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Bringing Up Baby: The Case for a Federal Parental Leave Act

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STUDENT COMMENTS

BRINGING UP BABY: THE CASE FOR A FEDERAL PARENTAL LEAVE ACT

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I. INTRODUCTION

How far does corporate social responsibility extend? Should employers be required to provide employees with job-protected leaves from work so that an employee can care for a newborn, newly adopted, or seriously ill child? Should states or the federal government require employers to provide this benefit? Or should the initiation of job-protected leaves be left to the discretion of business managers?

Three proposals presently before Congress would impose such an obligation on businesses.[1] These proposals would en-

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1. On January 6, 1987, Representative Marge Roukema (R-NJ) introduced H.R. 284, the Family and Medical Leave Job Security Act, 100th Cong., 1st Sess. (1987). H.R. 284 is currently pending before the House Committee on Education and Labor.

On February 3, 1987, Representatives Patricia Schroeder (D-CO) and William Clay (D-MO) introduced H.R. 925, the Family and Medical Leave Act, 100th Cong., 1st Sess. (1987). H.R. 925 is essentially the same act as H.R. 2020, the Parental and Disability Leave Act, which Representative Schroeder introduced on April 4, 1985, 99th Cong., 1st Sess. (1985). H.R. 2020 was referred jointly to the Committee on Education and Labor, and the Committee on Post Office and Civil Service. Representative William Clay (D-MO) reintroduced a revised version of Representative Schroeder's proposal on March 4, 1986, the Parental and Medical Leave Act, H.R. 4300, 99th Cong., 2nd Sess. (1986). On June 11, 1986, the Committee on Post Office and Civil Service ordered H.R. 4300 favorably reported. On June 24, 1986, the Committee on Education and Labor ordered H.R. 4300, as amended, favorably reported. On September 17, 1986, the Rules Committee granted a rule for floor debate of H.R. 4300, but the House of Representatives adjourned before the bill could be considered. H.R. 925, currently pending before the Committee on Education and Labor, and the Committee on Post Office and Civil Service, is a revised version of H.R. 4300.

On January 6, 1987, Senators Christopher Dodd (D-CT) and Arlen Specter (R-PA) introduced S.249, the Parental and Medical Leave Act, 100th

title employees to take parental leaves[2] without the risk of termination by employers. These proposals purport to balance the demands of the work place with the needs of families and to promote family stability by providing working parents with economic security.[3]

Promoting family stability is important because the family is the foundation upon which society is built; as such, the future of society is threatened wherever the family is somehow threatened.[4] The family, as the core institution that decisively determines the nature of society itself, plays the primary role in developing a sense of social virtues.[5] All of the positive human qualities that shape society are nurtured within the family: the capacity to love, to learn, and to trust.[6] Indeed, efforts to strengthen the solidarity of the family have been judically recognized as indispensable to the well-being of the nation.[7]

Cong., 1st Sess. (1987). S.249 is the same act as S.2278, which Senator Dodd introduced in the Senate on April 9, 1986, 99th Cong., 2d Sess. (1986). S.2278 was referred to the Committee on Labor and Human Resources, but the Committee took no action on the legislation. S.249 is currently pending before the Senate Committee on Labor and Human Resources.

2. Parental leave is defined as a period of protected leave from work to allow male or female employees to care for newborn, newly adopted, or seriously ill children. This leave period is independent of maternity leave which pertains to a period of leave from work to accommodate a woman's physical recuperation after childbirth. The maternity leave period may be paid or unpaid, depending on the employer's disability policies and applicable state law.

3. H.R. 925 § 2 (b)(1); S. 249 § 101(b)(1)-(2).

4. For example, in the Apostolic Exhortation on the Family, (*Familiaris Consortio*) no. 106 (1981), Pope John Paul II said: "The family has vital and organic links with society since it is its foundation and nourishes it continually through its role of service to life . . . and it is within the family that [citizens] find the first school of the social virtues that are the animating principle of the existence and development of society itself." Also, in Building Family Life: Homily in Bamenda, Cameroon, no. 7 (1985), Pope John Paul II said: "The future of society is threatened wherever the family is weakened. The well-being of individuals and of society is safeguarded where customs, laws and political, social and educational institutions contribute to the strengthening of marriage and the family. For the good of mankind the family must be defended and respected."

5. *Familiaris Consortio, supra* note 4, at no. 106.

6. *Id.* at no. 45. *See also* Address by Mother Teresa, Institute on Religious Life Symposium on "Fostering of Vocations by the Family and by Religious" (June 21, 1985).

7. In Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977), Justice Powell wrote: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the fam-

While the importance of family stability is well established and generally recognized, various business organizations do not support any of the proposals presently before Congress because a federal parental leave policy would allegedly place unbearable economic burdens on American businesses.[8] As this article will demonstrate, a federally mandated paid parental leave policy is not only necessary but also could be established without causing economic hardship for a substantial number of American companies.

This article will first examine why a parental leave policy is needed.[9] In particular, this article will analyze the changing work force, the changing roles in child rearing, the increase of single-parent families, and the necessity of parental attachment. Next, this article will focus on the necessity of having a federal policy, as opposed to state legislation, or waiting for businesses to initiate such policies on their own or through labor-management bargaining agreements. This article will then explain how such a federal policy is feasible by examining the present proposals before Congress and recommending various amendments. Finally, this article will justify the initiation of a *paid* parental leave policy.

II. Why A Parental Leave Policy is Needed

A. *The Changing Work Force*

The issue of parental leave after childbirth has become a prominent topic in the corporate world because of the dramatic increase in the number of two-parent households in which both parents work. Of the 45.6 million children in two-parent families, more than half have both parents in the

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ily is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." (footnotes omitted).

8. *See* National Federation of Independent Business (NFIB) News Release, "Response to Introduction of Parental Leave Legislation" (Feb. 3, 1987) (John Sloan, President and CEO of the NFIB); Statement of Frances Shaine, Chairman of the Chamber of Commerce's (Chamber) Council of Small Business at a Hearing on S. 249 Before the Subcommittee on Children, Youth, Drugs and Alcoholism of the Senate Labor and Human Resources Committee (Feb. 19, 1987).

9. Although the proposals currently before Congress advocate parental and disability leaves, this article will concentrate on justifying the necessity of a national parental leave policy. This focus in not intended to indicate that a disability leave policy is unimportant, but only that the arguments for and against disability leave are beyond the scope of this discussion.

work force.[10] Women no longer leave the work force to bear and raise children, returning to work after their children have gone to college; rather, women are more inclined to continue working after having a child. Within the last eleven years the proportion of working mothers aged 18 to 44 (the prime childbearing years) has steadily increased.[11] Today, women constitute 44 percent (50 million) of the work force.[12] Forty million are of childbearing age, and 37.2 million will become pregnant during their working lives.[13] According to Professors Sheila B. Kamerman and Alfred J. Kahn of Columbia University's School of Social Work: *"Within the last decade the labor force participation rate for married women with children under one year of age has increased by an astonishing 70 percent!"*[14]

One of the reasons for the dramatic increase in the number of women in the work force is that more women are pursuing professional careers. These women will favorably view the proposals currently before Congress.[15] The majority of women, however, are entering the work force because of economic necessity. Senator Christopher Dodd (D-CT) recognized this fact when he stated: "Two out of every three women working outside of the home today are either the sole providers for their children or have husbands who earn less than $15,000 a year."[16] The proposals currently before Con-

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10. Statement of Mary Del Brady, President, National Association of Women Business Owners, at a Hearing on S. 249 *supra* note 8, at 3.

11. *Parental and Disability Leave, H.R. 2020: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Post Office and Civil Service Comm., and the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Education and Labor Comm.*, 99th Cong., 1st Sess. 26 (October 17, 1985) (statement of Sheila B. Kamerman and Alfred J. Kahn, Professors, Columbia University School of Social Work).

12. H.R. Rep. No. 99-699, Part 2, 99th Cong., 2d Sess. 15 (Aug. 8, 1986); LeGrande, *Women in the Labor Force: Responses to Some Frequent Questions*, Economics Division, Congressional Research Service 1 (1985) (citing the U.S. Bureau of Labor Statistics, Employment and Earnings, 1985).

13. Kamerman and Kahn, "Parental Leave Policies: An Overview" 2, Association of Junior Leagues Report of the Conference on *Parental Leave: Options For Working Parents* (March 1985); Hearing on H.R. 2020, *supra* note 11, at 27 (statement of Kamerman and Kahn).

14. Hearing on H.R. 2020, *supra* note 11, at 27 (statement of Kamerman and Kahn) (emphasis in the original).

15. In fact, opinion polls show that most Americans favor the initiation of a federal parental leave policy. Blankenhorn, *Why Paid Parental Leave Makes Sense*, N.Y. Times, Apr. 7, 1987, at A35, col. 1.

16. 133 Cong. Rec. no. 1, S493 (Jan. 6, 1987).

gress would provide these women with the opportunity to help their families maintain a marginal standard of living in the face of inflation and economic uncertainty.

B. *The Changing Role in Child Rearing*

As more women enter the work force, the validity of traditional parental roles is being re-examined. Presently, only seven percent of families in the United States are comprised along traditional lines, wherein the husband is the sole wage earner and the wife remains at home to care for the children.[17] American society no longer views child care as solely a mother's role. Professor Sylvia A. Law of New York University Law School claims that a strong public interest exists in encouraging fathers to be more involved in the nuturing and care of their children.[18] As a result, corporations are increasingly allowing men to take unpaid parental leaves. Yet, only a few men avail themselves of this unpaid benefit. "Male employees who actually took a significant amount of time off, to actively participate in child care and parenting remain very rare," according to Professors Kamerman and Kahn.[19] Statistics show that many more women than men sought parental leave.[20] Such statistics, however, are questionable due to the widespread historical employment policies granting the leave only to female employees, and the complete loss of income in the majority of situations in which the father took advantage of the unpaid leave period.[21]

Indeed, most corporate supervisors still consider it unreasonable when male employees take unpaid parental leaves regardless of the fact that corporations are increasingly providing these benefits to both men and women.[22] Moreover, not many families in America could afford to allow the father to take a few weeks off from work without some sort of income replacement. If working fathers were compensated for

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17. H.R. Rep. No. 99-699, Part 1, 99th Cong., 2d Sess. 5 (July 21, 1986).

18. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1036. (1984).

19. Hearing on H.R. 2020, *supra* note 11, at 29 (statement of Kamerman and Kahn).

20. Catalyst, *Report on a National Study of Parental Leaves* 37-8 (1986) [hereinafter *Report*].

21. Few businesses provide male employees with paid parental leaves. *Id.* at 26-38.

22. *Id.* at 65-6.

the leave, more men would take a greater part in caring for their young children.[23]

C. *The Increase of Single-Parent Families*

As divorce and illegitimacy increase, the number of children born and reared in single-parent households has risen dramatically in American society. A family can no longer be solely defined as having both a mother and a father. A 1983 Gallup Poll survey reported that one out of every eight children lived in a single-parent home.[24] As of 1984, 8.5 million children under the age of 18 lived in one-parent families.[25] About 90 percent of these children are raised in a household where the single parent is female.[26] The Congressional Budget Office indicated that over half of all children in households with female heads were in poverty in 1981.[27] Consequently, a large number of mothers must work to keep their families above the poverty line. These single parent mothers need job security, since they are often the sole providers of income for their families. The loss of a job due to childbirth or a family illness may be all that is needed to push more single parents into poverty. The proponents of a federal parental leave policy, according to Professor Wendy M. Williams of the Georgetown University Law Center, "are especially concerned with the more than four million women who are single heads of households, for whom, along with their financially precarious families, lack of job protection renders illness a catastrophe."[28] All three proposals would provide single-parents with the opportunity for job security by requiring employers to restore an employee out on parental leave to the position held by the employee when the leave

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23. *See* Hearing on H.R. 2020, *supra* note 11, at 29 (statement of Kamerman and Kahn).

24. *Broken Families: Hearings Before the Subcomm. on Family and Human Services of the Senate Labor and Human Resources Comm.*, 98th Cong., 1st Sess. 13 (March 22 and 24, 1983) (statement of George Gallup, Jr., President of the Gallup Poll).

25. Rich, *One-Parent Families Found to Increase Sharply In The U.S.*, Washington Post, May 15, 1985, at A17, col. 1.

26. *Children, Youth, and Families: Beginning the Assessment: Hearing Before the House Select Comm. on Children, Youth, and Families*, 98th Cong., 1st Sess. 12 (April 28, 1983) (statement of Alice M. Rivlin, Director, Congressional Budget Office).

27. *Id.*

28. Hearing on H.R. 2020, *supra* note 11, at 12 (statement of Wendy W. Williams, Associate Professor of Law, Georgetown Law Center).

commenced or to a position with equivalent benefits, pay, and other terms and conditions of employment.

D. *The Importance of Parental Attachment*

Several prominent physicians and psychologists have accumulated an overwhelming amount of research concerning the importance of the first four months of a child's life.[29] This four-month period is important because that is when the necessary parent-child attachment process is solidified and stabilized.[30] According to Doctors Armand Nicholi, Jr. and Dr. T. Berry Brazelton, both of the Harvard Medical School, parents who do not begin to develop psychological attachments with their child in the four-month period after birth can retard the child's mental development.[31] Admittedly, the quality of the relationship that a child experiences with at least one parent is far more important for the child's overall physical and emotional development than merely the quanitity of time spent with the parent. But when dealing with an infant, a minimum amount of time, regardless of the quality, between parent and infant is critical to the child's psychological development.[32] A close and continuous relationship is essential for the proper development of a child.[33] Conse-

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29. Hearing on Children, Youth, and Families, *supra* note 26, at 144-52 (statement of Dr. Armand Nicholi, Jr., Professor, Harvard Medical School); Hearing on H.R. 2020, *supra* note 11, at 33-46 (statement of Dr. T. Berry Brazelton, Associate Professor of Pediatrics, Harvard Medical School); DR. S. FRAIBERG, EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING (1977); Drs. Edward Zigler and Susan Muenchow, *Infant Day Care and Infant-Care Leaves: A Policy Vacuum*, 38 AMERICAN PSYCHOLOGIST 91 (Jan. 1983); and *The Parental and Medical Leave Act of 1986, H.R. 4300: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Education and Labor Comm.*, 99th Cong., 2d Sess. 27 (Apr.22, 1986) (statement of Dr. Eleanor Stokes Szanton, Executive Director, National Center for Clinical Infant Programs).

30. *See* Hearing on H.R. 2020, *supra* note 29, 35-43 (statement of Brazelton) for an in depth explanation of how parent-child attachment develops. For a short explanation *see* Brazelton, *Getting The Best Child Care - Other Than Mom*, U.S. NEWS & WORLD REPORT 70 (Oct. 21, 1985).

31. Brazelton and Nicholi both provide justifications for selecting the four-month period. *Id.*; Address by Nicholi, The North American Social Science Network Conference (June 14, 1985).

32. Hearing on Children, Youth, and Families, *supra* note 29, at 174 (statement of Nicholi); and Zigler and Brazelton, "Medical/Psychiatric and Child Development Perspective" 5, Association of Junior Leagues Report, *supra* note 13.

33. Address by Dr. Nicholi, *supra* note 31; and Hearing on Children, Youth, and Families, *supra* note 29, at 144 (statement of Nicholi).

quently, while children require nurturing throughout their entire childhood, the formation of psychological attachments in the earliest months of life creates the basis for future cognitive, emotional, social, and physical development.[34]

Children who do not develop psychological attachments are predisposed to a variety of emotional disorders that manifest themselves either immediately or later in their lives.[35] The need for enhancing proper development of parental attachment takes on added significance in light of the probability that in three years 70 percent of all children will have two parents in the work force.[36] If these parents do not have the opportunity to take off from work at the time of their child's birth, the child may not be exposed to the necessary parental attachment process which may cause the child to develop psychological disturbances.[37]

Moreover, if these children fail to attain proper psychological development, society will also suffer because such children are associated with higher rates of drug abuse and juve-

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34. Hearing on H.R. 4300, *supra* note 29, at 28 (statement of Szanton).

35. Nicholi claims that emotionally absent parents, for instance, contribute to many forms of emotional disorder, especially the anger, rebelliousness, low self-esteem, depression, poor academic performace, and antisocial behavior that characterizes drug users. *See* Hearing on Children, Youth, and Families, *supra* note 29, at 147-75 (statement of Nicholi).

36. Hearing on H.R. 2020, *supra* note 29, at 37 (statement of Brazelton).

37. Psychologists differ as to whether an adequate parent substitute has the capacity to synthesize the biological parent-child relationship. Dr. Selma Fraiberg argues that babies who are raised by parent substitutes generally suffer the "diseases of non-attachment" because babies know their parents and prefer them to other people as early as the first weeks of life. *See* EVERY CHILD'S BIRTHRIGHT, *supra* note 29. Assuming that an adequate parent substitute has the capacity to synthesize the biological parent-child relationship, many other problems would still exist. Locating and being able to afford an adequate substitute to provide the necessary warm, sustained, and continuous relationship that an infant needs is one such problem. If parents opt for childcare, then another problem is that quality childcare centers, if any exist, are expensive, with fees ranging between $3,000 to $4,000 a year. Zigler and Muenchow, AMERICAN PSYCHOLOGIST, *supra* note 29, at 91. The majority of parents who cannot afford that amount of money may be forced to rely on substandard facilities. Hearing on H.R. 2020, *supra* note 11, at 70 (statement of Joan Krupa, Chairman of the Public Policy Committee, The Association of Junior Leagues). As Dr. Brazelton noted, "under the present conditions, the choices for childcare for over 50% of working mothers is grossly inadequate. . . . Physical abuse and neglect, as well as even sexual abuse, are inevitable under such conditions." Hearing on H.R. 2020, *supra* note 29, at 44 (statement of Brazelton).

nile delinquency.[38] Therefore, compelling health and societal reasons exist for establishing a parental leave policy.

Admittedly, not all children will be affected in exactly the same way by parental absence. It is possible that a child who is reared in an unstable family environment can grow up to be an emotionally stable and contributing member of society. Nevertheless, the causal connection between many forms of emotional disorders and parental absence cannot be ignored. According to Dr. Nicholi, the debate concerning parental attachment is similar to the controversy surrounding cigarette smoking.[39] An overwhelming amount of data indicates that cigarette smoking leads to cancer, but not every cigarette smoker will get cancer. Although there may be thousands of healthy cigarette smokers, the vast amount of research cannot be ignored. The same holds true for parent-child attachment.[40]

III. WHY PARENTAL LEAVE MUST BE A FEDERAL LAW

A. *Parental Leave in an International Context*

To the extent that parental leave exists in the United States, it does so as a consequence of either state required policies, voluntarily provided employee benefits, or labor-management bargaining agreements. Currently, the United States has no federal law allowing employees the right to take parental leaves from work for specified periods of time. Representative Frank Wolf (R-VA.) expressed his concern when

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38. Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 424 (1983); Hearing on Children, Youth, and Families, *supra* note 29, at 148 (statement of Nicholi).

39. Address by Nicholi, *supra* note 31.

40. Although this article concentrates on the importance of parental attachment, justifications also exist for making parental leave available to an employee to care for a seriously ill or newly adopted child. The need for parents to care for seriously ill children, according to Professor Williams, is "both practical and psychological: Practical because there may be no one else to provide essential care; psychological because in most cases parents can provide far greater psychological comfort and reassurance to seriously ill children than others not so closely tied to the child." Hearing on H.R. 2020, *supra* note 28, at 13. Adoptive parents also need protected leaves "to get to know the new baby and themselves as a family". Hearing on H.R. 2020, *supra* note 29, at 44 (statement of Brazelton). Moreover, many adoption agencies require parents to take a specified amount of leave from their jobs to get acquainted with the newly adopted child, and few employers offer time off for this purpose. Employee Benefit Research Institute, "Child Care Programs and Developments," no. 42, at 10 (May 1985); *Report*, *supra* note 20, at 34.

he stated:

> Congress and our Government have neglected the needs of the American family and we may have forgotten the important role that the family plays in shaping America. In contrast to what may be perceived as America's longstanding disregard for the family institution, the tradition around the world has been to place great emphasis on the family. [41]

Representative Wolf's concern becomes quite clear after examining the parental leave policies of other countries. The proposals before Congress are modest, according to Professor Williams, when compared to the governmental policies of every other industrialized nation in the world.[42] As Professors Kamerman and Kahn, experts on foreign parental leave policies, have noted, every industrialized and many developing countries have policies that provide female and (in most situations) male employees with paid, job-protected leaves at the time of childbirth.[43] "One hundred and thirty five countries provide maternity benefits, 125 with some wage replacement."[44] The United States is the only industrialized country that does not provide national legislation requiring a paid parental leave policy even though, according to Doctors Edward Zigler and Susan Muenchow, two prominent psychologists, this country "has one of the highest rates of female participation in the labor force in the world, and the fastest growing segment of the work force is among mothers of children under age three."[45]

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41. Hearing on Children, Youth, and Families, *supra* note 26, at 7 (statement of Representative Frank Wolf).

42. Hearing on H.R. 2020, *supra* note 28, at 11 (statement of Williams).

43. *See*, Kamerman, *Maternity and Parental Benefits and Leaves: An International Review*, Center for the Social Sciences, Columbia University (1980), for a detailed examination of parental leave policies of other countries. For a brief look at European policies *see* Kamerman and Kahn, *Europe's Innovative Family Policies*, Columbia University School of Social Work (1984); and Hearing on H.R. 2020, *supra* note 11 (statement of Kamerman and Kahn).

44. H.R. Rep., *supra* note 12, at 21.

45. Zigler and Muenchow, AMERICAN PSYCHOLOGIST, *supra* note 29, at 91.

B. *The Inadequacy of Present Federal Law*

The inadequacy of federal law is reflected in the Pregnancy Discrimination Act[46](PDA) which is the only relevant federal law that deals with pregnancy in the work place. In 1978 Congress passed the PDA which amended the definitions portion of Title VII of the 1964 Civil Rights Act to provide that discrimination based on pregnancy is to be considered sex discrimination on its face.[47] The basic principle of the Act is that pregnant women must be treated in the same manner as other disabled employees. When a pregnant employee can no longer work because of her condition, she is entitled to receive whatever benefits the employer accords to other employees who cannot work because of physical disabilities.

The PDA is an antidiscrimination statute that only compels employers not to discriminate against pregnant employees when granting temporary disability benefits. Unlike the parental leave proposals currently before Congress, the PDA does not require employers to provide temporary disability coverage. Employers who do not provide disability benefits are in full compliance with Title VII because their employees are being equally treated. Thus, under the PDA, working mothers are not assured of any benefits at the time of pregnancy or childbirth because employers who do not provide temporary disability plans for other disabilities do not have to provide coverage for pregnancy or childbirth.

C. *The Inadequacy of Existing State Law*

At least fourteen States provide greater benefits to pregnant workers than is required under the PDA.[48] These State

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46. According to the Act: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. sec. 2000e(k)(1982).

47. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

48. California, Hawaii, New Jersey, New York, and Rhode Island currently provide Temporary Disability Insurance (TDI) statutes. *See* Cal. Unemp. Ins. Code §§ 2601 to 3272 (West 1986); Haw. Rev. Stat. §§ 392-1 to 392-101; N.J. Stat. Ann §§ 43:21-25 to 43:21-56; N.Y. Work. Comp. Law § 201(9)(B) (McKinney, Supp. 1987); R.I. Gen. Laws §§ 28-39-1 to 28-39-40 (1986).

statutes and regulations, however, are inadequate for three reasons. First, the various State provisions do not provide sufficient coverage for parental attachment purposes. For example, California, the most progressive state in this area, requires employers subject to Title VII to provide female employees with unpaid, job-protected leaves of up to four months.[49] A female employee can utilize this leave only if an actual physical disability arises from pregnancy, childbirth, or related medical conditions. The California pregnancy disability statute, therefore, does not provide female employees with leaves to care for newborn children. Consequently, if a female single-parent employee experiences no physical disability from pregnancy, childbirth, or related medical conditions, and her employer has no parental leave policy, then she may be unable to take time off from work to develop the necessary psychological attachments with her child.

Second, the statutes and regulations do not provide leaves for male employees. The validity of the California statute has been challenged in Federal Court under Title VII principles which prohibits employers from discriminating on the basis of sex. In *California Federal Savings and Loan Association v. Guerra*,[50] a female employee utilized the California job-protected, pregnancy disability leave. After giving birth she notified her employer, California Federal Savings and Loan (Cal Fed), that she was able to return to work. As a result of her four-month absence, Cal Fed denied her request for reinstatement to the same or comparable job. Cal Fed brought an action seeking a declaration that the statute was inconsistent with and pre-empted by Title VII. The U.S. Supreme Court held that the California statute "is not pre-empted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute, nor

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California, Connecticut, Massachusetts, and Montana provide pregnancy disability or childbirth leave statutes. Cal. Gov't Code § 12945(b)(2) (West 1980); Conn. Gen. Stat. § 46a-60(a)(7) (1985); Mass. Ann. Laws ch. 149, § 105D (Law. Co-op. 1976) and ch. 151B § (4)11A (Law. Co-op., Supp. 1987); Mont. Code Ann. §§ 49-2-310 and 49-2-311 (1986).

The Women's Legal Defense Fund maintains a list outlining states that provide regulations on pregnancy disability and parental leave. According to the list, California, Colorado, Hawaii, Illinois, Kansas, Massachusetts, Montana, New Hampshire, Oregon, and Washington provide such regulations. *See* K. Keegan, Women's Legal Defense Fund Report, "State Fair Employment Laws and Regulations on Pregnancy Disability and Parental Leave" (Oct. 30, 1985).

49. Cal. Gov't Code Ann. § 129459(b)(2) (West 1980).

50. 107 S. Ct. 683 (1987).

does it require the doing of an act which is unlawful under Title VII."[51] The Court reasoned that the PDA was intended to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[52] The Court went on to say that the legislative history of the PDA is devoid of any discussion of preferential treatment for pregnant employees.[53] Accordingly, Title VII, as amended by the PDA, does not prohibit a State from requiring employers to provide more favorable treatment to pregnant workers, regardless of their policies for other disabled workers.

Although the *Guerra* majority failed to recognize the conflict between the California statute and Title VII,[54] State statutes and regulations that provide leaves only to female employees are precarious since employers could avoid the burden of providing the required leaves by simply not hiring women who might become pregnant.[55] The proposals currently before Congress maintain a leave policy that is, on its face, gender-neutral. Such a policy would prevent discrimination in hiring practices by allowing male and female employees to take advantage of the leaves.

The third problem with state laws is that the scope and basic leave provisions of the statutes and regulations vary from state to state. Some states do not provide employees with the minimum four-month period that physicians and psychologists claim is necessary. For instance, Massachusetts provides a pregnant employee with a two-month leave period.[56] The period of time provided to employees, due to the importance of the psychological attachment process, is one issue that requires a minimum standard. Federal legislation, by

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51. *Id.* at 695.

52. *Id.* at 692.

53. *Id.* at 692. Justice White, writing for the dissent, disagreed and cited the plain statements in the legislative history which indicated that equality of treatment was the guiding principle of the PDA. *Id.* at 699-700 (quoting Senator Brooke's statement at 123 Cong. Rec. 29664, 1977). Justice White claimed that the language of the PDA clearly "leaves no room for preferential treatment of pregnant workers." 107 S. Ct. at 698. Since California requires employers to have disability leave policies only for pregnant workers, the dissent concludes that the statute, on its face, conflicts with the PDA and is therefore pre-empted. Title VII principles, according to the dissent, requires all temporary disabled employees to receive the same benefits.

54. *See id.*, Justice White's dissenting opinion in *Guerra*.

55. Law, *supra* note 18, at 1031.

56. Keegan, Women's Legal Defense Fund Report, *supra* note 48.

requiring all affected employers to provide a basic four-month parental leave period, would provide such a standard. Indeed, states would still have the option of providing greater protection to working parents than the rights that would be established pursuant to the federal bills, since all three bills would not supersede any state laws.[57] While Congress recognizes the importance of state efforts, Congress has a history of enacting labor laws that established minimum requirements when important social values necessitated the protection of all workers.

D. *The Inadequacy of Current Employer Policies*

Most American workers are dependent upon employer provided benefit plans. Companies establish these plans on their own initiative or through bargaining processes. Admittedly, if employers are providing adequate coverage, then a federal parental leave policy is not needed. Employer initiated policies will therefore be examined before turning to the bargaining issue.

Catalyst, a nonprofit organization which affirms a dedication to increasing employee productivity by resolving career and family problems, conducted a national survey in 1984 of the parental leave policies of 1,462 companies.[58] Of the companies contacted, 384 responded to the questionnaire. The companies surveyed were chosen from the leading 1000 industrial and 500 financial service companies.

The size of a company and its annual sales are two factors that affect employee benefits. Indeed, the smaller the business, the less likely it can afford employee benefits.[59] Of the companies surveyed, 233 reported annual sales of over $500 million while 314 employed over 1,000 workers. These participation statistics indicate that the survey is biased towards large firms.[60] Consequently, the large majority of

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57. H.R. 284 § 501(b); H.R. 925 § 401(b); S. 249 § 401(b).

58. Unless otherwise indicated, all statistics in this section are from Catalyst's final report which outlined the major findings of the survey. *Report, supra* note 20.

59. Hearing on H.R. 4300, *supra* note 29, at 64 (statement of Susan Hager, a member of the U.S. Chamber of Commerce's Council of Small Business); Bernard Hobes Advertising, *Survey of U.S. Companies' Maternity, Paternity and Childcare Policies* 7 (1985); Hearing on H.R. 2020, *supra* note 11, at 28-30 (statement of Kamerman and Kahn).

60. The biased nature of the survey is further indicated by the fact that 129 of the respondents reported sales in excess of $2 billion while 126 of the companies employed over 9,500 workers. The final report indicated

American companies not included in the Catalyst survey are likely to provide less benefits than the leading industrial and financial service companies.

According to the survey, 95 percent of the companies provided employees with short-term paid disability leaves with guarantees of either the same or comparable jobs upon return to work. While this figure seems high, one must remember that the PDA requires pregnant employees to receive the same benefits accorded to any other disabled employee. Moreover, a companion survey of small and medium sized companies found that less than 40 percent of all women who worked for such companies received similar temporary disability leaves.[61] For pregnant employees, the disability leave period generally spanned eight weeks, two weeks prior to and six weeks following delivery when a woman is considered physically disabled due to her condition. Almost all of the Catalyst respondents (96.2 percent) provided some compensation to disabled employees out on leaves. The amount of money that an employee received generally varied according to the length of service and job rank. Compensation included not only salary replacement but a continuation of benefits during the disability period. Most of the corporations surveyed (90.2 percent) continued to provide the leave taker with full benefits.

Catalyst's final report does not contain any statistics on the number of companies that provided paid parental leaves as defined in this article.[62] Catalyst's preliminary report, however, indicated that few companies offered paid leaves to new parents other than paid disability leaves provided to women for childbirth purposes.[63] This suggests that paid leaves are confined to employees who are disabled. One might further conclude that if the companies surveyed are not providing employees with paid parental leaves, then the majority of smaller American companies also are not providing employees with paid parental leaves.[64]

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that the nation's largest businesses, the focus of the survey, were much more likely to offer a greater variety of leaves than smaller businesses. Catalyst, *Report*, *supra* note 58, at 14.

61. H.R. Rep., *supra* note 12, at 20 (Quoting from a 1981 survey conducted by Professors Kamerman and Kahn of Columbia University's School of Social Work).

62. *See supra* note 2.

63. Catalyst, *Preliminary Report on a Nationwide Survey of Maternity/Parental Leaves* 3 (1984) [hereinafter *Preliminary Report*].

64. *See supra* notes 59 and 60.

Half of the responding companies offered employees unpaid leaves in addition to disability leaves. Female employees who gave birth generally utilized unpaid leaves after the disability period ended. Half of the respondents continued to provide the leave taker with full benefits while the other half required employees to pay all or part of the premiums to continue benefits during the leave period. All of the companies that provided unpaid leaves also provided job guarantees. Although more companies offered unpaid leaves to women than to men, the number of companies that included men in their unpaid leave policy is clearly increasing. Of the companies surveyed, 170 provided female employees with unpaid leaves while 119 provided male employees with the opportunity to take unpaid leaves.[65] The most common length of time provided by employers is eight to twelve weeks for female workers and one to four weeks for male workers.[66] The difference in the number of companies which offered leaves of up to twenty-four weeks to both men and women is insubstantial. The duration of the leaves was almost certainly affected by the fact that such leaves are unpaid, and most employees could not afford to stay away from work for an extended period of time without compensation.

Catalyst's final report concludes by noting that companies are not implementing sufficient benefits to meet the needs of working parents. Professors Kamerman and Kahn described the leave policies of the leading 1000 industrial and 500 financial service companies as "astonishingly limited."[67] And for the millions of American workers who are not employed by the leading industrial and financial service companies, the availibility of parental leave policies is even more limited.

E. *The Inadequacy of the Collective and Individual Bargaining Process*

Parental leave is a mandatory subject of bargaining.[68] That an issue is a mandatory subject of bargaining, however,

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65. *Preliminary Report, supra* note 63, at 4.

66. *Id.*

67. Hearing on H.R. 2020, *supra* note 11, at 29 (statement of Kamerman and Kahn).

68. *See* National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958) (Holding that conditions of employment are mandatory subjects of bargaining); and National Labor Relations Board v. Katz, 369 U.S. 736 (1962) (Holding that leaves of absence

does not mean that any particular solution will be implemented; rather, it only means that the issue must be negotiated in good faith.[69] Granted, employees that are representated by unions are more likely to receive parental leave benefits than non-union employees (55 percent versus 33 percent for non-union workers).[70] A large majority of American workers, however, would be unrepresented when bargaining for this issue since only 17.9 percent of the work force is unionized.[71] An even smaller percentage of women are represented by unions.[72] Since union membership among men and women continues to decline, any improvement in the leave policies available to most workers would be less likely to be the result of collective bargaining.[73] Moreover, union negotiations have not been very effective in getting parental leaves for union employees. According to Catalyst's final report, of the corporate respondents that modified their parental leave policies within the past five years, only 4.5 percent cited union negotiations as the impetus for change, whereas 87.7 percent cited enactment of the PDA as the reason for the change.[74] For the unions that have obtained greater benefits than those that would be provided under the current parental leave proposals, companies would still be required to comply with such collective bargaining agreements.[75] The benefits that would be provided to employees under all three proposals, however, could not be diminished by collective bargaining agreements.[76]

Parental leave should not be left to individual bargaining because such bargaining would result in unequal and arbi-

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from work are considered conditions of employment). While neither case mentions parental leave specifically, such leave is a condition of employment.

69. If the parties cannot reach an agreement after exhaustive good faith negotiations, the law recognizes an impasse which allows the employer to unilaterally solve the mandatory bargaining issue. 1 THE DEVELOPING LABOR LAW 634 (C. Morris, A. Bioff, B. King, L. Cohen, C. Powell III eds. 2d ed. 1983).

70. Statement of James T. Bond, Director, National Council of Jewish Women, at 7, at a Hearing on S. 249 *supra* note 8.

71. The Bureau of National Affairs, Inc., DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1984-1985 edition, at 2.

72. Congressional Staffs of Representatives Clay and Schroeder, and Senator Dodd, Briefing Paper on "The Family and Medical Leave Act: H.R. 925 - S. 249" 7 (Mar. 5, 1987).

73. Hearing on S. 249, *supra* note 70 (statement of Bond).

74. *Report, supra* note 20, at 35.

75. H.R. 284 § 502(a); H.R. 925 § 402(a); and S. 249 § 402(a).

76. H.R. 284 § 502(b); H.R. 925 § 402(b); and S. 249 § (402(b).

trary treatment. Employees who are replaceable have little bargaining power against a business. An employer who does not want to be bothered with the inconveniences that an absent worker would create can very easily replace an employee who asks for leave time for child care purposes. Individual bargaining would only help those very few, if any, employees that are considered irreplaceable. Furthermore, employers would have a tendency to arbitrarily favor certain employees over others, since many personal factors would come into play when deciding to allow an employee to take leave. For example, an employer might determine to provide a leave period for an employee because the employee is white as opposed to black, male as opposed to female, a Democrat as opposed to a Republican. Employees in this situation must rely on the goodwill of their supervisor to get parental leave benefits. According to Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project, leaving the healthy development of children and families to the mercy of individual employers is not an appropriate response to the vital needs of this nation's families.[77]

IV. A Federal Parental Leave Policy is Feasible

A. *Present Proposals Before Congress*

As stated earlier, three similar legislative proposals dealing with parental leave were introduced in Congress in 1987. Representative Marge Roukema (R-NJ) introduced H.R. 284 in the House on January 6, 1987, while Representatives William Clay (D-MO) and Patricia Schroeder (D-CO) introduced H.R. 925 on February 3, 1987.[78] In the Senate, Senators Christopher Dodd (D-CT) and Arlen Specter introduced S. 249 on January 6, 1987.[79] All three bills would provide job-protected leaves to allow employees to care for newborn, newly adopted, or seriously ill children. The predominant bill is H.R. 925. The pertinent sections of that bill are summarized below:

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77. Statement of Meryl Frank, Director of the Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy, at 4, at a Hearing on S. 249, *supra* note 8.

78. *See supra* note 1.

79. *Id.*

TITLE I

SECTION 103. PARENTAL LEAVE REQUIREMENT

Employers who employ fifteen or more workers must provide eligible employees with a total of eighteen workweeks of parental leave[80]during any two year period.[81] An eligible employee is one who has worked for the employer from whom benefits are sought for at least three consecutive months or five hundred hours.[82] Parental leave allows an employee to take off from work for the birth or adoption of a child, or to care for a seriously ill child or parent.[83] An employee can only utilize parental leave if the employee's newly adopted or seriously ill child is under eighteen years of age or is incapable of self-care due to a mental or physical disability.[84] Serious illness means a physical or mental condition which involves inpatient care in a hospital, hospice, or residential health care facility or continuing treatment by a health care provider.

Whenever an employee plans to utilize a leave period for

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80. Since the term "parental" leave was used in all of the earlier proposals that came before Congress, the term "family" leave as found in H.R. 925 and H.R. 284 is considered synonymous for the purpose of this article.

81. Representative Roukema's bill, H.R. 284, applies to employers who employ fifty or more workers, and allows eligible employees with a total of eight workweeks of unpaid parental leave. If the husband and wife work for the same company, the aggregate number of workweeks of parental leave both may take cannot exceed eight workweeks. However, where a female employee takes leave because of the birth of her child, the first three weeks after birth are automatically deemed medical leave. An additional period of medical leave is permitted with doctor's certification if the employee is incapable of caring for the child due to a serious health condition. This medical leave period is in addition to parental leave.

82. Representative Roukema's bill only allows full-time employees who have worked for the employer for at least one year to be considered eligible for parental leave. Moreover, during any period in which the able-bodied spouse of an employee provides at-home care for a child or parent, such employee is ineligible for parental leave.

On the other hand, Senator Dodd's proposal, S. 249, applies to all employees, including permanent part-time employees.

83. Senator Dodd's bill does not allow an employee to take off from work to care for the employee's seriously ill parent.

84. Senator Dodd's proposal allows parental leave to care for a newly adopted or seriously ill child only if the child is under eighteen years of age.

Representative Roukema's bill allows an employee to utilize parental leave for the adoption of a child only if the child is not of legal school age or has not begun attending a regular elementary school.

an expected birth or adoption, that employee must provide reasonable and practicable notice to the employer. Whenever an employee plans to utilize a leave period for planned medical treatment of the employee's child or parent, that employee must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's business. The employee must also provide reasonable and practicable notice of the treatment to the employer.

Parental leave may be taken on a reduced leave schedule as long as the total length of leave does not exceed thirty-six consecutive workweeks. The term "reduced leave schedule" means leave scheduled for fewer than an employee's usual number of hours per workweek or hours per workday. The reduced leave, however, must be scheduled so as not to unduly disrupt the operations of the employer.

SECTION 106. CERTIFICATION

An employer may require that a claim for parental leave to care for a seriously ill child or parent be verified by the health care provider. Such certification is sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, and the medical facts regarding the condition.

SECTION 107. EMPLOYMENT AND BENEFITS PROTECTION

An employee who utilizes parental leave is, upon expiration of such leave, to be restored to the position held by the employee when the leave commenced or to a position with equivalent benefits, pay, and other terms and conditions of employment.[85] A restored employee must not lose any benefits that accrued prior to the leave. An employer must maintain the health benefits of an employee for the duration of the leave at the same level which such benefits would have been maintained had the employee not taken the leave.

TITLE III

Congress must establish a commission to study and recommend, within two years after the date on which the com-

85. Representative Roukema's bill allows an employer to deny reinstatement to any employee who is among the highest paid 20 percent of the employees if necessary to prevent substantial injury to the company's operations.

mission first meets, methods for implementing a system of partial or full salary replacement for employees utilizing family leave.[86]

B. *Relative Merits of a Federal Parental Leave Policy*

Due to the changing work force and the changing roles in child rearing, what were regarded as women's problems and needs are now being perceived as problems and needs of the whole family, as well as problems and needs of society. For example, companies that provide inadequate leave time force most female employees to return to work before they are rested and ready. This may be more deleterious to productivity than policies that provide longer leaves.[87] Once parents are provided with adequate time to foster psychological attachments with their children, the return to work is likely to be easier for both parents and children.[88] Consequently, a parental leave policy would reduce the conflicts between work and home, thus allowing employees to be more productive. Inadequate leave time, therefore, could adversely impact productivity as well as the psychological development of a child. Either result negatively effects society.

Policies that assist working mothers and fathers in coping with their dual roles of employee and parent are crucial, since the family is the primary place in which moral norms and values are learned and practiced. As Pope John Paul II said:

> In the conviction that the good of the family is an indispensable and essential value of the civil community, the public authorities must do everything possible to ensure that families have all those aids—economic, social, educational, political, and cultural assistance—that they need in order to face all their responsibilities in a human way.[89]

The government should therefore promote legislation that advances the interests of the family. A federal parental leave

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86. Although Representative Roukema's bill does not establish a commission to recommend methods for implementing a paid family leave policy, it does establish a task force to study the feasibility of applying this bill to employers who employ fifty or *less* workers. The task force would report to Congress within two years afte this bill is enacted.

87. Catalyst, *The Corporate Guide to Parental Leaves* 25 (1986).

88. Hearing on H.R. 4300, *supra* note 29, at 28 (statement of Szanton).

89. *Familiaris Consortio*, *supra* note 4, at no. 111.

policy is designed to promote the family unit. A society has a paramount interest in ensuring that the family unit be preserved so that children be given the opportunity to develop into responsible, productive citizens.[90]

Virginia Lamp, a labor-relations attorney for the Chamber of Commerce, stated that a federal parental leave policy has the superficial appeal of being pro-family legislation.[91] She has argued that the impact of such a policy would lead to economic suicide for a substantial number of small companies which are already struggling to survive.[92] The Chamber's Council of Small Business claims that a federal parental leave policy would not advance family interests because it would be costly and difficult to carry out, and would represent "a serious and substantial threat to businesses' ability to grow, compete, and create jobs . . . ."[93]

Although every new labor law that has been enacted was generally met with similar complaints and criticisms,[94] the Chamber's arguments have some merit. The costs associated

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90. In Santosky v. Kramer, 455 U.S. 745, 790 (1982), Justice Rehnquist, in disent, wrote:

> Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. Thus, the whole community has an interest that children be . . . given opportunities for growth into free and independent well-developed . . . citizens. (footnotes omitted).

91. Benesch, *Debate Looms on Liberalizing Leave for Workers*, Washington Post, July 10, 1986, at A21, col. 2. The Chamber of Commerce claims to be the principal spokesman for the American business community, representing over 180,000 companies. More than 91 percent of the Chamber's members are small business firms with fewer than 100 employees, 57 percent with fewer than 10 employees. The Chamber of Commerce generally opposes new demands on employers, especially mandating employee benefits that are not connected to job-related injuries.

92. Telephone conversation with Virginia Lamp (May 28, 1986).

93. Hearing on H.R. 4300, *supra* note 59, at 62-66 (statement of Hager).

94. For instance, in 1978, the Chamber opposed the PDA on the basis that it would create monumental costs and cause employers with a large proportion of female employees to drop their disability plans entirely. Opening statement of Chairman Christopher J. Dodd at a Hearing on S. 249 *supra* note 8. Ironically, the Chamber now supports the PDA, claiming that it is fair legislation which sufficiently provides working parents with adequate protection. Hearing on H.R. 4300, *supra* note 59, at 63-64 (statement of Hager).

with continuing the leave taker's health benefits for four months and the lower productivity that would result from replacing the leave taker would be "especially damaging" to this Nation's 14 million small companies.[95] Moreover, in some situations an employer would have to hire temporary help to cover the loss of the employee out on leave. The employer, therefore, would have to absorb double expenditures (continuing the leave taker's health benefits and paying the temporary employee) while productivity decreases. The Chamber estimated that S. 249, as currently written, would cost the economy and employers $27.2 billion while the unpaid parental leave provision would cost $16.2 billion a year.[96] Increased payroll expenses would account for nearly 60 percent of the estimated $16.2 billion while the projection of reduced productivity would account for another $5.5 billion.[97]

Admittedly, society would not be better off if the majority of small businesses were forced to close down. The Chamber's estimates, however, have been sharply attacked. William J. Gainer, Associate Director of the General Accounting Office's Human Resources Division, criticized the Chamber's unrealistic assumptions underlying the estimates.[98] David Blankenhorn, Director of the Institute for American Values, claimed that the Chamber "greatly overstates the alleged costs to business . . . ."[99] Blankenhorn argues that the absence of a parental leave policy forces some mothers to quit their jobs after childbirth which could cost the company more money in hiring and training expenses than paying for the temporary help.[100] In the report accompanying the passage of H.R. 4300, the Committee found that "[t]he expense of securing temporary replacements is more than offset by the savings realized by retaining the services and commitment of trained employees."[101] Karen Nussbaum, President

95. Hearing on H.R. 4300, *supra* note 29, at 70 (Letter of Frank S. Swain, Chief Counsel for Advocacy, U.S. Small Business Administration, to the Honorable Augustus F. Hawkins, Chairman of the House Comm. on Education and Labor, April 21, 1986).

96. Statement of Shaine, *supra* note 8, at 9; and Blankenhorn, *supra* note 15, at A35, col. 1. In March, the Chamber lowered the $16.2 billion estimate to $5.2 billion. Greenhouse, *Cost Figures Vary on Parents' Leave*, N.Y. Times, Apr. 26, 1987, at A13, col. 4.

97. Blankenhorn, *supra* note 15, at A35, col. 2.

98. Greenhouse, *supra* note 96, at A13, col. 4.

99. Blankenhorn, *supra* note 15, at A35, cols. 1-2.

100. *Id.* col. 2.

101. H.R. Rep., *supra* note 12, at 26-27.

of District 925, Service Employees International Union, described the Chamber's estimates as "grossly inflated," and she strongly challenged the claim that unpaid parental leave would bankrupt a majority of small businesses.[102]

While the opponents and proponents of a federal parental leave policy could argue indefinitely without reaching an agreement on the costs associated with such a policy, one thing is certain: Any proposal similar to H.R. 925 must be made practical from a business perspective or the powerful business lobbyists will make sure that it dies in committee. Family stability is not promoted if a parental leave act has no chance of becoming law. The essence of H.R. 925, which promotes economic security for families by guaranteeng jobs to wage earners who take a period of leave upon the birth of a child, should be maintained. But certain business concerns must be considered before trying to enact this type of a proposal. The economic impact of a federal parental leave policy must be mitigated as much as possible while keeping the policy's purposes intact.

C. *Amendments to the Present Proposals*

Four amendments can mitigate the economic impact that such a proposal would have on small businesses. Although these amendments seem contrary to the arguments espoused above that favor the initiation of a federal parental leave policy, they would make such a policy possible in the first place. Indeed, a conflict arises between ethical and economic considerations: No child or family should suffer because of an economic efficiency justification. But the present proposals are not economically feasible and therefore family interests would suffer a greater blow if small businessses were forced to close down. Small businesses employ 49 percent of the labor force, and last year, 65,000 small businesses failed.[103] People need jobs before they can start worrying about benefits. The proposed amendments balance the needs and interests of working parents with the needs and interests of American businesses. More importantly, the amendments still advance the needs and interests of children, as well as society, by providing working parents with the opportunity to supply their children with stable and loving homes.

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102. Statement of Karen Nussbaum, President of District 925, Service Employees International Union, at 7-8, at a Hearing on S. 249, *supra* note 8.

103. H.R. Rep., *supra* note 12, at 56.

EXEMPTING SMALL BUSINESSES

The first amendment to enhance the political prospects of a federal parental leave act would attempt to discern the true effect of such legislation on small businesses. Senators Dodd and Specter asked the General Accounting Office to resolve the dispute by preparing a report on the economic impact of a federal parental leave policy. The first amendment would go a little bit further by establishing a task force, as H.R. 284 would, to study the effects, including costs, of such legislation on businesses. Ultimately, the task force would establish a permanent employer exemption figure that would not be unreasonably burdensome to small businesses. In the interim, the amendment would provide that the federal proposal would exempt companies that employ twenty-four or less workers, making the bill inapplicable to those companies. Establishing an interim exemption figure at twenty-four would exclude 30.3 percent of the labor force.[104] Once the task force concludes its study, the interim exemption figure would be accordingly decreased or increased.

The proponents of a parental leave policy acknowledge the need for an exemption provision. While the first parental leave bill introduced in Congress, H.R. 2020, had no such provision, the second parental leave bill, H.R. 4300, would exempt businesses that employ four or less workers. Frank S. Swain, Chief Counsel for Advocacy, U.S. Small Business Administration, described that exemption figure as "ridiculously low."[105] Subsequently, H.R. 925 increased the small business exemption figure to fifteen. Establishing the exemption figure at fifteen would exclude 22 percent of the work force from the provisions of H.R. 925.[106] Fifteen is the current Equal Employment Opportunity Commission (EEOC) guideline that is used to limit other federal business related statutes which established employee rights. Using current EEOC guidelines is commendable, but with the lack of information on how a federal parental leave policy effects small businesses, fifteen is too small. Frank Toti, Legislative Representative for the NFIB, stated that between 70 to 80 percent of the NFIB's 500,000 members could not overcome the eco-

104. Briefing Paper, *supra* note 72, at 6 (Quoting from the Small Business Administration using 1983 Census Bureau data).

105. Hearing on H.R. 4300, *supra* note 95, at 71 (Letter of Swain).

106. Statement of Cheryle W. Mitvalsky, member of the Board of Directors at the Association of Junior Leagues, at 12, at a Hearing on S. 249, *supra* note 8.

nomic impact of a federal parental leave policy that set the exemption figure at fifteen.[107] Representative Roukema's proposal, H.R. 284, set an interim exemption figure at fifty employees. That figure would exempt about 42 percent of the work force which is too high.[108]

LONGER LENGTH-OF-SERVICE REQUIREMENT

The second amendment would incorporate a longer length-of-service requirement into this type of a proposal.[109] H.R. 925 would impose a three-month or 500 hour requirement before an employee could utilize parental leave. That requirement should be increased to one year, as H.R. 284 maintains. Being with a company for at least a year seems like a reasonable guideline to determine initial eligibility. Before an employee is allowed to take advantage of parental leave

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107. Telephone conversations with Frank Toti, Legislative Representative for the NFIB (June 28, 1985 and May 28, 1986). The NFIB represents more than a half-million small and independent-business owners. Although the NFIB does not support any of the proposals currently before Congress, Toti claimed that the NFIB could tolerate an exemption provision that would make the parental leave policy inapplicable to employers who employ 100 or less workers. Telephone conversation with Toti (May 28, 1986). That exemption figure would exclude 98 percent of the employers in the United States as well as 55 percent of the work force (40 percent being women). H.R. Rep., *supra* note 12, at 50; Statement of Brady, *supra* note 10, at 4.

108. Greenhouse, *Momentum and 'Family Leave'*, N.Y. Times, Feb. 3, 1987, at A18, col. 4.

109. *Compare* Miller-Wohl Co. v. Commissioner of Labor and Industry, 692 P.2d 1243 (1984), where the Montana Supreme Court struck down an employer's facially neutral length-of-service requirement. In that case, Miller-Wohl had a policy of no leave of absence to any disabled employee until the end of the first year of employment. Miller-Wohl fired a pregnant employee who had been hired twenty-six days earlier. Allowing this employee a leave of absence, argued Miller-Wohl, would violate Title VII of the 1964 Civil Rights Act because pregnant employees who did not meet the one year requirement would be treated differently than all other disabled employees. The Montana Court held that Miller-Whol's policy violated the Montana Maternity Leave Act which made it unlawful for an employer to terminate a woman's employment because of her pregnancy. *See* section 49-2-310, MCA (1983). The Court, however, noted that the suit was not initiated because of Miller-Wohl's refusal to provide the employee pregnancy leave; rather, the suit was initiated because Miller-Wohl fired the pregnant employee. 109 P.2d at 1251.

Miller-Wohl would have no affect on a federal parental leave policy that has a length-of-service requirement because the Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI.

benefits, that employee should establish a commitment to his or her job. An employer would be more willing to keep a position available for an employee who has established his or her value and dedication to the company. Under the broad coverage of S. 249, Senator Dodd's proposal, a new employee would be automatically eligible for the mandated benefits. Automatic eligibility allows an employee to take advantage of the leave period before the employer is assured that he or she had hired a reliable worker to meet the company's needs.

Excluding Part-time Employees

Senator Dodd's proposal applies to permanent part-time employees. Companies generally do not provide permanent part-time employees with the same benefits that are accorded to full-time employees.[110] Moreover, a part-time employee could satisfy the three-month or 500 hour requirement of H.R. 925. The third amendment, consistent with H.R. 284, would provide parental leave only to full-time employees. Part-time workers already have some spare time to spend with their children. Some limitations are necessary if a company is to survive the double expenditures described above. Besides, having a federal parental leave policy available only to full-time employees is better than not having one at all.

Limits for "Company families"

Similar to H.R. 284, the fourth amendment would specify that parents who work for the same company would be unable to simultaneously utilize the parental leave period. Either the mother or father would be entitled to take the leave. This requirement may be considered inequitable to parents who work for the same ccompany, but one employer should not have to bear the full responsibility of losing two employees who decide to have children. If a working couple decides to have a child, they should shoulder most of the responsibility of parenting that lies ahead. The parents, however, would be permitted to split the leave, if they so desire. For example, the mother could take off for the first ten workweeks with the father taking off the remaining workweeks.

These amendments would keep the purposes of the federal proposals intact while addressing the needs and concerns of American businesses. The business perspective must be taken into consideration whenever legislation like H.R. 925 is

110. *Report, supra* note 20, at 33.

being formulated, especially since small companies create the largest percentage, 70 to 80 percent, of all new jobs in this country.[111] Although the amendments would mitigate the economic impact of a federal parental leave policy, business opposition to the initiation of a paid leave policy would still be strenuous due to the ultimate costs that a paid leave would impose upon businesses.

D. *The Necessity of Establishing a Paid Policy*

The Chamber estimates that *full* salary replacement for workers on parental leave and short-term disability benefits could cost employers $75.6 billion.[112] An employer would have to pay the leave-taker and continue his or her health benefits, as well as the salary and benefits of a replacement worker while probably losing productivity caused by having a substitute worker. Susan Hager, a member of the Chamber's Council of Small Business, argues that "paid leave would have devastating national economic consequences."[113]

However, if the parental leave policy is unpaid, then only those couples who are econically well-off could afford to take advantage of unpaid leaves. A parental leave policy that proposes unpaid leaves would be designed for upper middle class families. Most working parents in America could not afford to use leave periods unless they receive some income replacement. The importance of providing a paid leave policy cannot be overlooked because women in low-income and single-parent families, due to the absence of paid parental leaves, are forced to return to work too soon after giving birth. This could be dangerous not only for the physical and emotional well-being of the mother (which could adversely effect productivity), but also for the psychological development of the child.[114] As John Stuart Mill wrote in his essay *On Liberty*: "[t]he worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their* mental expansion and elevation . . . will find that with small men no great thing can really be accomplished."[115] Moreover, a paid parental leave policy would

111. NFIB News Release, *supra* note 8, at 2.
112. Statement of Shaine, *supra* note 8, at 9.
113. Hearing on H.R. 4300, *supra* note 59, at 66 (statement of Hager).
114. Hearing on H.R. 2020, *supra* note 37, at 70 (statement of Krupa); and *Report*, *supra* note 20, at 61.
115. J.S. MILL, ON LIBERTY 187 (G. Himmelfarb ed. 1984).

provide single parents with the opportunity to maintain their family's economic means, thus benefitting society by keeping single-parent families above the poverty line and off of welfare services. Some financial protection, therefore, is needed to assist low-income and single-parent families as well as benefit society.

A properly planned paid leave system could be initiated without unreasonably burdening a company's financial position and without leading to devastating national economic consequences. Indeed, the proponents of a federal parental leave policy recognize the necessity to move with caution before requiring employers to provide employees with paid leaves. H.R. 925 would establish a Congressional Commission to study and recommend methods to provide income replacement for employees utilizing a leave period. Representatives of different sized businesses should be appointed to the Commission so that an equitable system could be initiated. Adoption of the four amendments suggested above would likely answer many of the concerns of business managers. Further, employers could limit their expenses by rerouting work to other employees or save some precious time in locating temporary help by establishing a working relationship with agencies that specialize in providing temporary workers. Companies could even recruit temporary help directly to avoid the costs of placement agencies. Moreover, the presence of an advance notice requirement, which all three proposals would impose upon the worker, would allow employers to minimize disruptions and effectively manage the loss in productivity.[116]

Although it is beyond the scope of this article to examine every way in which an equitable paid leave system could be established, a number of different examples for financing parental leaves are evident from paid leave programs in other countries.[117] The Commission could also study the feasibility of creating a national temporary disability insurance policy. At least five States require employers to provide temporary disability insurance (TDI) policies.[118] These statutes require employers to provide partial wage replacement, usually taken from employee/employer contributions, to all employees who become temporarily disabled due to non-work related injuries. TDI plans usually pay the disabled worker about half of his or her wage for a period not exceeding 26 weeks (52 in

116. *Report, supra* note 20, at 48-51.
117. *See supra* note 43.
118. *See supra* note 48.

California).[119] In the report accompanying the passage of H.R. 4300, the Committee found that the State TDI policies have proven to be both successful and cost-effective wage replacement for workers who are unable to perform their jobs due to non-work related medical reasons.[120]

An employee should *not* receive full salary replacement while out on leave; rather, some type of a pro-rata system, similar to the TDI plans, should be established. The more money that an employee makes, the less money that the employee should receive during the leave period. For example, an employee who gets paid $200 per week may receive $175 per week during the leave period, while an employee who gets paid $400 per week may receive $200 per week during the leave period. Although the above example is vague, some type of a pro-rata system can be implemented without leading to devastating national economic consequences. The proposed Congressional Commission can establish an acceptable percentage relationship between an employee's salary and the amount of income replacement that would be accorded to the leave taker. This percentage system would benefit those low-income and single-parent families who most need financial protection during a leave period.[121]

Whatever method the Congressional Commission would recommend, it should be noted that working parents, due to career demands or the financial costs of having a large family, are increasingly deciding to have fewer children.[122] As Professor Williams has stated: "The typical wage earning woman in this country will have two children while in the workforce. Over the course of a working lifetime, the leave time associated with caring for those two infants is small indeed, particularly when the benefits to family and society are weighed in the balance."[123] In the context of an employee's career, this type of a benefit could be less costly than other

119. Hearing on H.R. 2020, *supra* note 11, at 28 (statement of Kamerman and Kahn); and Cal. Unemp. Ins. Code § 2653 (West 1986).

120. H.R. Rep. No. 99-699, *supra* note 12, at 19.

121. This type of a distribution system should withstand an equal protection challenge. Any such challenge should not trigger a strict scrutiny standard of review because wealth is not considered a suspect classification. *See* James v. Valtierra, 402 U.S. 137 (1971). Rather, a rational basis standard of review should be used and this standard carries a heavy presumption of constitutionality.

122. *See* Conant, Underwood, and Rotenberek, *Three's a Crowd*, NEWSWEEK 68 (Sept. 1, 1986).

123. Hearing on H.R. 2020, *supra* note 28, at 13 (statement of Williams).

employment benefits like dental or medical benefits. As Doctors Zigler and Muenchow point out: "[s]ubsidizing two eighteen-week leaves per family is not a very large amount of time when one considers that women, like men, have approximately a 45-year work span."[124]

V. CONCLUSION

As Frances Shaine, Chairman of the Chamber's Council of Small Business, noted: "Legislation will not create responsible, caring parents."[125] Admittedly, the government cannot force parents to develop psychological attachments with their children. Some parents, unfortunately, may abuse the parental leave policy by using the time off for purposes other than parental attachment. Nonetheless, a federal parental leave policy would allow a parent to be with his or her newborn child for the critical four-month period so that parent-child attachment can be established. A simple fact that must be acknowledged is that a large majority of parents, and especially the single-parent, are unable to take time off from work after childbirth due to economic necessity. A federal parental leave policy would therefore provide working parents with the opportunity to become responsible, caring parents. It would promote the development of healthy parent-infant relationships.

Who suffers if a mother is forced to return to work shortly after giving birth because her job or the state she resides in does not provide a parental leave policy? The parent may suffer physically and psychologically because of the excessive strains placed upon her in trying to manage job responsibilities with parental responsibilities. The child may very well suffer because he or she will not be exposed to the necessary parental attachment so as to attain proper psychological development. But the suffering does not end with the mother and the child. Society may also feel the impact of the mother who is forced to return to work too soon after giving birth. Society may suffer short-term consequences by realizing a significant loss in productivity because the excessve strains placed upon the employee-mother could lead to poor work performance, and long-term consequences because her child, who is predisposed to a variety of emotional disorders,

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124. Zigler and Muenchow, AMERICAN PSYCHOLOGIST, *supra* note 29, at 94.

125. Statement of Shaine, *supra* note 8, at 3.

may never become a productive member of society. According to Professors Kamerman and Kahn, "[u]nless it is possible for adults to manage their work and family lives without undue strain on themselves and their children, society will suffer a significant loss in productivity, and an even more significant loss in the quantity and quality of future generations."[126]

The proposals currently before Congress, as modified by the amendments proposed in this article, would minimize the conflicts that arise between career and family responsibilities by balancing the demands of the work place with the needs of families. They would also provide parents with the opportunity for job protection so that parents could spend an important period of time with their child. More importantly, the proposals would accomplish this without placing any undue economic strain on American businesses. As Dr. Brazelton stated: "As a nation, we can no longer afford to ignore our responsibilities toward children and their families."[127]

126. Kamerman and Kahn, *Europe's Innovative Family Policies*, *supra* note 47, at 11.

127. Hearing on H.R. 2020, *supra* note 29, at 43 (statement of Brazelton).