave Law Was Supposed to Be Just the Start. Thirty Years Later, Not Much Has Changed.*, The 19th (Feb. 6, 2023), https://19thnews.org/2023/02/family-medical-leave-law-30/, [https://perma.cc/U97P-EN75] ("The modern shortcomings of [the] FMLA were built into the structure of the law, a product of a legislative compromise that advocates at the time knew would be insufficient.").
[104] 139 Cong. Rec. 1978 (1993).
[105] *Id.* at 1999–2000.
[106] *See id.* at 1999.
[107] *Id.* at 2001, 2009.
[108] *Id.* at 2001–02.
[109] *See generally id.*
[110] *See id.* at 2017.
[111] S. Rep. No. 103-3, at 15–20 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.
[112] 139 Cong. Rec. 2009.
[113] *Id.* at 2007.

period offered, while other representatives cited the twelve-week leave period as insufficient.[114] Even Representative Stephen Buyer (a Republican from Indiana), who opposed the FMLA, emphasized that the FMLA's exclusion of 60% of America's workforce suggested discrimination against women could reactively increase, arguing that "this bill only helps those with a job."[115]

D. The FMLA as a Remedial Anti-Discrimination Statute

Even after President Bill Clinton signed the FMLA into law in 1993, controversy over the law's reach continued.[116] In 2003, *Nevada Department of Human Resources v. Hibbs* addressed the significant issue of whether the FMLA applied to states as employers.[117] By holding that it does, and concluding it represents a legitimate exercise of congressional authority under Section 5 of the Fourteenth Amendment (to remedy sex discrimination), the decision affirmed the statute's effect of remediating discrimination by dismantling stereotypes surrounding women's "domestic roles."[118]

The *Hibbs* lawsuit was brought by a male employee, William Hibbs, a social worker who worked for the state of Nevada. Hibbs took a leave from his job to care for his wife, who was recovering from a car accident and resulting surgery.[119] After Mr. Hibbs was fired for doing so, he brought suit to enforce his rights under the FMLA.[120] Because Mr. Hibbs was a state employee, the Court had to decide whether the Act should constitutionally be construed to abrogate the Eleventh Amendment immunity the state would otherwise enjoy.[121] The Court held that it should, bolstering this conclusion by reference to the remedial purpose of the statute.[122]

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[114] *Id.* at 2009.

[115] *Id.* at 2005.

[116] *See* Marc Mory & Lia Pistilli, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 Hofstra Lab. & Emp. L.J. 689, 694 (2001); *see also* Donna R. Lenhoff & Lissa Bell, Nat'l P'ship for Women & Fams., Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study 3 (2019), https://www.nationalpartnership.org/our-work/resources/economic-justice/fmla/fmla-case-study-lenhoff-bell.pdf [https://perma.cc/B8V3-Q9VP] (discussing the debates over the FMLA).

[117] *Hibbs*, 538 U.S. at 728.

[118] *Id.* at 736, 740.

[119] *Id.* at 724.

[120] *Id.*

[121] *Id.* at 726.

[122] *Id.* at 728–38. As the Court explained, Section 5 of the Fourteenth Amendment permits Congress to pass legislation enforcing the Amendment's substantive guarantees to "remedy and deter violation of rights." *Id.* at 732. While Congress can enact preventative legislation to deter unconstitutional conduct, valid Section 5 legislation must exhibit "congruence and proportionality" to the injury. *Id.* at 728. Thus, in its endeavor to remedy employment discrimination based on gender, Congress may create a national program of caretaking leave protection that includes state employers, abrogating their Eleventh Amendment immunity, only if the legislation meets the congruence and proportionality test; the Court determined the family-care leave provision of the FMLA met this test. *See id.* at 737.

The *Hibbs* Court held that while the FMLA was wide-sweeping federal legislation, Congress "narrowly targeted" the FMLA at the "faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship."[123] Before the passage of the FMLA, state employers relied on deeply rooted stereotypical beliefs "that caring for family members is women's work"[124] and assumptions of "the family as the woman's domain."[125] Indeed, the firing of Mr. Hibbs based on his taking caretaking leave was a contemporary example of the problem. Moreover, Congress had evidence that state employers' reliance on these stereotypes resulted in overt and subtle discrimination that impacted women's employment opportunities.[126] By providing parental and other caretaking leave benefits "irrespective of gender,"[127] Congress hoped to reduce employers' incentive to discriminate against women by allowing men to take leave, and to reverse "the pervasive presumption that women are mothers first, and workers second."[128] Thus, the FMLA attempted to remedy gender discrimination and protected leave to enforce the Fourteenth Amendment's Equal Protection Clause.[129]

This specific, narrow reading of the purpose underlying the FMLA—to remedy historical gender discrimination based on sex role stereotyping—is bolstered by another FMLA case that the Supreme Court decided a few years after *Hibbs.* In *Coleman v. Court of Appeals of Maryland*,[130] the Court reiterated both that "[d]ocumented discrimination against women in the general workplace is a persistent, unfortunate reality, and, we must assume, a still prevalent wrong" and that "[a]n explicit purpose of the Congress in adopting the FMLA was to improve workplace conditions for women."[131] Yet, the Court did not permit the lawsuit by a state worker who was attempting to take leave for self-care of a medical issue because at the time the FMLA was enacted, there was no evidence of such discrimination or stereotyping in sick-leave policies.[132]

This myopic view of caretaking and self-care as distinct and unrelated, rather than as interconnected parts of a comprehensive remedial scheme, is disappointing, though not surprising. This limited perspective fails to account for the ways in which these roles intersect each other and other social identities, highlighting the need for an intersectional approach to create better legal and policy frameworks.

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[123] *Id.* at 738.
[124] *Id.* at 731.
[125] *Id.* at 736.
[126] *Id.*
[127] *Id.* at 737.
[128] *Id.* at 736.
[129] *Id.* at 734.
[130] 566 U.S. 30 (2012).
[131] *Coleman*, 566 U.S. at 42.
[132] *Id.* at 37.

II. Intersectionality and the FMLA

Intersectional feminism is "a prism, for seeing the way various forms of inequality often operate together and exacerbate each other" to compound discrimination.[133] This theory of feminism focuses on how multiple social identities and characteristics overlap concurrently and amplify the depths of discrimination.[134]

The FMLA,[135] enacted when the intersectional feminist movement was in its infancy, fails to live up to its goals in part because of a failure to utilize the lessons that an intersectional feminist lens reveals. In its efforts to remediate, Congress focused on gender as the sole catalyst for discrimination surrounding parental leave and caretaking responsibilities;[136] so, too, has the statute's purpose been similarly analyzed by the judiciary (most notably, by the Supreme Court in *Hibbs*)[137]—and this same approach informs various reform initiatives by policymakers across the political spectrum.[138] But the phenomenon of gender discrimination is not experienced the same way by all people—nor is everyone equally likely to experience it or be equally impacted by it, because it is not *solely* based on gender. In practice, discrimination unfolds as a complex intersection of multiple compounding factors.[139] Applying intersectional feminism to the FMLA illuminates the strengths and weaknesses of the existing statute and helps create guidelines for potential reform.[140]

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[133] Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, Time (Feb. 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/ [https://perma.cc/A7GZ-78J3].

[134] *What Does Intersectional Feminism Actually Mean?*, Int'l Women's Dev. Agency (Nov. 5, 2018), https://iwda.org.au/what-does-intersectional-feminism-actually-mean/ [https://perma.cc/3MF8-KA8V].

[135] 29 U.S.C. § 2601; S. Rep. No. 103-3, at 30 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.

[136] 139 Cong. Rec. 1995 (1993).

[137] *See supra* Part I (discussing *Hibbs*).

[138] *See infra* Part IV (discussing proposals for paid leave legislation that focus on gender).

[139] *What Does Intersectional Feminism Actually Mean?, supra* note 134.

[140] Of course, unsurprisingly intersectionality is not without its own criticisms. *See* Grace Ajele & Jena McGill, Women's Legal Educ. & Action Fund (LEAF), Intersectionality in Law and Legal Context 26–32 (2020), https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf [https://perma.cc/7ZYN-KTD9] (discussing the various critiques of intersectionality). As Ajele and Gill describe, "the rise of intersectionality has sparked a variety of critiques." *Id.* at 5. These include, for example, the claim that "intersectionality prioritizes the intersection of race and sex at the expense of other identity-based vectors of privilege and disadvantage like sexuality, gender identity, language and class," as well as the argument "that intersectionality fails to capture the complexities of cross-border dynamics and does not engage with the ways that colonialism undergirds intersecting systems of power and privilege." *Id.* Still others argue that "by focusing on the complexity of relations between identity categories, intersectionality does not fully capture the diversity of experience within individual identity categories." *Id.*

A. Intersectional Feminism: Background and Importance

Although principles underlying intersectionality have been traced as far back as Sojourner Truth's famous 1851 speech "Ain't I a Woman?,"[141] the concept of intersectionality was introduced to the field of legal studies by Crenshaw in 1989, kicking off a genre of scholarship that has slowly grown in influence over the past three-and-a-half decades.[142] Crenshaw coined the term "intersectionality" to describe the phenomenon experienced by Black women in the United States whose different experiences of discrimination cannot be summed up as the combination of the experiences of Black people plus the experiences of women.[143] These differences, she argues, should be considered in legal analysis and policymaking.[144]

Patricia Hill Collins and Sirma Bilge suggest a working definition of intersectionality to apply the framework more broadly: in their book *Intersectionality*, they explain that the concept is a lens through which the world may be better understood in its complexity,[145] arguing that "when it comes to social inequity, people's lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other."[146] Simply put, the events and conditions of social and political life are shaped not by a single factor, but rather by multiple, diverse factors that act in a symbiotic and mutually influencing way.[147]

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[141] Sojourner Truth, Remarks at the Woman's Rights Convention in Akron, Ohio (May 29, 1851), *printed in* Anti-Slavery Bugle, June 21, 1851, at 60.

[142] Crenshaw, *supra* note 33, at 141–43. The notion that intersectionality as a concept long predates Crenshaw's coining of that term is discussed in numerous articles, *see, e.g.*, Kathryn Abrams, *Title VII and the Complex Legal Subject*, 92 Mich. L. Rev. 2479, 2485–86 (1994); Avtar Brah & Ann Phoenix, *Ain't I a Woman? Revisiting Intersectionality*, 5 J. Int'l Women's Studs. 75, 78–79 (2004), including Crenshaw's, *see* Crenshaw, *supra* note 33, at 160 (describing 19th century Black feminist Anna Julia Cooper who criticized Black leaders for failing to speak for Black women when they claimed to speak for Black people about race).

[143] Crenshaw, *supra* note 33, at 140. Crenshaw explains that Black female legal subjects are subjected to both racism and sexism, yet both feminists and antiracist advocates fail to account for distinctive harms they face as a result of this dual identity. *Id.* She uses the example of rape to describe what she means, explaining that, although Black women are like their Black male and white female counterparts insofar as they are impacted by coercive violence perpetrated by white men (often in the specific form of rape), Black women must uniquely confront stereotypes that affect them as victims. *Id.* at 157–58. As she notes, "Courts in some states had gone so far as to instruct juries that, unlike white women, Black women were not presumed to be chaste." *Id.* at 157. Furthermore, feminists' "singular focus on rape as a manifestation of male power" overshadows the fact that rape has been used specifically "as a weapon of racial terror." *Id.* at 158. Thus, she concludes that Black women have been erased from the discourse, "caught between a Black community that, perhaps understandably, views with suspicion attempts to litigate questions of sexual violence, and a feminist community that reinforces those suspicions by focusing on white female sexuality." *Id.* at 159.

[144] *Id.* at 140.

[145] Patricia Hill Collins & Sirma Bilge, Intersectionality 2 (2016).

[146] *Id.*

[147] *Id.*

Yet, despite numerous scholarly accounts demonstrating the effectiveness of this multifaceted analysis, many actors continue to analyze discrimination in monolithic terms. As such, intersectionality has had a difficult time gaining traction in United States jurisprudence.[148] As Kathryn Abrams has noted,

> the reluctance of many actors, in both life and law, to depart from more unitary conceptions of [experience] does not have the same consequences for all of them. . . . The privilege associated with some characteristics—for example, whiteness, maleness, heterosexuality—may permit many people, including those who bear these characteristics, to ignore them.[149]

As a result, the typical "legal reliance on unitary conceptions of subjectivity . . . imposes a special burden on subjects who lack such indices of privilege—whose constructive or constitutive influences place them at cumulatively greater distance from the groups who prescribe the norm."[150]

In contrast to the unwelcome reception it has faced in United States jurisprudence,[151] intersectionality has begun to be embraced in international law, particularly by the United Nations.[152] Its slow integration into the legal mainstream may finally be reaching a tipping point as younger lawyers embrace it more readily than their older counterparts. Just as gender stereotyping of caregivers, especially in the context of privileged white parenting, is beginning to seem archaic (even to Republican sponsors of paid leave proposals), we seem to be increasingly accepting that intersectional analysis makes policies and proposed changes more effective.

B. Applying Intersectional Feminism to the FMLA

As the Supreme Court described in *Hibbs*, the FMLA was intended to protect workers needing to take caretaking and medical leaves[153] and, in doing

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[148] *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. Rev. 713, 727–28 (2015) ("[M]any if not most of the early classics of intersectionality legal scholarship featured Title VII cases as primary evidence of antidiscrimination law's essentialist, exclusionary, and one-dimensional approach to identity and to subordination."); Kathleen Morris, *Through the Looking Glass: Recent Developments in Affirmative Action*, 11 Berkeley Women's L.J. 182, 185 (1996); Crenshaw, *supra* note 33, at 141–152 (critiquing Title VII cases in which courts rejected African American women as representative plaintiffs in class action. ns).

[149] Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2491–92 (1994).

[150] *Id.* at 2492.

[151] Mayeri, *supra* note 148, at 727–28; Morris, *supra* note 148, at 185; Crenshaw, *supra* note 33, at 141–52.

[152] Isaac Conrad Herrera Sommers, Note, *Suffering for Her Faith: The Importance of an Intersectional Perspective on Gendered Religious Persecution in International Law*, 61 Harv. Int'l L.J. 511, 533–34 (2020).

[153] 29 U.S.C. § 2614(a)(1); 139 Cong. Rec. 2001, 2014 (1993).

so, help remediate gender discrimination by dismantling traditional gender stereotypes.[154] Yet, by focusing on gender as a monolithic category, the statute ignores the diversity of identities and other characteristics that intersect with gender and creates barriers to accessing FMLA-covered parental leave.[155] As discussed below, discrimination in the context of caretaking leave is felt differently by those from different socioeconomic backgrounds, different ages, and different racial and ethnic identities, which ultimately affects the FMLA's realized impact.[156] The discussion treats intersectional feminism and the FMLA in tandem. It first addresses how intersectional feminism views the intersection of gender and socioeconomic status, race, and age in workforce and caregiving contexts, highlighting the baseline disadvantage these groups face without the FMLA. The interactional analysis is then applied to the FMLA where the statute's failure to address the complexity of the population looking to take caretaking leave deepens the disadvantage chasm and potentially exacerbates the marginalization.

1. *Socioeconomic Status: The FMLA Leaves Behind Extra-Burdened Low-Income Parents*

While *Hibbs* focuses on the way that the burdens of caretaking responsibilities have traditionally fallen more heavily on women than on men, caretaking burdens are also felt differently by lower-income women. With less money available, it is no surprise that studies demonstrate lower-income caregivers are dramatically less likely than their higher-income counterparts to pay for assistance to help them or relieve them from their caregiving responsibilities.[157] This compounds the already much-heavier time burden that lower-income women shoulder: the majority of caregivers are women who disproportionately live in low-income households (45% of whom live twice

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[154] *See Hibbs*, 538 U.S. at 731.

[155] *See, e.g.*, Leslie Agyemfra, *An Intersectional Lens on Paid Family and Medical Leave*, YW Bos. (Apr. 28, 2018), https://www.ywboston.org/2018/04/intersectional-lens-on-paid-family-leave/ [https://perma.cc/ZW9K-W8UA]; *What Does Intersectional Feminism Actually Mean?*, *supra* note 134.

[156] Joshi et al., *supra* note 36, at 7 ("FMLA-eligible employees who needed leave but did not take it were more likely to be female, Hispanic, non-white, low-income, not married, and parents, raising concerns about inequitable take up for certain vulnerable subgroups."); *see* 29 U.S.C. § 2601; 139 Cong. Rec. 2001, 2014.

[157] *See* Amanda Freeman & Lisa Dodson, *Triple Role Overload: Working, Parenting, and Navigating Public Benefits*, 42 J. Fam. Issues. 1737, 1739 (2021) (noting that "around 30% of professional workers now have access to some paid parental leave, while the percentage of full-time low-wage workers hovers around 4%" and that "only roughly 30% of workers in the lowest 10% of wages have access to paid sick leave compared to more than 90% of workers in the top 10% of wages"); Richard Schulz & Connie A. Tompkins, *Informal Caregivers in the United States: Prevalence, Caregiver Characteristics, and Ability to Provide Care*, *in* The Role of Human Factors in Home Health Care: Workshop Summary 117, 134 (2010).

below the federal poverty line) and spend an estimated twenty hours each week providing care.[158]

Even when she can obtain help from a family member or a friend, a lower-income woman with caretaking obligations is far more likely than her higher-income counterpart to impact another low-income person.[159] That helper (whether eligible for and taking FMLA leave or not) is more likely to sacrifice income or job security to provide assistance.[160] She is also far more likely to rely upon the assistance of minor children whose education suffers as they pick up the caretaking burden in lower-income households, which can be outsourced by middle- and upper-income families.[161]

Women particularly are more likely to earn less (on average only eighty-two cents for every dollar a man earns) than men.[162] As a result of this continuing wage disparity, among other reasons, women are 35% more likely than men to find themselves in a lower socioeconomic bracket.[163] Factoring in family responsibilities widens the wage gap between men and women even

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[158] *See* Alice Ho et al., Commonwealth Fund, A Look at Working-Age Caregivers' Roles, Health Concerns, and Need for Support 1, 2 (2005), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2005_aug_a_look_at_working_age_caregivers_roles__health_concerns__and_need_for_support_854_ho_lookatworkingcaregiversroles_ib_pdf.pdf [https://perma.cc/AW2C-Y76D]; Lynn Feinberg et al., AARP Pub. Pol'y Inst., Valuing the Invaluable: 2011 Update The Growing Contributions and Costs of Family Caregiving. 1 (2011), https://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf [https://perma.cc/SQ2M-ZEZ9]; Commonwealth Fund, Informal Caregiving, at 1 (1999), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_data_brief_1999_may_informal_caregiving_caregiving_fact_sheet_pdf.pdf [https://perma.cc/JM9H-X43M].

[159] *See* Anthony David Campbell & Elizabeth H. Bakers, *Do Income Inequalities in Higher Weight Status Depend on Social Integration?*, 83 Soc. Sci. Rsch. 2 (Sept. 2009) ("Low income individuals are more likely to have worse social integration and are more likely to be socially integrated into groups of other low income individuals.").

[160] *See* Maya Jasinka, *Can CDCTC Policies Increase Child Care Supply?*, Bipartisan Pol'y Ctr. (Feb. 1, 2024), https://bipartisanpolicy.org/blog/can-cdctc-policies-increase-child-care-supply/ [https://perma.cc/CDP7-HYU3] (individuals with a lower socioeconomic status are more likely to use informal sources for childcare); Rebecca Anastos-Wallen & Paula Chatterjee, *Informal Caregivers and Health Policy*, Penn Leonard Davis Inst. of Health Econ. (Dec. 15, 2020), https://ldi.upenn.edu/our-work/research-updates/informal-caregivers-and-health-policy/ [https://perma.cc/F92B-9UHE] (individuals with lower socioeconomic status and lower educational achievement have an increased likelihood of providing daily care to relatives).

[161] Fabiola Cineas, *Why So Many Kids Are Still Missing School*, Vox (Jan. 9, 2024), https://www.vox.com/2024/1/9/23904542/chronic-absenteeism-school-attendance [https://perma.cc/5ZH4-XTWC].

[162] This wage disparity is far more pronounced for women of color. *See infra* notes 182–202 & accompanying text. Women of color, for many reasons, are the most likely of all American workers to be situated in a lower socioeconomic bracket; for example, Latinx women earn only 55% of what non-Hispanic white men are paid. *See* Katherine Haan & Kelly Reilly, *Top Gender Pay Gap Statistics*, Forbes (Mar. 1, 2024), https://www.forbes.com/advisor/business/gender-pay-gap-statistics/ [https://perma.cc/YFL9-2XZ5].

[163] Janelle Jones, *5 Facts About the State of the Gender Pay Gap*, U.S. Dep't of Lab. Blog (Mar. 29, 2021), https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap [https://perma.cc/MT6E-JNAV]; *Women and Poverty in America*, Women's Legal Def. & Educ. Fund, https://www.legalmomentum.org/

further, with mothers generally earning sixty-two cents to every dollar that fathers earn, and mothers working full-time earning only seventy-four cents to every dollar to fathers that also work full time.[164] Even more telling is the fact that fathers earn more than any other group of workers, including women and men without family responsibilities, as 94% of men with family responsibilities remain active in the workforce and to work more hours, a concept deemed the "fatherhood wage premium."[165]

Employees with low wage jobs, those paying two-thirds of the median salary of an estimated $30,000 annually, qualify for FMLA eligibility rates 40% less often than their middle-income counterparts.[166] This disparity increases for employees living at a poverty wage, who qualify for eligibility 65% less than their middle class counterparts.[167] Socioeconomic status thus furthers gender discrimination and, in a vicious cycle, gender furthers the likelihood of continued socioeconomic disadvantage and FMLA ineligibility.[168] Despite Congress' gender remediation efforts, these issues overlap and further cyclical discrimination, which is further compounded by other characteristics.[169]

The FMLA unfortunately does little to help lower-income caregivers. Lower-income caregivers carrying a significant financial burden are also the least likely to find the FMLA, in its current form, of much value.[170] First, for

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women-and-poverty-america#:~:text=70%25%20of%20the%20Nation's%20Poor,raise%20their%20families%20in%20poverty [https://perma.cc/4Y6N-CCP7].

[164] Ariane Hegewisch et al., Inst. for Women's Pol'y. Rsch., Fact Sheet: State by State, Mothers Are Paid Much Less Than Fathers 1 (2023), https://iwpr.org/wp-content/uploads/2023/08/Mothers-Equal-Pay-Fact-Sheet-2023-FINAL.pdf [https://perma.cc/CX5C-K4BE].

[165] Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, Pew Rsch. Ctr. (Mar. 1, 2023), https://pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/#mothers-with-children-at-home-tend-to-be-less-engaged-with-the-workplace-while-fathers-are-more-active [https://perma.cc/P3NE-97SU].

[166] Kelly Jones & Farah Tasneem, U.S. Dep't of Lab., FMLA Eligibility of Underserved Communities 2, 7 (2022) https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/American%20University_Final_20220105_508.pdf [https://perma.cc/AR2R-QSDK].

[167] *Id.* at 2, 8. For a discussion of how a "poverty wage" is determined, *see How the Census Bureau Measures Poverty*, U.S. Census Bureau (Sept. 22, 2022), https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html#:~:text=The%20family's%202021%20poverty%20threshold%20(below)%20is%20%2433%2C148 [https://perma.cc/9CNB-YJGE]. In 2025, the national poverty rate for a family of four was set at $32,150. *Poverty Guidelines*, Dep't of Health & Hum. Servs. Off. of the Assistant Sec'y for Plan. & Educ., https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines [https://perma.cc/9MMR-5G6Q].

[168] *See* Agyemfra, *supra* note 155.

[169] Pronita Gupta et al., *Paid Family and Medical Leave Is Critical for Low-wage Workers and Their Families*, Ctr. for L. & Soc. Pol'y (Dec. 19, 2018), https://www.clasp.org/publications/fact-sheet/paid-family-and-medical-leave-critical-low-wage-workers-and-their-families/ [https://perma.cc/6Y69-BX6E].

[170] Scott Brown et al., Abt Assocs., Employee Worksite Perspectives of the Family and Medical Leave Act: Results from 2018 Surveys, at iv (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf [https://perma.cc/3BZY-7USN] (noting low-wage workers are more likely than their higher-earning counterparts to forego leave and to be entitled only to unpaid leave).

those who can meet the strict FMLA requirements and establish coverage, the unpaid leave entitlement fails to provide any meaningful protection for the nearly half of those workers who simply cannot afford to go without income for twelve weeks.[171] For those that choose to do so, the consequences are severe and push many into more dire economic straits: "In 2001, 25 percent of dual-income families and 13 percent of single-parent families who filed for bankruptcy did so after missing two or more weeks of work due to their own illness or the illness of a family member."[172]

Second, a high percentage of American workers (44%) simply are not covered by the FMLA[173]—and those with lower incomes are the *most* likely to fall into this camp.[174] There are several reasons for this.

First, the FMLA does not take into account part-time employees who may work multiple jobs or employees who work for small employers—employment situations which are more commonly experienced by low-income workers and which offer limited job security.[175] Limited job security in tandem with the FMLA's one-year work provision is particularly onerous for these employees who generally lack social capital and the advantages that come with it.[176] Social capital advantages bring intangible benefits for employees that build upon themselves once they are present.[177] Indeed, social capital advantages are not only linked with job security but also solidify it further by allowing the longest-tenured employees to use their experience and

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[171] *See* Julie Ajinkya, *Who Can Afford Unpaid Leave?*, Ctr. for Am. Progress (Feb. 5, 2013), https://www.americanprogress.org/article/who-can-afford-unpaid-leave/ [https://perma.cc/A4VR-YWMP].

[172] Heather Boushey et al., *The Economic Benefits of Family and Medical Leave Insurance*, Ctr. for Am. Progress (Dec. 12, 2013), https://www.americanprogress.org/article/the-economic-benefits-of-family-and-medical-leave-insurance/ [https://perma.cc/Y2AW-BTM5].

[173] Nat'l P'ship for Women & Fams., Key Facts: The Family and Medical Leave Act 1, 2 (2025), https://nationalpartnership.org/wp-content/uploads/2023/02/key-facts-the-family-and-medical-leave-act.pdf [https://perma.cc/J7SB-V6HD].

[174] Renee Stepler, *Key Takeaways on Americans' Views of and Experiences with Family and Medical Leave*, Pew Rsch. Ctr. (Mar. 23, 2017), https://www.pewresearch.org/short-reads/2017/03/23/key-takeaways-on-americans-views-of-and-experiences-with-family-and-medical-leave/ [https://perma.cc/CT26-DQ7L] ("Leave takers with lower incomes are far less likely than those with higher incomes to receive pay when they take time off from work for family or medical reasons. . . . [A]mong leave takers with annual household incomes under $30,000, 62% say they received *no pay*, compared with 26% of those with household incomes of at least $75,000.").

[175] *See Paid Leave in the U.S.*, *supra* note 18.

[176] By "social capital," we mean the benefits that accrue from relationships, networking, and the trust these engender. Notably, and importantly, social capital has a positive correlation with higher socioeconomic status. *See* Jonathan Aseye Nutakor et al., *Socioeconomic Status and Quality of Life: An Assessment of the Mediating Effect of Social Capital*, 11 Healthcare (Special Issue) 1–2 (2023).

[177] *See id.*; *see also* Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, *in* Gender and Family Issues in the Workplace 65–85 (Francine D. Blau & Ronald G. Ehrenberg eds., 1998).

expertise to become even more valuable and less fungible the longer they are in their position.[178]

Furthermore, smaller employers who employ lower-income caregivers are less likely to offer paid leave, either because they lack the cash flow to afford it or have other priorities.[179] And, as a corollary to what is discussed above, lower-income employees lack the social capital to demand those benefits based on a less established relationship with their employers.[180] In such circumstances, employees are unable to afford to take unpaid parental leave and are thus forced to return to work before they are medically cleared to do so, compromising the development and well-being of both parent and child.[181]

2. *Compounding Discrimination Based Upon Race and Ethnicity*

Yet, an intersectional analysis reveals an even more dire situation. The racial imbalances in wage earnings are more starkly problematic for women of color—highlighting the intersection of socioeconomic status with race *and* gender.[182] On average, employees of color earn less than their white counterparts.[183] Black women make sixty-three cents, and Latina and Hispanic women make fifty-five cents, for every dollar a Caucasian male makes, while Caucasian women make seventy-nine cents for every dollar a Caucasian male makes.[184]

However, the pay disparity is not based on labor force participation. Latinx and Hispanic workers participate in the labor market at a high rate of 65.6%, but Latino and Hispanic males earn ninety-one cents for every dollar a Caucasian male makes. Further, these earnings are heavily concentrated in

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[178] Klerman & Leibowitz, *supra* note 177, at 80; *see also* Raj Chetty et al., *Social Capital I: Measurement and Associations with Economic Mobility*, 608 Nature 108, 115–16 (Aug. 1, 2022), https://www.nature.com/articles/s41586-022-04996-4 [https://perma.cc/HX5H-XZ7B]; *Network Effects: How to Rebuild Social Capital and Improve Corporate Performance*, McKinsey & Co. (Aug. 2, 2022), https://www.mckinsey.de/capabilities/people-and-organizational-performance/our-insights/network-effects-how-to-rebuild-social-capital-and-improve-corporate-performance [https://perma.cc/FPD6-8L9Y].

[179] Priyansha Mistry, *Why FMLA Doesn't Cut It for Growing Startups*, HR Digest (Oct. 7, 2018), https://www.thehrdigest.com/why-fmla-doesnt-cut-it-for-growing-startups/ [https://perma.cc/5Y7J-HYJ2].

[180] Chetty, *supra* note 178, at 108.

[181] Statement of Elisabeth Jacobs, *supra* note 35, at 49–50; *see* Jenifer MacGilvary & Netsy Firestein, U.C. Berkeley Lab. Ctr., Family Friendly Workplaces: Do Unions Make a Difference? 3 (2009), https://laborcenter.berkeley.edu/pdf/2009/family-friendly09.pdf [https://perma.cc/K4S3-MJLA] (finding "[u]nionized employees are more likely to have heard of the FMLA and have fewer worries about taking leave").

[182] Anahi Casas Perez, How the Family and Medical Leave Act Does Not Serve Single Mothers of Color 1, 10 (2021), https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1697&context=scursas [https://perma.cc/FYU4-YV53].

[183] *Id.*

[184] *See* Robin Bleiweis et al., *Women of Color and the Wage Gap*, Ctr. for Am. Progress (Nov. 17, 2021), https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/ [https://perma.cc/KZS5-BBLR].

low-wage jobs as a result of occupational segregation, with 39% of Caucasian men working in management or related professional roles with higher earnings, compared to 21% of Hispanic men, regardless of educational achievement.[185] Black workers are also impacted, with Black males earning eighty-seven cents for every dollar a Caucasian male makes, also with a high labor force participation rate at around 61.8% for Caucasian males and 60.5% for Black males.[186] Thus, Latino, Hispanic, and Black men are similarly positioned in lower-wage, non-management positions compared to Caucasian males.[187]

Thus, lack of access to family leave further has the potential to exacerbate the poor outcomes Black women and children face in America. Black women are three times more likely than white women to die from pregnancy-related complications, largely because of racism and systemic inequities to proper prenatal care.[188] The increased rate of chronic illness in communities of color extends to higher rates of maternal and infant mortality in both the childbirth and postpartum periods.[189] The most common cause of pregnancy-related mortality for Black women is related to a variety of cardiovascular conditions, which can occur up to one year postpartum.[190] Often women of color in low socioeconomic brackets who access healthcare via Medicaid do not start prenatal care until the third trimester, and adding insult to injury, are dropped from Medicaid after the expanded coverage period ends 60 days postpartum.[191]

Further widening the racially influenced gender divide, women of color are more likely than Caucasian women to need to leave their jobs to stay home with their children.[192] Race and ethnicity are characteristics that directly impact the unaffordability and ineligibility of FMLA's unpaid parental leave.[193] Women of color are more likely to lose their jobs when taking parental leave,

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[185] *Id.; see also* U.S. Bureau of Lab. Stats., Labor Force Characteristics by Race and Ethnicity, 2020, at 5 (2020), https://www.bls.gov/opub/reports/race-and-ethnicity/2020/pdf/home.pdf [https://perma.cc/8UJT-BD9J] (finding educational achievement "earnings comparisons are on a broad level and do not control for many factors that can be significant in explaining earnings differences").

[186] U.S. Bureau of Lab. Stats., *supra* note 185, at 21.

[187] *Id* at 9, 31–33.

[188] White House Blueprint for Addressing the Maternal Health Crisis, The White House 1, 3, 15 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf [https://perma.cc/S3X8-7RE8].

[189] Eugene Declercq & Laurie C. Zephyrin, Commonwealth Fund, Maternal Mortality in the United States: A Primer 6–9 (2020), https://www.commonwealthfund.org/sites/default/files/2020-12/Declercq_maternal_mortality_primer_db.pdf [https://perma.cc/MN65-SSBQ]; Milli et al., *supra* note 15.

[190] *Id.* at 6.

[191] *Id.* at 9.

[192] Gupta et al., *supra* note 169; *Press Release: New Department of Labor Family and Medical Leave Data Illustrates Gaps in Coverage, Threatening the Financial Security of American Workers,* Nat'l P'ship for Women & Fams. (Aug. 10, 2020), https://nationalpartnership.org/news_post/new-department-of-labor-data-shows-gap-in-coverage-html/ [https://perma.cc/23WB-YVUJ] [hereinafter Financial Security of American Workers].

[193] Casas Perez, *supra* note 182, at 7; Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SHRM (June 26, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx [https://perma.cc/6EGF-5QYF].

as only 57% of Black women and 52% of Latina and Hispanic women work for FMLA-covered employers.[194] Employment status strongly influences whether female employees of color can take FMLA's unpaid parental leave as it speaks to socioeconomic status.[195] An estimated 65% of Black (and 75% of Latina and Hispanic) parents are either ineligible or cannot afford unpaid leave under FMLA due to low wages.[196] Pay disparities stemming from racial inequalities not only exacerbate the FMLA's ineligibility and unaffordability limitations but also reinforce the intersection between gender and socioeconomic status with race and ethnicity.[197]

This intersection of race and ethnicity with gender and socioeconomic status and its compounding discrimination is a systemic barrier to FMLA eligibility and affordability.[198] Women of color's ineligibility and inability to afford unpaid leave stems from a workforce experience in low-wage positions absent legal protections and few educational opportunities.[199] Racism, historically discriminatory policies, and America's history with slavery and Jim Crow have perpetuated this issue, resulting in women of color statistically lacking "financial stability and upward mobility" opportunities.[200] This directly contributes to the overrepresentation of women of color in low-wage and part-time work compared to their White counterparts, highlighting the intersectional nature of these characteristics and resulting impacts.[201] Generally, women of color who cannot participate in the FMLA's unpaid parental leave are barred from doing so because of their lack of participation in *qualifying types* of employment.[202] Women of color give to the workforce without reaping the benefits of the FMLA for systemic reasons out of their control.

3. *Impact on Younger Women*

Typically, age discrimination involves discrimination against those older than a specific job requirement or qualification.[203] Thus, almost all legislation and cases addressing "ageism" involve allegations of someone being

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[194] Gupta et al., *supra* note 169; *Financial Security of American Workers, supra* note 192.
[195] Gupta et al., *supra* note 169.
[196] *Id.*
[197] *Id.*; *see Intersectionality Resource Guide and Toolkit*, *supra* note 40, at 8–9.
[198] *See* Agyemfra, *supra* note 155; Gupta et al., *supra* note 169.
[199] Nat'l P'ship for Women & Fams., Paid Family and Medical Leave: A Racial Justice Issue – and Opportunity 2, 7 (2018), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf [https://perma.cc/VU5K-NYS3].
[200] Agyemfra, *supra* note 155.
[201] Nat'l P'ship for Women & Fams., *supra* note 199, at 7; Julie M. Goodman, *Racial/Ethnic Inequities in Paid Parental Leave*, 5 Health Equity 738, 740 (2021).
[202] Nat'l P'ship for Women & Fams., *supra* note 199, at 7; Goodman, *supra* note 201, at 740.
[203] *Age Discrimination*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/age-discrimination [https://perma.cc/6H49-S94X].

considered too old for a specific job, service, or opportunity rather than being too young for one.[204] Judicially, age is a complicated characteristic as the Supreme Court has concluded that age discrimination earns only rational basis review despite its immutability.[205] The Court further established that age plays an insignificant role in assessing a larger group's lack of political power, despite a standard voting age and other age-based requirements for political representation.[206] However, age as a characteristic has not been completely ignored, as Congress passed legislation prohibiting age discrimination in the workplace, most notably through the Age Discrimination Act of 2004, despite largely ignoring the characteristic as a relevant issue under the FMLA.[207]

However, the intersection between age and socioeconomic status is pervasive in cases of discrimination against younger employees, which is further compounded for younger women who become mothers. On average, girls in the workforce between the ages of sixteen and eighteen are more likely than boys to work hourly jobs at a lower wage or the federal minimum wage.[208] These low-paying jobs are more often part-time work for smaller companies, compounding the likelihood of teenage mothers earning lower incomes than their older counterparts, as they lack career mobility.[209] Though declining since 1991, teenage pregnancies and teenage motherhood are still prevalent in America at a rate of 14 per 1,000 women.[210] Compounded by the increasing legislation aimed at limiting younger women's ability to obtain contraception and abortion care in the wake of *Dobbs*, the idea of working teenage women requiring parental leave is a politically uncomfortable, but perhaps an unavoidably looming issue.[211] As younger female workers are generally more

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[204] *Id.* ("The Age Discrimination in Employment Act (ADEA) forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states have laws that protect younger workers from age discrimination.").

[205] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 307 (1976*);* Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 63 (2000); Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Census*, 44 U.C. Davis. L. Rev. 213, 236–37 (2010).

[206] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470–73 (1991); Vance v. Bradley, 440 U.S. 93, 96–98, 106–09 (1979); Murgia, 427 U.S. at 313.

[207] *Age Discrimination*, *supra* note 203.

[208] *Characteristics of Minimum Wage Workers, 2020*, U.S. Bureau of Lab. Stats., https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm [https://perma.cc/N555-HD4P]; *Workers Under 18*, U.S. Dep't of Lab., https://www.dol.gov/general/topic/hiring/workersunder18 [https://perma.cc/QY2G-D66K].

[209] Kathleen Romig & Kathleen Bryant, *A National Paid Leave Program Would Help Workers, Families*, Ctr. on Budget & Pol'y Priorities (Apr. 27, 2021), https://www.cbpp.org/research/economy/a-national-paid-leave-program-would-help-workersfamilies#:~:text=And%20for%20people%20of%20color,to%20leave%20for%20elder%20care.%E2%80%9D [https://perma.cc/M4JV-EMYT].

[210] *About Teen Pregnancy*, U.S. Ctrs. for Disease Control & Prevention (Nov. 15, 2021), https://www.cdc.gov/reproductive-health/teen-pregnancy/index.html [https://perma.cc/V86E-ARDG].

[211] *See generally Teen Pregnancy*, Guttmacher Inst., https://www.guttmacher.org/united-states/teens/teen-pregnancy?gclid=Cj0KCQiAz9ieBhCIARIsACB0oGKp2uflUcRymvkVjY-XxR9iPpVHfKCBXSaBm3TU4ua4H-noEKs4yn8aAlbwEALw_wcB [https://perma.cc/55GE-3UQG]; *see also* Suzanne Gamboa, *Texas Teen Birthrate Rose*

prone to job insecurity based on market fluctuations, have less experience, and have less education, the impact of removing them from the workforce without parental leave protection could stunt their socioeconomic prospects (and their children's) for up to a decade afterward.[212]

Yet, age is another barrier for FMLA-covered parental leave. While minors are typically not considered as prototypical workers, in fact, minors who have reached the ages of sixteen or seventeen years old may legally work the equivalent of full-time hours in many states, and minors as young as fourteen or fifteen years old may work forty hours in select circumstances.[213] The FMLA's employment tenure requirements, however, complicates eligibility for younger employees who generally lack the time in the workforce and the experience to accumulate the requisite twelve-month employment tenure required for parental leave.[214] Younger employees are also more likely to work for smaller, local employers that do not meet the fifty-employee minimum.[215] Furthermore, younger employees more frequently work part-time or adjusted hours to accommodate schooling, truancy laws, and labor restrictions and are thus generally unable to meet the 1,250 minimum annual hours requirement.[216]

These younger mothers are particularly disadvantaged by a lack of FMLA-protected leave. "Adolescent mothers" (as they are called by the World Health Organization[217]) are 40% more likely than their childless peers to drop out of high school before receiving a degree, compared to "adolescent fathers," who are only about 25% more likely to drop out before graduating.[218] Adolescent mothers are more likely to require longer periods of parental leave and less likely to have the economic support of their male counterparts than women over the age of nineteen.[219] Without any protected parental leave,

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for the First Time in 15 years After Abortion Ban, Largely Affecting Latinas, NBC News (Jan. 24, 2024) https://www.nbcnews.com/news/latino/texas-latina-teen-birth-rate-rises-after-abortion-ban-rcna135511[https://perma.cc/2V8U-NTAC].

[212] Kate Bahn & Kathryn Zickuhr, *May Jobs Report: Young Workers Are Entering a Uniquely Evolving U.S. Labor Market*, Wash. Ctr. for Equitable Growth (June 3, 2022), https://equitablegrowth.org/may-jobs-report-young-workers-are-entering-a-uniquely-evolving-u-s-labor-market/ [https://perma.cc/ENK8-J35S].

[213] *A Short Guide to Child Labor in Non-Agricultural Jobs*, U.S. Dep't of Lab., https://www.dol.gov/agencies/whd/child-labor/short-guide-to-child-labor-non-ag [https://perma.cc/7FU6-9DWG].

[214] *See* Romig & Bryant, supra note 209; *see also* Brown et al., *supra* note 170, at 2.

[215] *See* Romig & Bryant, *supra* note 209; *see also* Brown et al., *supra* note 170, at 48.

[216] *See* Romig & Bryant, *supra* note 209; Brown et al., *supra* note 170, at 42.

[217] *Adolescent Pregnancy*, World Health Org., (Sept. 15, 2022), https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy [https://perma.cc/DRS7-5SCL].

[218] *About Teen Pregnancy, supra* note 210; *see also The Adverse Effects of Teen Pregnancy*, Youth.gov, https://youth.gov/youth-topics/pregnancy-prevention/adverse-effects-teen-pregnancy [https://perma.cc/7F8Z-RJZ5].

[219] Susan May, *Postpartum Depression Among Adolescent Mothers in the United States*, Ballard Brief Rsch. Lib (2022), https://ballardbrief.byu.edu/issue-briefs/postpartum-depression-among-adolescent-mothers-in-the-united-states [https://perma.cc/C7K8-BR6S] (surveying studies reflecting that teenage mothers are more likely to develop post-partum depression and "are less likely to have a stable partner" than their older counterparts); *see also* Julie Maslowsky et al., *Post-Pregnancy Factors Predicting Teen Mothers' Educational Attainment by Age 30 in Two National Cohorts*, 54 Youth Soc. 1377, 1377 (2021);

adolescent mothers are likely to experience higher rates of unemployment and higher rates of living in poverty, significantly limiting their socioeconomic options and earning potential.[220] Adolescent mothers' age and limited work experience reduce their employment options, making them more likely to work for employers who do not qualify as FMLA "covered employers" based on employer size and hours needed, further removing them from the labor market.[221] Failing to find ways to protect these mothers under the FMLA compounds the intersectional discrimination this unique group faces.[222]

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To be sure, while these are the identities that come up most often when considering the intersectional impact of caregiving, they are likely not the only ones. It is quite possible to imagine other categories for which data might reveal similar unique burdens, such as sexual orientation.[223] The key to using an intersectional lens is to aggregate what is so often disaggregated and consider whether unique identities (whether they be based on gender, race, class, age, sexual orientation, religion, etc.) intersect to create unique burdens that require targeted solutions, rather than approaches that will tend to benefit the privileged who do not bear the burdens that can be associated with intersecting identities.

III. Incorporating Intersectionality in the Current Political Climate

Being mindful of intersectional identities is critical to designing impactful legal frameworks to protect and support families, especially the most vulnerable. But the current, polarized political landscape is littered with landmines that must be identified and avoided for any meaningful reform to be enacted. Of particular note here, when a political issue is understood by the

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see generally Jorge L. Pinzon et al., *Care of Adolescent Parents and Their Children*, 130 Pediatrics e1743 (2012), https://publications.aap.org/pediatrics/article/130/6/e1743/30301/Care-of-Adolescent-Parents-and-Their-Children?autologincheck=redirected [https://perma.cc/Z2KN-UP6C] (surveying data regarding increased risks associated with younger motherhood and factors associated with improved outcomes).

[220] Maslowsky et al., *supra* note 219, at 1377 ("Having child care was associated with increased odds of attaining a high school diploma and of attending college" for teen mothers); *Education and Employment*, Youth.gov, https://youth.gov/youth-topics/expectant-parenting-young-families/education-employment [https://perma.cc/75F8-BLUU].

[221] Philip B. Levine, *Teenage Childbearing and Labor Market Implications for Women*, IZA World of Lab., https://wol.iza.org/articles/teenage-childbearing-and-labor-market-implications-for-women/long [https://perma.cc/DV5S-MC2Y].

[222] *See generally* Pinzon, *supra* note 219 (describing various factors and identities that overlap and exacerbate poorer outcomes associated with younger maternal age).

[223] Trevor Hastings & Morgan Winsor, *Buttigieg Responds to Pence's "Joke" on His "Maternity Leave"*, ABC News (Mar. 27, 2023), https://abcnews.go.com/Politics/buttigieg-responds-pences-joke-maternity-leave/story?id=98144545#:~:text=Since%20Buttigieg%20and%20his%20husband,about%20Buttigieg%20taking%20parental%20leave [https://perma.cc/3L48-4E4Q].

public to affect primarily people or families of color, there is relatively little political interest in the problem—as opposed to when the same issue is understood in race-neutral terms.

Professor Clare Huntington has provided several examples of this phenomenon in policy areas directly adjacent to the subject of this Article.[224] For example, she describes "family law's (mostly) compassionate response to the opioid epidemic . . . to support families affected by the epidemic, including keeping families together and providing treatment for parents," in direct contrast to the policies that prevailed during the crack epidemic, with "legal actors pathologiz[ing] Black parents and ma[king] little effort to blunt the impact of the epidemic on families."[225]

Keeping the conversation on the concrete needs of children and families without overtly surfacing racial or other politically charged categories has allowed lawmakers to create programs, "such as the Earned Income Tax Credit, Medicaid expansion, and universal prekindergarten, [that] have helped reduce racial gaps between families."[226] But it has done so by describing the issues in terms that do not highlight the racial and socioeconomic groups who are their biggest beneficiaries.

Thus, while the data presented in the previous Part suggests broad sweeping reforms, this Article focuses on alleviating those problems in pragmatic ways. The rest of this Part describes the political reality in which we currently find ourselves: where states have begun passing paid leave laws after Congress' decades-long inability to do so and Congresspeople of both parties have demonstrated broad bipartisan support for the concept of a paid leave entitlement for all American workers, with a wide array of bills having been proposed in the recent past and a new bipartisan/bicameral working group that has been attempting to create a compromise bill (currently proposed in a form that would seek to incentive and coordinate paid leave laws enacted at the state level).

A. State Family Leave Laws

The inability of federal legislators to find a bipartisan solution and enact a paid family leave law has persisted for decades; yet, one silver lining to this congressional paralysis is a recent surge in political activism at the state level. Just as states like California paved the way for the FMLA decades ago, so too has California (along with a few other states) led a growing state-level wave of paid leave laws. While only a handful of states had passed any legislation to supplement the gaps in the FMLA in 2017, nearly half of all states

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[224] *See generally* Clare Huntington, *Pragmatic Family Law*, 136 Harv. L. Rev. 1501 (2023).

[225] *Id.* at 1510–11.

[226] *Id.* at 1510.

(twenty-three including the District of Columbia) have enacted paid family leave laws as of 2025.[227]

While each state has tailored its own individual law, the state laws that have been enacted to date fall into two basic categories: mandatory and voluntary. That is, "[t]hirteen states and the District of Columbia have enacted mandatory paid family leave systems" and "[a]n additional ten states have voluntary systems that provide paid family leave through private insurance."[228]

Most of the states that have enacted mandatory laws—California, Connecticut, Massachusetts, New Jersey, Rhode Island, Washington, Colorado, Delaware, Maine, Maryland, Minnesota, and Oregon, as well as the District of Columbia—impose payroll taxes to pay for the paid leave benefits (which include maternity/paternity leave, family caregiving leave, and personal medical leave).[229] Only New York has pursued a different policy, mandating a private insurance system which is strictly regulated by the state. Under this system, employers must "purchase paid family and medical leave plans from a private insurance market where insurance companies, including the state-run New York Insurance Fund, offer coverage."[230]

The nine states that have adopted voluntary paid family leave policies also utilize private insurers.[231] Of these, seven states—Texas, Arkansas, Kentucky, Tennessee, Virginia, Alabama, and Florida—have "adopted a legislative blueprint endorsed by the National Council of Insurance Legislators (NCOIL), which permits the sale of paid family leave insurance."[232] Two states—New Hampshire and Vermont—similarly have enacted laws allowing for the adoption of voluntary private insurance plans but, in both cases, "the state government plays a more proactive role in establishing the private market. In particular, they contract with a single insurance carrier to provide a base plan for the state. To establish a risk pool, those states purchased coverage for all state employees."[233]

As most of these state laws have only recently come into effect, and only thirteen provide mandatory coverage, it is not yet clear how well these laws will work to provide paid leave to American workers who work for employers not offering paid leave as a benefit. However, as more workers gain these benefits under state law (especially in states where there is less political pushback

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[227] *State Paid Family Leave Laws Across the U.S.*, Bipartisan Pol'y Ctr. (Feb. 20, 2025), https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/ [https://perma.cc/NE5K-X9F5]; *see also State Features of State Paid Family Leave Programs*, Bipartisan Pol'y Ctr., https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2024/08/2024-August-Features-of-PFL-programs.pdf [https://perma.cc/WAA9-96DU] (chart explaining details of all currently enacted paid family leave laws).

[228] *State Paid Family Leave Laws Across the U.S.*, *supra* note 227.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.* For text of this blueprint, *see* Nat'l Council of Ins. Legislators, Proposed Paid Family Leave Income Replacement Insurance Law (2020), https://ncoil.org/wp-content/uploads/2020/02/PFML-Draft-Model-2-5-20.pdf [https://perma.cc/EM54-QDDK].

[233] *State Paid Family Leave Laws Across the U.S.*, *supra* note 227.

to policies involving universal(ish) coverage and payroll taxes), the need for a broad federal mandate may become less critical. Thus, state-level legislation provides further opportunity for applying an intersectional approach to family leave laws.

B. Proposals for Amending and Supplementing the FMLA

Since before it was enacted (as compromises left neither side satisfied with the statute[234]), there have been calls for overhauls and expansion of the rights created by the FMLA.[235] While a comprehensive account of every federal paid leave proposal is beyond the scope of this Article, three recent ones—the CRADLE Act, the FAMILY Act, and the unnamed Cassidy-Sinema plan (introduced and advanced by Republicans, Democrats, and a bipartisan partnership, respectively)—are typical and illustrative. In addition to these, a fourth federal-level initiative (a bipartisan/bicameral working group that was created fairly recently and released its first proposal in late 2024) is briefly discussed.

1. *The CRADLE Act*

Introduced as a bill by Senators Joni Ernst and Mike Lee (Republicans from Iowa and Utah, respectively) in 2019,[236] the Child Rearing and Development Leave Empowerment Act (the "CRADLE" Act) was designed to give working parents the ability to take paid caretaking leave in the first few months of a child's life by "borrowing" against their Social Security entitlements and delaying their eligible retirement date[237] in order to fund the time

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[234] *See supra* Part I.

[235] *See, e.g.*, Aparna Mathur et al., AEI Brookings, Paid Family and Medical Leave: An Issue Whose Time Has Come 24–26 (2017), https://www.aei.org/wp-content/uploads/2017/06/Paid-Family-and-Medical-Leave-An-Issue-Whose-Time-Has-Come.pdf?x85095 [https://perma.cc/GVT5-FKBA].

[236] The CRADLE Act was nearly identical to a bill introduced in 2018 by Senator Marco Rubio (with support from then-White House advisor Ivanka Trump) called the "Economic Security Act for New Parents." Campbell, *supra* note 41. Senator Rubio, along with co-sponsor Senator Mitt Romney, reintroduced another, nearly identical bill (called the "New Parents Act") in 2021. *See Press Release: Rubio, Romney Reintroduce Bill Giving New Parents Option for Paid Leave*, Sen. Marco Rubio (Sept. 15, 2021), https://www.rubio.senate.gov/rubio-romney-reintroduce-bill-giving-new-parents-option-for-paid-leave/ [https://perma.cc/P9HC-FVDY].

[237] A similar proposal—Senator Rubio and Senator Romney's New Parents Act—allows new parents who receive benefits to choose to "pay it back" either by pushing back their Social Security full retirement age by three to six months *or* by receiving a reduction in monthly retirement benefits during their first five years of retirement. Thus, parents who utilize the proposal advanced by the Republicans would be required either to work longer or to receive a lower Social Security payment compared to their counterparts who did not elect to utilize the benefit. Bruenig, *supra* note 41.

away from work.[238] As Senator Lee's press release described it, the CRADLE Act "would [have] allow[ed] parents to receive one, two, or three months of paid leave by giving them the option to postpone activating their Social Security benefits."[239] According to its sponsors, this would provide "every new mom and dad the flexibility to stay home with their newborns during the critical first months after birth," but do so "without creating another massive mandated government program or adding to our ever-growing deficit."[240]

Furthermore, supporters of the CRADLE Act emphasize that the formula it uses (the same one used to determine Social Security Disability benefits) "is progressive, meaning that monthly benefits would be more generous to those least likely to have the luxury of an employer-sponsored benefit."[241] Eligibility to take paid leave would be easier to meet under the CRADLE Act than the FMLA. Because it is focused on the employee's Social Security entitlement, rather than imposing any financial cost on the employer, it requires only that the person seeking to take leave have worked for at least a year. Specifically, "[t]o qualify for the program, parents must have worked either four out of the previous four quarters, five out of the previous six quarters or at least 20 total quarters before an initial application [with Social Security to take paid parenting leave under the Act] is filed."[242]

Like the FMLA, the CRADLE Act would apply equally to both mothers and fathers and to birth and adoptive parents. Unlike the FMLA, it only applies to caretaking leave for new parents—and only within the first few months of birth (when a child is small enough to fit in a "cradle").

Critics of the CRADLE Act focused mainly on its funding mechanism, albeit from several angles. The Act relies upon Social Security for funding, and skeptics emphasize that "Social Security is already in trouble, and using it for this purpose might only make things worse."[243] Republican proponents of the Act have responded by insisting that "the [CRADLE] Act would deepen that fund pool by allowing more people to have kids who'd eventually contribute to it."[244] But this response leads to the other major criticism: why

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[238] *See Press Release, Sens. Ernst, Lee Put Forward Paid Parental Leave Plan That Is Budget Neutral and Flexible for Parents,* Sen. Mike Lee (Mar. 12, 2019), https://www.lee.senate.gov/2019/3/sens-ernst-lee-put-forward-paid-parental-leave-plan-that-is-budget-neutral-and-flexible-for-parents [https://perma.cc/4ZAU-A3GF].

[239] *Id.*

[240] *Id.*

[241] *Id.*; *see also* Sens. Joni Ernst & Mike Lee, *How to Provide Paid Family Leave Without Further Indebting the Nation*, Wash. Post (Mar. 12, 2019), https://www.washingtonpost.com/opinions/how-to-provide-paid-family-leave-without-further-indebting-the-nation/2019/03/12/4ea8ceda-44e4-11e9-aaf8-4512a6fe3439_story.html [https://perma.cc/V8ZU-BJ8W] ("Benefit levels would be determined by Social Security's primary insurance amount, so that monthly benefits would be more generous the lower the beneficiary's income.").

[242] Sens. Ernst & Lee, *supra* note 241, at 53.

[243] Jen Gann, *Is the Cradle Act Better Than Nothing?*, The Cut (Mar. 25, 2019), https://www.thecut.com/2019/03/what-is-the-cradle-act-a-new-paid-family-leave-policy.html [https://perma.cc/9F6Q-66MJ].

[244] *Id.*

should you make "people poorer in retirement in proportion to the number of children they have"—especially if "you believe . . . that parents are already 'double-charged for federal senior entitlement programs' because they both pay into them directly and undergo huge personal costs to raise up the next generation of workers that keep the programs afloat for parents and non-parents alike"?[245] Another aspect of the funding calculus that has generated criticism is the provision that "requires the SSA to recover the leave benefits paid to parents who die before retirement by going after the deceased parents' estate."[246] This is an incongruous aspect of what is essentially a new Social Security program given that Social Security was, inter alia, designed in the first place to provide support to widows and orphans.[247]

2. *The FAMILY Act*

The main competing approach—endorsed by Democratic members of Congress—is reflected in the version of a paid leave law (called the Family and Medical Insurance Leave or "FAMILY" Act) that has been introduced multiple times by Democratic Senator Kristen Gillibrand of New York. The most recent version of the bill, co-sponsored by Representative Rosa DeLauro of Connecticut and introduced in May 2023, provides paid caretaking leave of up to twelve weeks annually for all workers: new parents, sick people, or those with sick family members.[248] The FAMILY Act's sponsors tout that it "would ensure that every worker, no matter the size of their employer or if they are self-employed or part-time, has access to paid leave for every serious medical event, every time it's needed."[249] They point out that "[p]aid medical and family leave is especially helpful for new parents and older Americans, who are more likely to have health issues or caregiving obligations for older relatives."[250]

Unlike previous iterations of the proposed FAMILY Act,[251] the most recent version creates a low eligibility threshold. The Act would cover all U.S.

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[245] Bruenig, *supra* note 41.

[246] *Id.*

[247] *See Historical Background and Development of Social Security*, U.S. Soc. Sec. Admin., https://www.ssa.gov/history/briefhistory3.html [https://perma.cc/Q8JQ-2VCN] (noting that when Social Security benefits first began to be paid in 1940, they "were authorized not only for aged retired workers but for their aged wives or widows, children under age 18, and surviving aged parents").

[248] *See Press Release: Gillibrand, DeLauro Introduce New and Improved Family Act in Fight for Universal Paid Leave,* Sen. Kirsten Gillibrand (May 17, 2023), https://www.gillibrand.senate.gov/news/press/release/gillibrand-delauro-introduce-new-and-improved-family-act-in-fight-for-universal-paid-leave/ [https://perma.cc/SL5L-28VM].

[249] *Id.*

[250] *Id.*

[251] *See* Bruenig, *supra* note 41 (noting that a previous version of the FAMILY Act based eligibility for benefits on a person's having "worked for 1.5 years, half of the time since their 21st birthday, and in the 12 months prior to giving birth").

workers (including private and public sector workers employed in federal, state, and local governments), regardless of employer size.[252] It would also "protect self-employed workers, including freelancers, independent contractors, and small-business owners, as well as gig workers, regardless of their classification."[253]

To qualify for benefits, a worker would be required to meet two requirements, neither onerous. First, "the worker must have earned some income during" an "eligibility period [that] lasts seven to nine months."[254] "Some income" is "any amount, no matter how small, so long as the amount is greater than zero ($0)."[255] Second, the worker would also be required to "have earned at least a certain total income amount across the [two-year] period" ending shortly before the benefit period.[256] The total income would also be minimal: just $2,000 total to begin with, then "adjusted annually based on growth in the national wage index"—and could be earned based on a combination of earnings from multiple jobs.[257]

Like the CRADLE Act, the program would be run through the Social Security Administration. Unlike the CRADLE Act, the FAMILY Act program would be funded by imposing a payroll tax on all employees, which would be split evenly between the employer and the employee.[258] "Self-employed people would pay an amount equal to the sum of the employee and employer shares."[259] Benefits would be paid in an individually calculated amount (based on the previous three years of income) that would be no less than $580 and no higher than $4,000 per month.[260] The income-based formula results in a higher percentage of total income for lower-income workers than for higher-income workers.[261]

Critics of the FAMILY Act had argued that the main problem with a prior iteration of the bill was its "steep work history requirement that excludes one in three new parents from eligibility"–possibly the result of "thoughtlessly copying the work history requirements for the Social Security Disability Insurance (SSDI) program."[262] SSDI benefits are not a good fit for a parental leave program since "SSDI benefits are generally needed by older Americans

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[252] Molly Weston Williamson, *Getting to Know the New FAMILY Act*, Ctr. for Am. Progress (July 12, 2023) (citing S. 1714, 118th Cong. § 2(9) (2023)), https://www.americanprogress.org/article/getting-to-know-the-new-family-act/ [https://perma.cc/WXL3-H9SE].

[253] *Id.*

[254] *Id.* (citing S. 1714, 118th Cong. § 4(a)(1)(C) (2023)).

[255] *Id.*

[256] *Id.* (citing S. 1714, 118th Cong. § 4(a)(1)(D) (2023)).

[257] *Id.* (citing S. 1714, 118th Cong. § 4(a)(2) (2023)).

[258] *See id.* (citing S. 1714, 118th Cong. §§ 7(a)(1)-(2) (2023)).

[259] *Id.* (citing S. 1714, 118th Cong. § 7(a)(3) (2023)).

[260] *Id.* (citing S. 1714, 118th Cong. §§ 4(b)(2)(A)-(B), 4(b)(3)(A) (2023)).

[261] Specifically, workers would receive "85 percent of the portion of their monthly wages that is less than or equal to $1,257, plus 69 percent of the portion of their monthly wages that is more than $1,257 but less than or equal to $3,500, plus 50 percent of the portion of their monthly wages that is more than $3,500 but less than or equal to $6,200." *Id.* (citing S. 1714, 118th Cong. §§ 4(b)(2)(A)-(B) (2023)).

[262] Bruenig, *supra* note 41.

who become disabled before retirement while parental leave benefits are generally needed by younger Americans who have just joined the workforce or, in some cases, are still getting their education."[263] Given that these benefits are aimed at such significantly different pools of workers, "the SSDI work history requirement [is] clearly inappropriate for a parental leave benefit."[264]

While the newest version of the FAMILY Act responds to these criticisms and now, as noted above, contains very minimal work history (and earnings) requirements to qualify for benefits, those very changes may make it less appealing to members of the other party. The main objection of Republicans—who agree generally on a need to provide workers with paid parenting leave—is the cost.[265] They object to imposing a tax on businesses and increasing the scope of the coverage to nearly all workers as it would raise the costs to businesses.[266] In addition, critics claim that this proposal harms lower-income workers by effectively forcing them to subsidize higher-income workers because the funding mechanism works as a regressive tax–and lower-income workers are less likely to use existing paid leave entitlements.[267]

3. *The (Unnamed) Cassidy-Sinema Plan*

A first attempt at a bipartisan proposal was a plan set forth by Senator Bill Cassidy, a Republican of Louisiana, and Senator Krysten Sinema, a then-Democrat[268] of Arizona.[269] This plan is not as fleshed out as the above partisan bills and was released without bill text.[270]

This plan, unlike the others, is available only to those families eligible for Child Tax Credits (CTCs). It would provide these eligible "new parents the option of receiving $5,000 immediately following the birth or adoption of a child (under the age of 6)."[271] Later, in exchange for the $5,000 benefit, "families would take a $500 reduction from their future annual Child Tax

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[263] *Id.*

[264] *Id.*

[265] *See generally* Caldwell, *supra* note 9 ("The biggest challenge will be how to fund the program. Republicans tend to like tax credits or incentives, and Democrats generally prefer a government-funded program.").

[266] *See Hearing on Legislative Proposals for Paid Family and Medical Leave Before the H. Ways and Means Comm.*, 116th Cong. (2020) (statement of Rep. Kevin Brady).

[267] *See id.*

[268] In December 2022, after the proposed bill was considered, Senator Sinema changed her party affiliation from Democrat to Independent, but she continued to caucus with the Democrats. *See* Chris Walker, *Republicans Invite Sinema to Caucus with Them Instead of Democrats*, Truthout (Jan. 26, 2023) https://truthout.org/articles/republicans-invite-sinema-to-caucus-with-them-instead-of-democrats/ [https://perma.cc/49BD-DUUR].

[269] *See* Sens. Bill Cassidy & Krysten Sinema, A Bipartisan Solution to Help Working Families: Frequently Asked Questions 1, https://www.cassidy.senate.gov/wp-content/uploads/media/doc/Cassidy%20Sinema%20Proposal%20FAQs.pdf [https://perma.cc/LUD3-9LU6].

[270] *See* Bruenig, *supra* note 41.

[271] Sens. Cassidy & Sinema, *supra* note 269, at 2.

Credits (CTC) over the following ten years."[272] The main point of the proposal was to advance money to parents who "would otherwise receive . . . the CTC to a period where they need it most."[273] Because of the length of time they have to repay the advance, "parents could . . . elect to receive $5,000 at birth or adoption and still receive a CTC of $1,500 for each of the next ten years."[274]

The proposal acknowledged that "[u]nder current law, some low-income families do not qualify for the full refundable portion of the CTC."[275] This would mean that "many low-income families would find it difficult to take this benefit."[276] Thus, to avoid this result, the "proposal contemplates an alternative for these families."[277] These low-income earners would be entitled to take an advance of an amount sufficient to cover 100% of their regular wages for twelve weeks.[278] Then, they would have fifteen years, instead of the usual ten, to offset their annual CTC.[279]

This plan, while not as fleshed out, also came under attack. As one critic points out, while it "ostensibly makes all new parents eligible," it "fails to scale the benefit amounts to the parent's prior earnings."[280] Thus, "[f]or a two-parent family where both parents earn the average wage of $58,000, this benefit would replace less than 2.3 weeks of their earnings. Above-average earners would receive even less income replacement."[281]

Furthermore, the Cassidy-Sinema plan would be difficult to administer. Since "Child Tax Credit eligibility is redetermined every year based on the income of the household that the child resides in," some families would lose eligibility for the CTC going forward, making it "unclear how they would pay back the benefit they received."[282] Similarly, since children often move between their parents' households year to year in non-intact families, "the person who receives parental leave benefits under the plan [may not be] the same person who is eligible for the subsequent years of CTC benefits, which also makes it hard to understand how paying back the benefit would actually work."[283]

4. *The Current Bipartisan Working Group*

In 2022, a collection of members of both the Senate and the House created a working group on paid leave. The Senate group is led by Gillibrand and

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[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.* at 3.
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] Bruenig, *supra* note 41.
[281] *Id.*
[282] *Id.*
[283] *Id.*

Cassidy, while the House membership is headed by Representatives Chrissy Houlahan (a Democrat of Pennsylvania) and Stephanie Bice (a Republican of Oklahoma).[284] In December 2024, the working group released two draft bills.[285] The first bill, entitled "The Paid Leave Public-Private Partnership Act," focuses on the "establish[ment of] a competitive grant program to be run by the U.S. Department of Labor as an incentive for states to establish their own paid family leave programs that utilize a public-private partnership model."[286] The second bill, entitled the "Interstate Paid Leave Action Network Act" or the I-PLAN Act, would "make it easier for people to access paid family leave and for states to connect with one another" by "coordinat[ing] and harmoniz[ing] paid leave benefits."[287]

Group members previously noted that "[s]upport for paid family leave is at historic levels across the nation and across both chambers of Congress"[288] and claimed that they would focus on finding areas of agreement, with "the lowest-income people . . . expected to be a priority."[289] In addition, the group originally insisted that proposed "legislation would probably include coverage for all aspects of care, including caring for new children, adult children with special needs and elderly parents."[290]

Instead, the bipartisan working group ended up choosing a different path. Eligibility for the grant program that would be established by the first bill only requires states to provide a paid leave program for parents of newborn or newly adopted children (with paid leave coverage of any other category covered by the FMLA expressly not required).[291] Furthermore, because eligibility

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[284] Caldwell, *supra* note 9.

[285] *Press Release: House Bipartisan Paid Family Leave Working Group Releases Legislative Text to Chart the Path Forward for the 119th Congress*, Rep. Chrissy Houlahan (Dec. 17, 2024), https://houlahan.house.gov/news/documentsingle.aspx?DocumentID=4368 [https://perma.cc/VEH3-HVRE] ("The two drafts being released today are the culmination of the group's work in the 118th Congress and focus on 1.) providing guidance and incentives to states to establish their own paid family leave programs using a public-private partnership model, and 2.) establishing a convening body and process to enable states to coordinate and harmonize benefits and to establish best practices for paid leave programs thereby supporting workers and businesses.").

[286] *Id.* ("For grant eligibility, states would have to meet several criteria including establishing a partnership with a private entity, to assist with program administration and provide this paid leave benefit for, at a minimum, the birth or adoption of a child. The bill also establishes a benefit floor (must provide a wage replacement rate of at least 50%–67%, based on income) and requires state programs to provide a minimum of six weeks of paid family leave in order to receive a grant."). For text of the draft bill and a summary, see linked documents within press release.

[287] Houlahan, *supra* note 285 (noting that "[o]ther social insurance programs such as unemployment insurance built the necessary state and federal connections nearly a century ago. The I-PLAN ACT will do the same for paid family leave in a way that works for employees, employers, and states."). For text of the draft bills, see linked documents within the press release.

[288] Caldwell, *supra* note 9 (quoting Rep. Houlahan).

[289] *Id.*

[290] *Id.*

[291] *Paid Family Leave Public-Private Partnerships Act (Draft Bill)*, U.S. Rep. Stephanie Bice (Dec. 13, 2024), https://bice.house.gov/sites/evo-subsites/bice.house.gov/files/

is linked to leave covered by the FMLA, it leaves out those who currently are not covered by the FMLA, including many low-income workers.[292] Instead, the emphasis of the bipartisan bills is on providing a federal framework to incentivize and coordinate diverse state leave laws that would offer more benefits to workers in some states than others.[293]

IV. Harnessing Intersectionality to Analyze and Create Political Solutions

As discussed above, the most vulnerable Americans, who feel the burdens of caretaking more than the rest of us, are impacted in ways that a universalizing approach fails to see at all, much less prioritize. A better and more impactful analysis for policymakers should begin with an intersectional approach to the problem—to identify holes that, if filled, will create the most significant impacts. To refocus and deepen the conversation around how paid leave could be designed to offer the most to those in greatest need, the competing paid leave proposals that have recently been on the table are each scrutinized through the intersectional lens described above.[294] Finally, a different approach that the bipartisan working group (or future legislators considering similar issues at either the state or federal level) should incorporate into their work is offered.

A. The Intersectional Holes in Current Federal Proposals

1. *The CRADLE Act*

As discussed in detail above,[295] the CRADLE Act narrowly offers caregiving leave to parents of newborns during their first three months only. To qualify for coverage, workers must meet significant work history requirements.[296] Because it uses the same formula used to calculate Social Security Disability benefits, it provides more generous monthly benefits to lower-income workers who the Act's sponsors correctly note are "least likely to have the luxury of an employer-sponsored benefit."[297]

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evo-media-document/2024.12.17%20-%20Paid%20Family%20Leave%20Public-Private%20Partnerships%20Act%20-%20Draft%20Text.pdf [https://perma.cc/CTP6-C3XT].

[292] *Id.* §(d)(5).

[293] Draft Bill, *supra* note 291; *Interstate Paid Leave Action Network Act of 2024* (*Draft Bill)*, U.S. Rep. Stephanie Bice (Dec. 6, 2024), https://bice.house.gov/sites/evo-subsites/bice.house.gov/files/evo-media-document/IPLAN%202024%20Discussion%20Draft%20FINAL.pdf [https://perma.cc/N4PB-TCZZ].

[294] *See supra* Part II.

[295] *See supra* Part III.B.1.

[296] U.S. Sen. Mike Lee, *Press Release*, *supra* note 238.

[297] *Id.*; Sens. Joni Ernst & Mike Lee, *supra* note 241 ("Benefit levels would be determined by Social Security's primary insurance amount, so that monthly benefits would be more generous the lower the beneficiary's income.").

For a parent of a newborn who would otherwise be financially unable to take time off work, the sourcing of the funds hitting her bank account may not be as important as having the option to take time off from work with pay.[298] Many would choose compensation in the present moment to care for a newborn, even if they ultimately might be forced to accept a lower income in retirement (or to retire later) as a result.[299]

While it does acknowledge that lower-income workers are less likely to work for employers with paid leave policies that would provide them with a source of income for the first three months of their newborn's life, the CRADLE Act fails to take account of many of the other issues that an intersectional analysis reveals. With respect to lower-income workers, not only are they less likely to have employer-sponsored plans, but as discussed at length above, they are far less likely to meet the work history requirements of the existing FMLA, which means they will be similarly unserved by this proposal.[300] The CRADLE Act also provides no paid leave for caretaking *after* the first three months of a child's life—and none for paid caretaking of other family members (or themselves). This also hits lower-income workers harder. As discussed above, absorbing the impact of unpaid caretaking is far easier for parents who can afford childcare or people who can obtain caretaking services from family or others—but the very people most in need of paid leave are, as we have seen, least likely to have that type of social safety net.[301] While something is better than nothing, a significant number of people for whom this type of law is most urgently needed will still find themselves in crisis, because they lack a right to paid leave in most situations currently covered by the FMLA's unpaid leave entitlement. These crises are also more likely to arise for women of color even during the period closely associated with birth because they face an increased risk of medical complications that require extra leave and additional caretaking help.[302] And teenage mothers are far less likely to have work

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[298] *Cf.* Freeman & Dodson, *supra* note 157, at 1746–49, 1751–52 (describing how low-income mothers in their study generally prioritized childcare over work, leading them to make many personal sacrifices, as well as specifically noting how difficult they found it "to juggle work and parenting in the period after birth without any financial support").

[299] This may be especially true the more people feel uncertainty about future social security benefits. *See* Trina Paul, *Will Social Security Run Out? Here's What Could Happen to Your Benefits*, CNBC (Jan. 23, 2025), https://www.cnbc.com/select/will-social-security-run-out-heres-what-you-need-to-know/ [https://perma.cc/FW7B-QJ2A] (reporting that "[t]he trust fund reserves used to pay beneficiaries are projected to become insolvent in 2035" and "without congressional action, retirees will only receive 83% of their full benefits"); *see also* Stephanie Sy & Karina Cuevas, *Trump Administration's Social Security Changes Could Limit Access to Benefits for Millions*, PBS News Hour (Mar. 19, 2025), https://www.pbs.org/newshour/show/trump-administrations-social-security-changes-could-limit-access-to-benefits-for-millions [https://perma.cc/6BPF-M58L] (describing potential impacts, particularly on the most vulnerable populations, of new policies that "will require new and existing [Social Security] recipients to either verify themselves online or . . . in person, even while more than 40 field offices are slated to be shut down by the Department of Government Efficiency").

[300] *See supra* Part III.B.1.

[301] *See id.*

[302] *See id.*

histories that qualify them, meaning they too are likely also remain without the paid caretaking benefits they will need to care for their children, but also without any benefits aimed at giving them ability to stay in school (or return to it), and increase their access to more secure employment opportunities as they raise their children to adulthood.[303]

2. *The FAMILY Act*

By contrast, the FAMILY Act, which applies to all workers and all types of caregiving leave—and does so with a much shorter work history requirement[304]—is more likely to provide financial support to those most in need of assistance, in terms of income and shorter work histories, split between different employers, as well as the need for multiple types of caretaking leaves. Likewise, by providing a minimum monthly payment and capping the maximum at an amount that is equivalent to a middle-class salary, the FAMILY Act is likely to be the most helpful for the people who need it the most.[305]

On the other hand, its sponsors' insistence on a universal benefit (which would be costly and has generated the most significant political problems with obtaining the bipartisan support needed to get the bill enacted into law) has caused their proposed legislation to stalemate at the expense of those most in need of a paid leave option. If the Act exempted employers that already offer paid leave, it would be less costly and would be much more tailored to provide benefits to those who are not only in actual need but are least likely to have the social capital advantages necessary to enjoy this type of benefit outside a legal requirement. The universal plan also treats everyone as equally likely to need twelve weeks of paid leave annually without regard to those who are at particular risk of experiencing birthing complications requiring longer medical leaves and additional caretaking support or who are more likely to need to care for others in the same year they give birth.

While the sponsors of the FAMILY Act have discussed their concern about the potential urgency of the issue of paid caretaking leave in the post-*Dobbs* era, the impact of *Roe v. Wade* being overturned is likely to fall heaviest on teenage mothers.[306] But a paid leave bill like this one, which cross-references the FMLA, would retain the FMLA's eligibility requirements and leave younger workers much less likely to be covered. This particular group would benefit even more from specially tailored legislation to encourage the

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[303] *See id.*

[304] Williamson, *supra* note 252 (citing S. 1714, 118th Cong. § 4(a)(1)(C) (2023)).

[305] *Id.* (citing S. 1714, §4(b)(2)(A)-(B)).

[306] *See* Hannah Lantos et al., *State-Level Abortion Restrictions Will Negatively Impact Teens and Children*, ChildTrends (Oct. 19, 2022), https://www.childtrends.org/blog/state-level-abortion-restrictions-will-negatively-impact-teens-and-children [https://perma.cc/3HBX-8DBV].

education they need to be in a more secure situation as they raise children.[307] Regular and subsidized child care for teen mothers increases the odds a teen mother will earn a high school diploma, as well as achieve higher levels of educational attainment.[308]

3. *The (Unnamed) Cassidy-Sinema Plan*

Issues of administrability aside,[309] this plan (like the CRADLE Act) also focuses on those most in need: lower-income families who are eligible for Child Tax Credits (CTCs), as well as low-income families who do not qualify for them. Furthermore, while the plan has been attacked because the flat $5,000 benefit does not scale to match the earnings of some middle-income earners, it provides a significant amount of money to those most in need.

This proposal, however, contains many of the same failings as the CRADLE Act. While this Act does not restrict the parental leave payment to the first three months of a child's life, like the CRADLE Act, it contains no right to paid leave to care for other family members (or oneself). Like the other proposals, it also lacks any benefit that would lessen some of the specific obstacles faced by both lower-income women of color and teenage mothers.

4. *The Current Bipartisan Working Group*

The current paid-leave working group is unprecedented in that it is both bipartisan and bicameral. Yet, despite the fact that "[s]upport for paid family leave is at historic levels across the nation and across both chambers of Congress," passing a consensus law continues to remain an uphill battle.[310]

Senators from both parties originally acknowledged broad support on many issues, including "that the lowest-income people are expected to be a priority" and that there should be paid "coverage for all aspects of care, including caring for new children, adult children with special needs and elderly parents, for example."[311] Yet, ultimately neither of those points of agreement

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[307] A teenage mother's level of educational attainment correlates with significant benefits to health and well-being of both mother and child. Julie Maslowsky et al., *Mechanisms Linking Teenage Mothers' Educational Attainment with Self-Reported Health at Age 50*, BMC Women's Health (2021), https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-020-01150-y [https://perma.cc/GY6V-EXLS]; *see also* Emily Hendrick & Julie Maslowsky, *Teen Mothers' Educational Attainment and Their Children's Risk for Teenage Childbearing*, 55 Dev. Psych 1259, 1259 (2019) (discussing impact of teen mothers' educational attainment on likelihood their children will also become teen parents); Anna Zajacova & Bethany G. Everett, *The Nonequivalent Health of High School Equivalents*, 95 Soc. Sci. Q. 221, 221 (2014) (discussing that GED recipients and high school dropouts have worse health outcomes than high school graduates).

[308] Maslowsky, *supra* note 219, at 1377.

[309] *See supra* notes 282–83 & accompanying text.

[310] Caldwell, *supra* note 9 (quoting Rep. Houlahan).

[311] *Id.*

made it into the consensus draft bills. Instead, the committee pivoted sharply away from federal legislation that would directly provide any benefit to the most needy workers (or ensure that paid leave would be mandatory for *all* types of caretaking) in favor of a grant-based approach that would serve to incentivize states to create their own programs that the federal government would help connect and coordinate.[312]

While it is unclear exactly why the group shifted so far away from these original talking points of agreement, it may be that they found no way to bridge the gap between the funding concerns of the Republicans and the universal coverage that Democrats have long championed. While perhaps the current bills are but a first step, it arguably would have been more effective if Democrats had joined forces with Republicans to create programs that would find money for the lowest-income worker, including those whose intersecting identities make them most vulnerable to the financial consequences of having to take unpaid leave. Given that workers in states with the most liberal state laws will already benefit from those laws, with or without the new proposal, agreeing to a less-than-perfect plan that would focus on those most in need appears to be a missed opportunity. It remains to be seen, however, what more this working group may propose—or whether the bipartisan proposal will go anywhere.

B. State Paid Leave Laws

Unfortunately, most state paid leave laws are in their infancy (some are not yet in operation), so a comprehensive analysis would be somewhat limited. One glaring issue is the choice of states with Republican-controlled legislatures to enact laws that create optional insurance programs without any large pool (such as state workers) or regulated rate structure.[313] The private insurance market is not necessarily likely to create benefits that are available to the most vulnerable workers.[314] In Texas, for example, a recent news report concluded that "two years [after the state law creating the optional insurance program], there's little to show for it in a state where most parents say they don't have the ability to care for their newborns at home while still getting paid."[315] Because the law does not require any enrollment data be collected, it is difficult to assess how successful the law has been.[316] But, as of

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[312] *See supra* notes 291–93 & accompanying text.

[313] Taylor Goldenstein, *Texas Created a Paid Family Leave Plan. Why Isn't Anyone Using It?*, Houston Chron. (Feb. 13, 2025) (describing Texas law, which is similar to many of the other states, and noting that it applies to private employers, whereas state employees have guaranteed paid leave), https://www.houstonchronicle.com/politics/texas/article/texas-paid-family-leave-20023443.php [https://perma.cc/7GF9-QYJX].

[314] *Id.* ("Experts say optional insurance is not an effective way to ensure most Texans have time off to bond with their newborns while still holding onto their jobs.").

[315] *Id.*

[316] *Id.*

February 2025, "only two insurers have signed up to offer family leave plans in Texas."[317] These two companies have declined to say how many companies have signed up, "and it's unclear if any employees have received benefits" under this program.[318]

On the other hand, there is an exciting possibility that states with Democratic-controlled legislatures may join the states that have already enacted paid leave laws entitling workers to paid leave funded through state payroll taxes.[319] While these state laws are all different, the majority provide up to 12 weeks of paid parental and caretaking leave and have a lower eligibility threshold in terms of prior work experience and total hours worked than the FMLA.[320] If this trend continues to be adopted in states with Democratic-controlled legislatures, a significant number of American workers (and their families) will benefit[321]—especially if states structure their laws with an eye to ensuring that the most vulnerable are protected. Yet, it also means that amendments to existing federal law could be used to fill the gaps left in places without strong state laws. The recommendations section below should be read both as a blueprint for state legislators to consider and as a call to take a more holistic approach that tries to do less—but focus on creating impacts where they matter more.

C. Recommendations

Viewing issues relating to taking medical and caretaking leave through an intersectional lens reveals some major themes. The populations who are most vulnerable to a lack of legal protection are not just women, but are specifically those women who are non-white, lower income, part-time, or under eighteen years old—or especially those who fall under more than one of these demographics. Workers who already work for employers who voluntarily offer paid leave benefits are more likely not to fall into one of these categories, thus making plans that create universal coverage not necessarily as beneficial as ones designed to target those most in need.

Unfortunately, explicit recognition of this reality may not be politically feasible.[322] The "broad public support for pragmatic doctrines and policies

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[317] *Id.*

[318] *Id.*

[319] *State Paid Family Leave Laws Across the U.S.*, *supra* note 227.

[320] See *id.*; *see also State Features of State Paid Family Leave Programs*, *supra* note 227.

[321] For example, after the 2022 midterm elections, "140 million. . . . Americans . . . live[d] in a state where Democrats will have total control over state government. By contrast, only 137 million live[d] in a state where Republicans . . . control state government." Nathaniel Rakich & Anna Rothschild, *140 Million Americans Will Live in States Controlled by Democrats*, FiveThirtyEight (Dec. 19, 2022), https://fivethirtyeight.com/videos/140-million-americans-will-live-in-states-controlled-by-democrats/ [https://perma.cc/5PZW-C33B].

[322] *Cf.* Huntington, *supra* note 224, at 1566–67 (describing disproportionate benefits for Black families with respect to a number of policies, but observing that "[i]t is notable, however, that advocates and policymakers generally have not framed these policies as

when they are *not* framed as redressing racial inequity" dissipates "when a problem is understood to affect primarily families of color."[323] Anything that appears to take race directly into account is almost certain to fail a bipartisan test (nor pass a Congress that, as of today, is in the sole hands of the Republican party).[324] Therefore, it will be essential to be satisfied with incremental changes, as well as to target proxies or correlates rather than those subgroups who are most in need of coverage. Issues of paid leave are ones that broadly appeal to most Americans. They can have an impact on those who most need it, and they can be calibrated to do so, even if they need to be packaged and politically "sold" as race neutral.

Rather than create a benefit that is universal, a better starting point would be to establish a safety net for those whose employers do not offer them paid leave benefits. Creating paid leave benefits—as well as longer periods of job protection—for those who are at risk of, and in fact suffer the most significant medical issues relating to childbearing would be a different approach that would also benefit those who are struggling with the biggest challenges, often because of their racial or ethnic identities. Such a benefit could be included as a parallel right to the newly created accommodations provision in the Pregnant Workers' Fairness Act. That is, requiring employers to accommodate workers with pregnancy-related medical issues for up to twelve months beyond the end of a pregnancy would create opportunities for women struggling to balance child care, work, and their own health issues in potentially creative ways that go beyond the current regime of unpaid leave. Employers could provide workers with temporary hybrid or home-work schedules—or myriad other accommodations during the period when they are most in need and at risk.

Likewise, teenage mothers' unique vulnerabilities and need for support have been unaddressed by all the proposals that have been advanced.[325] While politically this can be a difficult issue for members of both parties because of many other related political issues, including abortion, there could be consensus that this group has been rendered invisible in most conversations around family leave, to the detriment of a significant number of families who are often the most in need of assistance.

This list is far from exhaustive. In fact, it is only a starting point. It provides a template that lawmakers should use to move beyond monolithic

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efforts to address racial inequity. And framing the programs in such terms may well erode support.").

[323] *Id.* at 1510 (emphasis in original); *see also id.* ("Thus, when a problem is understood to affect primarily families of color, race has trumped pragmatism.").

[324] *Cf. id.* at 1568 ("[I]f advocates restyled the [Earned Income Tax Credit] as a racial equity payment program, views on the desirability of the subsidy would likely be polarized, and much support would likely evaporate.").

[325] While the full impact of the *Dobbs* decision and state responses to it remain unclear, at least in one state—Texas—the birth rate has increased in the wake of the decision. Eleanor Klibanoff, *Hispanic and Teen Fertility Rates Increase After Abortion Restrictions*, Tex. Trib. (Jan. 26, 2024), https://www.texastribune.org/2024/01/26/texas-abortion-fertility-rate-increase/ [https://perma.cc/W2P6-5YBX]. The state saw a birth rate increase for the first time in a decade, with the biggest increase among young Hispanic women. *See id.*

categories of gender, race, or class to instead focus on the overlapping and intertwined identities that work together to create unique leave-taking and caretaking burdens on distinct groups of American workers. Doing so is likely to allow legislators to discover smaller programs that can generate significant returns for the neediest in ways that are likely to benefit us all.

Conclusion

As we have become a more politically polarized society, the number of issues that remain available to bipartisan solutions appears to be constantly dwindling. Caretaking leave—especially parenting leave—remains one of the few policy proposals that has broad bipartisan support in both houses of Congress.

This may be because it is an issue that upon which Americans of all political affiliations agree. Yet, it is the most vulnerable and politically powerless that are most in need. Both *who* they are and *what* their needs are get lost when these issues are framed in terms of gender or class (or race or another monolithic identity) viewed in isolation. To counter this problem and encourage solutions that solve the most serious problems, the entire caretaking landscape and needs of American workers should be viewed through an intersectional lens. Doing so identifies the problems with the existing FMLA as well as with various proposals to add to it with a paid leave program that is supported, albeit through very different approaches, by lawmakers from both parties.

This lens has the potential to solve many other problems as well. Beginning in an area of fairly broad agreement and using it to find a solution that is acceptable to lawmakers from both parties and their constituencies therefore has the potential to be a stepping stone to new legislative agreements in other more intractable policy areas.