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## Article

# Equalizing Parental Leave

Deborah A. Widiss<sup>†</sup>

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## INTRODUCTION

The United States is the only developed country that fails to guarantee paid time off work to new parents.<sup>1</sup> Just 21% of American workers—and just 9% of the lowest quartile of earners—receive paid parental or family leave from their employers.<sup>2</sup> As a result, many new parents, particularly low-wage workers, are forced to go back to work extremely soon after a birth or adoption.<sup>3</sup> Fortunately, a growing number of states have stepped into the breach, enacting their own laws to provide this paid time off to new parents.<sup>4</sup> Additionally, in December 2019, Congress passed a law providing paid parental leave to most federal workers,<sup>5</sup> and the coronavirus pandemic has heightened

1. See, e.g., AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, PAID FAMILY AND MEDICAL LEAVE: AN ISSUE WHOSE TIME HAS COME (2017), [https://www.brookings.edu/wp-content/uploads/2017/06/es\\_20170606\\_paidfamilyleave.pdf](https://www.brookings.edu/wp-content/uploads/2017/06/es_20170606_paidfamilyleave.pdf) [<https://perma.cc/6HBS-DVZQ>].

2. U.S. BUREAU OF LAB. STAT., BULL. 2793, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at tbl.31 (2020), <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf> [<https://perma.cc/UK6V-WCTS>]. These figures largely predate the coronavirus pandemic of 2020 and 2021. In response to this crisis, some employers expanded their leave policies, though it is not yet clear if these changes will be permanent. See *infra* note 48.

3. See *infra* Part I.

4. See *infra* Part II.A.

5. See Federal Employee Paid Leave Act, Pub. L. No. 116-92, §§ 7601–7606, 133 Stat. 2304 (2019) (enacted as part of the National Defense Authorization Act for Fiscal Year 2020). The policy for federal workers only addresses leave for new parents, while the state laws provide parental leave as part of more general laws also providing leave

calls for a more comprehensive federal solution.<sup>6</sup> The new laws are a significant step forward from the prior baseline of *no* paid leave, but their structure systematically disadvantages nonmarital families and thus exacerbates inequality on the basis of class, race, and sex.<sup>7</sup>

The unequal treatment of nonmarital families under parental leave laws has been overlooked—in both academic scholarship and policy debate—because in America, leave is typically assessed from the perspective of *parents*, not *families* or *children*. Under the state and federal laws, each parent of a new child receives income replacement during time taken off work to provide care.<sup>8</sup> Mothers and fathers receive the same benefits; this structure is intended to encourage fathers to play a hands-on role in infant care.<sup>9</sup> This is an important objective. Among married different-sex couples, women often curtail paid work when children are born, which has long-term ramifications on married women's economic and social status.<sup>10</sup> The pandemic has intensified this concern, with women being far more likely than men to disrupt their own work to meet children's needs—or to have dropped out of the workforce entirely for at least a period of time.<sup>11</sup>

Early evidence from states with paid parental leave programs suggests the gender-neutral structure, which provides equal benefits to each parent, is helping achieve better gender parity.<sup>12</sup> Men are claiming benefits at relatively high rates.<sup>13</sup> However, every step forward in achieving the gender equality envisioned by these laws—that is, the aspiration that both mothers and fathers will fully utilize their

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to take care of family members with serious health conditions and for a worker's own serious health condition. *See infra* Part II.A. These laws are typically known as “family and medical leave” laws. I agree that state and federal policymakers should provide paid leave for serious medical conditions. However, since my focus in this Article is on leave for new parents, I typically refer to both kinds of laws as “parental” leave laws.

6. *See infra* Part II.B.

7. *See infra* Parts I.C, III.B–C.

8. *See infra* Parts II.A–B.

9. *See infra* Part III.A.

10. *See infra* notes 152–58 and accompanying text; *see also* David Fontana & Naomi Schoenbaum, *Unsexed Pregnancy*, 119 COLUM. L. REV. 309 (2019) (arguing that laws related to pregnancy should also be “unsexed” to encourage more equal sharing of caretaking responsibilities); Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 977 (2018) (discussing not only the history of the gender-neutral approach to parental leave, but also the extent to which women continue to play a disproportionate role in caregiving).

11. *See infra* notes 163–64 and accompanying text.

12. *See infra* Part IV.A.

13. *See infra* notes 392–96 and accompanying text.

benefits—will widen the gap between families with one parent and families with two.

This is a significant issue. Nearly 40% of new mothers in the United States are unmarried; nonmarital birth rates are much higher for women who lack a college degree, as well as for certain racial minorities.<sup>14</sup> This is the result of a large and growing “marriage gap” in our country.<sup>15</sup> When unmarried parents are living together, or otherwise both involved in childcare, it makes sense that each should be able to take parental leave. But many nonmarital children are cared for by a single parent, usually their mother.<sup>16</sup> This is particularly true for Black women; almost one-third of Black women with children under the age of one are the sole adult in their household—unmarried, un-partnered, and not living with extended family.<sup>17</sup> Most single mothers will ultimately bear primary responsibility for both breadwinning and caregiving.<sup>18</sup> But because the state and federal leave laws provide benefits to individual parents, single-parent families are eligible for only half as much support as two-parent families.<sup>19</sup> In other words, the new laws disadvantage the families that are likely to need them the most.

This Article exposes the structural inequality built into paid leave laws and then proposes potential solutions. In the process, the Article makes several contributions. The first are descriptive and doctrinal. The emergence of the state paid family and medical leave laws, and the policy for federal workers, address a major gap in American labor

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14. See JOYCE A. MARTIN, BRADY E. HAMILTON, MICHELLE J.K. OSTERMAN & ANNE K. DRISCOLL, CTNS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2018, at 1, 5, 27 tbl.11 (2019), [https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68\\_13-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf) [<https://perma.cc/M23U-LFPX>]; see also *infra* Part I.C.

15. See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168–69 (2015) (gathering research on demographic differences between marital and nonmarital families).

16. See *infra* Part I.C.

17. See *infra* notes 112–15 and accompanying text. Likewise, approximately one-third of Black mothers are the only *legally* recognized parent for a new baby. See *infra* notes 278–81 and accompanying text. These are likely overlapping, but not identical, groups.

18. See SARAH JANE GLYNN, CTN. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM (2019), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm> [<https://perma.cc/7T8N-H2T2>] (showing that 41% of mothers were the primary breadwinners, including women that were single working mothers). Some will be eligible to receive child support. See *infra* Part II.C. Many, however, will not receive full child support payments. See, e.g., Huntington, *supra* note 15, at 206 n.214 (citing studies that show only 40% of never-married parents receive the full amount owed).

19. See *infra* Parts II.A–B.

and social welfare policy. A few articles in the legal literature have touched upon these new laws,<sup>20</sup> but this Article provides a far more detailed description of their structure. It then breaks new ground by analyzing how the parental leave laws interact with the state laws that establish legal parentage and custodial responsibility, and shows that this has the—likely unintended—consequence of disadvantaging nonmarital families.<sup>21</sup>

Second, the Article uses this analysis to suggest that our current theoretical approach to assessing “equality” in the context of parental leave laws is incomplete.<sup>22</sup> Parental leave policies implicate foundational questions of sex discrimination doctrine and theory because they respond to key biological and social differences between (cis-gender) men and women.<sup>23</sup> American law adopts a formal equality approach, requiring equal benefits for each parent.<sup>24</sup> Most other countries, by contrast, provide maternity leaves that are much longer than paternity leaves, specifically permitting such “special” treatment of mothers under their sex discrimination doctrine.<sup>25</sup> There are merits

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20. For the most comprehensive discussion in legal literature that I have located, see Brendan Williams, *The Slow Crawl of Paid Family Leave Laws*, 55 CAL. W. L. REV. 423, 426–37 (2019). This article briefly describes all family leave state laws enacted by 2019, but it focuses more on the campaigns to enact them than the substantive provisions. A handful of earlier articles mention emerging state laws, mostly discussing California’s family leave law, as it was the first. See Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Discrimination Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 51–53 (2015); Seth K. Kornfeld, Note, *A Need Not Being Met: Providing Paid Family Medical Leave for All Americans*, 56 FAM. CT. REV. 165, 168–69 (2018); Bernie D. Jones, *Privately Funded Family Medical Leave?*, 35 N. ILL. U. L. REV. 119, 146–49 (2014); Molly Weston Williamson, *Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance*, 17 CONN. PUB. INT. L.J. 1, 38–46 (2017). For a detailed analysis of what is included in “leave” rights, including an analysis of the paid parental leave laws, see Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 197 (2019). For a seminal exploration of the normative justifications for paid leave based on its potential to increase women’s workforce participation, see Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

21. See *infra* Part II.C.

22. See *infra* Part III.

23. See *infra* Part III.A. Doctrinal debates regarding what constitutes sex discrimination in this context have been premised on the assumption that persons who are pregnant and bear children are cisgender women. However, transmen and non-binary persons can also be pregnant, and legislation and employer policies responding to the needs of pregnant persons should be gender-inclusive. See *infra* note 306. Nonetheless, since the vast majority of persons who are pregnant and bear children are cisgender women, the text generally refers to such persons as “mothers.”

24. See *infra* notes 323–25 and accompanying text.

25. See *infra* notes 326–33 and accompanying text.

to both approaches. But the myopic focus on what constitutes “equal” treatment of parents obscures other important vectors of analysis, such as equal treatment of children or families. Further, by shortchanging single parents, disproportionately women of color,<sup>26</sup> the American structure perpetuates other forms of inequality. In this respect, the Article builds on other scholarship that has exposed how labor policies privileging ideals of formal equality may disadvantage women and exacerbate class and race-based disparities.<sup>27</sup>

Finally, the Article applies this expanded theoretical frame to suggest policy reforms that would address the inequitable treatment of single-parent families without abandoning the aspects of the current structure that are helping shift gender norms around caretaking in two-parent families. Drawing on models used in other countries, the Article proposes that sole parents (which could be defined according to legal parentage, legal custody, or the use of other factors to gauge the level of involvement by a second-parent) would be able to access an extended period of benefits, or that a broader range of family members be able to claim benefits to care for a newly-born, newly-adopted, or newly-fostered child.<sup>28</sup> It also suggests that leave policies be structured to provide medical benefits separate from newborn bonding benefits, which helps ensure that a mother with medical needs during pregnancy still has access to paid time off after the birth; this is important for all birth mothers, but it is particularly essential for single parents.<sup>29</sup> These solutions could be readily achieved without unduly burdening any individual employer because the costs of benefits are spread through an insurance-based approach.<sup>30</sup>

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26. See *infra* Part I.C.

27. See generally DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* (2004) (discussing how feminist labor activists sought to protect women-only protective labor legislation); Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017) (describing how focus on formal equality in early implementation of Title VII was “intertwined with deregulation of labor and with cutbacks in the welfare state”); Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1 (2007) (describing how concessions that were required to pass the FMLA as a gender-neutral leave disadvantaged poor and working class women); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (discussing how constitutional doctrine on policies disadvantaging nonmarital families failed to engage with arguments relating to race- and sex-based discrimination).

28. See *infra* Parts IV.B–C.

29. See *infra* Part IV.D.

30. See *infra* Part IV.E.

One final introductory note: this Article is being published in the midst of the COVID-19 pandemic. The widespread disruptions caused by the pandemic have caused extreme economic and social upheaval.<sup>31</sup> It is not clear, as of this writing, how lasting these changes will be. In describing the need for legislation in this area, this Article relies primarily on studies conducted prior to the pandemic. However, it also includes emerging research showing how the pandemic has exacerbated economic duress of workers, shortages of childcare, and the likelihood that women will curtail paid work to meet family caregiving needs.<sup>32</sup> In short, the pandemic makes dramatically clear the costs of failing to allow workers time off to address their own health needs or to care for family members. Even prior to the pandemic, paid leave laws were gaining momentum, with six states, as well as the District of Columbia, passing laws since 2016.<sup>33</sup> A silver lining of the current crisis is that it may help spur further state laws or a robust federal response, ideally structured in such a way as to address the structural inequities discussed in this Article.

The Article proceeds as follows. Part I describes the need for paid leave laws. Part II explains the structure of state and federal leave laws and how they interact with state family laws governing parentage and custody. Part III argues that leave laws should be assessed not only in terms of “equal” treatment of parents, but also equal treatment of families. Part IV proposes reforms that could better achieve both of these objectives.

## I. NEED FOR LEGISLATION

New babies need full-time care. Most new parents work for pay before their first child,<sup>34</sup> and many hope—or need—to continue to

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31. See *infra* notes 48, 61, 79–82, 164, 217 and accompanying text.

32. See *infra* notes 48, 61, 79–82, 164, 217 and accompanying text.

33. See *infra* note 168 and accompanying text.

34. See, e.g., SANDRA E. BLACK, DIANE WHITMORE SCHANZENBACH & AUDREY BREITWIESER, HAMILTON PROJECT, THE RECENT DECLINE IN WOMEN’S LABOR FORCE PARTICIPATION 2 fig.2, 6 fig.7 (2017), [https://www.brookings.edu/wp-content/uploads/2017/10/es\\_10192017\\_decline\\_womens\\_labor\\_force\\_participation\\_blackschanzenbach.pdf](https://www.brookings.edu/wp-content/uploads/2017/10/es_10192017_decline_womens_labor_force_participation_blackschanzenbach.pdf) [<https://perma.cc/MZF8-YF5N>] (reporting that close to 90% of men age 25–54, with and without children, and close to 80% of women age 20–54, without children, are in the labor force); see also LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, P70-128, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008, at 4 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf> [<https://perma.cc/KY76-QZJS>] (reporting 2006–2008 data showing that 66% of women expecting a first child worked while pregnant).



work for pay after their first child.<sup>35</sup> Balancing work and childcare obligations remains a challenge at least until children are old enough to be home on their own, but it is particularly difficult in the first months of parenting. Infant care is both less available and more expensive than care for older children.<sup>36</sup> Parents may also feel that a newborn baby is simply “too young” to be cared for by anyone other than a family member. If the baby, or the mother, has health complications, the challenges can be even more difficult. Foster placements or adoptions yield similar quandaries. Even if the child involved is sometimes older, facilitating a smooth transition and addressing all legal issues likewise takes significant time.

Making a decision regarding care for a new child requires assessing work policies of the parent or parents, available non-parental care providers, and personal preferences. Some families are lucky enough to have many options, and they can simply choose the solution that works best for their particular situation. But for many families, it is a question of which option is the least bad among a variety of flawed choices. This Part describes how families navigate these choices, against the baseline of policies that assumes this is, functionally, a private challenge.<sup>37</sup> The next Part describes the new paid leave laws that help support families in the first months after a birth or adoption, without imposing significant costs on individual employers.

#### A. WORK POLICIES

In the absence of legislative mandates, most employees receive minimal or no paid time off to care for a new baby. The Bureau of

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35. See *Employment Status of Mothers with Own Children Under 3 Years Old by Single Year of Age of Youngest Child and Marital Status, 2018–2019 Annual Averages*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/famee.t06.htm> [<https://perma.cc/3GVD-S4AU>] (Apr. 21, 2020) (reporting that more than 55% of mothers with children under one were employed in 2019); see also *Families with Own Children: Employment Status of Parents by Age of Youngest Child and Family Type, 2018–2019 Annual Averages*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/famee.t04.htm> [<https://perma.cc/6468-C8A3>] (Apr. 21, 2020) (reporting more than 90% of families with children under six in 2019 had one or both parents employed).

36. See generally SIMON WORKMAN & STEVEN JESSEN-HOWARD, CTR. FOR AM. PROGRESS, UNDERSTANDING THE TRUE COST OF CHILD CARE FOR INFANTS AND TODDLERS (2018), <https://cdn.americanprogress.org/content/uploads/2018/11/14133754/TrueCostITChildCare-report.pdf> [<https://perma.cc/P7B4-KSUF>].

37. In many other countries, by contrast, parents are guaranteed a relatively lengthy period of paid leave, and then childcare is heavily subsidized. See, e.g., BARBARA JANTA, RAND CORP., CARING FOR CHILDREN IN EUROPE: HOW CHILDCARE, PARENTAL LEAVE AND FLEXIBLE WORKING ARRANGEMENTS INTERACT IN EUROPE (2014), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR500/RR554/RAND\\_RR554.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR554/RAND_RR554.pdf) [<https://perma.cc/53SJ-QKXC>].

Labor Statistics collects detailed data on employer leave and benefit policies. The statistics are sobering. Just one in five American employees—and one in ten low-wage workers—receive paid parental or family leave.<sup>38</sup> Where it is provided, it tends to be short; one recent study found the average length of paid leave offered by employers was just over four weeks.<sup>39</sup> A somewhat larger percentage of employees, but still less than half, receive short-term disability benefits<sup>40</sup>—an insurance-based plan that offers partial income replacement for employees who are unable to work because of a temporary health condition.<sup>41</sup> Birth mothers can often claim short-term disability benefits during late pregnancy or while physically recovering from childbirth—usually a period of six to eight weeks.<sup>42</sup> Employers sometimes refer to time off for new mothers under a short-term disability plan as a “maternity” leave.<sup>43</sup> New fathers, or adoptive parents, usually cannot access such benefits, as they will not have a qualifying health need.<sup>44</sup>

If workers do not have paid family, parental, or disability leave, they may be able to take a short amount of time off after a birth or

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38. See U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.31 (reporting 21% of private civilian employees and 9% of lowest quartile of earners receive this benefit). Not surprisingly, higher revenue companies are more likely to provide leave. A recent survey of Fortune 500 companies found that at least half of the full Fortune 500, and 74% of the companies included in the study, provide paid leave. See Gayle Kaufman & Richard J. Petts, *Gendered Parental Leave Policies Among Fortune 500 Companies*, CMTY. WORK & FAM., Aug. 16, 2020, at 10.

39. See WORLDATWORK, SURVEY OF PAID PARENTAL LEAVE IN THE UNITED STATES 17 (2017), <https://www.worldatwork.org/docs/research-and-surveys/survey-report-survey-of-paid-parental-leave-in-the-us.pdf> [<https://perma.cc/WEP9-CYLJ>] (reporting that, of employers that provided leave at full pay, the mean length of leave was 4.1 weeks).

40. See U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.16 (reporting 46% of full-time and 15% of part-time workers receive short-term disability benefits).

41. Williamson, *Structuring Paid Family and Medical Leave*, *supra* note 20, at 3.

42. See, e.g., MAYA ROSSIN-SLATER & LINDSEY UNIAT, HEALTH AFFS., PAID FAMILY LEAVE POLICIES AND POPULATION HEALTH 3 (2019), [https://www.healthaffairs.org/doi/10.1377/hpb20190301.484936/full/HPB\\_2019\\_RWJF\\_09\\_W.pdf](https://www.healthaffairs.org/doi/10.1377/hpb20190301.484936/full/HPB_2019_RWJF_09_W.pdf) [<https://perma.cc/7KMA-DA5T>] (referencing norm of six weeks of disability benefits for vaginal deliveries and eight weeks for cesarean section deliveries). This publication focuses on states that require short-term disability benefits, but the same standard generally applies under private plans.

43. See WORLDATWORK, *supra* note 39, at 8 (indicating most employers provide employer-sponsored disability insurance benefits to birth mothers during medical recovery time); *id.* at 19 (noting some companies refer to time available to birth mothers as maternity leave and time available to fathers and adoptive parents as parental or family leave).

44. See *id.* at 8, 19.

adoption using vacation, sick, or personal days.<sup>45</sup> A growing number of states and localities also mandate paid sick days.<sup>46</sup> However, most workers receive, at most, a few weeks of such paid time off.<sup>47</sup> Not only is this a short period of time, but using it to care for a new baby means it will not be available for its actual intended purpose. Moreover, these benefits are also discretionary. Fewer than half of part-time workers receive *any* paid vacation time, sick days, or personal days,<sup>48</sup> let alone paid family leave.<sup>49</sup> Women are disproportionately likely to work part time, meaning they are disproportionately likely to lack such paid time off.<sup>50</sup>

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45. FMLA-covered employees may opt to use such accrued time off during a period of FMLA leave, and employers may require them to do so. *See* 29 U.S.C. § 2612(d)(2); 29 C.F.R. § 825.207(a) (2020).

46. *See, e.g.*, A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES (2020), <https://www.abetterbalance.org/paid-sick-time-laws/?export> [<https://perma.cc/UNN7-Q8B3>] (describing paid sick time laws in various cities and states across the United States).

47. *See* U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.34 (showing civilian workers with these benefits receive on average seven days of sick leave); *id.* at tbl.37 (showing civilian workers who receive vacation days receive on average ten days after one year of service and fifteen days after five years of service); *id.* at tbl.38 (showing civilian workers generally receive eighteen to twenty-seven days under a consolidated plan depending on length of service). State paid sick day laws generally provide between three and ten days of leave. *See* A BETTER BALANCE, *supra* note 46.

48. *See* U.S. BUREAU LAB. STAT., *supra* note 2, at tbl.31 (reporting that of part-time civilian employees, 45% receive paid sick leave, 39% receive paid vacation, and 24% receive paid personal leave). These statistics largely predate the COVID-19 pandemic. In response to the crisis, some large employers changed their policies to provide greater access to paid sick leave. *See, e.g.*, Irene Jiang, *From Walmart to Starbucks, These 22 Retail Companies Are Changing Their Benefits Policies amid the Coronavirus Pandemic*, BUS. INSIDER (Mar. 31, 2020, 4:24 PM), <https://www.businessinsider.com/coronavirus-changes-walmart-starbucks-employee-benefits-2020-3> [<https://perma.cc/N8RW-EMKN>]. Additionally, federal legislation passed in March 2020 required certain employers to provide paid sick leave and paid family and medical leave for certain COVID-19-related reasons; these mandates expired December 31, 2020. *See Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [<https://perma.cc/5TE2-VMA2>]. At the time of this writing, it's unclear whether these changes will result in broader availability of sick leave or paid family leave on a more permanent basis.

49. *See* U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.31 (reporting just 8% of part-time workers receive paid family leave).

50. *See* Megan Dunn, *Who Chooses Part-Time Work and Why?*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Mar. 2018), <https://www.bls.gov/opub/mlr/2018/article/who-chooses-part-time-work-and-why.htm> [<https://perma.cc/6E26-ES9U>] (showing women, particularly married women, are much more likely than men to work part-time for non-economic reasons, including family care).

Most employers do provide employees the option to take *unpaid* leave after the birth or adoption of a new child. As discussed below, the federal Family and Medical Leave Act, and comparable state laws, mandates this for many workers.<sup>51</sup> These laws set a soft norm often followed by employers that are too small to be covered by the FMLA.<sup>52</sup> However, a very high percentage of the American workforce lives paycheck to paycheck, meaning unpaid leave is of very limited utility; going even a few weeks without pay can cause real economic hardship.<sup>53</sup> The widespread layoffs and work hour reductions caused by the COVID-19 pandemic have exacerbated these problems, with many workers exhausting any savings they may have had before the crisis; adults ages 25–34 (prime childbearing years) are the most likely to have depleted emergency funds.<sup>54</sup> There are also significant racial disparities; White adults are about twice as likely as Black and Hispanic adults to have savings that can cover three months of expenses.<sup>55</sup>

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51. See 29 U.S.C. § 2612(a)(1).

52. See U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.31 (reporting 92% of full-time and 80% percent of part-time workers receive unpaid family leave); KENNETH MATOS & ELLEN GALINSKY, FAM. & WORK INST., 2014 NATIONAL STUDY OF EMPLOYERS 6 (2014), <https://cdn.sanity.io/files/ow8usu72/production/4874c2b573182576b4d1542ec88df1bab69af604.pdf> [<https://perma.cc/F4Z5-2AHV>] (concluding that twelve weeks of unpaid leave has become the “norm” in the United States, even for employers that are exempt from the FMLA). However, the same study also concludes that many employers who *are* covered by the FMLA have non-compliant policies. See *id.* at 7.

53. A report from the Federal Reserve, based on surveys administered in 2017, found that four in ten adults could not easily cover a \$400 unexpected expense; in 2013, when the economy was weaker, half of adults said they would have problems covering such an expense. See JEFF LARRIMORE, ALEX DURANTE, KIMBERLY KREISS, CHRISTINA PARK & CLAUDIA SAHM, BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 2 (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [<https://perma.cc/VF7E-PBJC>]. A national survey found that 78% of workers live paycheck to paycheck, a rate that is higher for women than for men (81% compared to 75%). See *Living Paycheck to Paycheck Is a Way of Life for Majority of U.S. Workers, According to New CareerBuilder Survey*, CAREERBUILDER: NEWSROOM (Aug. 24, 2017), <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey> [<https://perma.cc/SCR8-5CDS>].

54. Jessica Dickler, *Nearly 14% of Americans Have Wiped Out Their Emergency Savings During the Pandemic: CNBC + Acorns Survey*, CNBC (Sept. 1, 2020, 9:00 AM), <https://www.cnbc.com/2020/09/01/nearly-14percent-of-americans-have-wiped-out-emergency-savings-during-pandemic.html> [<https://perma.cc/9BA5-GHX9>].

55. See Kim Parker, Juliana Menasce Horowitz & Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19> [<https://perma.cc/KJZ6-RT7P>] (noting that 53% of White adults have “rainy day

All these benefits—paid parental or family leave; short-term disability benefits; vacation, sick, or personal days; and even unpaid leave rights—are generally provided more commonly to highly-paid workers than to lower-paid workers.<sup>56</sup> The nonmarital birthrate runs in the opposite direction.<sup>57</sup> This means unmarried parents are often less likely than married parents to receive paid time off from their employers to care for a new child.

#### B. PAID CARE

If parents cannot provide childcare themselves, they generally rely on extended family members, who typically provide care for free, or they must pay for care.<sup>58</sup> In this country, paid childcare is expensive, and demand often far exceeds supply.<sup>59</sup> This was true even before the coronavirus pandemic of 2020 and 2021.<sup>60</sup> However, the virus, and resulting economic shutdowns, has made the situation far worse, with experts projecting that almost half the nation's childcare capacity could be lost permanently.<sup>61</sup>

The federal government's limited childcare subsidy program assumes childcare is "affordable" if it costs families no more than 7% of household income.<sup>62</sup> But even prior to the pandemic, more than 40% of American families spent more than 15% of their income on care.<sup>63</sup> For many families, childcare is a larger expense than rent or monthly

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funds" that would last three months, compared to 27% of Black adults and 29% of Hispanic adults).

56. See U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbls.31, 45.

57. See *infra* Part I.C.

58. See, e.g., *Grandparents & Extended Family, ZERO TO THREE*, <https://www.zerotothree.org/espanol/grandparents-extended-family> [<https://perma.cc/YR64-VW86>].

59. See WORKMAN & JESSEN-HOWARD, *supra* note 36, at 2, 13.

60. See *id.*

61. See, e.g., STEVEN JESSEN-HOWARD & SIMON WORKMAN, CTR. FOR AM. PROGRESS, CORONAVIRUS PANDEMIC COULD LEAD TO PERMANENT LOSS OF NEARLY 4.5 MILLION CHILD CARE SLOTS (2020), <https://www.americanprogress.org/issues/early-childhood/news/2020/04/24/483817/coronavirus-pandemic-lead-permanent-loss-nearly-4-5-million-child-care-slots> [<https://perma.cc/8U5P-C9PV>].

62. See Child Care and Development Fund (CCDF) Program, 81 Fed. Reg. 67,438, 67,440 (Sept. 30, 2016) (to be codified at 45 C.F.R. 98).

63. See *This Is How Much Child Care Costs in 2019*, CARE.COM (July 15, 2019), <https://www.care.com/c/stories/16863/cost-of-child-care-survey-2019-report> [<https://perma.cc/ND3S-22DC>]. The pandemic raises costs even more. See *Child Care Costs More in 2020, and the Pandemic Has Parents Scrambling for Solutions*, CARE.COM (June 15, 2020), <https://www.care.com/c/stories/2423/how-much-does-child-care-cost> [<https://perma.cc/MK66-ESXL>].

mortgage payments.<sup>64</sup> This ratio is getting worse. Over the past twenty years, wages have remained largely flat, while the cost of child-care has approximately doubled.<sup>65</sup> Families respond by making major budget cuts, stopping payments on debt, or putting themselves further into debt.<sup>66</sup>

These issues are even more extreme when considering paid *in-fant* care. Since young babies need almost constant hands-on care, states require licensed childcare centers to maintain very low ratios of infants to caregivers.<sup>67</sup> This means that infant rooms are very expensive to operate. Many centers simply forgo infant care entirely; others charge parents more for infant care, even as they may also subsidize costs with income from preschool rooms.<sup>68</sup> Models suggest the average cost for infant care in a licensed-center to be almost \$15,000 per year,<sup>69</sup> which is much higher than the tuition costs of public colleges in many states.<sup>70</sup> This amounts to nearly 20% of the average

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64. See CHILD CARE AWARE, *THE US AND THE HIGH PRICE OF CHILD CARE: AN EXAMINATION OF A BROKEN SYSTEM* 13 (2019), <https://cdn2.hubspot.net/hubfs/3957809/2019%20Price%20of%20Care%20State%20Sheets/Final-TheUSandtheHighPriceofChildCare-AnExaminationofaBrokenSystem.pdf> [<https://perma.cc/UY39-Q8JT>] (“The annual price of child care for two children exceeds annual mortgage payments for homeowners in 40 states and the District of Columbia. Child care prices for two children in a child care center also exceed annual median rent payments in every state.”).

65. See SARAH JANE GLYNN & KATIE HAMM, *CTR. FOR AM. PROGRESS, THE ECONOMICS OF CAREGIVING FOR WORKING MOTHERS* 11 (2019), <https://cdn.americanprogress.org/content/uploads/2019/12/09124207/MaternalLaborForce-report.pdf> [<https://perma.cc/KN9U-LLTB>].

66. See *This Is How Much Child Care Costs in 2019*, *supra* note 63.

67. See, e.g., WORKMAN & JESSEN-HOWARD, *supra* note 36, at 6 (showing that the national average infant to teacher ratio for licensing is one to four, compared to the one to eleven preschooler to teacher ratio).

68. See STEVEN JESSEN-HOWARD, RASHEED MALIK, SIMON WORKMAN & KATIE HAMM, *CTR. FOR AM. PROGRESS, UNDERSTANDING INFANT AND TODDLER CHILD CARE DESERTS 4–5* (2018), <https://cdn.americanprogress.org/content/uploads/2018/10/31064929/IT-ChildCare-Deserts-13.pdf> [<https://perma.cc/LDH7-ZFHG>].

69. See WORKMAN & JESSEN-HOWARD, *supra* note 36, at 6. A leading report based on data received from centers estimates somewhat lower averages. See CHILD CARE AWARE, *supra* note 64, at 44 (reporting estimates ranging from \$11,444 to \$11,896 for infant care).

70. See, e.g., Taryn Morrissey, *Why Child Care Costs More than College Tuition – and How To Make It More Affordable*, *CONVERSATION* (Mar. 9, 2018, 6:40 AM), <https://theconversation.com/why-child-care-costs-more-than-college-tuition-and-how-to-make-it-more-affordable-92396> [<https://perma.cc/N4PD-U7P4>] (reporting estimated average net tuition and fees of \$4,140 for full-time students who were in-state at public four-year institutions).

household income<sup>71</sup> and about one-third of the average income of a single mother.<sup>72</sup> Family childcare, typically provided in a home, is slightly more affordable, with estimates for infant care ranging from approximately \$8,300 to \$9,900 annually, but it still amounts to a very large portion of a typical family's income.<sup>73</sup> And hiring a full-time nanny is extremely expensive, with base pay salaries averaging close to \$40,000 per year.<sup>74</sup>

Even for families that can afford to pay, it can often be extraordinarily difficult to secure a space in an infant care program. Nationally, before the COVID-19 pandemic, there were on average five infants and toddlers for every available slot in a licensed center; in rural areas, that ratio was a shocking nine to one.<sup>75</sup> Accordingly, waitlists are often long. One recent article reported childcare center directors typically advise parents to get on waitlists "at least a year or more" before they expect to need care.<sup>76</sup> Parents often sign up for multiple waitlists even before a child is born; this itself can be an expensive proposition, as many require refundable deposits.<sup>77</sup> It is even harder to find paid care options outside of standard business hours or care that can be modified in response to last-minute requests that a parent work overtime or an unexpected shift.<sup>78</sup>

COVID-19 has exacerbated these challenges. During spring 2020, when most states were under stay-at-home orders, many childcare

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71. See WORKMAN & JESSEN-HOWARD, *supra* note 36, at 16 (comparing average costs of center-based infant childcare to median income by state).

72. See Jessica Semega, *Payday, Poverty, and Women: Pay Is Up. Poverty Is Down. How Women Are Making Strides*, U.S. CENSUS BUREAU (Sept. 10, 2019), <https://www.census.gov/library/stories/2019/09/payday-poverty-and-women.html> [<https://perma.cc/ZRM4-C36M>] (reporting a 2018 median household income for female-headed family household with no spouse present as \$45,128).

73. See CHILD CARE AWARE, *supra* note 64, at 44.

74. See 2017 INA Nanny Salary & Benefit Survey RESULTS, INT'L NANNY ASS'N (Jan. 15, 2018), <https://nanny.org/2017-ina-nanny-salary-benefits-survey-results> [<https://perma.cc/PP5H-AJXM>] (reporting average hourly wage for nannies as \$19.14 per hour in 2017, and also reporting practices regarding overtime, benefits, and paid time off).

75. JESSEN-HOWARD ET AL., *supra* note 68, at 2.

76. Sue Shellenbarger, *Day Care? Take a Number, Baby*, WALL ST. J. (June 9, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704256604575294523680479314> [<https://perma.cc/3YNV-UM94>].

77. See *id.*

78. See JULIA R. HENLEY & GINA ADAMS, URB. INST., INSIGHTS ON ACCESS TO QUALITY CHILD CARE FOR FAMILIES WITH NONTRADITIONAL WORK SCHEDULES (2018), [https://www.urban.org/sites/default/files/publication/99148/insights\\_on\\_access\\_to\\_quality\\_child\\_care\\_for\\_families\\_with\\_nontraditional\\_work\\_schedules\\_1.pdf](https://www.urban.org/sites/default/files/publication/99148/insights_on_access_to_quality_child_care_for_families_with_nontraditional_work_schedules_1.pdf) [<https://perma.cc/V3GN-ASNL>].

providers suspended operations. Those that stayed open, or have since reopened, are generally operating at reduced capacity to permit social distancing, while incurring extra costs associated with providing personal protective equipment and an enhanced sanitation regime.<sup>79</sup> Anecdotal reports suggest care providers may be particularly likely to reduce infant slots, since they are comparatively expensive to operate even under normal times.<sup>80</sup> The losses may be permanent. A July 2020 survey reported that approximately 50% of childcare providers were “certain” they would close permanently without additional public assistance.<sup>81</sup> In March 2021, Congress included significant aid for childcare providers in its \$1.9 trillion COVID relief bill,<sup>82</sup> but as this Article goes to press, it is too soon to know how fully the sector will bounce back.

Another option is to ask relatives or friends to provide lower cost, or entirely unpaid, care. For some families, this is a preferred choice, one embraced by all involved; in fact, studies show married women with young children who live close to their own mother or mother-in-law are more likely to work.<sup>83</sup> But many new parents live far away from extended family. And even if geographically possible, family members may have different ideas about what constitutes high-quality care, or they may face health conditions or employment obligations that make such care arrangements unstable.<sup>84</sup> The reality is that parents who cannot find or afford paid care, or cannot find or afford

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79. See, e.g., NAT’L ASS’N FOR THE EDUC. OF YOUNG CHILD., *HOLDING ON UNTIL HELP COMES: A SURVEY REVEALS CHILD CARE’S FIGHT TO SURVIVE* (2020), [https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/our-work/public-policy-advocacy/holding\\_on\\_until\\_help\\_comes.survey\\_analysis\\_july\\_2020.pdf](https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/our-work/public-policy-advocacy/holding_on_until_help_comes.survey_analysis_july_2020.pdf) [<https://perma.cc/2J3J-6Z5N>].

80. See, e.g., Alissa Quart, *Day-Care Slots for Babies Are Vanishing. Now Their Parents Can’t Work*, WASH. POST (Oct. 6, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/10/06/babies-child-care-centers-shortage-slots> [<https://perma.cc/NL7L-D3SN>].

81. See *id.*; see also JESSEN-HOWARD & WORKMAN, *supra* note 61 (predicting approximately 50% of slots could be lost permanently in the United States).

82. See Richard Rubin & Lauren Weber, *Child-Care Providers Get Billions in Covid-19 Relief Law*, WALL ST. J. (Mar. 14, 2021), <https://www.wsj.com/articles/child-care-providers-get-billions-in-covid-19-relief-law-11615737600> [<https://perma.cc/QJ77-6XS5>] (reporting childcare providers will receive about \$40 billion for operating expenses). Some states also provided relief. See, e.g., Quart, *supra* note 80 (reporting that Illinois offered a \$150 million subsidy to providers and Michigan \$18 million).

83. See, e.g., Janice Compton & Robert A. Pollak, *Family Proximity, Childcare, and Women’s Labor Force Attachment*, 79 J. URB. ECON. 72, 72 (2014).

84. See, e.g., *All in the Family: Using Relatives for Child Care*, CHILD CARE AWARE (Oct. 18, 2018), <https://info.childcareaware.org/blog/all-in-the-family-using-relatives-for-child-care> [<https://perma.cc/5KGY-VCEZ>].



*enough* paid care, typically rely on a shifting network of extended family, neighbors, friends, new partners, and older siblings.<sup>85</sup> Such arrangements are almost always precarious.

### C. MARRIAGE GAP

Work policies and the cost of paid care are the same, whatever the configuration of a family. But the calculus that goes into meeting care needs, while also earning necessary income, differs. Historically, it was expected that children would be born to married (different-sex) couples, and these needs would be met in a gendered fashion: mothers were expected to drop out of the labor force to care for young children, while fathers were expected to play the breadwinning role.<sup>86</sup> There have always been families that departed from this model, and now it is patently unrealistic for the vast majority of families.<sup>87</sup>

Until 1960, it *was* true that almost all new babies would have married parents, as only about 5% of women giving birth were unmarried.<sup>88</sup> This did not mean there was no pre-marital sex. Rather, when nonmarital pregnancies occurred, couples often rushed to marry before the birth.<sup>89</sup> Alternatively, the child might be given up for adoption or the pregnancy terminated.<sup>90</sup> But in the past fifty years, that model has changed dramatically. The nonmarital birth rate has risen steadily since 1960, and the adoption rate has fallen to very low levels.<sup>91</sup> For the past decade, about 40% of all births are to unmarried

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85. See, e.g., CHILD CARE AWARE, *supra* note 64, at 15 (“Many [single mothers] have to rely on a patchwork of child care arrangements consisting of family, friends and neighbors, none of whom may be licensed.”); JOAN WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE* 13–21 (2010) (discussing the “fragile patchwork” of care used by most poor families).

86. See, e.g., Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1118–20 (describing the separate spheres ideology).

87. *Id.* at 1124–25.

88. Gretchen Livingston & Anna Brown, *Birth Rate for Unmarried Women Declining for the First Time in Decades*, PEW RSCH. CTR. (Aug. 2014), <https://www.pewresearch.org/fact-tank/2014/08/13/birth-rate-for-unmarried-women-declining-for-first-time-in-decades> [https://perma.cc/H4PF-4JDT].

89. See, e.g., STEPHANIE J. VENTURA & CHRISTINE A. BACHRACH, NAT’L VITAL STATS. REPS., *NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940–99*, at 10 (2000), [https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48\\_16.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf) [https://perma.cc/A5Z4-XG2V] (reporting that in 1960–64, 60% of couples who conceived outside of marriage married before the birth).

90. See *id.* at 12 (reporting that before 1973, 8.7% of children born to never-married mothers were relinquished for adoption).

91. See Olga Khazan, *Why So Many Women Choose Abortion over Adoption*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/health/archive/2019/05/>

mothers.<sup>92</sup> In some states, the nonmarital birthrate is over 50%.<sup>93</sup> In other words, nonmarital families are not a small, relatively insignificant, aberration from a marital norm. Rather, they constitute a significant share of *all* families.<sup>94</sup>

However, nonmarital births are not equally distributed across the American population. The nonmarital birth rate is inversely related to both income<sup>95</sup> and educational level.<sup>96</sup> Highly educated and relatively affluent adults tend to marry before they have children. Less educated and less affluent adults, by contrast, often have children without being married. The nonmarital birthrate is also inversely related to age; nonmarital mothers are generally younger than marital mothers.<sup>97</sup> That said, the stereotypical image of a nonmarital mother as a teenager who drops out of school upon discovering she is pregnant is generally incorrect. Only about 15% of unmarried mothers are teenagers, and most of those are older teens.<sup>98</sup> Rather, around 65% of unmarried mothers are in their 20s, and more than 20% are women

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why-more-women-dont-choose-adoption/589759 [https://perma.cc/WZ5X-Y4Y3] (reporting a fall in adoption rates from 9% of pregnancies of unmarried women before 1973 to just 1% in 2002).

92. See MARTIN ET AL., *supra* note 14.

93. See *Percentage of Births to Unmarried Mothers by State*, NAT'L CTR. FOR HEALTH STATS., <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm> [https://perma.cc/Y5SM-HUX3] (Feb. 8, 2021).

94. Since this Article's focus is parental leave policies for new babies, the text focuses on marital status at birth. Because there is also a high divorce rate, a larger portion of children live with a single parent or with a parent and his or her unmarried partner at some point during childhood. See generally, e.g., Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents> [https://perma.cc/T47R-77VU].

95. See RACHEL M. SHATTUCK & ROSE M. KREIDER, U.S. CENSUS BUREAU, SOCIAL AND ECONOMIC CHARACTERISTICS OF CURRENTLY UNMARRIED WOMEN WITH A RECENT BIRTH: 2011, at 4–5 (2013) (reporting that approximately 70% of new mothers with less than \$10,000 household income were unmarried, as compared to 9% of new mothers with a household income above \$200,000).

96. Elizabeth Wildsmith, Jennifer Manlove & Elizabeth Cook, *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, CHILD TRENDS (Aug. 8, 2018), <https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels> [https://perma.cc/SA8K-D7GY] (showing that 10% of women with a bachelor's degree or higher are unmarried when they give birth; 43% of women with an associate degree or some college; 59% of women with a high school degree; and 62% of women with less than a high school degree).

97. SHATTUCK & KREIDER, *supra* note 95, at 5.

98. See *id.*

in their 30s or 40s.<sup>99</sup> Generally, unmarried mothers have finished whatever level of schooling they are likely to complete prior to becoming pregnant.

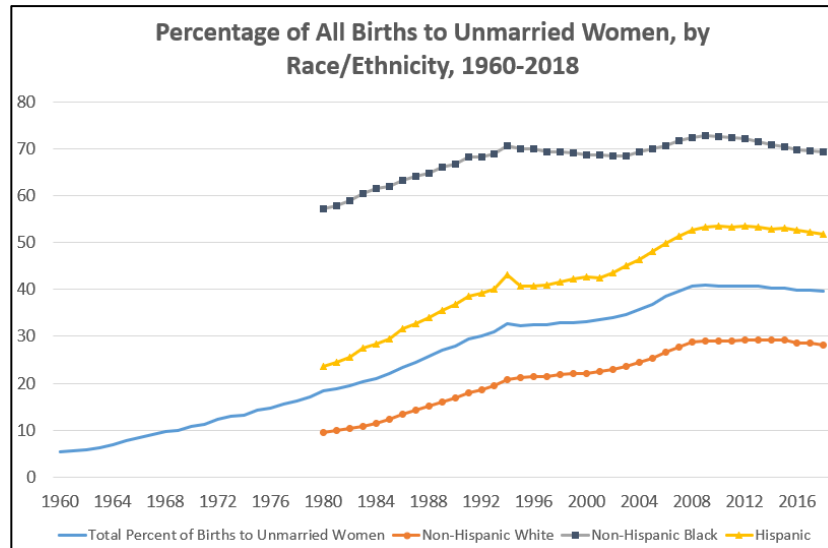


Figure 1.<sup>100</sup>

As Figure 1 shows, there are also very significant racial differences in family formation patterns. Even in 1960, when the overall rate of nonmarital childbearing was quite low, more than a third of Black women giving birth to their first child were unmarried.<sup>101</sup> Generally available annual data tracks the nonmarital birth rate by race

99. CARMEN SOLOMON-FEARS, CONG. RSCH. SERV., R43667, NONMARITAL BIRTHS: AN OVERVIEW 1, 12 fig.5 (2014), <https://fas.org/sgp/crs/misc/R43667.pdf> [<https://perma.cc/TCK7-B48T>] (citing Brady E. Hamilton, Joyce A. Martin, Michelle J.K. Osterman & Sally C. Curtin, Ctrs. for Disease Control & Prevention, *Births: Preliminary Data for 2013*, NAT'L VITAL STATS. REPS., May 29, 2014, [https://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63\\_02.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_02.pdf) [<https://perma.cc/LT6A-3D5X>]).

100. Data is from *National Vital Statistics Reports*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/products/nvsr.htm>; Table 5, CTRS. FOR DISEASE CONTROL & PREVENTION (May 6, 2015, 7:43 AM), [https://ftp.cdc.gov/pub/health\\_statistics/nchs/Publications/Health\\_US/hus14tables](https://ftp.cdc.gov/pub/health_statistics/nchs/Publications/Health_US/hus14tables) (use hyperlink table005.xls to access relevant data); SOLOMON-FEARS, *supra* note 99, at 24–26.

101. See AMARA BACHU, U.S. CENSUS BUREAU, P23-197, TRENDS IN PREMARITAL CHILD BEARING: 1930 TO 1994 (1999), <https://www.census.gov/prod/99pubs/p23-197.pdf> [<https://perma.cc/VLK5-B98D>] (reporting that among women ages 15–29, nonmarital birthrate for Black women at first birth in 1960–64 was 36.1%).

beginning in 1980.<sup>102</sup> By that point, the nonmarital birth rate for Black women had risen to around 60%; it reached around 70% in the mid-1990s and has remained at approximately the same level since.<sup>103</sup> The rate for Hispanic women rose somewhat later, but it has also been above 50% for more than a decade.<sup>104</sup> The nonmarital birthrate for non-Hispanic White women has risen over the same time period, but it remains well under 50%, and rates for Asian-American women are much lower.<sup>105</sup> If children are living with just one of their biological parents, it is far more likely to be their mother than their father.<sup>106</sup>

While the rapid rise in nonmarital birth rates marks an extremely important change in family structure, it can be distorting to the extent it suggests new babies live in one of only two-family configurations: with two married parents or with one unmarried parent. Reality is more complex. Along with the rise in nonmarital birthrate, there has also been a significant increase in cohabiting couples living with children.<sup>107</sup> Studies suggest that between one half and two-thirds of unmarried parents are living with each other when the baby is born,<sup>108</sup> although these unions tend to be fragile and may dissolve relatively quickly.<sup>109</sup> Additionally, it is very common for unmarried parents,

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102. See SOLOMON-FEARS, *supra* note 99, at 13; see also BACHU, *supra* note 101 (providing nonmarital birthrate for first-time mothers by race in five-year increments from 1930 to 1994).

103. *Id.*

104. *Id.*

105. Prior to 2015, government data included a combined "Asian or Pacific Islander" category, with rates ranging from 7 to 17%. *Id.* In 2016, this category was divided into "Asian," where the rate was around 11%, and "Hawaiian or Other Pacific Islander," where the rate was close to 50%. See MARTIN ET AL., *supra* note 14, at 25.

106. See *America's Families and Living Arrangements: 2018*, U.S. CENSUS BUREAU tbl.C-3 (2018), <https://www.census.gov/data/tables/2018/demo/families/cps-2018.html> [<https://perma.cc/GB3E-6D8U>] (showing that 17% of children under one live with mother alone, and just 3% with father alone).

107. See, e.g., Livingston, *supra* note 94, at 3 (reporting that about 65% of children live with married parents, 21% with a single mother, 4% with single fathers, and 7% with cohabiting parents).

108. See CHILD TRENDS DATA BANK, BIRTHS TO UNMARRIED WOMEN 2 (2015), [https://www.childtrends.org/wp-content/uploads/2015/03/75\\_Births\\_to\\_Unmarried\\_Women.pdf](https://www.childtrends.org/wp-content/uploads/2015/03/75_Births_to_Unmarried_Women.pdf) [<https://perma.cc/4SFB-XJ5A>] (citing data showing that in 2006 to 2010, 58% of nonmarital births occurred within cohabiting unions); CTR. FOR ECON. & POL'Y RSCH. & FAM. STORY, BRIEFING PAPER: SOLO PARENTS AND PAID LEAVE FOR CARE OF NEWBORN CHILDREN UNDER THE FAMILY ACT (Sept. 18, 2020) (unpublished briefing paper) (on file with author) (citing data showing that in 2011 to 2015, 68% of nonmarital births occurred within cohabiting unions).

109. See, e.g., Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE CHILD. 17, 21 (2010) (finding that less than one-third of nonmarital parents are still romantically involved five years after birth).

particularly unmarried mothers, to live in a household that includes one or both of their own parents.<sup>110</sup> In fact, more children live with their mother and at least one grandparent than live with their father alone.<sup>111</sup>

There are significant race-based differences in family living patterns, as well as the nonmarital birthrate itself. Approximately 550,000 Black women gave birth in the United States in 2018.<sup>112</sup> About 30% of these new mothers were married, 30% were unmarried but living with a cohabiting partner, and 40% were unmarried and not cohabiting.<sup>113</sup> White and Hispanic women who gave birth were not only more likely to be married, they were also more likely to be living with a partner if unmarried.<sup>114</sup> Census data provides a somewhat different perspective, as it tracks family household configurations over the first full year of a baby's life, and also reports on parents living with other adult family members. As Figure 2, below, shows, the vast majority of White mothers with a child under the age of one are married, and another 12% are cohabiting; fewer than 10% are living with other family or alone with their child or children. For Black women, the picture is very different. Around 40% of Black mothers of a child under the age of one are married and 15% are living with a partner, while 17% are living with other family and 29% are the only adult in the household. The pattern for Hispanic women falls between these two poles.

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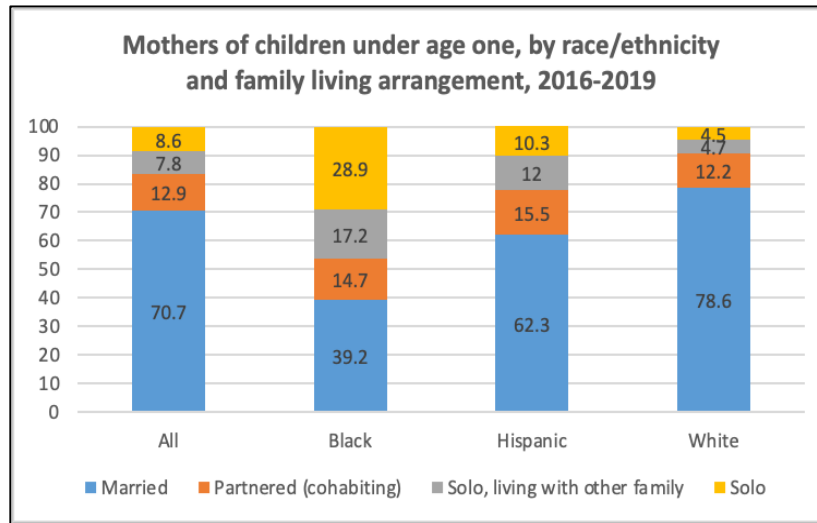
110. See U.S. CENSUS BUREAU, *supra* note 106, at tbl.C-4 (reporting that 30% of children under one living with mother but not father live in a household that includes one or both grandparents).

111. See *id.*

112. Ctr. for Econ. & Pol'y Rsch., Solo Parents and Paid Leave for Care of Newborn Children under the FAMILY Act at Family Story Roundtable (Sept. 30, 2020) (presentation slide deck on file with author).

113. *Id.*

114. *Id.* (showing that of White women who gave birth, 72% were married, 20% were cohabiting, and just 8% were unmarried and not cohabiting, and that of Hispanic women who gave birth, the respective numbers were 48% married, 36% cohabiting, and 16% unmarried and not cohabiting).

Figure 2.<sup>115</sup>

In other words, Black women are the least likely to be married when they give birth, and the least likely to be cohabiting. They are somewhat more likely than women of other races to be living with other family members, but close to *one-third* of Black mothers living with a child under the age of one are truly on their own.

Concurrent with these changes, women's earnings have become increasingly crucial to families. Overall, women now serve as the sole or primary breadwinner for 41% of families; this figure includes both single working mothers and married women who earn more than their spouses.<sup>116</sup> An additional quarter of mothers, termed "co-breadwinners," contribute at least 25% of household earnings.<sup>117</sup> Families in the lowest quintiles of earnings are much more likely to depend on women, many of whom are single parents, as the primary or sole breadwinner; in higher-income families, women are more likely to be co-breadwinners.<sup>118</sup> Racial disparities exist in this context as well. Black women—especially unmarried Black women—are particularly likely to be primary or sole breadwinners.<sup>119</sup>

115. *Id.*116. *See Glynn, supra* note 18.117. *See id.*118. *Id.*119. *Id.*

Research in many fields explores changes in legal rules and social norms around childbirth, marriage, and workplace access that both help explain and reflect the rapid growth of nonmarital families.<sup>120</sup> A full discussion of these changes is beyond the scope of this project, but there are many overlapping causes. Women are far more likely to engage in paid work now than they were in 1960.<sup>121</sup> Widespread availability of birth control allows women to make choices around when to have children.<sup>122</sup> At the same time, larger labor market trends, including globalization and increased automation, have diminished the earning potential of blue-collar men.<sup>123</sup> Many poor and working-class women who become pregnant outside of marriage believe they will be in a stronger financial position by remaining on their own.<sup>124</sup> There is also a decreased level of religious affiliation and relaxed standards around sexual intimacy outside of marriage.<sup>125</sup> Women, and to some extent men, are choosing to become parents without marrying, and such choices are, at least in many communities, no longer normatively condemned.

There is, however, a large body of research suggesting that non-marital children are disadvantaged, on a variety of measures, as compared to marital children.<sup>126</sup> They tend to be less healthy, less successful in school, and face higher levels of instability and stress.<sup>127</sup> Many

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120. For a representative sampling, see generally Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403 (2010); CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* (2012); and STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (rev. ed. 2016).

121. See, e.g., Mitra Toossi & Teresa L. Morisi, *Women in the Workforce Before, During, and After the Great Recession*, U.S. BUREAU LAB. STATS. (July 2017), <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf> [<https://perma.cc/T4VX-W666>].

122. See, e.g., Megan L. Kavanaugh & Jenna Jerman, *Contraceptive Method Use in the United States: Trends and Characteristics Between 2008, 2012 and 2014*, 97 CONTRACEPTION 14, 16 (2018) (reporting 90% of women at risk of unintended pregnancy use contraception).

123. See, e.g., Cherlin, *supra* note 120, at 404; see also KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 219–22 (2013).

124. See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 202–03 (2005).

125. Cf. *id.* at 199–201 (discussing the changing cultural norms for marriage); MURRAY, *supra* note 120 (noting similar trends though providing a more critical perspective on them).

126. See, e.g., Huntington, *supra* note 15, at 184–201 (gathering and discussing studies).

127. *Id.* at 196, 198.

of these differences hold true even when controlling for factors such as income, race, or education level of the parents.<sup>128</sup> Although some policy makers and researchers argue that the appropriate response is encouraging parents to marry, others consider how policy can be modified to better support nonmarital families.<sup>129</sup> The reforms suggested in Part IV fall into this latter category. If enacted, they could help ensure that nonmarital children have access to a meaningful period of parental or family-provided care during their very first weeks and months of life.

#### D. CHOICES

Given the limited amount of paid time off available under private employment policies, a significant number of new parents conclude that they cannot afford to take any meaningful break from work to care for a new child. In states without relevant legislation, new fathers take, on average, only about one week off work when their partners have a baby; many fathers take only a day or two.<sup>130</sup> Even this estimate may be high, as at least some of the relevant data sources only capture fathers who live with their children.<sup>131</sup> Many fathers take this time as vacation time or sick leave, rather than under a formal family or parental leave policy.<sup>132</sup>

Perhaps even more shockingly, given the physical strain of childbirth, as well as the needs of a newborn child, many new mothers are also back at work within just a few weeks of having a baby.<sup>133</sup> Indeed, in states without relevant legislation providing paid leave, new mothers take, on average, just three weeks off after a birth,<sup>134</sup> and almost

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128. *Id.* at 197.

129. *See id.* at 223.

130. *See, e.g.*, Ann P. Bartel, Maya Rossin-Slater, Christopher J. Ruhm, Jenna Stearns & Jane Waldfogel, *Paid Family Leave, Fathers' Leave-Taking, and Leave-Sharing in Dual-Earner Households*, 37 J. POL'Y ANALYSIS & MGMT. 10, 12 (2017) (finding in states without paid family leave, "fathers tak[e] about one week of leave on average after their child's birth"); Charles L. Baum II & Christopher J. Ruhm, *The Effects of Paid Family Leave in California on Labor Market Outcomes*, 35 J. POL'Y ANALYSIS & MGMT. 333, 343 (2016) (showing rapid drop-off in the percentage of fathers on leave within just days of the birth).

131. *See* Bartel et al., *supra* note 130, at 15.

132. *See id.* at 14–15.

133. *See, e.g.*, JoNel Aleccia, *Two Weeks After Baby? More New Moms Cut Maternity Leave Short*, TODAY (Sept. 27, 2013, 3:49 AM), <https://www.today.com/health/two-weeks-after-baby-more-new-moms-cut-maternity-leave-4B11229443> [<https://perma.cc/HSU8-XUSL>].

134. *See* Maya Rossin-Slater, Christopher J. Ruhm & Jane Waldfogel, *The Effects of California's Paid Family Leave Program on Mothers' Leave-Taking and Subsequent Labor*



one-quarter of new mothers are back at work within two weeks.<sup>135</sup> Not surprisingly, workers with relatively low levels of education, who tend to work in blue collar or service jobs with less paid time off, tend to go back to work much more quickly than workers with more education.<sup>136</sup> These mothers are also disproportionately likely to be unmarried.<sup>137</sup>

If both parents are back at work, or if there is only a single parent and she or he is back at work, the family needs to arrange childcare. Among the most detailed data available on how families handle these choices comes from the U.S. Census.<sup>138</sup> The most recent version of this study reports on 2011 data; the first iteration of this study was issued in 1985.<sup>139</sup> Perhaps reflecting its age, this study defines “childcare” as care during any hours that the *mother* is working in paid employment.<sup>140</sup> In other words, time that a mother provides hands-on care while the father is working is not captured, whereas time a father provides care while a mother is working *is* considered care. By this measure, 35% of families with children under one year of age, in which the mother works for pay, rely on grandparents to cover care needs, while just 31% use fathers as “childcare” providers.<sup>141</sup> Fathers are far more likely to provide “care” to children if the mother works nights,

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*Market Outcomes*, 32 J. POL’Y ANALYSIS & MGMT. 224, 225 (2012) (finding average duration of maternity leave in states without legislation to be three weeks).

135. See Sharon Lerner, *The Real War on Families: Why the U.S. Needs Paid Leave Now*, THESE TIMES (Aug. 18, 2015), <https://inthesetimes.com/article/the-real-war-on-families> [<https://perma.cc/QN9-RG9H>] (finding that 12% of new mothers who took FMLA leave took one week or less off, and 11% took between one and two weeks off). The sample size for this study was small, but its findings are relatively consistent with other studies. See Rossin-Slater et al., *supra* note 134.

136. See Lerner, *supra* note 135 (reporting that 80% of college graduates took at least six weeks off, but only 54% of women without a college degree did so); see also U.S. BUREAU OF LAB. STAT., *supra* note 2, at tbl.31 (showing that employees in the bottom quartile of earners are much less likely to receive paid family leave or disability benefits and somewhat less likely to receive vacation or sick time).

137. See *supra* notes 95–96 and accompanying text.

138. See LYNDA LAUGHLIN, U.S. CENSUS BUREAU, P70-135, WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011 (2013), <https://www.census.gov/prod/2013pubs/p70-135.pdf> [<https://perma.cc/TT5R-R2G5>]. Because the U.S. Census is a nationwide survey, it includes families in states that provide paid leave and families in states that do not. This report was based on data collected between January and April 2011, predating much of the expansion of paid leave. *Id.* at 1 n.1.

139. *Id.* at 1.

140. See *id.*

141. *Id.* at 2–3, 3 tbl.2.

suggesting that the families stagger shifts to cover care needs.<sup>142</sup> About 10% of families rely on the child's older siblings or other non-grandparent relatives to provide care, and 5% of mothers care for their babies while simultaneously working for pay.<sup>143</sup>

The same study reports that 16% of families with children under one, in which the mother works for pay, use formal day care centers, another 16% pay for childcare in the provider's home, and 4% use nannies or other non-relative care within their own home.<sup>144</sup> Disturbingly, 13% of families in which the mother is employed report having *no* regular arrangement for handling care during the time the mother is working.<sup>145</sup> As the study's author points out, this may reflect difficulty identifying which care arrangements are regularly used, rather than that "no one looked after the child," but it does highlight the precariousness of childcare arrangements for many families.<sup>146</sup>

The Census study also considers differences in care patterns between married and unmarried parents.<sup>147</sup> Not surprisingly, children of married parents were comparatively more likely to be cared for by their fathers<sup>148</sup> and less likely to be cared for by their grandparents.<sup>149</sup> That said, a significant number of unmarried fathers were regularly providing care for their children.<sup>150</sup> Children of unmarried parents were also *much* more likely than marital children to be cared for by siblings or other family members; if the sibling is not him or herself quite mature, this is clearly a sub-optimal solution.<sup>151</sup>

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142. *See id.* at 2-3, 3 tbl.2, 22 (reporting that fathers are almost twice as likely to provide care when mothers work nonday shifts than day shifts). This figure relates to all children under five, rather than specifically children under one, but there is no reason to think this pattern would be different for the under one subpopulation.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. This portion of the report considers care of preschoolers generally, rather than specifically care of children under age one; however, the patterns are likely similar. *See id.* (reporting that fathers provide care for about 32% of children of married parents and 24% of children of never married parents).

149. *See id.* (reporting that grandparents provided care for about 30% of children of married parents and 38% of children of never married parents).

150. *Id.*

151. *See id.* (reporting that siblings or relatives provided care for about 7% of children of married parents and 21% of children of never married parents).

Other families choose to meet care needs by having one parent stay home full time.<sup>152</sup> Among different-sex parents, it continues to be far more common for new mothers than new fathers to take on this role.<sup>153</sup> Just over half of mothers with a child under one year of age are employed.<sup>154</sup> As I have explored in greater detail elsewhere, this pattern reflects a variety of factors.<sup>155</sup> First, there are biological differences between men and women that are important in many cases. Immediately after a birth, a new mother herself needs time to recover (although there are certainly jobs that are less physically taxing than newborn care). Mothers who seek to breastfeed typically try to be available to nurse on demand, as most experts advise that babies need several weeks to develop and solidify their ability to nurse before they are offered a bottle.<sup>156</sup> There are also economic factors. Given the persistence of a gender-based wage gap, women on average make less money than their partners, so it is typically better for the family financially for the mother to leave paid employment and the father to keep working.<sup>157</sup> And finally, social norms around caregiving continue to be quite gendered.<sup>158</sup> This means that in many families, it simply seems “right” for the mother to play this role.

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152. See Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RSCH. CTR. (Sept. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents> [https://perma.cc/H6M]-ANPK].

153. See *id.* (reporting that 7% of fathers and 27% of mothers are stay-at-home parents).

154. See U.S. BUREAU OF LAB. STAT., *Employment Status of Mothers with Own Children Under 3 Years Old by Single Year of Age of Youngest Child and Marital Status, 2018-2019 Annual Averages*, *supra* note 35 (reporting that about 56% of married mothers with a child under one were employed and 54% of non-married mothers with a child under one were employed).

155. See Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 757–65 (2012) (gathering and discussing studies demonstrating that in different-sex couples, women typically perform a greater share of housework and childcare than men, while men engage in more hours of paid work than women).

156. *Id.* at 733 (citing RUTH A. LAWRENCE & ROBERT M. LAWRENCE, *BREASTFEEDING: A GUIDE FOR THE MEDICAL PROFESSION* 471 (6th ed. 2005)).

157. *Id.* at 762 (citing studies showing gender-based wage gap). See generally Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOCIO. REV. 204 (2001) (documenting how motherhood itself is associated with a wage penalty); Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 DEMOGRAPHY 1663 (2018) (showing that the motherhood wage penalty is higher for low-wage workers).

158. See Widiss, *supra* note 155; see also Isabel Valarino, Ann-Zofie Duvander, Linda Haas & Gerda Neyer, *Exploring Leave Policy Preferences: A Comparison of Austria, Sweden, Switzerland, and the United States*, 25 SOC. POL.: INT’L STUD. GENDER ST. & SOC’Y 118, 136 (2017) (reporting that in the United States, almost two-thirds of survey

Sometimes a caregiving parent is out of the workforce for a relatively short period of time. Such parents have functionally created a “leave” by quitting a job to stay home for somewhat longer than would be permitted under the relevant employment policies, but then going back to work within a few months.<sup>159</sup> Of course, unlike a true leave, the employee lacks job security and may not be able to find a job comparable to her or his prior employment. Other caregiving parents, once having quit, will remain out of the workforce for several years.<sup>160</sup> This may reflect true preferences, or this may reflect an inability to find work that pays sufficiently to make it “worth” purchasing child-care.<sup>161</sup> This is particularly true if the family includes several young children, as paid care will generally be more expensive, since care providers typically charge per child.<sup>162</sup>

The coronavirus pandemic has greatly exacerbated challenges faced by working parents and the gender-based imbalances in how care needs are met. Studies suggest pregnant women who contract COVID-19 may be at greater risk of serious complications from the illness, and little is known about how the virus may affect developing embryos.<sup>163</sup> Accordingly, some pregnant women who are not able to

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respondents indicated mothers should take all or most of any available paid parental leave while just 36.4% indicated it should be shared equally between parents).

159. See Danielle Sandler & Nichole Szembrot, *Maternal Labor Dynamics: Participation, Earnings, and Employer Changes* 16 (Ctr. for Econ. Stud., Research Paper No. 19-33, 2019), <https://www2.census.gov/ces/wp/2019/CES-WP-19-33.pdf> [<https://perma.cc/62QW-VKJS>] (showing gradual increase in labor force participation for new mothers each quarter after birth for the first year).

160. See Alexandra Killewald & Xiaolin Zhuo, *U.S. Mothers' Long-Term Employment Patterns*, 56 *DEMOGRAPHY* 285, 297 (2019) (showing 21% of mothers remain out of the workforce until children are 18 and another 29% return to full-time work sometime after the child turns six). Additionally, approximately 13% of mothers return to part-time work rather than full-time work. See *id.*

161. See, e.g., Haley Sweetland Edwards, *Here's How Much It Costs To Be a Stay-at-Home Parent*, *TIME* (June 22, 2016, 9:27 AM), <https://time.com/4377397/cost-stay-at-home-parent> [<https://perma.cc/D5XT-7M9Y>] (“It’s no secret that many young parents these days face a stark choice: pay through the nose for professional child care—or leave the workforce and become full-time caregivers themselves.”).

162. See Sandler & Szembrot, *supra* note 159, at 16, 19–20 (showing decline in labor force participation by new mothers after first child turns one, which the authors ascribe to subsequent children and a rise in labor force participation after the youngest child turns six); see also *supra* Part I.B (discussing high cost of paid care).

163. See generally Sascha Ellington, Penelope Strid, Van T. Tong, Kate Woodworth, Romeo R. Galang, Laura D. Zambrano, John Nahabedian, Kayla Anderson & Suzanne M. Gilboa, Ctrs. for Disease Control & Prevention, *Characteristics of Women of Reproductive Age with Laboratory-Confirmed SARS-CoV-2 Infection by Pregnancy Status—United States, January 22–June 7, 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 769 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6925a1-H.pdf> [<https://>

work remotely or take other steps to reduce the risk of infection have chosen to leave jobs to minimize exposure. As discussed previously, many childcare providers have closed, and, as of March 2021, school districts across the country are still operating fully or partially remotely, although many have announced plans to reopen. For a year or more, many parents have been called on to serve as de facto teachers while also meeting their own work obligations. Emerging research shows that women have been far more likely than men to disrupt work to meet children's needs, including dropping out of the workforce entirely for at least a period of this time.<sup>164</sup>

Many stay-at-home parents greatly value the opportunity to care for their children full-time. But time out of the workforce causes large and persistent wage penalties, and it may limit professional opportunities long after a parent returns to paid work.<sup>165</sup> It also dramatically reduces retirement savings, as well as future social security benefits, contributing to the very high rate of poverty experienced by older women.<sup>166</sup> Studies suggest that the United States' failure to provide paid family leave and robust subsidies for childcare helps explain why women's labor force participation is low—and declining—relative to

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perma.cc/QB89-VQDS]; Meredith Wadman, *COVID-19 Unlikely To Cause Birth Defects, but Doctors Await Fall Births*, 369 *SCIENCE* 607, 607 (2020) (discussing the effect of COVID-19 on pregnant women and their fetuses).

164. See Misty L. Heggeness, Jason Fields, Yazmin A. García Trejo & Anthony Schultzenberg, *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. CENSUS BUREAU, at fig.3 (Mar. 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html> [<https://perma.cc/F72L-LH58>] (showing labor force participation of mothers with school age children dropped much more than fathers' from April to November 2020, and concluding this likely reflected both mothers carrying a heavier burden of childcare and being more likely to work in service jobs impacted by COVID closures); see also Gema Zamorro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work, and Mental Health During COVID-19* (Univ. of S. Cal. CESR-Schaeffer Working Paper Series, Paper No. 2020-003, 2020), [https://cesr.usc.edu/documents/WP\\_2020\\_003.pdf](https://cesr.usc.edu/documents/WP_2020_003.pdf) [<https://perma.cc/Y2ZN-BG59>] (finding women with children spent significantly more time than their partners providing extra childcare during the crisis and that they were more likely to have reduced paid work hours to provide care).

165. See Budig & England, *supra* note 157 (finding a wage penalty of 7% per child, with penalties higher for married women than unmarried women); Silke Aisenbrey, Marie Evertsson & Daniela Grunow, *Is There a Career Penalty for Mothers' Time Out? A Comparison of Germany, Sweden and the United States*, 88 *SOC. FORCES* 573, 596 (2009) (finding that longer time away from paid work in the United States is associated with downward moves in career opportunities).

166. See Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 *GEO. L.J.* 1323, 1338–39 (2017) (discussing how new mothers who leave the workforce face financial impacts on their retirement savings, Social Security, and Medicare benefits).

other developed countries; this depresses the overall health of the economy, as well as individual women's economic security.<sup>167</sup>

Paid leave changes these calculations by making it financially viable for new parents to spend more time at home with a new baby before returning to the job that was held prior to the birth. The high cost, and the limited availability, of infant care means that every additional week of paid leave provides significant financial savings, as well as the intangible benefits that come from being able to provide care personally for a new child.

## II. PARENTAL LEAVE LAWS

As of March 2021, nine U.S. states (California, Colorado, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington), as well as Washington, D.C., have enacted laws that provide full or partial income replacement to parents taking time off work to care for a new child.<sup>168</sup> Because many of these states have large populations, more than a quarter of the U.S. population lives in a state with a paid leave law.<sup>169</sup> Seven of these laws were passed since 2016,<sup>170</sup> and the new laws are more generous than the older laws, suggesting growing support.<sup>171</sup> Additionally, in December 2019, Congress passed

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167. See Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why Is the United States Falling Behind?*, 103 AM. ECON. REV. 251, 252 (2013) (concluding that the United States' lack of paid family leave and affordable childcare contribute to women's lower labor force participation as compared to other countries); BLACK ET AL., *supra* note 34, at 8 ("[I]mplementing paid family leave and expanded access to child care[] would likely increase the labor force participation rate of prime-age women.").

168. CAL. UNEMP. INS. CODE §§ 3300–3306 (West 2021) (enacted Jan. 1, 2014); COLO. REV. STAT. §§ 8-13.3-401 to -421 (2021) (effective July 14, 2020); CONN. GEN. STAT. §§ 31-49e to -49t (2021) (effective June 25, 2019); D.C. CODE §§ 32-541.01 to .09 (2021); MASS. GEN. LAWS ch. 175M §§ 1–11 (2021) (effective Jan. 1, 2019); N.J. STAT. ANN. §§ 43:21-25 to -65 (West 2021); N.Y. WORKERS' COMP. LAW §§ 200–242 (McKinney 2021); 2019 Or. Laws ch. 700 (H.B. 2005) (amending OR. REV. STAT. §§ 410.619, 657.100, 657.471, 659A.162, 659A.885 (2020)); 28 R.I. GEN. LAWS §§ 28-39-1 to -41 (2021); WASH. REV. CODE §§ 50A.05.005 to .120 (2021). For detailed descriptions of the scope of each of these laws, see A BETTER BALANCE, COMPARATIVE CHART OF PAID FAMILY AND MEDICAL LEAVE LAWS IN THE UNITED STATES (2021), <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart> [<https://perma.cc/DDP4-MXAS>].

169. See Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, COMPAR. LAB. L. & POL'Y J. (forthcoming 2021) (manuscript at 6), <https://ssrn.com/abstract=3505553> [<https://perma.cc/3J4G-N339>] (explaining the basis for these calculations).

170. *Supra* note 168.

171. See Widiss, *supra* note 169 (manuscript at 7).

legislation providing paid parental leave to most federal employees.<sup>172</sup> The momentum on this issue is, at some level, not surprising. Paid leave meets a pressing problem, and it is very popular with voters. A 2018 survey found that 84% of voters, including 74% of Republicans, support a national policy of paid parental leave.<sup>173</sup> Colorado's law was approved in November 2020 by ballot referendum, where it passed by wide margins.<sup>174</sup>

This Part offers a detailed analysis of the structure of the state paid leave laws, the policy for federal workers, and leading proposals for more general federal legislation. It then explains how the leave laws interact with the body of state family law that defines parentage and custody rights. This analysis reveals how the new laws, while clearly an important step forward, categorically disadvantage single parents.

#### A. STATE LEAVE AND BENEFITS LAWS

Prior to the enactment of the new state laws, and in the forty-one states that lack such legislation, American workers in the private workforce are generally guaranteed, at best, *unpaid* leave for time off work with new children.<sup>175</sup> The federal Family and Medical Leave Act (FMLA), enacted in 1993, provides up to twelve weeks annually of unpaid leave.<sup>176</sup> FMLA leave can be used by parents to care for a new child, as well as by employees to address their own serious health condition or to care for family members with a serious health condition; later-added provisions provide time off for needs related to a family member's military service.<sup>177</sup>

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172. See generally Federal Employee Paid Leave Act, Pub. L. No. 116-92, § 7601-7606, 133 Stat. 2304 (2019).

173. NAT'L P'SHIP FOR WOMEN & FAMS., VOTERS' VIEWS ON PAID FAMILY + MEDICAL LEAVE 1, 3 (2018), <http://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf> [<https://perma.cc/66WZ-33QU>].

174. See *Colorado Proposition 118, Paid Medical and Family Leave Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/Colorado\\_Proposition\\_118,\\_Paid\\_Medical\\_and\\_Family\\_Leave\\_Initiative\\_\(2020\)](https://ballotpedia.org/Colorado_Proposition_118,_Paid_Medical_and_Family_Leave_Initiative_(2020)) [<https://perma.cc/E2D4-WP4B>] (reporting that the measure passed 57.75% to 42.25%).

175. One partial exception is Hawaii, which mandates employers provide short-term disability benefits and thus guarantees a period of benefits for new birth mothers. See HAW. REV. STAT. §§ 392-1 to -101 (2020) (providing benefits for short-term medical disability, including pregnancy and childbirth). However, this does not necessarily provide job security.

176. 29 U.S.C. § 2812(a)(2).

177. *Id.* § 2612(a)(1).

The limitations of the FMLA are well-known. Most obviously, it is unpaid.<sup>178</sup> Also, the FMLA only applies to employers with at least fifty employees, and to employees who can meet hour and longevity requirements.<sup>179</sup> These limitations collectively exclude more than 40% of workers.<sup>180</sup> Low-skilled workers, women, and racial minorities are disproportionately likely to be excluded because they are more likely to change jobs frequently, work part-time, and work for small employers.<sup>181</sup> Just 43% of single-parent households, as compared to 63% of dual-parent households, are covered.<sup>182</sup> Even workers who are covered often cannot afford to take unpaid leave, or they may fear employer retaliation if they were to take leave—an illegal but common reality.<sup>183</sup>

The new state leave laws follow the general structure of the FMLA, while addressing many of its weaknesses. First, they provide income replacement. Under the state laws, benefit levels are a percentage of a worker's regular earnings, up to caps set around the state median wage.<sup>184</sup> Although the older laws provided about half or 60% of regular earnings, the recently-enacted laws provide full, or close to full, income replacement up to the caps.<sup>185</sup> Functionally, this means low-wage workers receive almost regular income while on leave; workers who make more than the median wage receive only partial pay.<sup>186</sup>

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178. In spring 2020, during the first surge of coronavirus cases, Congress passed temporary amendments to the FMLA that provided paid leave for certain purposes related to the pandemic and expanded eligibility. *See Families First Coronavirus Response Act*, *supra* note 48. These provisions, however, did not address leave for new children and the benefits expired in December 2020. *Id.*

179. 29 U.S.C. § 2611(2), (4).

180. *See* SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, *ABT ASSOCS., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT 6 (2020)*, [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD\\_FMLA2018SurveyResults\\_FinalReport\\_Aug2020.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf) [<https://perma.cc/UUX7-56R8>] (“Overall, 56 percent of employees are eligible for FMLA, on the basis of their reported tenure, hours, and worksite size.”).

181. *See generally* O’Leary, *supra* note 27.

182. *See* BROWN ET AL., *supra* note 180, at 8.

183. *See id.* at 45 (reporting that 66% of employees who needed FMLA leave but didn’t take it said they couldn’t afford it and 45% were concerned they might lose their job); *see also id.* at 39 (reporting that 5% of employees covered by FMLA nonetheless reported losing a job because they took leave, and 8% reported losing seniority or potential for advancement).

184. *See* A BETTER BALANCE, *supra* note 168, at 7.

185. *Id.*

186. *Id.*



Like the FMLA, the state laws embed a right to parental leave—generally called “bonding benefits”—within a more general right to take time off for family and medical conditions, and, in many states, military-related care needs.<sup>187</sup> The maximum period of benefits a parent can claim for caring for a newborn or newly adopted child varies between states.<sup>188</sup> The older state laws provide between four and eight weeks of benefits.<sup>189</sup> The six more recently passed laws, however, provide each parent twelve full weeks of benefits, and some of the states with older laws have amended them to extend the period of benefits.<sup>190</sup> In most states, a birth mother can receive benefits during the period of time that she is recovering from the medical effects of pregnancy and childbirth (generally six to eight weeks), in addition to the permitted weeks of bonding benefits.<sup>191</sup> This is different from the FMLA, which limits the total amount of time available annually to twelve weeks, such that any use of FMLA-leave for medical reasons decreases the time available for bonding purposes.<sup>192</sup>

To be eligible to receive state benefits, individuals need to have a pre-existing connection to the labor market, but, in sharp distinction to the FMLA, most people who work for pay can qualify.<sup>193</sup> Generally, all private sector employment is covered, regardless of the size of the employer; many states also cover public employment.<sup>194</sup> Self-employed workers can generally opt into the system, meaning independent contractors—a rapidly growing portion of the workforce—can receive benefits.<sup>195</sup> Most also specifically cover domestic workers.<sup>196</sup> The requirements regarding prior hours worked are also quite modest, and they can be satisfied by work for several different employers.<sup>197</sup> This means that most part-time workers are covered, and that new employees can receive benefits so long as they have worked sufficient hours for *some* employer in the period preceding the claim.<sup>198</sup>

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187. *See id.* at 1.

188. *See id.* at 8.

189. *Id.*

190. *Id.* In July 2020, New Jersey workers began receiving twelve weeks of bonding leave (up from eight) and California workers began receiving eight weeks (up from six). *See id.*

191. *Id.*; *see also infra* Part IV.D (discussing this difference in more detail).

192. 29 U.S.C. § 2612(a)(1).

193. A BETTER BALANCE, *supra* note 168, at 2.

194. *Id.*

195. *Id.* at 3.

196. *Id.*

197. *Id.* at 3–4.

198. *Id.*

Businesses do not pay directly for the benefits claimed by their employees on leave. Rather, states generally use an insurance model to spread costs, with funding being provided by a small payroll tax (generally less than 1% of wages).<sup>199</sup> In some states, this tax is borne fully by employees; in some, by employers; and in some, it is shared.<sup>200</sup> Whatever the allocation, the tax generally amounts to just a few dollars per employee per week—or, as various paid leave campaigns have pointed out, less than the cost of a cup of coffee.<sup>201</sup>

Under most of the state laws, workers also have a legally-enforceable right to return to their prior job, or a comparable position, at the same company.<sup>202</sup> A few states, however, provide benefits without job protection.<sup>203</sup> In this sense, some are technically “benefits” laws rather than “leave” laws. However, many employers already provide workers a right to *unpaid* leave pursuant to the FMLA or a discretionary employment policy.<sup>204</sup> Employees can take advantage of the job-protection such policies provide while receiving income replacement through the state system. Employees who lack job-protection or who seek to take a longer period of time off than permitted under such policies may ultimately be forced to quit a position, in which case the benefits still help support the employee during a makeshift “leave” period.

Like the FMLA, the new state laws provide individual, equal, and non-transferable benefits to each parent of a new child. The specific standards that govern who is recognized as a parent for this purpose are discussed in detail in Section II.C, below. Families have considerable flexibility in terms of how they apportion benefits among eligible parents. In distinction to laws in some other countries, and some private plans in the United States, the state laws do not require

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199. *Id.* at 5–6.

200. *Id.*

201. *See, e.g.*, Press Release, José M. Serrano, Sen., N.Y. State Senate, New York Enacts Paid Family Leave (Feb. 14, 2018), <https://www.nysenate.gov/newsroom/press-releases/jose-m-serrano/new-york-enacts-paid-family-leave> [<https://perma.cc/E7QU-NJLY>] (“[T]his comprehensive family benefit costs less than \$2 a week – the price of a typical cup of a coffee!”).

202. A BETTER BALANCE, *supra* note 168, at 9 (indicating that Colorado, Connecticut, Massachusetts, New York, Oregon, and Rhode Island provide job-protected leave to most or all employees taking bonding leave, and that Washington provides more limited leave rights). *See generally* Williamson, *The Meaning of Leave*, *supra* note 20 (describing what is encompassed in leave rights in detail).

203. A BETTER BALANCE, *supra* note 168, at 9 (indicating that California, New Jersey, and Washington, D.C., fall into this category).

204. *See supra* text accompanying notes 51–52.

designating a parent as a primary caregiver to be eligible,<sup>205</sup> and parents generally may take leave simultaneously, sequentially, or some combination of the two. For example, in a two-parent family, both parents might take two weeks off when the baby is born; then one parent might take the rest of her leave, while the second parent saves the balance of leave to use after the first parent has exhausted her benefits. In states that provide each parent twelve weeks of bonding benefits and provide additional benefits during time a birth mother is physically recovering from childbirth, a two-parent family would typically be eligible for thirty or more weeks of benefits.

#### B. FEDERAL POLICY AND PROPOSED BILLS

In December 2019, Congress enacted legislation providing paid leave for federal workers who are new parents.<sup>206</sup> The law, folded into a defense appropriations bill, was championed both by then-President Trump and Speaker of the House Nancy Pelosi, a rare bipartisan compromise in our current time of fractured government.<sup>207</sup> It is a major step forward for more than two million federal workers who are covered by the law;<sup>208</sup> it also is a sign that it may be viable to enact more general paid parental leave legislation on a federal level.

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205. See, e.g., Widiss, *supra* note 169 (manuscript at 2–3) (discussing Australia’s policy which provides eighteen weeks of benefits to a primary caregiver and two weeks of benefits to secondary caregivers). In the United States, “primary” caregiver requirements have been challenged as illegal sex discrimination. *Id.* (manuscript at 14–15).

206. Federal Employee Paid Leave Act, Pub. L. No. 116-92, § 7603, 133 Stat. 2304 (2019).

207. The deal happened in large part because the Democrats agreed to fund Space Force, which was a priority for President Trump. See Jeff Stein, Lisa Rein & Josh Dawsey, *Democrats Leveraged Trump’s Fixation on Space Force To Pursue Parental-Leave Victory for Federal Workers*, WASH. POST (Dec. 8, 2019, 6:10 PM), [https://www.washingtonpost.com/business/economy/democrats-leveraged-trumps-fixation-on-space-force-to-pursue-parental-leave-victory-for-federal-workers/2019/12/08/92f290fc-19ce-11ea-826b-14ef38a0f45f\\_story.html](https://www.washingtonpost.com/business/economy/democrats-leveraged-trumps-fixation-on-space-force-to-pursue-parental-leave-victory-for-federal-workers/2019/12/08/92f290fc-19ce-11ea-826b-14ef38a0f45f_story.html) [https://perma.cc/6Ecr-Z3YV]. After making the deal, however, President Trump highlighted parental leave as an achievement he is “proud” of. See President Donald Trump, State of the Union Address (Feb. 4, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-state-union-address-3> [https://perma.cc/FC3D-3KPE].

208. Catherine Thorbecke, *2.1 Million Federal Employees To Get Paid Parental Leave for the First Time*, ABC NEWS (Dec. 17, 2019, 2:23 PM), <https://abcnews.go.com/US/21-million-federal-employees-paid-parental-leave-1st/story?id=67777014> [https://perma.cc/F96A-TRB5]; see also Nicole Ogrysko, *Not All Federal Employees Are Covered Under the New Paid Parental Leave Law, At Least Not Yet*, FED. NEWS DESK (Jan. 8, 2020, 10:28 AM), <https://federalnewsnetwork.com/benefits/2020/01/not-all-federal-employees-are-covered-under-the-new-paid-parental-leave-law-at-least-not>

The law modifies existing leave rights for federal workers, which track the FMLA in terms of available unpaid leave, to specify that leave for purposes of bonding with a new child will be paid leave.<sup>209</sup> In other words, the law *only* addresses parental leave, rather than the broader category of family caregiving or paid time off for an employee's own medical conditions covered in the state laws. Each parent of a new child is eligible to receive twelve weeks of paid leave.<sup>210</sup> As noted above, the state laws, funded through a state-based insurance system, do not necessarily provide full income replacement for workers on leave.<sup>211</sup> The federal policy, by contrast, is financed directly by the federal government and federal workers receive their regular pay.<sup>212</sup> Employees began receiving benefits for births or adoption placements that occurred after October 1, 2020.<sup>213</sup>

There is also new momentum for more general federal legislation. Bills have been introduced by members of both parties, President Biden endorsed paid family leave as part of his platform,<sup>214</sup> and former President Trump also called for paid family leave in his 2020 State of the Union Address.<sup>215</sup> Additionally, Congress passed a temporary requirement that some employers provide paid family leave for COVID-19 related needs.<sup>216</sup> As the pandemic continues to rage, there have been heightened calls for more general and permanent leave for employees to address health conditions and family-related care needs.<sup>217</sup>

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-yet [<https://perma.cc/W6S8-QWQ7>] (explaining that enacted law covers most, but not all, federal employees).

209. Federal Employee Paid Leave Act § 7603; *see also* 5 C.F.R. § 630.1203(i) (2020).

210. Federal Employee Paid Leave Act §§ 7602–7603.

211. A BETTER BALANCE, *supra* note 168, at 7.

212. Federal Employee Paid Leave Act § 7603.

213. *Id.*

214. *See, e.g.,* Lois M. Collins, *What Family Policy Might Look Like If Biden and Harris Are Elected*, DESERET NEWS (Sept. 6, 2020, 10:00 PM), <https://www.deseret.com/indepth/2020/9/6/21395769/biden-harris-democrats-family-policy-election-abortion-aca-healthcare-taxes-child-care> [<https://perma.cc/RD6K-FULE>] (noting that “Biden and Harris have supported paid parental leave for both fathers and mothers” and that before dropping her own presidential run, Harris supported leaves of up to six months).

215. *See* President Donald Trump, *supra* note 207 (“Now I call on the Congress to pass the bipartisan Advancing Support for Working Families Act, extending family leave to mothers and fathers all across our nation.”).

216. *Families First Coronavirus Response Act*, *supra* note 48.

217. *See* DIANA BOESCH, CTR. FOR AM. PROGRESS, THE URGENT CASE FOR PERMANENT PAID LEAVE: LESSONS LEARNED FROM THE COVID-19 RESPONSE (2020), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case>

This Section briefly describes federal bills introduced in the 117th Congress, which began in January 2021, and bills introduced or considered in the 116th Congress (2019–20), which may be reintroduced in similar form in the 117th Congress.<sup>218</sup> Paid parental leave may represent an opportunity to craft a bipartisan agreement, even in these hyper-partisan times. Notably, none of the leading bills actually provide job-protected leave; they simply provide benefits that can be used as income replacement. Under the bills as currently drafted, workers who take time off from work to provide care would only have the right to return to a job if they are eligible under the FMLA, state analogs, or an employer's private policy.

In the 117th Congress, the Democrats hold razor-thin majorities in the House and Senate.<sup>219</sup> Most Democrats in Congress support a bill called the Family and Medical Insurance Leave (FAMILY) Act; in the previous Congress, one Republican representative also signed on as a sponsor.<sup>220</sup> President Biden has signaled support for an approach generally similar to the FAMILY Act, although he did not specifically endorse the bill.<sup>221</sup>

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-permanent-paid-leave [<https://perma.cc/C35M-MPAA>] (“One issue that has been front and center during the current crisis is the lack of meaningful, comprehensive paid family and medical leave and paid sick leave policies to support workers and public health.”); Rebecca Gale, *The Coronavirus Is Shaping the Conversation About the Need for Paid Family Leave*, WASH. POST (Oct. 23, 2020, 8:00 AM), <https://www.washingtonpost.com/lifestyle/2020/10/23/paid-leave-covid> [<https://perma.cc/Z4Q7-GESU>] (“[A] federal paid family leave policy may be inevitable, and longtime opponents are opting for a seat at the table in crafting such legislation.”); Katherine Wiles, *Why Colorado Passing Paid Family Leave Matters Even More During COVID*, MARKETPLACE (Nov. 6, 2020), <https://www.marketplace.org/2020/11/06/why-colorado-passing-paid-family-leave-matters-even-more-during-covid> [<https://perma.cc/V9EP-4G3S>] (“[T]he pandemic is only highlighting the need for more family support.”).

218. *117th United States Congress*, BALLOTPEDIA, [https://ballotpedia.org/117th\\_United\\_States\\_Congress](https://ballotpedia.org/117th_United_States_Congress) [<https://perma.cc/926Y-MKT2>].

219. *See id.* (showing Democrats hold 220 seats in the House and Republicans hold 211, with four vacancies, and a 50-50 tie in the Senate, since two independents caucus with the Democrats).

220. *See Cosponsors: H.R. 804—117th Congress (2021-2022)*, U.S. CONG., <https://www.congress.gov/bill/117th-congress/house-bill/804/cosponsors> [<https://perma.cc/2STX-YRYE>] (showing 198 Democratic cosponsors); *S. 248—117th Congress (2021-2022)*, U.S. CONG., <https://www.congress.gov/bill/117th-congress/senate-bill/248/cosponsors> [<https://perma.cc/2J5B-BLGP>] (showing thirty-four Democratic and two independent cosponsors); *see also Cosponsors: H.R. 1185—116th Congress (2019-2020)*, U.S. CONG., <https://www.congress.gov/bill/116th-congress/house-bill/1185/cosponsors> [<https://perma.cc/52NT-Z3PU>] (showing 218 Democratic cosponsors and one Republican cosponsor, Christopher Smith of New Jersey).

221. *See* Allen Smith, *Presidential Election: Candidates Back Paid-Leave Proposals*, SOC'Y FOR HUM. RES. (Sept. 8, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/presidential-election-2020-paid-leave>

In structure, the FAMILY Act, at least as introduced in February 2021, is similar to state paid parental leave laws. Workers would receive up to twelve weeks annually of partial income replacement for: (1) their own serious health conditions, including pregnancy and childbirth; (2) to care for a new baby; (3) to care for a family member with a serious health condition; or (4) to address certain military-related care needs.<sup>222</sup> Like the state leave laws, this structure disadvantages single-parent families, as they are eligible to receive only half as many weeks of benefits as two-parent families. Additionally, while many of the state leave laws allow birth mothers to claim medical benefits separately from bonding benefits, the current version of the FAMILY Act does not.<sup>223</sup> This can be a particularly serious problem for single mothers because, if a birth mother uses some or all of her benefits for medical needs during the pregnancy, there is not a second parent available to claim bonding benefits to care for the newborn child.

Under the FAMILY Act, benefits would be funded by a small payroll tax (jointly paid by employers and employees), and workers would receive approximately two-thirds of their regular income, subject to minimum and maximum amounts.<sup>224</sup> Workers would be eligible for benefits, regardless of the size of their employers, and part-time, contingent, and self-employed workers could receive benefits, if they had earned sufficient credits under the Social Security Act.<sup>225</sup> This would exclude far fewer workers than the FMLA does; however, younger workers (who are also disproportionately likely to be single parents) are less likely to have worked the requisite number of quarters to qualify, as are caregivers who have taken extended breaks from the paid workforce.<sup>226</sup> In sum, the FAMILY Act would be a significant

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.aspx [<https://perma.cc/UM69-6LY6>] (“Biden supports 12 weeks of paid family and medical leave similar to the FAMILY Act but hasn’t said he supports every provision of the legislation.”).

222. See H.R. 804, 117th Cong. § 2(6) (2021) (“The term ‘qualified caregiving’ means any activity engaged in by an individual, other than regular employment, for a reason for which an eligible employee would be entitled to leave under subparagraphs (A) through (E) of paragraph (1) of section 102(a) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)).”).

223. See *id.* § 4(b)(4).

224. *Id.* §§ 4(b), 5. As introduced, the minimum monthly benefit would be \$580 and the maximum would be \$4000; these amounts would be indexed according to wage growth. *Id.* § 4(b).

225. *Id.* § 4(a).

226. See CTR. FOR ECON. & POL’Y RSCH. & FAM. STORY, *supra* note 108, at 9 (“[T]here is reason to be concerned that the FAMILY Act’s work-credit test will disproportionately exclude young solo parents from eligibility for wage-replacement benefits.”). By basing

step forward as compared to the current patchwork of state protections, but, at least as currently structured, it would not address aspects of state law that disadvantage single parents.

There were several other bills related to family leave introduced in the last Congress. Since the Democrats' majority is so slim, and most legislation addressing the issue would be subject to the filibuster, one or more of these other bills might gain traction as a bipartisan alternative to the FAMILY Act. The most likely candidate would be the Advancing Support for Working Families Act, which had both Republican and Democratic sponsors in the last Congress and was the bill endorsed by President Trump.<sup>227</sup> General tax law provides parents a tax credit of up to \$2,000 per child each year (although this amount has been increased temporarily in 2021 as part of the COVID relief package).<sup>228</sup> This bill, as drafted in the last Congress, would allow new parents to receive a maximum \$5,000 "advance" on future child tax credits, which most parents would gradually repay over the next ten years.<sup>229</sup> Low-income parents who do not qualify for the full refundable portion of the child tax credit would be eligible to receive the equivalent of twelve weeks of wage replacement, and the repayment period would be extended to 15 years.<sup>230</sup> Eligibility for the benefit would not depend on taking time off work. Rather, parents could use

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eligibility on Social Security, the latest version of the FAMILY Act also excludes some state and local government workers. See SOC. SEC. ADMIN., PUB. NO. 05-10051, HOW STATE AND LOCAL GOVERNMENT EMPLOYEES ARE COVERED BY SOCIAL SECURITY AND MEDICARE 1 (2017), <https://www.ssa.gov/pubs/EN-05-10051.pdf> [<https://perma.cc/2WWM3-8MX7>] ("Unlike workers in the private sector, not all state and local employees are covered by Social Security.").

227. *Cosponsors: S. 2976—116th Congress (2019-2020)*, U.S. CONG., <https://www.congress.gov/bill/116th-congress/senate-bill/2976/cosponsors> [<https://perma.cc/2SH5-RYJG>] (showing four Republican and two Democratic cosponsors).

228. See Bill Cassidy & Kyrsten Sinema, *A Bipartisan Solution To Help Working Families*, U.S. SENATOR BILL CASSIDY, <https://www.cassidy.senate.gov/imo/media/doc/Cassidy%20Sinema%20One-Pager%20FINAL.pdf> [<https://perma.cc/53UU-E25E>]; Garrett Watson & Erica York, *The American Rescue Plan Act Greatly Expands Benefits Through the Tax Code in 2021*, TAX FOUND. (Mar. 12, 2021), <https://taxfoundation.org/american-rescue-plan-covid-relief> [<https://perma.cc/5GRU-PD8X>] (explaining that in 2021 the credit will increase to \$3,600 annually for children under six and \$3,000 for older children).

229. S. 2976, 116th Cong. § 2 (2020). The bill does not cover foster children, and available benefits would be reduced for adopted children older than five years of age. *Id.*; see also Cassidy & Sinema, *supra* note 228 (summarizing S. 2976); Claire Cain Miller, *Trump Called for Paid Family Leave. Here's Why Few Democrats Clapped.*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/upshot/paid-leave-trump.html> [<https://perma.cc/UP3R-EUFB>] (explaining key provisions of the bill and leading critiques of it).

230. Cassidy & Sinema, *supra* note 228.

the money to replace lost income for leave or to pay for infant care, hospital expenses, or whatever else they choose.<sup>231</sup> Only new parents would be eligible; the advance would not be available for taxpayers who might need income during time off work for personal or family medical needs.<sup>232</sup>

This bill would provide new parents the equivalent of an interest-free loan from the government. Thus, in contrast with the insurance-based model adopted in the states, the costs of care would continue to be borne largely by the individual family. More liberal-leaning advocacy groups have, appropriately I believe, criticized this feature of the bill.<sup>233</sup> The model differs from the state-based models, the new policy for federal workers, and the FAMILY Act in a different way that is more directly relevant to the issues addressed in this Article. It would treat single-parent families largely equivalently to marital families, in that the benefit is structured on a *child* basis, rather than an individual *parent* basis.<sup>234</sup> Likely, this is simply a byproduct of the larger structure of the child tax credit it is grafted onto, rather than a conscious design choice, but it offers an approach to parental-leave-related benefits that would not cause the inequities that are the focus of this Article.<sup>235</sup> That said, as discussed more fully below, it would also lose the aspects of the state laws and the FMLA that are intended to shift gender norms around leave for two-parent families.<sup>236</sup>

Two prominent Republican-sponsored bills addressing paid leave in the last Congress, the New Parents Act<sup>237</sup> and the Child Rearing and Development Leave Empowerment (CRADLE) Act,<sup>238</sup> are

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231. *Id.*

232. *Id.*

233. *See, e.g.*, Kathleen Romig, “Paid Family Leave” Bill Offers Loan, Not Leave, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 6, 2019), <https://www.cbpp.org/research/federal-tax/paid-family-leave-bill-offers-loan-not-leave> [<https://perma.cc/Q9BT-VK9P>].

234. In general, only one taxpayer can claim a child tax credit for any given child, and the same rule would apply to the “advance” that would be allowed by this Act. If a couple is married and files their taxes jointly, they functionally share the credit; if the new parents are unmarried, only one of the parents will be able to claim the credit. *See* 26 U.S.C. §§ 24, 152(c).

235. *See supra* Part I.C.

236. *See infra* Part IV.A.

237. New Parents Act of 2019, S. 920, 116th Cong. (2019) (as of October 2020, sponsored by two Republican senators); H.R. 1940, 116th Cong. (2019) (as of October 2020, sponsored by eleven Republican representatives).

238. In March 2019, Senators Joni Ernst and Mike Lee announced plans to introduce this Act and made the draft text of the Act available. *See* Press Release, Mike Lee, U.S. Sen., Sens. Ernst, Lee Put Forward Paid Parental Leave Plan that Is Budget Neutral and Flexible for Parents (Mar. 12, 2019), <https://www.lee.senate.gov/public/index>



structured similarly to the Advancing Support for Working Families Act. Like that bill, they would provide benefits only for new parents, rather than benefits for individual or family health needs.<sup>239</sup> Like that bill, as well, they would place the burden for paying for benefits on individual families, although benefits would be funded by taking an advance against the employee's own social security benefits, rather than future tax credits.<sup>240</sup> Commentators have pointed out that, under this structure, if women take more leave than men to care for a new child, as seems likely, it would widen the gap between women and men's income security in retirement.<sup>241</sup>

A different weakness of the Republican-sponsored bills has been far less discussed. Although the bills adopt the general structure of the FMLA, in that mothers and fathers typically would receive equal and non-transferable benefits, there is a wrinkle. Under the bills as currently drafted, legally-recognized parents who do not live with the child could be precluded from claiming benefits at all.<sup>242</sup> In this respect, these bills would disadvantage nonmarital families even more directly than the FAMILY Act and the state laws do.

In summary, the proposed FAMILY Act has the same structural issues as the state laws; because benefits are granted as an individual

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.cfm/2019/3/sens-ernst-lee-put-forward-paid-parental-leave-plan-that-is-budget-neutral-and-flexible-for-parents [https://perma.cc/2MND-FFTW]. It received considerable press attention at that time. See, e.g., *Republicans Finally Have a Paid Family Leave Proposal. Here's How It Works*, CBS THIS MORNING (Mar. 12, 2019, 11:25 AM), <https://www.cbsnews.com/news/paid-family-leave-cradle-act-senators-joni-ernst-and-mike-lee-its-time-to-catch-up-with-other-countries> [https://perma.cc/QP6Q-G3Q5]. However, as of March 2021, the bill has not been formally introduced in Congress.

239. See S. 920, § 2; Press Release, *supra* note 238.

240. See S. 920 (proposing new section 219(f) explaining that old age benefits would be reduced or receipt of benefits would be delayed to offset costs); Press Release, *supra* note 238 (explaining receipt of benefits would delay eligibility to receive old-age insurance benefits).

241. See, e.g., DIANA BOESCH, CTR. FOR AM. PROGRESS, RHETORIC VS. REALITY: NOT ALL PAID LEAVE PROPOSALS ARE EQUAL (2019), <https://www.americanprogress.org/issues/women/reports/2019/10/10/475625/rhetoric-vs-reality-not-paid-leave-proposals-equal> [https://perma.cc/6TP5-49PX].

242. See S. 920, § 2 (proposing new section 219(i)(1)(B) that defines a qualified child as a child who will "be residing with, and under the care of, the individual [claiming benefits] during the benefit period"); Press Release, *supra* note 238 (proposing new 42 U.S.C. § 235(e)(3)(B)(ii) to define eligible parents as only including parents who "intend[] to maintain the same principle place of abode as such child for more than one-half of the 12-month period subsequent to the birth or adoption of the child"). The proposed language also is narrower than most of the state laws in that it includes biological and adoptive parents, but not foster parents. See Press Release, *supra* note 238; see also S. 920, § 2 (proposed new section 219(i)(1)).

right to each parent, single-parent families are disadvantaged relative to two-parent families. The Advancing Support for Working Parent Act would treat nonmarital and marital families equally, as eligibility is defined per *child* rather than per *parent*. However, it would lose the aspects of the state laws, and the proposed FAMILY Act, that are intended to encourage men as well as women to provide care. The New Parents Act and the CRADLE proposals would disadvantage nonmarital families even more directly than the state laws and the FAMILY Act do, as unmarried parents who did not live with the new baby would be entirely ineligible for the benefits.<sup>243</sup>

### C. PARENTAGE AND CUSTODY LAWS

As explained in Section A, the state paid leave laws cover both bonding with a new child and caring for a family member with a serious health condition, as well as time off to address an employee's own serious medical need. Under the *family care* provisions of these laws, employees can take leave to care for a relatively extensive group of extended family members.<sup>244</sup> However, under the *bonding* provisions, a person is only allowed to take time off to care for his or her "son," "daughter," or "child."<sup>245</sup> This is also true of the new policy for federal workers.<sup>246</sup>

Under the laws, "child," or "son" and "daughter," are generally defined to include biological, adopted, and foster children, step-children, legal wards, and children to whom the employee has served *in loco parentis*.<sup>247</sup> In this way, the leave laws incorporate by reference a complex body of state family law. This law has been developed through statutory provisions and judicial decisions, with important

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243. *Id.*

244. See A BETTER BALANCE, *supra* note 168 (summarizing family care provisions as typically covering spouses, siblings, children, parents, parents-in-law, grandparents, and grandchildren). Several of the more-recently enacted laws go further to also include other persons related by blood or affinity with a "close association" that is "equivalent" to these family relationships. See *id.*

245. See, e.g., CAL. UNEMP. INS. CODE § 3302(a) (West 2021) (defining "care recipient" for purposes of bonding leave as a person with a new "child" with whom the care provider is bonding); *id.* § 3302(c) (defining "child" as a "biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or the person to whom the employee stands in loco parentis").

246. The federal policy incorporates the FMLA approach. See 29 U.S.C. § 2612(a)(1)(A)–(B) (allowing FMLA leave "because of the birth of a son or daughter" or "placement of a son or daughter with the employee for adoption or foster care").

247. The Appendix includes specific language from each law and, where implemented, permitted documentation.

constraints provided by state and federal constitutions.<sup>248</sup> While establishing a parental relationship is often straightforward, it is not always so. Advances in reproductive technology, genetic testing, recognition of same-sex parents, and the rapid growth of nonmarital childbearing all have implications for how these determinations are made.<sup>249</sup>

There are two distinct legal questions. The first is which adults qualify as a “parent” having the requisite relationship to a “child,” pursuant to the statutory definitions, as that is the threshold requirement for claiming benefits.<sup>250</sup> The second is who among legal parents has custodial authority, meaning both the opportunity and responsibility to provide physical care for the child; this is relevant since the benefits are income replacement for caretakers.<sup>251</sup> The marital status of the birth parent plays a significant role in both these questions.<sup>252</sup> Accordingly, the sociological divide discussed in Section I.C determines which adults—and how many adults—will care for a new child.

To appreciate the importance of marriage in making these legal determinations, it is first essential to understand what “biological” means in this context. In parentage law, “biological” parenthood generally refers to adults who have a legally-recognized relationship with a child that is not premised on legal proceedings such as an adoption or foster agreement. In other words, “biological” parents are generally understood as the adult or adults who are listed as parents on a baby’s

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248. See generally Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (detailing the legal evolution of the notion of parentage).

249. *Id.*

250. The category is slightly broader than actual legal parents, as persons serving *in loco parentis* or as guardians may be eligible. See *infra* text accompanying notes 294–304. Additionally, the definition of “child” includes stepsons or stepdaughters, i.e., children of a person’s spouse. See *supra* note 245 and accompanying text. That has relevance in the context of medical family leave claims, but it generally will not have significance in the context of *bonding* claims; as discussed in the text, a spouse of a parent at the time a baby is born or adopted will almost always be a second legal parent, not merely a stepparent. See *infra* text accompanying notes 255–64.

251. In the context of parental leave laws, the aspect of custody known as “physical” custody, meaning whether one or both parents is responsible for physical care of the child, is far more relevant than “legal” custody, meaning whether one or both parents have authority to make important decisions regarding the child’s upbringing. See J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 217 (2014) (explaining the difference).

252. Some transmen and non-binary persons bear children. See sources cited *infra* note 306. Any person who gives birth would likely be recognized as a legal parent, but jurisdictions might apply different parentage rules to a spouse of a trans- or non-binary birth parent than they apply to the spouse of a cisgender woman who gives birth.

original birth certificate.<sup>253</sup> But parentage in this sense can exist even in the absence of a biological connection—and it may *not* exist even where there *is* a biological connection.<sup>254</sup> This is due to a long-standing rule of parentage known as the “marital presumption.”<sup>255</sup> Under common law, this rule provided that a child born to a married woman would be presumed to be the legal child of the woman and her husband, unless it was unquestionably clear that her husband could not be the biological father.<sup>256</sup>

The rationale of the common law rule was that the husband at least *could* be the biological father of the child; it also avoided the potential public dependency that could come from labelling a child “illegitimate.”<sup>257</sup> The rule has since been expanded to encompass several scenarios where there is no biological connection between the birth mother’s spouse and the child. Under the Uniform Parentage Act, and most state parentage laws, if a married woman utilizes a sperm donor, the child born will be considered the legal child of the woman and her spouse, not the sperm donor, so long as the husband consented to the process.<sup>258</sup> Most states that have considered the matter have applied this same rule to lesbian couples, in the sense that the birth mother’s wife is automatically recognized as a legal parent.<sup>259</sup> The same is true if a married women gestates and gives birth to a child using a donated egg, whether the sperm is contributed by her husband or by a sperm

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253. See, e.g., Julia Savacool, *What Adoptive Parents Need To Know About Birth Certificates*, FATHERLY, <https://www.fatherly.com/parenting/what-adoptive-parents-need-to-know-about-birth-certificates> [<https://perma.cc/YRU9-FMTE>] (Nov. 20, 2020, 10:01 AM) (explaining an adopted child will have two birth certificates, one created at birth with her birth mother and sometimes her birth father, and one created after the adoption with the adoptive parents’ names).

254. See, e.g., NeJaime, *supra* note 248, at 2266 (“The common law tied parenthood to marriage and thus made parentage a legal, rather than biological, determination.”). It is theoretically possible that legislators enacting paid leave laws intended to use “biological” more literally, but it is unlikely. Even if this were intended, the agency personnel administering the laws accept birth certificates and other such evidence of *legal* parenthood, rather than DNA tests, to establish eligibility. See Appendix.

255. See NeJaime, *supra* note 248, at 2272.

256. See *id.* (noting that under English common law the presumption could only be overcome by showing that the husband had no access to his wife during the entire nine months preceding the birth).

257. See *id.* at 2266.

258. See UNIF. PARENTAGE ACT §§ 702, 704 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2017); NeJaime, *supra* note 248, at 2291–92.

259. See NeJaime, *supra* note 248, at 2294–96 (describing case law and statutory amendments, as well as constitutional considerations, that generally support applying the marital presumption to lesbian couples).

donor.<sup>260</sup> In all of these scenarios, the birth mother and her (male or female) spouse would generally both be listed as “parents” on the birth certificate, and they would both be considered “biological” parents under the rubric of the paid leave laws.

If a married couple arranges for a woman to serve as a gestational or traditional surrogate, generally with a male spouse providing sperm, parentage may be more complicated because in some states the woman who has served as surrogate may have her own claim to parental status.<sup>261</sup> However, typically the couple and the woman serving as surrogate will have executed a contract in which the surrogate agrees to relinquish any claim to parental rights, and then the (same- or different-sex) spouse of the biological father will be recognized as a second parent through an adoption proceeding.<sup>262</sup> And finally, if a (same- or different-sex) married couple wants to adopt a child that is not biologically related to either parent, state law generally requires that they do so jointly, again ensuring that the child has two legal parents who are married to each other.<sup>263</sup> Under the paid leave laws, these two adults would, again, both qualify as “parents,” whether categorized as “biological” or “adoptive.”<sup>264</sup>

Married couples are not only presumptively both recognized as legal parents of the child, they also presumptively share custodial responsibility for their children.<sup>265</sup> This is true even if, as is often the case, the mother takes on primary responsibility for providing

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260. See, e.g., *id.* at 2299–300.

261. Women serving as “traditional” surrogates, i.e., women who both provide the egg and gestate the fetus, have stronger claims than women who gestate the fetus but do not provide the egg. See *id.* at 2301–04 (describing recent case law); see also Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009) (describing evolution in approaches to surrogacy).

262. See Nejaime, *supra* note 248, at 2309–11 (discussing recent cases).

263. See, e.g., CHILD WELFARE INFO. GATEWAY & CHILD’S BUREAU, WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 (2015), <https://www.childwelfare.gov/pubPDFs/parties.pdf> [<https://perma.cc/WF5Z-D22L>]. Some states make exceptions for married persons who are legally separated or whose spouse is legally incompetent. See *id.*

264. The woman serving as a surrogate might have a claim for medical benefits related to her own recovery from childbirth, but, assuming she terminated parental rights, she would not have a claim for bonding benefits. See A BETTER BALANCE, *supra* note 168 (describing availability of both kinds of benefits).

265. See, e.g., Huntington, *supra* note 15, at 203 (“Marital family law assumes the child is living with both parents.”); *Who Has Custody of the Child If There Is No Court Order?*, IND. LEGAL SERVS. INC., <https://www.indianalegalservices.org/node/25/who-has-custody-child-if-there-no-court-order> [<https://perma.cc/BT2T-UHF4>] (Apr. 18, 2012) (explaining that if the parents are married, each parent has equal rights to custody of the child).

physical care. The only way to change the legal default of shared custody within a marriage is through a formal legal action, such as a protective order awarding temporary custody to a victim of domestic violence or a divorce proceeding.<sup>266</sup>

Legal parenthood and custodial responsibility for children born to unmarried parents is very different. Under common law, nonmarital children were—shockingly—deemed to be legally a child of *no one*.<sup>267</sup> Rather, they were considered wards of the state.<sup>268</sup> By the mid-eighteenth century, mothers of nonmarital children were recognized as legal parents for their children.<sup>269</sup> But through the middle of the twentieth century, nonmarital fathers were categorically denied recognition as potential custodial parents, even if they were tasked with financial responsibilities.<sup>270</sup> Although a 1972 Supreme Court decision established that a nonmarital father should be at least *considered* as a custodian for his biological children after the death of their mother,<sup>271</sup> subsequent cases continued to disadvantage nonmarital fathers relative to nonmarital mothers and divorced fathers.<sup>272</sup>

The legal default is not as different today as many might assume. Under modern parentage law, an unmarried woman who gives birth is automatically recognized as a legal parent—initially the only legal parent—of her child, and she necessarily will also have sole custody of the child.<sup>273</sup> In most instances, the child will have a legal father only if the mother and a man she identifies as the father both sign a “voluntary acknowledgment of paternity” or VAP form, which in some states is now called a “voluntary acknowledgment of parentage.”<sup>274</sup> A

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266. See, e.g., IND. CODE § 34-26-5-9 (2021) (permitting a court to order temporary custody of a child upon a showing that domestic or family violence has occurred).

267. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 197 (1985).

268. See *id.* at 199 (describing public responsibility for children but also noting that jurisdictions began to try to collect support from fathers to compensate for these costs).

269. See *id.* at 248.

270. See Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 *YALE L.J.* 2292, 2303–09 (2016) (describing the evolution of nonmarital parental rights for unwed fathers).

271. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

272. See generally Mayeri, *supra* note 270.

273. See Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 *AM. U. J. GENDER SOC. POL'Y & L.* 467, 468 (2012).

274. See, e.g., Huntington, *supra* note 15, at 203 (describing VAP process). In many states, fatherhood may also be established by living with a child for two years and holding oneself out as the father, but this is irrelevant when considering parental leave, as

father's name generally cannot be put on a birth certificate unless both parents sign the VAP; a man who is contemplating signing a VAP may request genetic testing, but genetic testing is not required.<sup>275</sup>

It is hard to get precise data regarding what percentage of non-marital children have fatherhood established through a VAP. Studies report estimates ranging from 69% up to 90%, a variation that may reflect in part different timeframes being considered.<sup>276</sup> As might be expected, fathers who are cohabiting with the birth mother are more likely to complete a VAP.<sup>277</sup> There are also large racial differences in VAP completion, which may reflect at least in part racial differences in cohabitation patterns. VAP completion rates are much lower for African American and Native American parents than for White, Asian, or Hispanic parents.<sup>278</sup> For example, one study found that paternity was established for only about half of children born to unmarried African American women.<sup>279</sup> This means that not only are Black women the most likely to be unmarried when they give birth,<sup>280</sup> they are also more likely than other unmarried women to be the sole legal parent for the child. Collectively, these studies suggest approximately one-third of all babies born to Black women have just *one* legal parent.<sup>281</sup>

A father who signs a VAP can be held responsible for paying child support.<sup>282</sup> But a VAP generally does not affect the default assumption that an unmarried mother has sole custody for a child. At most, it makes it *possible* for the father to bring a formal legal action seeking to share custody.<sup>283</sup> In some states, a VAP by itself is not even sufficient

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leave generally must be taken within one year of birth. Fathers may also initiate a legitimacy action in court, but these are rare. *See id.*

275. *See, e.g., Paternity*, ILL. DEP'T PUB. HEALTH, <https://www.dph.illinois.gov/topics-services/birth-death-other-records/birth-records/paternity> [<https://perma.cc/8PV6-CN5L>].

276. *See* Kermyt G. Anderson, *Establishment of Legal Paternity for Children of Unmarried Women: Trade-offs in Male Commitment to Paternal Investment*, 28 HUM. NATURE 168 (2017) (gathering studies).

277. *See id.* at 170.

278. *See id.* at 179.

279. *See id.*

280. *See supra* text accompanying notes 101–03.

281. This estimate is based on the nonmarital birthrate for Black women of about 70%, *see supra* text accompanying notes 101–03, with VAPs being completed for approximately half of those births, *see supra* text accompanying note 279, meaning approximately 35% of babies born to Black mothers would have just one legal parent.

282. *See* 42 U.S.C. § 666(a)(2) (setting rules requiring states to develop expedited procedures for establishing paternity—i.e., VAPs—to be used as the basis for “establishing, modifying, and enforcing” support obligations).

283. *See* Huntington, *supra* note 15, at 203–05 (discussing and critiquing case law and statutes establishing these rules).

to start such a legal process. For example, in Indiana, an unmarried father seeking to share custody must complete a blood test establishing biological fatherhood, in addition to completing a VAP.<sup>284</sup> Accordingly, even if unmarried parents are living together when the baby is born, and even if the father signs a VAP, the mother will generally have sole custody. Of course, the father in that scenario may well be a loving caregiver for his child, but, as a formal legal matter, responsibility for ensuring adequate care is provided rests solely with the mother.

The rules are a little different for unmarried same-sex couples, as most states do not permit a same-sex partner of a biological parent to execute a VAP.<sup>285</sup> Rather, a partner in that situation seeking to be recognized as a parent would generally need to complete a second-parent adoption; this is a far more expensive and time-consuming process.<sup>286</sup> That said, if a second-parent adoption *is* executed, the parents would generally share custodial rights, in contrast to the common scenario after a VAP.<sup>287</sup> On the other extreme, if the couple is not married, there are some states where neither a VAP nor adoption will be possible without terminating the biological parent's own parental rights.<sup>288</sup>

Scholars have made important critiques of the VAP structure and the way it relates to custody.<sup>289</sup> They observe, correctly, that it gives unmarried mothers a functional veto over fathers who might seek to form relationships with their biological children.<sup>290</sup> Even if a mother is initially receptive, she can bar access to children when and if her own relationship with the man sours. But it also responds to the reality that cohabiting relationships tend to be fragile, and that if such relationships dissolve, children almost always remain with their mother.<sup>291</sup>

There are also unmarried adults (of any sexual orientation) who conceive a child, or adopt or foster a child, purposefully intending to

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284. See, e.g., IND. STATE DEP'T OF HEALTH, PATERNITY AFFIDAVIT—HOSPITAL USE, <https://www.in.gov/dcs/2482.htm> [<https://perma.cc/6P7E-UC8X>] (click "Paternity Affidavit - Hospital Use (State Form 44780)" hyperlink).

285. See NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES (2019), [https://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) [<https://perma.cc/CQ9X-NDWW>].

286. See *id.*

287. See Alona R. Croteau, *Voices in the Dark: Second Parent Adoptions When the Law Is Silent*, 50 LOY. L. REV. 675, 679 (2004).

288. See NAT'L CTR. FOR LESBIAN RTS., *supra* note 285.

289. See, e.g., Huntington, *supra* note 15, at 205.

290. *Id.*

291. See *supra* notes 106, 108–09 and accompanying text.



be a sole parent. These parents often refer to themselves as “single parents by choice,” and they tend to be more highly educated and have higher incomes than most nonmarital parents.<sup>292</sup> A woman bearing a child in this situation generally would not agree to execute a VAP; a man who provided sperm to conceive an embryo gestated by a surrogate would simply retain parentage after the woman who bore the child terminated her own claim.<sup>293</sup> In any of these scenarios, the single parent will be the only legal parent and she or he will have full responsibility for the care and custody of the child.

The state and federal paid leave laws, like the FMLA, also define parents to include persons who stand *in loco parentis* to a child,<sup>294</sup> as well as legal guardians, which is a more formalized recognition that a non-parent is playing a parental role.<sup>295</sup> As developed under the FMLA’s regulations and in case law, establishing *in loco parentis* status generally requires proof that the person has taken on significant and routine care responsibilities for the child and provided financial support.<sup>296</sup> This relationship often develops when the child’s legally-recognized parent or parents are absent or incapacitated for an extended period of time. In the FMLA context, *in loco parentis* status is most typically claimed by an employee seeking time off to care for a child with a serious health condition, for whom she or he has already provided extensive support before the health condition develops, or by an

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292. See Isabel V. Sawhill, *Celebrating Single Mothers by Choice*, BROOKINGS (May 8, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/05/08/celebrating-single-mothers-by-choice> [<https://perma.cc/E2M8-8K52>] (describing single mothers by choice as older, better-educated, and more financially prepared than single parents who “drift into parenthood unintentionally”). *But cf.* Sarah R. Hayford & Karen Benjamin Guzzo, *The Single Mother by Choice Myth*, 14 CONTEXTS 70 (2015) (analyzing data to conclude single parents who fit in this category remain relatively rare).

293. Most such parents are women, but some men do the same. See, e.g., Ian Tuttle, *Single Father by Choice: The Newest Trend*, NAT’L REV. (July 2, 2012, 8:00 AM), <https://www.nationalreview.com/2012/07/single-father-choice-newest-trend-ian-tuttle> [<https://perma.cc/JBY6-ASUS>].

294. See Appendix; see also 29 U.S.C. § 2611(12) (FMLA provisions).

295. See, e.g., Deirdre M. Smith, *Keeping It in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L.J. 271, 284 (2019) (discussing uniform laws and case law regarding standards for appointing guardians).

296. See 29 C.F.R. § 825.122(d)(3) (2016) (defining “*in loco parentis*” as persons with “day-to-day responsibilities to care for and financially support a child”); *Martin v. Brevard Cnty. Pub. Sch.*, 543 F.3d 1261, 1265 (11th Cir. 2008) (explaining the phrase means someone acting “in the place of a parent”); *Dillon v. Md.-Nat’l Cap. Park & Plan. Comm’n*, 382 F. Supp. 2d 777, 786 (D. Md. 2005), *aff’d*, 258 F. App’x 577 (4th Cir. 2007) (similar).

employee seeking time off to care for an older adult who acted like a parent to the employee when the employee him or herself was a child.<sup>297</sup>

There are far fewer cases brought by adults seeking time off to bond with a newborn baby for whom they serve *in loco parentis*.<sup>298</sup> This is not surprising, as there generally is not sufficient time for an adult who is not a parent to have developed the requisite relationship—bonding claims, by their nature, are the *beginning* of parental caregiving.<sup>299</sup> However, in a 2010 Administrative Interpretation, the Department of Labor took the position that a person who “intends to assume the responsibilities of a parent” in the raising of a child could qualify as a person serving *in loco parentis* and be eligible for bonding leave.<sup>300</sup> The guidance also emphasizes that the fact that a child may have a biological parent also in the home does not preclude finding an

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297. See, e.g., *Coutard v. Mun. Credit Union*, 848 F.3d 102, 104–05 (2d Cir. 2017) (reporting that an employee sought leave to care for grandfather who raised him after his father’s death); *Dillon*, 382 F. Supp. 2d at 786 (reporting that an employee sought leave to care for grandmother who was “like a mother” to her); *Megonnell v. Infotech Sols., Inc.*, No. 07–cv–02339, 2009 WL 3857451, at \*1 (M.D. Pa. Nov. 18, 2009) (reporting that an employee sought leave to care for seventeen-year-old niece). My research did not locate analogous state cases seeking family or parental leave for persons who serve *in loco parentis*. Where state courts did consider *in loco parentis* standards, they often use the term as an equivalent of *de facto* parents. See, e.g., Raymond C. O’Brien, *Obergefell’s Impact on Functional Families*, 66 CATH. U. L. REV. 363, 402 (2016).

298. I found one case brought by a grandfather seeking FMLA leave to care for his granddaughter who was under twelve months of age. See *Martin*, 543 F.3d at 1265. His daughter, the child’s mother, was unmarried, a student, and a member of the National Guard. *Id.* at 1263–64. The employee provided his daughter and granddaughter with a home, food, health insurance, and direct care for his granddaughter. *Id.* at 1264. The Eleventh Circuit concluded there were material facts in dispute as to whether he would qualify as serving *in loco parentis*. See *id.* at 1266.

299. It is possible, however, that administrators or courts would look to the extent to which a non-biological parent was involved during the pregnancy, such as whether the person went to prenatal doctor visits or helped purchase items such as a crib. Cf. Fontana & Schoenbaum, *supra* note 10 (discussing how fathers or other non-pregnant parents can be involved in a pregnancy).

300. See U.S. DEP’T OF LAB., NO. 2010-3, ADMINISTRATOR’S INTERPRETATION (2010). The Department also takes the position that an employee who provides day-to-day care for a partner’s child may qualify, even if the employee does not provide financial support. See *id.* Although the regulation specifies both care “and” financial support, and this generally implies both elements must be satisfied, it is well recognized that courts do not apply this assumption “inexorably,” and sometimes “and” is interpreted to mean “or.” See, e.g., CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 9 (2014). Particularly as applied to bonding leave, there is good reason to prioritize day-to-day care as the primary requirement that would need to be satisfied. Indeed, under traditionally gendered roles, it’s well established that sometimes a parent will provide primarily caregiving rather than financial support, or vice versa. See *supra* notes 152–58.

additional person is serving *in loco parentis*.<sup>301</sup> The interpretation references same-sex couples raising children together, likely reflecting the challenges that such couples may face being jointly recognized as parents.<sup>302</sup> Even now that same-sex couples can marry, they may need to rely on legal adoption to establish legal parentage; the *in loco parentis* provisions can be particularly important for such couples, since adoptions can take several months, and some couples do not have the resources to pursue them at all. However, there is nothing in the agency's interpretation that specifies it only applies in the context of same-sex couples; rather, the interpretation references the possibility that a child with a mother and a father could also have additional persons serving *in loco parentis*.<sup>303</sup> The interpretation states that to claim such status, a person would merely need to provide a "simple statement" asserting that the requisite relationship exists.<sup>304</sup>

While the FMLA guidance is not directly binding on the interpretation of state laws, it offers a helpful template. It suggests that extended or "chosen" family who provide significant and regular care for a new child can be considered persons who are serving *in loco parentis*. However, as detailed in the Appendix, in most states, the agencies implementing the parental leave laws ask for proof of parental status in the form of a birth certificate, VAP, legal work associated with an adoption or foster care arrangement or guardianship, or a formal marriage certificate to a legally-recognized parent. Accordingly, while the *in loco parentis* standard could be interpreted to broaden the scope of potential claimants, and while this might be particularly relevant for single-parent families, there are administrative obstacles and potentially legal obstacles that would need to be addressed for this to be a viable response to the inequities identified above. Section IV.C below develops and discusses this further.

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In summary, if a woman is married (to a man or a woman) when she gives birth, the child will almost always have two legal parents, and they will generally share custodial responsibility. By contrast, if a mother is unmarried when she gives birth, she generally will be the sole legal parent for the new child, unless a VAP is signed. Moreover, even if a VAP is signed, the mother will almost always have sole custody, which means she will be the only adult with legal responsibility for providing care for the new child—or figuring out who else will

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301. See U.S. DEP'T OF LAB., *supra* note 300.

302. See *id.*

303. See *id.*

304. See *id.*

provide care for a new child. Unmarried men or women who adopt, or who use assisted reproductive technology to conceive intending to parent on their own, likewise are generally the only legal parent for the child, and they will necessarily have sole custody. Existing parental leave laws make no adjustment for these realities, meaning families with two legally-recognized parents will be eligible to receive twice as much time off and benefits than families with one legally-recognized parent.

### III. THEORIZING EQUALITY

Equality is central to American lawmaking, but that commitment is the beginning point rather than the end point for structuring policy. Any equality-based analysis requires assessing what will be considered relevant similarities and differences, which in turn requires normative judgments as to the salience of various factors. Equality theorists highlight the plural and contested nature of these judgments.<sup>305</sup> The parental leave policies considered in this Article illustrate those complexities well, as the exclusive focus on (one particular understanding of) sex-based equality between parents obscures other important vectors of analysis, such as equality between families.

#### A. SEX EQUALITY

Women generally can become pregnant and bear children; men generally cannot.<sup>306</sup> Pregnancy and childbirth can—and do—interfere with many women’s ability to engage in paid work for a period of time, while men’s role in procreation does not necessarily cause any such interruptions. Additionally, women generally are able to breastfeed; men generally are not.<sup>307</sup> However, apart from breastfeeding, men are

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305. See generally, for example, Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); and Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

306. Some transmen can and do become pregnant and bear children. See, e.g., Alexis D. Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS & GYNECOLOGY 1140 (2014). Some non-binary persons may also bear children. In making policy relating to pregnancy, legislation should be drafted to avoid sex-based classifications that could exclude transmen or non-binary persons. See Fontana & Schoenbaum, *supra* note 10. Additionally, there are of course some cisgender women who have medical conditions that preclude pregnancy.

307. Transmen who bear a child may be able to breastfeed; additionally, some transwomen may be able to breastfeed. See, e.g., Tamar Reisman & Zil Goldstein, *Induced Lactation in a Transgender Woman*, 3 TRANSGENDER HEALTH 24 (2018). Some

as able as women to care for a child. Nonetheless, in most societies, women have traditionally taken primary responsibility for early child-care.<sup>308</sup> In designing parental leave policies, lawmakers must determine the extent to which the policy will conform to, or seek to disrupt, the gendered norms around infant care encouraged by this combination of biological and social expectations. The range of options may be constrained by a society's constitutional, legislative, or judicially-developed conceptions of what constitutes discrimination on the basis of sex.

There are two distinct approaches, famously characterized as "equality's riddle" by activist and theorist Wendy Williams.<sup>309</sup> Some theorists and policymakers argue that women should receive more time off than men after the birth of a new baby.<sup>310</sup> They often frame this approach as advancing a "substantive" understanding of equality, on the premise that simply treating men and women identically under a structure that was originally designed to meet the needs of men—that is, a baseline that does not guarantee *any* time off after a birth—will disadvantage women. By contrast, other theorists and policymakers argue that providing such "special" treatment to new mothers will reify the expectation that women are primarily responsible for caregiving of children and spur discrimination against working mothers or female employees more generally.<sup>311</sup> Such theorists and policymakers argue that to change these patterns, men and women should receive the same amount of time off for infant caretaking, and that pregnancy and childbirth should be treated like other health conditions that might interfere with work.<sup>312</sup> Lawmakers, courts, and theorists in the United States generally endorse the latter approach; the rest of the world, by contrast, generally endorses the former.

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non-binary persons may also be able to breastfeed. And again, there are cisgender women who bear a child but have medical conditions that preclude breastfeeding.

308. See, e.g., Kathrine E. Starkweather, Mary K. Shenk & Richard McElreath, *Biological Constraints and Socioecological Influences on Women's Pursuit of Risk and the Sexual Division of Labor*, 2 *EVOLUTIONARY HUM. SCIS.*, e59, 2020, at 2-3 (gathering studies that show in most cultures women tend to do more childcare than men and do other work that is more compatible with childcare).

309. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1984).

310. See *id.*; see also Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 *U.C. DAVIS L. REV.* 961, 966 nn.13-14 (2013) (collecting leading articles from the 1970s and the 1980s debating these points).

311. See sources cited *supra* note 310.

312. See sources cited *supra* note 310.

As I and others have discussed in greater detail elsewhere, in the United States, this debate is usually known as the “special treatment/equal treatment” debate.<sup>313</sup> It has its roots in the early twentieth century, when some feminist and labor leaders opposed efforts to enact an Equal Rights Amendment on the grounds it would dismantle protective labor legislation that set maximum working hours, minimum wage levels, and workplace safety standards for female, but not male, employees.<sup>314</sup> It re-emerged as a point of contention after the enactment of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex, and particularly after Congress passed the Pregnancy Discrimination Act of 1978 (PDA), which provides that pregnant employees must be treated the “same” as other employees with similar ability or inability to work.<sup>315</sup>

When the PDA was enacted, there were a handful of states that had laws mandating employers provide new mothers unpaid maternity leaves.<sup>316</sup> Employers argued these laws were preempted by the PDA because they provided women “special” treatment that was not provided to men. In the Supreme Court case addressing this issue, feminist organizations filed briefs on both sides.<sup>317</sup> The Court ultimately held the state law at issue was permissible, at least in so far as it addressed the period of “actual disability” after childbirth.<sup>318</sup> Feminist advocates, however, had already begun to lobby Congress for the bill that became the FMLA.<sup>319</sup> The leaders of this effort rejected suggestions that they should simply require employers to provide maternity leave.<sup>320</sup> Instead, as discussed above, the FMLA provides gender-neutral leave for new parents, as part of a more general leave guarantee for employees’ own serious health conditions and to care for

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313. I discuss the history that follows more fully in Widiss, *supra* note 310. *See also*, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 416 (2011); Samuel R. Bagenstos, Nevada Department of Human Resources v. Hibbs: *Universalism and Reproductive Justice*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Kate Shaw & Reva Siegel eds., 2019).

314. *See* Widiss, *supra* note 310, at 981–83.

315. *See* 42 U.S.C. § 2000e(k); *see also* Widiss, *supra* note 310, at 989–98.

316. *See* Widiss, *supra* note 310, at 998.

317. *See id.* at 998–1000. That said, feminist groups who were arguing the state laws were preempted also suggested the appropriate remedy was to provide job-protected leave to both male and female employees with health conditions that interfered with work.

318. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 290 (1987).

319. *See* Widiss, *supra* note 310, at 1001.

320. *See id.*

family members with serious health conditions.<sup>321</sup> This approach was adopted to encourage men to play a more hands-on role in infant childcare and to reduce the likelihood it would spur discrimination against mothers.<sup>322</sup>

In the years since the FMLA was adopted, the Equal Employment Opportunity Commission (EEOC) and courts have consistently taken the position that Title VII requires that employers provide new mothers and fathers equal periods of time off to care for a new baby.<sup>323</sup> Even policies that are formally gender neutral, in that they provide extended leaves to “primary” caregivers, have been challenged as discriminatory. Male plaintiffs have argued that, when implementing such policies, company personnel generally assume women are primary caregivers, while asking men to take steps to prove that they meet this standard.<sup>324</sup> New mothers can receive extra time only for the limited period in which they are physically recovering from pregnancy and childbirth, typically six to eight weeks.<sup>325</sup> Moreover, such medical leave is generally provided as part of a sex-neutral short-term disability policy, although employers may colloquially refer to such leave as “maternity” leave.

The model in almost all other countries is very different. The International Labour Organization (ILO), the branch of the United Nations that promulgates labor standards, first adopted a convention calling on member states to adopt maternity leave in 1919.<sup>326</sup> (Rather strikingly for an agreement enacted a century ago, the convention explicitly applies to “any female person, . . . whether married or

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321. See *supra* notes 176–77 and accompanying text.

322. See Widiss, *supra* note 310, at 1001–02; see also, e.g., Editorial, *Women’s Work—and Men’s Too*, N.Y. TIMES, Aug. 17, 1993, at A16 (“[T]he sooner men also start asking for time off to take care of a new baby or an ailing parent, the sooner employers will stop thinking twice about hiring women.”).

323. See U.S. Equal Emp. Opportunity Comm’n, Notice No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, at I.C.3 (June 25, 2015); U.S. Equal Emp. Opportunity Comm’n, Notice No. 915.002, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, at I.C (May 2007); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) (holding that six-week leave given to “biological mothers . . . due to the physical trauma they sustain giving birth” was not based on gender, but that other than such a period of disability, biological mothers and fathers would need to be treated equally).

324. See Widiss, *supra* note 169 (collecting and discussing such cases).

325. See *id.*

326. Int’l Lab. Org. [ILO], *Maternity Protection Convention*, ILO Doc. No. C003 (Nov. 29, 1919), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C003](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C003) [<https://perma.cc/49KZ-4B2D>].

unmarried.”)<sup>327</sup> The ILO’s recommendations have been subsequently reaffirmed and expanded in conventions adopted in 1952 and 2000.<sup>328</sup> To comply with the current convention, countries must provide at least fourteen weeks of paid maternity leave, with six weeks to be compulsory.<sup>329</sup> By contrast, the ILO does not have a convention regarding paternity leave or gender-neutral parental leave; it has addressed such policies only in recommendations and resolutions, which carry less weight than conventions.<sup>330</sup>

Most countries follow the ILO’s approach, prioritizing maternity leaves over paternity leaves. The most recent ILO report on leave policies around the world finds that at least ninety-eight countries provide fourteen or more weeks of paid maternity leave, while only five countries offer a paid paternity leave that is more than two weeks.<sup>331</sup> Sex discrimination laws around the world generally permit such differential treatment. For example, the United Kingdom’s Equality Act (a 2010 law that consolidated prior separate antidiscrimination laws) specifies that men cannot bring sex discrimination claims premised on “special” treatment afforded to women in connection with pregnancy and childbirth.<sup>332</sup> Such language is generally interpreted to justify differential treatment for a considerable amount of time after childbirth, long past the point of physical recovery for the mother. In a recent high-profile decision, an English appeals court affirmed that, given this provision, it was permissible to provide fifty-two weeks of maternity leave and just two weeks of paternity leave.<sup>333</sup>

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327. *Id.*

328. Int’l Lab. Org. [ILO], *Maternity Protection Convention (Revised)*, ILO Doc. No. C103 (June 28, 1952), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312248](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312248) [<https://perma.cc/NL8B-TU4G>]; Int’l Lab. Org. [ILO], *Maternity Protection Convention (Revised)*, ILO Doc. No. C183 (June 15, 2000) [hereinafter *ILO Convention No. 183*], [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C183](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183) [<https://perma.cc/H6CG-ZDBD>].

329. See *ILO Convention No. 183*, *supra* note 328.

330. See LAURA ADDATI, NAOMI CASSIRER & KATHERINE GILCHRIST, *MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD* 60 (2014) (referencing Recommendation No. 191 and Recommendation No. 165); see also *id.* at 52 (referencing a 2009 ILC Resolution encouraging paternity leave).

331. See *id.* at 52, 64 (finding paternity leave is offered in 79 out of 167 countries and parental leave is offered in 66 countries, most or all of which also offer paternity leave).

332. See Equality Act, 2010, c. 15 § 13(6)(B) (U.K.) (providing claims brought by men based on “special treatment afforded to a woman in connection with pregnancy or childbirth” are not actionable as sex discrimination claims).

333. See *Ali v. Capita Customer Mgmt., Ltd.*, 2019 WL 02256085 (UK App. Ct. May 24, 2019).



In the past few decades, it has become relatively common, particularly in developed economies, to supplement sex-specific leaves with a gender-neutral “parental” leave that is available to either parent for use after maternity or paternity leave. Parental leave is typically paid at a lower rate than maternity or paternity leave, or it may be entirely unpaid.<sup>334</sup> Parental leave is often allocated at a family level, meaning the allotment may be used by either parent or shared by the parents. In general, to the extent that a parental leave *can* be claimed by women, it typically *is* claimed by women.<sup>335</sup>

Some countries have modified this basic structure to encourage fathers to claim more parental leave. This is typically done by making a portion of “shared” parental leave available *only* to fathers, generally known as “use-it-or-lose-it” provisions, or providing financial benefits to families in which fathers claim a significant portion of shared leave.<sup>336</sup> For example, under European Union policy, member countries are expected to provide at least 10 days of paternity leave and set aside at least two months of parental leave as usable only by fathers.<sup>337</sup> Most countries that implement such policies, however, generally retain the basic structure of a long maternity leave and a short paternity leave, and they typically also continue to allow women to claim the bulk of parental leave.<sup>338</sup> On average, in economically-developed countries, mothers can access more than a year of leave (a combination of maternity and shared parental leave), as compared to two months of leave dedicated to fathers (a combination of paternity leave and parental leave reserved for fathers).<sup>339</sup>

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334. See ADDATI ET AL., *supra* note 330, at 64 (indicating 66 of 169 countries have parental leave provisions but that it is often unpaid).

335. ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF, PARENTAL LEAVE: WHERE ARE THE FATHERS? MEN’S UPTAKE OF PARENTAL LEAVE IS RISING BUT STILL LOW (2016), <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf> [<https://perma.cc/JE52-JGPR>]; ADDATI ET AL., *supra* note 330, at 66–67.

336. See INT’L NETWORK ON LEAVE POL’YS & RSCH., 15TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2019, at 20–31 (2019), [https://www.leavenetwork.org/fileadmin/user\\_upload/k\\_leavenetwork/annual\\_reviews/2019/2\\_2019\\_Compiled\\_Report\\_2019\\_0824-.pdf](https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2019/2_2019_Compiled_Report_2019_0824-.pdf) [<https://perma.cc/4D7L-AKHJ>] (providing detailed information on forty-five countries’ parental leave policies, of which twelve are identified as including an incentive for fathers to take leave).

337. See Council Directive 2018/1158, on Work-Life Balance for Parents and Carers, 2019 O.J. (L 188) ¶¶ 19–20, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158&from=EN> [<https://perma.cc/YC3D-44QW>].

338. See INT’L NETWORK ON LEAVE POL’YS & RSCH., *supra* note 336.

339. See ORG. FOR ECON. CO-OPERATION & DEV., FAMILY DATABASE § PF2.1: PARENTAL LEAVE SYSTEMS 3, 7 (2019), [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) [<https://perma.cc/N6QE-AKAS>]. This includes the thirty-seven countries that are members of the Organisation for Economic Co-operation and Development.

A handful of countries, most notably the Nordic countries, have gone further and replaced maternity and paternity leaves with gender-neutral parental leave.<sup>340</sup> But even in these countries, routinely held up as the most progressive in their efforts to change gender norms, mothers continue to be able to access—and to use—a majority of leave. For example, Iceland currently provides nine months of parental leave on a family basis; it designates three months of this time for mothers, three months for fathers, and three months that can be used by either parent.<sup>341</sup> Mothers generally use their own time and all or almost all of the shared months.<sup>342</sup> Sweden currently provides each parent 240 days of parental leave (usable over a period of several years), but all but ninety days of this allotment may be transferred to the other parent;<sup>343</sup> again, mothers continue to use the majority of leave.<sup>344</sup> Australia provides eighteen weeks for “primary” caregivers and two weeks for “secondary” caregivers; again women claim the vast majority of “primary” caregiver leave.<sup>345</sup>

Commentators in the United States sometimes point to Sweden, Iceland, and other countries that have designated a portion of parental leave as usable only by fathers to suggest that U.S. lawmakers should do the same as a mechanism for encouraging fathers to take leave.<sup>346</sup> This suggestion reflects a fundamental misunderstanding of existing U.S. law. It is true that in other countries, reserving time for fathers has raised men’s leave-taking rates—but that was against a previous baseline in which mothers could use *all* available parental leave. In the United States, by contrast, we have no shared parental leave at all.

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340. See INT’L NETWORK ON LEAVE POL’YS & RSCH., *supra* note 336, at 20 (identifying six countries as having adopted this model).

341. See *id.* at 256–60 (describing Iceland’s model).

342. See *id.* at 263 (reporting that in 2016, 96% of mothers used a period of the parents’ joint rights, as compared with 14% of fathers, and that mothers took on average 180 days total and fathers took on average 88 days total).

343. See *id.* at 461 (describing benefit). Sweden also retains a very short “pregnancy” benefit and “temporary leave” to be used by the other parent at the time of birth. See *id.* at 459–60.

344. See *id.* at 467–68 (reporting that by the time children born in 2013 turned two, fathers had taken on average 69 days of leave and mothers had taken on average 276 days of leave).

345. See *Paid Parental Leave Act 2010* (Cth), <https://www.legislation.gov.au/Details/C2018C00165> [<https://perma.cc/9VA6-NNRN>]; Widiss, *supra* note 169 (collecting and discussing statistics on usage patterns).

346. See, e.g., Bagenstos, *supra* note 313, at 20 (referencing Portugal’s and Iceland’s policies setting aside time for fathers and suggesting that the FMLA does not provide such non-transferrable leave); Cunningham-Parmeter, *supra* note 20, at 51 (suggesting U.S. lawmakers provide fathers “use-it-or-lose-it” leave modeled on the approach in Nordic countries).

Rather, mothers and fathers have equal, individual, non-transferable rights to benefits and leave.<sup>347</sup> In other words, although gender neutral, the American approach is already more aggressive in encouraging men to take leave than almost any other country's policy, in that a full *half* of bonding benefits and leave is "use-it-or-lose-it."<sup>348</sup> The problem with American leave policy is actually the opposite problem: we make no modifications of that structure for families in which just *one* parent has custodial responsibilities.

#### B. FAMILY EQUALITY

If all families conformed to the stereotypical nuclear family—married different-sex parents raising their shared children—the distinct conceptions of sex-based equality discussed in Section A would have no impact on equality *between* families. Under the American approach, in which fathers and mothers have individual and non-transferable rights to leave and benefits, families in which both parents fully utilize their benefits would have an advantage over families in which only one parent does, but no family would be categorically disadvantaged. Similarly, the various approaches used in other countries—that is, providing a longer maternity than paternity leave, or awarding gender-neutral leave on a family basis—would likewise treat all *families* equally.

But of course, not all families conform to this family structure. That has never been the case, and, as Section I.C makes clear, it is even less accurate today. Under American parental leave policy, it is immaterial whether a child's parents are the same or different sex, but very important whether the child has one or two legally-recognized parents. By contrast, a country that provides only maternity leave disadvantages a child with two fathers but treats a child with a single mother and a child with married different-sex parents equally.<sup>349</sup> A policy that awards benefits purely on a family basis is agnostic among all of these family forms.

Recognizing that the various leave policies can result in different levels of benefits being available based on family form is not the same

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347. See *supra* Part II.A.

348. It is possible that men would be more likely to use use-it-or-lose-it leave specifically designated for "fathers," as compared to the existing gender-neutral approach to providing use-it-or-lose-it leave. Cf. Cunningham-Parmeter, *supra* note 20, at 53. Unlike Professor Cunningham-Parmeter, I think any such labels in U.S. law would violate statutory and constitutional antidiscrimination provisions.

349. In Europe, this has led to proposals for reform. See *generally, e.g.*, NATALIE PICKEN & BARBARA JANTA, EUR. PLATFORM FOR INVESTING IN CHILD., LEAVE POLICIES AND PRACTICE FOR NON-TRADITIONAL FAMILIES (2019).

as concluding this is a problem. Parental leave laws serve multiple purposes. They facilitate a *parent's* ability to take time off to provide care personally to a new child—and they facilitate what might be termed a *child's* interest in being cared for personally by a parent,<sup>350</sup> or a *family's* interest in having public support to permit parents to provide care for a reasonable period of time after a birth.<sup>351</sup> They also support more general public interests, such as encouraging and supporting levels of reproduction necessary to maintain and support future economic growth.<sup>352</sup> If the focus is on the former, American law is fair, as all parents are treated equally (at least to the extent men and women are similarly situated). If the focus is on the child's interest in care from family members, or society's interest in supporting all new babies, American law is extremely unfair, as families with one legally-recognized parent are eligible for half as much parental leave time and benefits as families with two legally-recognized parents. And because state family law makes distinctions between legally recognized *parents* and *custodial* responsibilities, the existing structure of the laws means that some parents technically able to claim benefits have no legal custodial relationship with the child, although they may functionally be involved in care.

The demographic divide discussed in Section I.C shows that the nonmarital families shortchanged by our current policies are already disadvantaged on many measures. Unmarried parents tend to have less education and less money. They are more likely to be members of racial minorities. And they are very unlikely to receive paid family leave from their employers as an employment benefit. In other words, they are already, generally, vulnerable workers and vulnerable families.

As a matter of American constitutional law, the variation in how the parental leave laws treat families is probably permissible. Under equal protection clause jurisprudence, laws that distinguish on the basis of marital status are generally allowed, so long as there is a rational basis for the distinction.<sup>353</sup> In the late 1960s and 1970s, the Court held in a series of cases that nonmarital children could not be categorically

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350. See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018) (proposing a new paradigm for children's relationship to law prioritizing children's present and future interests, including in parental relationships).

351. See generally, e.g., MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2020).

352. See generally, e.g., JONATHAN V. LAST, *WHAT TO EXPECT WHEN NO ONE'S EXPECTING: AMERICA'S COMING DEMOGRAPHIC DISASTER* (2013).

353. See generally, e.g., Mayeri, *supra* note 27 (discussing the development of this doctrine).

denied benefits.<sup>354</sup> However, since leave laws frame parents, rather than children, as the beneficiaries, they would likely pass scrutiny. Indeed, the laws at issue do not explicitly reference marital status at all; the difference between marital and nonmarital families arises indirectly because of the way in which the parental leave laws interact with state parentage and custody laws. Likewise, although the policies certainly disproportionately disadvantage Black and Latino families, the Court has held that strict scrutiny on the basis of race under the equal protection clause is applicable only where there is evidence of *intentional* discrimination, which likely does not exist in this context.<sup>355</sup>

The existing policies are also likely permissible under statutory antidiscrimination laws. Title VII of the Civil Rights Act prohibits employment policies that cause a disparate impact on the basis of race or sex.<sup>356</sup> But again the focus of any Title VII claim would be on the individual *employee's* benefits, and from this perspective, the policies treat employees equally, in that all new parents receive equal benefits in conjunction with the birth or adoption of a new baby.<sup>357</sup>

There are also state statutes that preclude discrimination by employers on the basis of marital status.<sup>358</sup> But again, since existing policy does not actually turn on marital status—in that a new parent will be eligible for benefits whatever their marital status—they are probably permissible.

As a matter of *policy*, however, this structure is far from optimal. An extensive body of research shows that parental leave laws provide important health and emotional benefits to children and the adults

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354. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 397 U.S. 73, 75–76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

355. See *Washington v. Davis*, 426 U.S. 229, 239 (1976); cf. *Mayeri*, *supra* note 27 (discussing how the Court's decisions relating to nonmarital families do not address the racial impacts of these policies).

356. See 42 U.S.C. § 2000-e(2)(k).

357. Even if a *prima facie* case of disparate impact were shown, courts might well accept an employer's claim that the current policy is job-related and a business necessity. See *id.*

358. See Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808 (2015) ("Today, almost half the states—approximately twenty-one—prohibit marital status discrimination in housing, employment, or both."); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2094 n.56 (2017) (listing sources that document state marital status nondiscrimination laws covering employment, housing, and public accommodations).

who care for them.<sup>359</sup> Additionally, because paid infant care is so expensive, every additional week of benefits can make a very real financial difference for families living on tight budgets.<sup>360</sup> Our current approach to leave laws means that nonmarital children, and the adults who care for them—disproportionately poor and working-class women of color<sup>361</sup>—are disadvantaged from the very first months of the child's life.

### C. SEX EQUALITY, REVISITED

As described above, the particular structure of American leave laws is intended to address sex inequality *within* (presumptively different-sex two-parent) families by encouraging men and women to share caregiving responsibilities.<sup>362</sup> But this policy simultaneously disadvantages single parents. Since women are far more likely than men to be raising children on their own,<sup>363</sup> a policy that disadvantages single parents functionally disadvantages women. In this way, the policies cause a different kind of sex-based inequality.

In other words, for most single parents, the relevant question is not how to encourage a more equal split of breadwinning and caregiving between two involved (different-sex) parents, but rather how to support women who bear the primary responsibility for both roles. In this respect, the new paid leave policies echo earlier debates over the pros and cons of focusing on formal equality between parents rather than more robust support for mothers.<sup>364</sup> At earlier points, as well, advocates made the argument that prioritizing treating men and women the same had the effect of harming poor and working class mothers,<sup>365</sup> as well as that implicit or explicit racism rankled under the surface in

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359. See, e.g., *Paid Leave Research*, NAT'L P'SHIP FOR WOMEN & FAMS., <https://www.nationalpartnership.org/our-work/economic-justice/paid-leave-resources.html> [<https://perma.cc/6N9K-DKPW>] (gathering research measuring the positive effects of leave policies in the United States and other countries from a variety of professional disciplines).

360. See WORKMAN & JESSEN-HOWARD, *supra* note 36, at 3 (finding an average cost of \$1,230 per month to provide center-based care to an infant and \$800 per month for family home-based care).

361. See *supra* notes 95, 100–06 and Figure 1.

362. See *supra* Part III.A.

363. See *supra* note 107 and accompanying text.

364. See *supra* note 27 (listing sources discussing the negative effects of formal equality policy on women and class- and race-based disparities); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing that policy should support the mother-child dyad rather than the marital family).

365. See *supra* note 27.

policies disadvantaging nonmarital families.<sup>366</sup> These questions have become more pressing as the socio-economic marital divide has widened.

#### IV. RECALIBRATING EQUALITY

The interaction of the parental leave laws with parentage laws means that single-parent families can claim only half as much support for bonding with a new child as two-parent families. That said, the gender-based imbalances in caregiving by married (different-sex) parents that animated the structure of the FMLA remain very real.<sup>367</sup> This Part suggests several ways in which paid leave laws could be modified to better advance both sex- and family-based equality objectives. Further empirical research could play an important role in informing policy debate in this area. We need to know more, for example, about how unmarried parents currently provide care to new children, what their preferences might be among the options outlined below, and the extent to which various policies might spur workplace discrimination against new parents. The administrability of various policy options is also an important factor.

To truly help families meet their care needs, there would need to be public support not only for paid parental leave on the scale of the recently enacted state laws, but also for universal access to high-quality childcare or the option of taking a much longer period of parental leave at a high level of income replacement.<sup>368</sup> Such changes, however, would require significant additional resources.<sup>369</sup> By contrast, the modifications suggested below—permitting sole parents to receive extended benefits, allowing a broader range of caretakers to receive benefits, and separating medical leave from bonding leave—would address the structural inequalities built into the existing leave laws with relatively modest additional costs. These potential solutions have different strengths and weaknesses, but each could help ensure

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366. See, e.g., Mayeri, *supra* note 27, at 1285 (“[M]any efforts to punish nonmarital childbirth were thinly veiled attacks on racial desegregation.” (footnote omitted)).

367. See *supra* notes 153–64 and accompanying text (discussing studies showing that women remain more likely than men to curtail paid work to meet family care needs).

368. Cf. JANTA, *supra* note 37 (describing other countries’ commitments to publicly funded childcare and parental leave).

369. See, e.g., Grover J. Whitehurst, *Why the Federal Government Should Subsidize Childcare and How To Pay for It*, BROOKINGS INST.: EVIDENCE SPEAKS REPS., Mar. 9, 2017, at 1 (proposing a “substantial [childcare] subsidy for every child from birth to fifth birthday in a family at or below 200 percent of the federal poverty level” which would cost \$42 billion per year).

that *all* children, whatever their family configuration, have the support they need in the first weeks and months of life.

#### A. CHILD-BASED BENEFITS

One way to address the structural disadvantage that single parents face under current laws would be to provide a fixed number of weeks of benefits per *child* (or family) rather than per *parent*. This structure would address the inequality between two-parent and single-parent families that I identify, but it would almost certainly undermine efforts to encourage two-parent families to share leave. Accordingly, I want to discuss this approach but ultimately argue against it.

As discussed in Section III.A, many other countries provide parental leave benefits on a family basis, albeit usually after separate maternity and paternity leaves.<sup>370</sup> Likewise, as noted in Section II.B, one of the proposals for new federal legislation in this area, the Advancing Support for Working Families Act, also takes a “child”-based approach to benefits. This bill would let new parents receive an advance of up to \$5,000 on future child tax credits, with the expectation it could be used to cover costs during a period of unpaid leave.<sup>371</sup> This credit would be available on the same terms to a single custodial parent and a married couple filing jointly.<sup>372</sup>

The experience in other countries, however, provides abundant evidence that women consistently use most or all of leave that is allocated on a child- or family-basis.<sup>373</sup> This reflects an interplay of biological differences, social norms, and the persistent gender wage gap. Worldwide, the most effective way to change this pattern is to make a portion of shared leave usable *only* by fathers. The American approach to leave, by contrast, already sets aside time for fathers, in that each parent receives individual and non-transferable benefits.<sup>374</sup> Few fathers take extended unpaid leaves.<sup>375</sup> However, early evidence on usage rates under the new *paid* leave laws suggests that women are claiming leave at relatively high rates, and, increasingly, men are

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370. See *supra* notes 334–39 and accompanying text.

371. See *supra* note 229 and accompanying text.

372. See *supra* note 234 and accompanying text.

373. See *supra* notes 340–45 and accompanying text (discussing studies showing that mothers use most shared leave).

374. See *supra* Part II.A.

375. Cf. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 335, at 2 (“Many OECD countries already offer fathers unpaid parental leave, but . . . take-up is usually low.”).



too.<sup>376</sup> This is consistent with the experience in other countries. Men are much more likely to use leave when it is paid at a relatively high rate and forfeited if not used.<sup>377</sup> There also generally must be adequate protection against employment discrimination, and more general societal support for men using leave.

The bulk of published research on usage patterns under the American paid leave structure studies California's program, as that is the oldest; most of the other laws are too new to have generated much, if any, data for researchers to analyze.<sup>378</sup> California's law was enacted in 2002 and implemented in 2004.<sup>379</sup> It is less generous to workers than the more recently-enacted laws.<sup>380</sup> As originally passed, it provided just six weeks of paid bonding time to each parent, although birth mothers could also claim benefits under a preexisting state short-term disability program.<sup>381</sup> Benefit levels were also low—only 55% of income replacement, up to a cap at about the median wage.<sup>382</sup> This meant low-wage workers received only slightly more than half their regular income, and higher-wage workers received an even smaller percentage of their regular income. Additionally, it is purely a benefits scheme; workers only have a right to job-retention if they are

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376. See Widiss, *supra* note 169 (manuscript at 19–20) (discussing increased male usage of paid leave under new state laws).

377. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 335, at 2 (“Not surprisingly, research suggests that fathers’ use of parental leave [in OECD countries] is highest when leave is not just paid but well paid . . .”); Widiss, *supra* note 169 (manuscript at 18–21) (discussing studies of new paid leave laws in California, Rhode Island, and New Jersey, and showing increased paternal usage under paid leave regimes).

378. See NAT’L P’SHP FOR WOMEN & FAMS., *supra* note 359 (collecting studies on state leave programs in California, as well as a few in Rhode Island and New Jersey).

379. EMP. DEV. DEP’T, LAB. & WORKFORCE DEV. AGENCY, PAID FAMILY LEAVE: TEN YEARS OF ASSISTING CALIFORNIANS IN NEED 2 (2014) (“On September 25, 2002, Senate Bill (SB) 1661 was enacted, making California the first state in the nation to provide . . . Paid Family Leave (PFL). . . . The EDD began issuing benefit payments on July 1, 2004.”).

380. See *supra* text accompanying note 190 (noting more recently enacted laws provide twelve weeks of benefits to each parent, with many providing additional medical leave time to birth mothers).

381. See KELLY BEDARD & MAYA ROSSIN-SLATER, EMP. DEV. DEP’T, THE ECONOMIC AND SOCIAL IMPACTS OF PAID FAMILY LEAVE IN CALIFORNIA 4 (2016), [https://www.edd.ca.gov/disability/pdf/PFL\\_Economic\\_and\\_Social\\_Impact\\_Study.pdf](https://www.edd.ca.gov/disability/pdf/PFL_Economic_and_Social_Impact_Study.pdf) [<https://perma.cc/H3KZ-CQVL>] (explaining that birth mothers with a normal pregnancy could be eligible for up to four weeks of leave prior to the expected due date and six weeks after the due date, and that if there are complications or the birth is by C-section, the period of disability may be longer).

382. See Rossin-Slater et al., *supra* note 133.

covered by the FMLA, its state analog, or an employer's discretionary private policy.<sup>383</sup>

Even with these limitations (which have since been mitigated),<sup>384</sup> parents have seized the opportunity to spend more time at home with new babies. During the first six years after the law was implemented, women's average maternity leave increased from around three weeks to six or seven weeks.<sup>385</sup> There were particularly large increases for less-advantaged mothers. For example, prior to the implementation of the benefits program, unmarried mothers took on average just one week of leave; after it, they took on average five weeks of leave.<sup>386</sup> There were similarly large gains for women with low levels of education and for Black women.<sup>387</sup> These increases are particularly impressive since, during the time of the study, about half of California workers who experienced a life event that made them eligible for leave did not even know about the new law.<sup>388</sup> Among the universe of mothers who *did* claim benefits, the vast majority took the full six weeks of bonding leave, with many also taking additional weeks of medical leave.<sup>389</sup> As in other countries, taking leave has been associated with positive effects on both mothers' and children's physical and emotional health, and on mothers' long-term connection to the labor market.<sup>390</sup> Strikingly, one recent study found health benefits for children likely extended at least until early elementary school.<sup>391</sup>

The existing structure also seems to have its intended effect of encouraging *fathers* to take leave. As I discuss in greater detail elsewhere, men's share of bonding leave has steadily increased in all three

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383. See *id.*; see also notes 175–177, 203–204 and accompanying text.

384. In 2019, the law was amended to allow each parent to take eight weeks of bonding leave, and the income replacement rate was raised to between 60 and 70% of income. See A BETTER BALANCE, *supra* note 168.

385. See Rossin-Slater et al., *supra* note 134, at 1, 16–17.

386. See *id.* at 17.

387. See *id.*

388. See EILEEN APPELBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 13 (2011) (describing survey administered in 2009–10, five years after the law took effect; respondents with lower education and less income, as well as Latinos and immigrants, were much less likely to know about the law).

389. See BEDARD & ROSSIN-SLATER, *supra* note 381, at 13–14, 28 fig.5 (2016) (reporting virtually all women who took bonding leave took the full six weeks of leave).

390. See generally NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 359 (gathering studies).

391. See generally Shirlee Lichtman-Sadot & Neryvia Pillay Bell, *Child Health in Elementary School Following California's Paid Family Leave Program*, 36 J. POL'Y ANALYSIS & MGMT. 790 (2017).

of the states with multiple years of data.<sup>392</sup> In California and Rhode Island, fathers now account for around 40% of bonding claims.<sup>393</sup> This rate is far higher than the average for industrialized countries of 18%, and very close to that of international leaders like Sweden and Iceland.<sup>394</sup> Available data also shows that a fairly high percentage of male claimants take the full amount of leave allowed.<sup>395</sup> Accordingly, while studies that consider leave-taking by all new employed fathers in California find only modest gains in the average duration of leave,<sup>396</sup> the trends are quite promising.

Moreover, research from the United States and other countries suggests that leave taking by fathers promotes larger gender equality objectives. Men who take parental leave, particularly relatively extended leaves, are more involved as fathers months, or even years, later.<sup>397</sup> They engage in more childcare activities, such as bathing, feeding, changing diapers, and playing with children, and they report feeling closer to their children.<sup>398</sup> Paternal leave-taking is also

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392. See Widiss, *supra* note 169 (manuscript at 19) (finding that men's share of bonding leave in California rose 23% over 14 years, Rhode Island's rose 9% over four years, and New Jersey's rose 3% over six years).

393. See *id.* (reporting a 38% share for fathers in California and a 41% share in Rhode Island).

394. See ORG. FOR ECON. CO-OPERATION & DEV., FAMILY DATABASE § PF2.2: PARENTS' USE OF CHILDBIRTH-RELATED LEAVE 4 (2019), <https://www.oecd.org/els/family/PF2-2-Use-childbirth-leave.pdf> [<https://perma.cc/S8VV-RMNA>] (reporting a roughly 45% male share of paid parental leave in Sweden and Iceland).

395. See Widiss, *supra* note 169 (manuscript at 19–20 & nn.115–16) (finding that about 40% of fathers in California take all or almost all of the six weeks permitted and that about 66% of fathers in Rhode Island take the full four weeks permitted).

396. See Baum & Ruhm, *supra* note 130, at 334 (“On average . . . fathers [use] around two or three extra days.”). Notably, the time frame of this study (2000–2010) pre-dated much of the increase in men's leave-taking rates. See Widiss, *supra* note 169 (manuscript at 20 n.115) (discussing various studies of California paternal paid leave usage).

397. See, e.g., Richard J. Petts & Chris Knoester, *Paternal Leave-Taking and Father Engagement*, 80 J. MARRIAGE & FAM. 1144, 1146–47 (2018) (reporting the results of studies based on data from the United States finding numerous correlations between paternal leave and child-engagement); MARÍA DEL CARMEN HUERTA, WILLEM ADEMA, JENNIFER BAXTER, WEN-JUI HAN, METTE LAUSTEN, RAEHYUCK LEE & JANE WALDFOGEL, ORG. FOR ECON. CO-OPERATION & DEV., FATHERS' LEAVE, FATHERS' INVOLVEMENT AND CHILD DEVELOPMENT: ARE THEY RELATED? EVIDENCE FROM FOUR OECD COUNTRIES 29 (2013) (analyzing data from four OECD countries and finding that “these figures suggest that fathers who took leave were more likely to be involved with their child on a regular basis than fathers who did not take leave”).

398. See Petts & Knoester, *supra* note 397, at 1146 (finding a positive correlation between paternal leave and performance of such childcare activities); DEL CARMEN HUERTA ET AL., *supra* note 397, at 29 tbl.4 (reporting statistically significant increases in many such activities correlated with paternal leave-taking).

associated with greater workplace equality<sup>399</sup> and more equal divisions of labor at home. Studies show, for example, that men who take paternity leave are not only more likely to help with childcare, but also with other domestic tasks such as dishwashing and cleaning.<sup>400</sup>

Married parents presumptively share custodial responsibility for their children.<sup>401</sup> Although women continue to provide a disproportionate portion of hands-on care, there are clear benefits to encouraging both parents to share the burden—and the joy—of infant care. The same is true for unmarried parents who have taken the necessary legal actions to formally share custody. The experience from other countries suggests that the current structure of U.S. parental leave laws, providing individual rights to each parent that are forfeited if not used, is the most effective way to achieve these objectives. This has been a hallmark of American sex discrimination policy for more than thirty years, and it is finally bearing fruit. Accordingly, I suggest the law remain unchanged for parents who share custody.

#### B. EXTENDED BENEFITS FOR “SOLE” PARENTS

It is possible to maintain the existing structure for parents who share custody while also addressing the distinct needs of single-parent families. One approach would be to allow a “sole” parent (the definition of which is discussed below) to claim the same total amount of benefits available to a family with two custodial parents. For example, New York provides each parent of a new child twelve weeks of bonding benefits.<sup>402</sup> Under current law, married parents can claim a total of twenty-four weeks of benefits, but a sole parent can claim just twelve. The law could be modified so that a sole parent could receive the same twenty-four weeks of benefits.

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399. See, e.g., U.S. DEP’T OF LAB., DOL POLICY BRIEF: PATERNITY LEAVE: WHY PARENTAL LEAVE FOR FATHERS IS SO IMPORTANT FOR WORKING FAMILIES 3 (2012) (discussing studies that “found that when fathers take more paternity leave, mothers increase their level of full-time work, and . . . similar positive impacts on women’s labor force participation”).

400. See, e.g., Andreas Kotsadam & Henning Finseraas, *The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave*, 46 SOC. SCI. RSCH. 1611, 1612 (2011) (“Respondents with children born after [Norwegian paternity leave] reform report an 11% lower level of conflicts over household division of labor and are 50% more likely to equally divide the task of washing clothes than respondents with children born before the reform.”).

401. See *supra* note 265 and accompanying text.

402. See N.Y. WORKERS’ COMP. LAW § 204 (McKinney 2020) (“Family leave benefits shall be payable to an eligible employee . . . . The weekly benefit for family leave . . . shall not exceed twelve weeks during any fifty-two week calendar period . . .”).

It is common in other countries that designate leave as usable only by a specific parent (i.e., statutory maternity or paternity leave, or a portion of shared paternal leave) to modify these rules for sole custodians, as well as when one parent is unable to provide care for other reasons.<sup>403</sup> This includes countries typically held up as international leaders for the progressive nature of their policies in encouraging fathers to take leave. For example, as noted above, in Sweden, generally a portion of shared parental leave is reserved for fathers.<sup>404</sup> However, a parent awarded sole custody receives the full leave period.<sup>405</sup> Similarly, in Norway, a mother who does not live with the father of the child may receive the full period of parental leave.<sup>406</sup> Many countries also allow transfer of benefits from one parent to the other if one parent is deceased or has serious health problems that preclude providing care.<sup>407</sup> Some countries address other situations that can preclude providing care, such as imprisonment or the mother's status as a student.<sup>408</sup> Many also specify that under certain circumstances, benefits can be transferred to grandparents, as well.<sup>409</sup> Additional countries may well make such modifications through administrative policies, even if the relevant legislation does not specifically authorize such shifts. These laws could serve as a model for reform in the United States.

Policymakers implementing such an approach would need to determine who could be considered a "sole" parent under such a policy. Presumably, this category would include, at a minimum, all parents

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403. See INT'L NETWORK ON LEAVE POL'YS & RSCH., *supra* note 336, at 215–18, 386–89, 423–28, 459–64 (identifying special policies for sole custodians in, at least, France, Portugal, Slovenia, and Sweden). Additionally, in Iceland, where there is only a single parent—such as a sole-parent adoption or artificial insemination—that parent receives the full period of benefits that would otherwise be split between the parents. *Id.* at 257–60.

404. *Id.* at 461 (reporting that each parent is "eligible for 240 days of Parental leave" and that "90 of these days . . . cannot be transferred to the other parent").

405. *Id.* at 463 ("In the case of sole custody, the parent with custody receives all of the Parental leave days (i.e., 480 days).").

406. See *id.* at 368 (reporting that the father's quota may be transferred to the mother "if the mother and father do not live together").

407. *Id.* at 75, 83, 93, 195, 225, 258, 265, 389, 424 (identifying such policies in, at least, Austria, Belgium, Brazil, Finland, Germany, Iceland, Ireland, Portugal, and Slovenia).

408. See *id.* at 75, 258, 424–25 (identifying such policies in, at least, Austria, Iceland, and Slovenia).

409. See *id.* at 66, 103–04, 169, 195, 228, 267 (identifying at least Australia, Bulgaria, Czech Republic, Finland, Germany, and Norway as countries where policies permit grandparents to receive benefits under certain circumstances, such as minority-aged parents or parents who are unable to care for the child).

who are the sole and only legal parent for a child and therefore almost always also the sole custodial parent.<sup>410</sup> As discussed in Section II.B, this is a sizable group. It will generally include all babies born to unmarried women where a VAP is not completed and paternity is not established by other means. Available statistics suggest approximately one-third of babies born to Black women, as well as smaller percentages of children born to unmarried women of other races, have just one legal parent.<sup>411</sup> This category would also include children of “single parents by choice,” including birth mothers who use donor sperm to conceive, adults of either sex who adopt on their own, and adults who foster on their own.

The harder question would be whether an unmarried mother would ever be considered a “sole” parent, even if her partner *has* completed a VAP. In that case, the woman and her partner are each legally-recognized parents of the new child, and they are both, under existing parental leave laws, eligible to claim benefits. However, because of the legal defaults described in Section II.C, typically the mother will retain sole legal custody. That said, legal custody does not always describe the reality of lived family life. A nonmarital father could be living with the mother of their shared child, or regularly providing care for a shared child, but never have taken the formal legal steps necessary to apply for joint custody. On the other hand, there are also nonmarital fathers who have signed a VAP but have little day-to-day involvement with the child.

The period immediately after a birth has been characterized as a “magic moment” in which nonmarital fathers often seize the opportunity to build a relationship with a new child.<sup>412</sup> In theory, the current structure of parental leave laws could play a role here. Individual and non-transferable benefits might encourage nonmarital fathers to take leave, just as individual and non-transferable benefits have been successful in encouraging marital fathers to take leave.<sup>413</sup> However, if nonmarital fathers in this situation are unlikely to take leave even if offered benefits, the practical result is that single mothers and their children are disadvantaged.

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410. In rare cases, it might be that a grandparent or some other adult would be recognized as a joint custodian.

411. See *supra* notes 100–06, 276–81 and accompanying text.

412. See, e.g., ROBERT WOOD JOHNSON FOUND., FRAGILE FAMILIES AND CHILD WELLBEING STUDY (2014) (“[B]irth presents a ‘magic moment’ when unmarried parents are highly motivated to work together . . .”).

413. See *supra* notes 392–96 and accompanying text (reporting increased leave usage for fathers in states with individual, non-transferable benefits).

In considering whether and how to change the current model, it would be helpful to know how common it is for unmarried fathers to claim benefits, and also whether factors such as cohabitation affect the likelihood that a father will claim benefits. Longitudinal studies that track whether nonmarital fathers who take leave are more likely to remain involved with their children months or years later would also be helpful. Unfortunately, existing data collected by states implementing paid leave laws does not seem to permit such analysis.

Depending on the result of such studies, policymakers might choose to provide extended benefits to an unmarried parent even in some instances where a VAP has been completed. A jurisdiction could, for example, consider cohabitation or other markers of involvement between the non-custodial parent and the child.<sup>414</sup> Or a jurisdiction could look to legal custody, which in most instances would remain solely with the mother.<sup>415</sup> This would be easier to administer than a more subjective and fluid standard such as cohabitation. Indeed, some demographers challenge the basic concept that cohabitation is a meaningful signifier of familial form, noting that many couples slide in and out of “living together” based on factors such as the end of a lease rather than a formal decision to make a long-term commitment.<sup>416</sup>

There is also the possibility that if extended benefits were provided to unmarried mothers where a VAP *has not* been completed, but not to unmarried mothers where a VAP *has* been completed, an unmarried woman might be less likely to agree to a VAP (or even, theoretically, to agree to marriage) so that she could access extended benefits. Accordingly, it would be important to assess the extent to which the policy line drawn might itself affect behavior and the relative costs and benefits of different approaches. These questions are similar to debates over whether marriage should be the exclusive standard to define commitment and intimacy between adults—an approach I have criticized in other contexts.<sup>417</sup>

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414. Cf. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 6.03 (AM. L. INST. 2002) (suggesting a multifactor test for assessing domestic partners who would be treated equivalently to married couples in financial claims related to a dissolution of the relationship).

415. See *supra* notes 273–84 and accompanying text.

416. Cf. Cherlin, *supra* note 120, at 408, 410–11 (reporting studies finding “entry into cohabitation sometimes occurred as a gradual process without a clear decision to live together”).

417. See Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 550 (2015) (“I join other commentators who have long warned that the marriage equality movement’s valorization of marriage could be detrimental to respect for alternative family structures.”).

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There are some other potential concerns with a policy that provides extended benefits to a “sole” parent, however that term is defined. Under my proposal, an unmarried parent who is the primary caregiver for a child could receive extended benefits, but a married parent who likewise is the primary caregiver for a child could not.<sup>418</sup> Some would complain that the policy was unfair to married parents. This could increase political pressure to change the existing structure as it applies to married couples, or other parents who formally share custody, undermining the larger gender equality goals discussed in Section IV.A.

There is also a risk that extending benefits for sole parents could spur employment discrimination against them or, even more troublingly, against women whom employers think might be likely to become sole parents. Even though this would often be illegal, employees who were forced out of a job might not seek legal recourse. Additionally, as noted in Section II.A, although most of the state laws provide both benefits and leave rights, others are just a benefit stream. In such states, employees will only have a right to job-protected leave if they qualify under the FMLA or a state analog, or under an employer’s own policies. The FMLA provides just twelve weeks of leave to care for a new baby,<sup>419</sup> and it sets a soft norm followed by many employers that are not covered by the FMLA. This means that even if sole parents could access an extended period of benefits, many would risk losing their jobs if they took off more than twelve weeks. Such policies also set an expectation that three months is the “right” amount of time to take off with a new baby. Workers may be reluctant to take more time, even if they would be nominally eligible to do so, fearing that this would have negative repercussions at work.

Again, future empirical work would be helpful to assess the extent to which such policies would encourage discrimination, as well as to discern sole parents’ stated preferences. It is possible that some would welcome the opportunity to receive benefits for a longer period of time, even if they would have to look for a new job when the benefits ran out. This might be particularly true for sole parents who are living far from extended family. And while doubling the available bonding leave in some states would result in a relatively lengthy leave by

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418. It might be appropriate to consider extensions in a slightly broader range of circumstances, such as where a married parent has been granted sole custody under a domestic violence protective order, or if a spouse is seriously ill, disabled, incarcerated, or serving overseas in the military. Again, this kind of modification is common in countries that designate leave and benefits to individual parents.

419. See 29 U.S.C. § 2612(a)(1).



American standards, it is not necessarily excessive. As discussed above, new mothers in economically developed countries receive, on average, over a year of paid leave,<sup>420</sup> and medical experts recommend breastfeeding a child for at least six months.<sup>421</sup> Indeed, a growing number of American companies, particularly in the technology sector, are providing five or more months of leave to birth mothers.<sup>422</sup>

### C. ELIGIBILITY FOR EXTENDED OR CHOSEN FAMILY

A different potential solution to address the inequities faced by single parents would be to broaden the range of adults eligible to take leave to care for a new child. As discussed in Part I, a relatively large number of unmarried parents of young children live with one or both of their own parents. Even if they do not live with extended family, many single parents rely heavily on grandparents or other extended family to provide childcare. Indeed, the focus on “parenting” solely by nuclear parents has been criticized as a White, middle class conception of family, misaligned in particular with African American families, but also Hispanic and Asian families.<sup>423</sup> Single parents also may be especially likely to rely on close friends to play a parental role. The concept of “chosen” family originally referred primarily to support networks within the LGBT community,<sup>424</sup> but many children enjoy family-like relationships with non-relatives.

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420. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 339, at 3 (finding that OECD member countries offer mothers an average of 53.9 weeks of paid leave).

421. See CTRS. FOR DISEASE CONTROL & PREVENTION, BREASTFEEDING REPORT CARD: UNITED STATES, 2020, at 1 (2020), <https://www.cdc.gov/breastfeeding/pdf/2020-Breastfeeding-Report-Card-H.pdf> [<https://perma.cc/DH2R-RX8V>] (“The American Academy of Pediatrics recommends infants are exclusively breastfed for about the first 6 months.”).

422. See, e.g., Kristen Lotze, *10 Tech Companies with Generous Parental Leave Policies*, TECHREPUBLIC (Feb. 15, 2019, 7:19 AM), <https://www.techrepublic.com/article/10-tech-companies-with-generous-parental-leave-benefits> [<https://perma.cc/8BTK-J6KG>] (identifying several companies that provide birth mothers at least twenty weeks of paid leave).

423. See Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 23–24 (2013) (“In the United States, 25% of Asians, 23% of African Americans, and 22% of Hispanics live in multi-generational homes, in contrast to 13% of whites.”).

424. See generally KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991) (describing how many gay men and lesbians establish “chosen” families, incorporating friends, lovers, and children, often without formal legal recognition). “Gay or chosen families might incorporate friends, lovers, or children, in any combination.” *Id.* at 27; see also Nancy J. Knauer, *LGBT Older Adults, Chosen Family, and Caregiving*, 31 J.L. & RELIGION 150, 158–59 (2016) (emphasizing the central role that chosen families play in providing care for older LGBT adults).

The state laws providing benefits and leave for new parents embed parental leave rights in a broader “family and medical leave” framework. Although only “parents” are eligible to take time off to care for a new “son” or “daughter,” the family care provisions—which allow employees to take time off to care for family members with a serious health condition—are more expansive.<sup>425</sup> All of the existing laws permit grandparents to take leave to care for grandchildren, and they also generally permit employees to take time off to care for siblings, spouses, domestic partners, and in-laws.<sup>426</sup> Some of the more recently enacted laws go further, allowing an employee to care for any other person “related by blood” or with whom the employee has a “close association . . . equivalent of a family relationship.”<sup>427</sup> These provisions could be amended to allow the same broad range of extended and chosen family to care for a newly-born, newly-adopted, or newly-fostered child.<sup>428</sup> Even more radically, the statutes could be modified to allow at least sole parents to simply designate an additional adult—family or not—to claim benefits.<sup>429</sup>

Statutory language already potentially authorizes a much broader class of potential claimants for bonding leave, in that existing laws extend coverage to individuals who serve *in loco parentis* to a new child.<sup>430</sup> As described above, the federal agency that is charged with implementing the FMLA has interpreted this language to include

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425. See A BETTER BALANCE, *supra* note 168, at 1 (listing nine states, and D.C., where employees can use paid leave “to care for a family member with a serious health condition”).

426. See *id.* at 4–5 (detailing which family members are covered by the family leave provisions). The FMLA’s military caregiver provisions also include an expansive definition of “next of kin” who can provide care. See 29 U.S.C. § 2611(17) (“[N]ext of kin’ used with respect to an individual, means the nearest blood relative of that individual.”); 29 C.F.R. § 827.127(d)(3) (2021) (providing a prioritized list of relations and rules for determining “next of kin” who may take such leave).

427. See A BETTER BALANCE, *supra* note 168, at 4–5 (describing applicable provisions in New Jersey, Connecticut, Oregon, and Colorado’s laws).

428. In states where the relevant policy provides benefits but not leave, a familial caregiver would only be able to access leave under the FMLA if they could meet the *in loco parentis* standard, suggesting additional legislative reform would be helpful.

429. Cf. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 221–22 (2007) (suggesting legal reforms based on programs in Canada and France which “provide friends with state recognition and benefits if their relationships sufficiently mirror traditional definitions of family”). This, however, might raise concerns about potential abuse, to the extent that it would be considered improper to use state-supported benefits to compensate a non-familial caregiver who might otherwise receive pay directly from the parent for care.

430. See Appendix (providing statutory language for state and federal leave programs).

individuals who intend to provide day-to-day care to a new child, even if the child is also living with a legally-recognized birth or adoptive parent.<sup>431</sup> This interpretation is not binding on state agencies implementing state statutes with similar language. However, state laws are often interpreted consistently with federal laws on which they are modeled,<sup>432</sup> and, certainly, this interpretation is within the general ambit of what the *in loco parentis* standard could encompass.

To make this an effective solution for sole parents (and others relying on non-legal parents to provide parent-like care), agencies administering paid leave laws would need to modify existing requirements relating to documentation. As detailed in the Appendix, to claim bonding benefits, an individual generally needs to provide a birth certificate, VAP, or papers relating to an adoption or foster placement. Although the relevant statutes authorize persons serving *in loco parentis* to claim benefits, the claim forms in most states do not invite documentation to show that such relationships exist. Similarly, the websites, handbooks, and other materials developed by agencies generally make clear that bonding benefits can be claimed by biological, adoptive, and foster parents. They typically do not suggest that informal parent-like relationships could be sufficient.<sup>433</sup> Thus, not only would parental leave claim forms need to be revised, but public education campaigns would be essential to raise awareness of this possibility.

Changing the statutory standard to explicitly authorize a broader range of family members eligible to receive benefits to bond with a new child, or clarifying that adults playing a parental role can claim benefits under the existing *in loco parentis* standard, has some potential downsides. Some employers would likely fear that “loosening” standards would invite abuse. This could spur political opposition to any amendment or new law adopting these provisions. It could also mean that employers might seek to challenge individual employees’ efforts to claim benefits. Courts might be unwilling to defer to agency interpretations suggesting an intention to provide care is sufficient to meet the *in loco parentis* standard, and it might be difficult for a non-parent to prove that she or he has *already* played a “parental” role for

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431. See *supra* notes 300–04 and accompanying text.

432. See, e.g., Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 721–24 (2016) (providing numerous examples of how “state judicial interpretations of state [employment discrimination] statutes have tended to track federal interpretations of the federal statutes”).

433. See, e.g., OFF. OF PAID FAM. LEAVE, D.C. DEP’T OF EMP. SERVS., EMPLOYEE HANDBOOK: DC PAID FAMILY LEAVE 9 (2020) (permitting parental leave benefits if “your child was born or . . . a child was placed with you within the past year”).

a newborn or newly-adopted or newly-fostered baby. The whole point of parental leave is to allow workers to take time off work to develop this kind of close relationship. Moreover, litigation is always expensive and time-consuming, and a lack of clarity would likely deter potential claims. These concerns would be somewhat less likely if states were to explicitly expand the range of family members who can claim benefits, rather than rely on the *in loco parentis* language.

Additionally, while these solutions would certainly provide important support to many single parents, they are not specifically calibrated to the inequities that have animated this Article. Grandparents and other extended family members frequently provide care not only for children of single parents, but also for children of married parents.<sup>434</sup> If the list of potentially eligible claimants of bonding leave were expanded, it is likely that grandparents or other extended family might claim benefits even where there were already two legally-recognized custodial parents eligible for benefits.<sup>435</sup> This could provide welcome support for many families, especially those living in multi-generational households. However, it might have the unintended effect of undermining the sex-equalizing objectives described in Section IV.A, as it is possible that fathers would be less likely to claim benefits if other family members could receive paid time off while providing this care. It might also increase costs on the laws more generally.

A related approach, which might better balance these competing priorities, would be to combine the proposals from Sections IV.B and IV.C and make the broader range of family caregivers eligible for benefits *only* in cases in which there is a “sole” parent, however defined. Any such reforms, however, should not narrow or replace the *in loco parentis* standard that is already included in these laws; that provision can be particularly essential for same-sex couples jointly raising a child if they are unable to afford to secure a second-parent adoption or are waiting for such an adoption to be finalized.

#### D. SEPARATE MEDICAL BENEFITS FROM BONDING BENEFITS

A third possible strategy to provide support to many (but not all) single parents would be structuring comprehensive family and

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434. See LAUGHLIN, *supra* note 138, at 3 tbl.2 (reporting that grandparents provided care for about 30% of preschoolers with married parents, 37% of children of separated, divorced or widowed parents, and 38% of children of parents who never married).

435. Indeed, because stepparents can claim benefits under existing laws, sometimes there could be three or four adults already authorized to claim benefits under the existing structure.

medical leave laws to include a cap for medical benefits that is separate from the cap for bonding benefits, rather than subjecting all forms of relevant benefits to a single annual cap. Again, this structure already exists in some state laws.<sup>436</sup>

Debate over this aspect of the statutory benefit structure generally focuses on cost projections and employers' concerns about employees taking excessive amounts of time away from work. However, at root, it implicates foundational questions of sex equality theory and doctrine. As discussed in Section III.A, historically, pregnancy and childbirth received less support than other health conditions from employers. Title VII, as amended by the PDA, prohibits such unequal treatment.<sup>437</sup> Since its enactment, courts and the EEOC have been clear that pregnancy and childbirth should receive at least the same level of support as other health conditions. Likewise, Title VII also mandates that policies designed to support new parents as caregivers be structured in a sex-neutral fashion.<sup>438</sup>

Putting these two equality conceptions together, the EEOC and courts suggest that employers should provide mothers and fathers equal time to bond with a new baby, but birth mothers may receive additional time to recover from the physical effects of childbirth.<sup>439</sup> Many private companies choose to structure their policies for new parents in this way. For example, a recent study of Fortune 500 companies found that the vast majority of companies that offered paid leave provided birth mothers more paid time off than fathers.<sup>440</sup>

The FMLA, by contrast, subjects any and all leave—medical, bonding, and family care—to a single, twelve-week annual cap.<sup>441</sup> Some of the state paid leave laws adopt a similar approach.<sup>442</sup> In

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436. Compare, e.g., *Bonding Leave for the Birth of a Child*, N.Y. ST.: PAID FAM. LEAVE, <https://paidfamilyleave.ny.gov/bonding-leave-birth-child> [<https://perma.cc/XF8G-AFR4>] (“After giving birth, new mothers may be eligible for both short-term disability benefits and Paid Family Leave.”), with OFF. OF PAID FAM. LEAVE, *supra* note 433, at 7 (subjecting parental, family, and medical leave benefits to a single eight-week cap). For a discussion of the range of state approaches, see *infra* note 442.

437. See *supra* note 315 and accompanying text.

438. See *supra* note 323 and accompanying text.

439. See text accompanying note 325.

440. See Kaufman & Petts, *supra* note 38, at 14 (finding that “76% of [Fortune 500] companies that provide paid parental leave” give mothers “access to longer periods of paid leave”).

441. See 29 U.S.C. § 2612(a)(1).

442. See A BETTER BALANCE, *supra* note 168, at 8 (reporting that Connecticut, Colorado, Oregon, and Washington, D.C., cap annual leave generally at the same number of weeks as the total authorized weeks of bonding leave, although Connecticut and Oregon allow workers with pregnancy- and childbirth-related health needs to receive two

practice, this means that a mother who experiences serious pregnancy complications may exhaust most or all of her available leave before the baby is even born. Even if a mother is able to work through her pregnancy (and new legislation requiring pregnancy accommodations may be helpful on this point), the physical effects of childbirth can interfere with a new mother's ability to provide infant care. A caesarean section, for example, is serious abdominal surgery. After a C-section, it can be difficult to walk or carry anything heavy—including a baby—for days or weeks.<sup>443</sup> A mother recovering from such surgery is not primarily “bonding” with a new baby; she is healing herself. Indeed, often in that scenario, the father or other second parent will take bonding leave simultaneously with the new mother taking medical leave.

If maternity leaves are much longer than paternity leaves, this approach could undermine the extent to which the policy can help shift gender norms around caregiving in two-parent (different-sex) families. Such policies would also likely violate Title VII.<sup>444</sup> When properly calibrated to the medical effects of childbirth and pregnancy, however, a tiered plan like this is actually equality *enhancing*. It responds to the physical effects of pregnancy and childbirth and ensures they receive as much support as other physical conditions.

Again, this solution is not calibrated to the particular inequities that animated this Article, as married or partnered birth mothers would likewise be eligible for extended medical benefits. But as a practical matter, it would provide a significant extension of support for a birth mother to take an extended period of time off work, while still receiving income replacement. This is particularly important for single mothers who may not have a co-parent available to provide care. While single mothers would still be eligible for fewer weeks of

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additional weeks and Colorado allows such workers to receive four additional weeks). Other states set a cumulative cap that is considerably longer than the authorized period of bonding leave. *See id.* (reporting Rhode Island, Massachusetts, and New York structure programs in this way). In practice, this generally allows new mothers to take the full period of bonding leave and an additional period of disability leave for health needs related to the pregnancy and childbirth. Finally, some states do not have a cumulative cap at all. *See id.* (reporting California and New Jersey fall in this category).

443. *See Going Home After a C-Section*, MOUNT SINAI, <https://www.mountsinai.org/health-library/discharge-instructions/going-home-after-a-c-section> [<https://perma.cc/U73N-6P9X>] (“Do not lift anything heavier than your baby for the first 6 to 8 weeks. . . . Expect to tire easily. . . . Avoid heavy housecleaning, jogging, most exercises, and any activities that make you breathe hard or strain your muscles. Do not do sit-ups.”).

444. *See supra* notes 323–25 and accompanying text (discussing the sex-neutrality requirements imposed by Title VII).

benefits than the total benefits available to married couples, this approach helps make sure that new mothers can take paid time off, if necessary, during pregnancy for medical needs and still have benefits available to both heal from the physical effects of childbirth and to care for a newborn child.

#### E. ADMINISTRABILITY

It would be relatively easy to implement any of these suggested changes to existing leave laws. As noted above, many countries extend benefits for a sole parent or allow benefits to be claimed by a broader range of family members,<sup>445</sup> and several states provide medical leave that is separate from bonding benefits.<sup>446</sup> Defining a “sole” parent by custody would be straightforward, since marriages, birth certificates, and VAPs are all filed with the state, and other legal actions to secure shared custody also create a legal record. If “sole” parent were defined in a different, more nuanced way, it might be somewhat harder to administer, but workable standards could be developed. Broadening the range of family members who can claim bonding benefits, or clarifying the application of *in loco parentis* standards in this context, could likewise build on existing legal structures.

Allowing extensions for a “sole” parent, or permitting extended or chosen family to claim bonding benefits (especially if this option were limited to families with a sole parent), would not be unduly costly to employers. This is because individual employers of employees on leave do not directly pay the costs of the benefits. Rather, as explained in Section II.A, state parental leave benefits are financed through small payroll taxes. Like other insurance and social welfare-based programs, the tax rate is based on projections of likely use. Implementing the proposed options would presumably increase the overall level of use of the program to some extent. However, it would likely be a relatively small change as compared to the program as a whole. The current tax is generally only a few dollars per employee per week; even if this tax rate had to be raised slightly, it would remain very small.<sup>447</sup> The key here is that the costs are already spread out. Whether or not the tax rate was adjusted, the specific employer of an

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445. See *supra* notes 403–09 and accompanying text (discussing other countries that allow transfers or extensions of leave benefits in certain circumstances).

446. See *supra* note 442.

447. See *supra* notes 199–201 and accompanying text (discussing the funding models and financial impact of state leave programs); see also A BETTER BALANCE, *supra* note 168, at 5–6 (providing tax rates and graduation schemes for state and D.C. paid leave programs).

employee who received extended benefits would bear only a tiny fraction of additional costs.

As discussed in Section III.A, our constitutional and statutory sex discrimination frameworks generally require treating men and women equally in policies relating to parenting. Accordingly, if jurisdictions were to adopt this proposal, they would need to do so on a sex-neutral basis—i.e., an extension of benefits for a sole parent however defined, rather than an extension for mothers specifically. This structure would almost certainly be permissible under sex discrimination doctrine.<sup>448</sup> Similarly, although a full assessment is beyond the scope of this Article, this proposal would likely be lawful even in jurisdictions that prohibit discrimination on the basis of marital status.<sup>449</sup> Although the policies would indirectly implicate marital status, they would technically turn on legal parenthood, or the custodial or lived relationship with a child, rather than marital status explicitly. The policies would also likely accord with existing constitutional doctrine, which scrutinizes justifications for denying benefits to nonmarital children, since the ultimate effect of these proposed changes would be to treat nonmarital children *more* similarly to marital children.<sup>450</sup> Accordingly, it seems likely that benefit structures could be amended in any of the ways suggested above without violating existing antidiscrimination laws or constitutional standards.

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448. Because women are more often sole legal parents and sole custodians, women would be more likely to receive extended benefits. *See supra* notes 92–94 and accompanying text (discussing nonmarital birth rates), notes 273–275 and accompanying text (discussing the default custody laws for nonmarital children). This, however, would be unlikely to be considered unconstitutional sex discrimination, as there would be no evidence of discriminatory intent. *Cf. Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (holding disparate impact claims are generally not cognizable under the equal protection clause). It would also probably be permissible under Title VII. Under that statute, it might cause a *prima facie* case of disparate impact, but employers could probably show that the policy was job-related and a business necessity based on benefits such as reduced turnover or medical costs. *But cf. Trina Jones, Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1299 (2014) (noting that “courts and legislatures have not addressed the question of whether the dissimilar treatment of [single persons without children] constitutes unlawful discrimination”).

449. *See sources cited supra* note 358 (identifying state laws that prohibit discrimination on the basis of marital status in employment).

450. *See supra* note 354 and accompanying text (discussing a series of cases in which the Supreme Court held that nonmarital children could not be categorically denied benefits).



## CONCLUSION

The needs of a newborn child do not differ based on the marital status of her parents. But the calculation that goes into meeting those needs varies based on family structure. There is a large and growing “marriage gap” in this country, and nonmarital families are already disadvantaged on a variety of measures. Paid leave laws, while offering a marked improvement over the preexisting baseline of *no* paid leave, exacerbate inequalities, as single-parent families can claim only half as much support as two-parent families. This means nonmarital children, and the adults who care for them, are disadvantaged from the very first weeks of life.

There are some relatively easy fixes for this problem. As in other countries that allocate benefits to individual parents, sole parents should be able to claim extended benefits or benefits should be available to a broader range of extended or chosen family. Separating medical benefits from bonding benefits could also help alleviate the inequity. Without such reforms, single parents, who are disproportionately poor and working-class women of color, will continue to be shortchanged by policies ostensibly designed to advance women’s equality.

## APPENDIX

## STATUTORY DEFINITIONS IN FEDERAL AND STATE PAID LEAVE LAWS AND SPECIFIED DOCUMENTATION TO ESTABLISH PARENTAL STATUS

*Although statutory definitions of persons eligible to take parental leave generally include persons serving in loco parentis to a child, the administrative materials that implement these laws often do not invite applicants to provide documentation that would establish that the requisite relationship exists, meaning potential claimants are unlikely to realize they might be eligible for leave.*

Jurisdiction	Statutory Definitions	Administrative Materials
United States, Federal Employee Paid Leave Act	Provides paid leave because of the “birth of a son or daughter” and defines “son or daughter” as “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.” <sup>451</sup>	Regulations specify that an agency may request “appropriate documentation” that “include[s], but is not limited to, a birth certificate or documentation from an adoption or foster care agency.” <sup>452</sup>

451. 5 U.S.C. §§ 6381(6), 6382(a)(1)(A).

452. 5 C.F.R. § 630.1703(h) (2021); *see also Types of Supporting Documentation for*

California	"Child" defined as "a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a [legally registered] domestic partner, or the person to whom the employee stands in loco parentis." <sup>453</sup>	Claim form requires submission of child's birth certificate, declaration of paternity, adoptive placement agreement, independent adoption placement agreement, foster care placement record, or unspecified "other" documents. <sup>454</sup>
Massachusetts	"Child" defined as "a biological, adopted or foster child, a stepchild or legal ward, [or] a child to whom the covered individual stands in loco parentis." <sup>455</sup>	Claims for biological children require submission of a child's birth certificate or a statement from the birth hospital or health care provider of the birth-giving parent or child stating the child's birth date. Parents of adopted or fostered children must submit a certificate from the child's healthcare provider, adoption or foster care agency, or Department of Children and Families confirming the child's placement and date of placement. <sup>456</sup>
New Jersey	"Child" defined as "a biological, adopted, foster child, or resource family child, stepchild, legal ward." <sup>457</sup>	Claim form does not specify relevant documents that must be submitted, but statutory language suggests legal parenthood rules would apply. <sup>458</sup>
New York	"Child" defined as "a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or the	Claim form requires: birth mothers to submit birth certificate or certification by health care provider; second parent to submit birth certificate naming party as second parent, VAP, or court order of filiation, or birth certificate

*Use of Paid Parental Leave*, U.S. DEP'T COM., <https://www.commerce.gov/sites/default/files/2020-09/Types%20of%20Supporting%20Documentation%20for%20the%20Use%20of%20Paid%20Parental%20Leave.pdf> [<https://perma.cc/4DXG-3ESN>] (expanding on relevant documentation related to births, adoptions, or foster care, but not referencing any documentation related to establishing an *in loco parentis* or guardianship relationship).

453. CAL. UNEMP. INS. CODE § 3302(c) (West 2021).

454. EMP. DEV. DEP'T, CAL. LAB. & WORKFORCE DEV. AGENCY, CLAIM FOR PAID FAMILY LEAVE (PFL) BENEFITS 8 (2020) (providing a sample of EDD Form DE 2501F Rev. 5; claims must be submitted electronically or on EDD original forms).

455. MASS. GEN. LAWS ch. 175M, § 1 (2021).

456. *Documents Needed To Complete Your Paid Family and Medical Leave (PFML) Application*, MASS.GOV, <https://www.mass.gov/info-details/documents-needed-to-complete-your-paid-family-and-medical-leave-pfml-application> [<https://perma.cc/4YBR-8PT8>].

457. N.J. STAT. ANN. § 34:11B-3(a) (West 2021).

458. DIV. OF TEMP. DISABILITY & FAM. LEAVE INS., N.J. DIV. OF LAB. & WORKFORCE DEV., FL-1: NEW JERSEY FAMILY LEAVE BENEFITS APPLICATION (2020).

	person to whom the employee stands in loco parentis.” <sup>459</sup>	together with legal documentation of marriage, civil union, or domestic partnership to the birth mother; foster placement letter; or court documents establishing adoption. <sup>460</sup>
Rhode Island	“Child” defined as “a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or a son or daughter of an employee who stands in loco parentis to that child.” <sup>461</sup>	Claim form requires child’s birth certificate, proof of adoption, foster care placement, or proof of legal guardianship. <sup>462</sup>
Washington	“Child” defined as a “a biological, adopted, or foster child, a stepchild, a child’s spouse, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status.” <sup>463</sup>	Claim form for births requires birth certificate, hospital records, or a form signed by a health provider identifying up to two parents. <sup>464</sup> Separate claim form for adoption and foster placements requires court documents or relevant documentation from a social worker or an agency. <sup>465</sup>
Washington, D.C.	“Family member” defined, in part, as “[a] biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a [legally recognized] domestic partner, or a person to whom an eligible individual stands in loco parentis.” <sup>466</sup>	Parental leave claim form requires birth certificate, court document indicating custody, Consular Report of Birth Abroad, documents by medical providers, or documents connected with an adoption or foster placement. <sup>467</sup> The agency has also created a claim form that can be used to provide information about a family relationship, including serving <i>in loco parentis</i> , if the applicant

459. N.Y. WORKERS’ COMP. LAW § 201(16) (McKinney 2021).

460. N.Y. STATE, HOW TO REQUEST PAID FAMILY LEAVE 2 (2019).

461. 28 R.I. GEN. LAWS § 28-41-34(1) (2021).

462. R.I. DEP’T OF LAB. & TRAINING, TEMPORARY CAREGIVER INSURANCE (TCI) APPLICATION FOR BENEFITS 1 (2014).

463. WASH. REV. CODE § 50A.05.010(2) (2021).

464. WASH STATE EMP. SEC. DEP’T, CERTIFICATION OF BIRTH FORM 1 (2020).

465. *Before You Apply*, WASH. ST. PAID FAM. & MED. LEAVE, <https://paidleave.wa.gov/get-ready-to-apply> [<https://perma.cc/54KQ-N74N>].

466. D.C. CODE § 32-541.01(7)(A) (2021).

467. OFF. OF PAID FAM. LEAVE, D.C. DEP’T OF EMP. SERVS., PARENTAL LEAVE CLAIM FORM (PFL-2), at 1 (2020).

		lacks specific documentation showing the relationship. <sup>468</sup> However, the parental leave form only references birth, adoption, foster placement, or persons who have “legally assumed parental responsibility” for a child, which suggests a formal guardianship proceeding.
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STATE STATUTES ESTABLISHING PARENTAL LEAVE PROGRAMS NOT YET IMPLEMENTED (CLAIM FORMS NOT YET DEVELOPED BECAUSE CLAIMS CANNOT YET BE FILED)

Jurisdiction	Statutory Definitions
Colorado (program effective Jan. 1, 2024)	Individuals “caring for a new child during the first year after the birth, adoption or placement of that child” are eligible for paid leave. <sup>469</sup> “Child” is not separately defined, but the definition of “family member” (for whom an individual may take family care leave) includes “a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, [or] a child to whom the covered individual stands in loco parentis.” <sup>470</sup>
Connecticut (program effective Jan. 1, 2022)	Individuals are eligible for leave “[u]pon the birth of a son or daughter” or “[u]pon the placement of a son or daughter . . . for adoption or foster care.” <sup>471</sup> “Son or daughter” defined as “a biological, adopted or foster child, stepchild, legal ward, or, in the alternative, a child of a person standing in loco parentis.” <sup>472</sup>
Oregon (program effective Jan. 1, 2023)	Child defined as “[a] biological child, adopted child, stepchild or foster child,” “legal ward,” a person to whom the individual is “in a relationship of in loco parentis,” or any such child of an “individual’s spouse or domestic partner.” <sup>473</sup>

468. OFF. OF PAID FAM. LEAVE, D.C. DEP’T OF EMP. SERVS., CERTIFICATION OF FAMILY RELATIONSHIP (PFL-FR) (2020).

469. COLO. REV. STAT. § 8-13.3-504(2)(a) (2021).

470. *Id.* § 8-13.3-503(11)(a).

471. CONN. GEN. STAT. § 31-51ll(2)(A)-(B) (2021).

472. *Id.* § 31-51kk(6).

473. H.R. 2005, 80th Legis. Assemb., 2019 Reg. Sess. (Or. 2019).