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## Failing Our Workers: How the FMLA and RFRA Disadvantage Female Workers in the United States when Compared to their European Union Counterparts

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**FAILING OUR WORKERS: HOW THE  
FMLA AND RFRA DISADVANTAGE  
FEMALE WORKERS IN THE UNITED  
STATES WHEN COMPARED TO THEIR  
EUROPEAN UNION COUNTERPARTS**

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## I. INTRODUCTION AND OVERVIEW

*“While many women are working hard to support themselves and their families, they’re still facing unfair choices, outdated workplace policies. That holds them back, but it also holds all of us back. We have to do better, because women deserve better. And, by the way, when women do well, everybody does well.”*

– President Barack Obama<sup>1</sup>

The United States has come a very far way in protecting its workers. The basic framework for conceptualizing employer/employee relationships in the United States is “at-will,” meaning that without statutory protections, most employees have no guarantee of

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<sup>1</sup> Barack Obama, *Remarks by the President on Women and the Economy*, OBAMA WHITE HOUSE (Oct. 31, 2014, 11:24 AM), <https://obamawhitehouse.archives.gov/the-press-office/2014/10/31/remarks-president-women-and-economy-providence-ri>.

rights in the workplace and can be fired for any reason, including no reason.<sup>2</sup>

However, by the end of the Twentieth Century, the United States enacted worker safety laws,<sup>3</sup> minimum wage laws,<sup>4</sup> maximum workweek hours,<sup>5</sup> and anti-discrimination provisions, essentially limiting the reasons for terminating an employee.<sup>6</sup> And, because these kinds of worker protections have been statutorily enshrined for so long, they have become an integral part of the employer/employee relationship, meaning that the fundamental nature of the employment relationship in the United States has changed to both value and require increased employee protection.

Moreover, although each increase in worker protection was met with resistance from the business community—which was convinced that the increased worker protections would affect their bottom line and would unduly interfere with their business model—<sup>7</sup> employers have been able to find marketable solutions to maximize

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<sup>2</sup> *The At-Will Presumption and Exceptions to the Rule*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last visited Dec. 14, 2017). What this means is that an employer can dismiss an employee for any cause or no cause at all. In contrast, “good cause” or “just cause” is required by the European Union (EU), the state of Montana, and most Collective Negotiations Agreements; this generally requires an employer to demonstrate why an employee was terminated and to further demonstrate that the termination or discipline was for “good” or “just” cause. *See generally Termination of Employment Relationships: Legal Situation in the Member States of the European Union*, EUROPEAN COMMISSION (2006); *see also William L. Corbett, Resolving Employee Discharge Disputes under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issue in the Context of a Discharge Case*, 66 Mont. L. Rev. 329, 333-337 (2005).

<sup>3</sup> *See, e.g.* 29 U.S.C. § 651 *et seq* (2014), 29 U.S.C. § 201 *et seq* (2014).

<sup>4</sup> *See* 29 U.S.C. § 206 (2007).

<sup>5</sup> *See* 29 U.S.C. § 207 (2010).

<sup>6</sup> *See, e.g.* 29 U.S.C. § 206(d)(2007), 29 U.S.C. § 623 (2014), 42 U.S.C. § 12101 *et seq* (2009), 42 U.S.C. §2000ff-1 (2008), 42 U.S.C. § 2000e-(2-4) (2009), 42 U.S.C. § 1981 (2009). These statutes are representative of some of the major federal nondiscrimination statutes.

<sup>7</sup> *See* 137 CONG. REC. E3869-02 (DAILY ED. NOV. 13, 1991) (SPEECH OF HON. JOHN T. DOOLITTLE) (opposing 42 U.S.C. § 1981 because of what he believed to place an undue burden on the employer). *See also Consider the Source: 100 Years of Broken-Record Opposition to the Minimum Wage*, NATIONAL EMPLOYMENT

their economic profit while working in the constraints of worker protections.<sup>8</sup> As a result, employees have come to rely on worker protections as a basic entitlement guaranteed to them in their employment and employers have come to recognize them as a necessary part of the employment relationship.

Yet even with these protections in place, female employees continue to experience workplace discrimination in the United States. Occasionally disguised as paternalism, this discrimination has manifested as mandatory minimum wage laws for women but not for men,<sup>9</sup> as a refusal to allow women to work the same jobs as men for fear of harm coming to women,<sup>10</sup> and most prevalently, as an ongoing wage gap between men and women.<sup>11</sup> As the involvement of companies in the private affairs of their employees has deepened, the discrimination female employees face has continued.<sup>12</sup>

This is best exemplified in the following two situations. First, although the Family and Medical Leave Act (FMLA) was intended to be a way for employees to take leave from work, the reality is that

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LAW PROJECT (Mar. 2013), <http://www.nelp.org/content/uploads/2015/03/Consider-The-Source-Minimum-Wage.pdf>.

<sup>8</sup> See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Despite a lengthy court battle culminating in the holding that the company had violated Title VII by engaging in business practices that had a disparate impact on minority populations, Duke Power did not go out of business, but in fact provides power to 7.2 million U.S. customers under the umbrella corporation of Duke Energy. See also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Despite the court finding that a mixed-motive existed in the adverse employment action taken against Hopkins, Price Waterhouse continues to thrive to this day as the largest professional services firm in the world.

<sup>9</sup> See generally *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

<sup>10</sup> See *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (stating that women were not allowed to work certain jobs because of a concern on the part of the employer that exposure to lead would cause harm to unborn children).

<sup>11</sup> See generally *Labor Force Statistics from the Current Population Survey*, Highlights of Women's Earnings in 2016, BUREAU OF LAB. STAT. (2016), <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf>.

<sup>12</sup> See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (holding that an employer can deny contraceptive coverage to female employees because of religious reasons).

employees struggle to afford to take leave, have medical leave denied, and face repercussions at work when they return. Second, and more recently, the Supreme Court decided in *Burwell v. Hobby Lobby Stores, Inc.* (hereinafter *Hobby Lobby*), that for-profit, closely held corporations may refuse to provide contraceptive coverage through their health insurance plans, to their employees; essentially permitting employers to impose their religious views on their employees.<sup>13</sup>

By contrast, the European Union<sup>14</sup> (EU) has rejected at-will employment. With the exception of Belgium, every EU member state has “good cause” requirements before an employer may terminate a contract.<sup>15</sup> In many countries, there is a presumption of a “right to work.”<sup>16</sup> That presumption allows for stronger worker protections to be built into the employment relationship itself, resulting in a better quality of life for the employee.<sup>17</sup>

Importantly, the EU continues to take steps to ensure gender equality in the workplace by passing a series of directives applying to

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<sup>13</sup> *Id.*

<sup>14</sup> The EU is currently made up of 28 member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

<sup>15</sup> See *Termination of Employment Relationships: Legal Situation in the Member States of the European Union*, EUROPEAN COMMISSION 3-13 (2006); see also DELOITTE, INTERNATIONAL EMPLOYMENT LAW: REDUNDANCY AND TERMINATION IN EUROPE 27-101 (2013) (noting that Belgium is the only EU country which allows for “absolute” power in dismissals where an employer is generally not required to give a reason for a termination).

<sup>16</sup> *Termination of Employment Relationships: Legal Situation in the Member States of the European Union*, *supra* note 15, at 7.

<sup>17</sup> See DELOITTE, *supra* note 15, at 29-33 (dealing generally with severance packages, unemployment benefits, and judicial remedies. With few exceptions, EU member states generally provide for some sort of termination security to avoid an uncertainty of the kind that United States workers face for a termination of an at-will employment contract). See also Directive 2003/88/EC of the European Parliament and of the Council Concerning Certain Aspects of the Organisation of Working Time, L 299/11.

working time.<sup>18</sup> From its inception, the EU has issued broad directives attempting to inject gender equality into the lives of its citizens even outside of the employment setting.<sup>19</sup> Because the EU continues to focus on gender equality, resources remain devoted to its achievement and citizens benefit as a result of this focus.

While the EU has not succeeded in achieving gender parity, it has succeeded in implementing regulations designed to reduce the discrimination and inequality that female workers would otherwise face. Among these regulations are directives on: equal pay between men and women,<sup>20</sup> equal treatment in the employment setting,<sup>21</sup> reports on the equality between women and men,<sup>22</sup> and the creation of an Institute on Gender Equality.<sup>23</sup> Each of these regulations serves to reduce the gender differences and disadvantages that women face.<sup>24</sup> Importantly, because the EU continues to recognize the

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<sup>18</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ [2003] L 299/9. This directive is generally concerned with working conditions, annual leave available, daily rest period and breaks, maximum weekly working time, and special consideration for night workers.

<sup>19</sup> Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16; Council Directive 75/117/EEC on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. L 45/19.

<sup>20</sup> See Council Directive 75/117/EEC on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. L 45/19.

<sup>21</sup> See Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

<sup>22</sup> See *Strategy for Equality Between Women and Men 2010-2015*, THE EUR. ECON. AND SOC. COMMITTEE AND THE COMMITTEE OF THE REGIONS 491 (Sept. 21, 2010), [http://www.europarl.europa.eu/registre/docs\\_autres\\_institutions/commission\\_europeenne/sec/2010/1080/COM\\_SEC%282010%291080\\_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2010/1080/COM_SEC%282010%291080_EN.pdf); *Strengthening the Commitment to Equality Between Women and Men: A Women's Charter*, EU COMMISSION 78, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:em0033&from=EN> (last visited Dec. 18, 2017).

<sup>23</sup> See Regulation 1922/2006/EC of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality [2006] L 403/9.

<sup>24</sup> This is not to say that the United States has not attempted to address the same issues, just that the EU has taken further steps and continues to address the

disadvantage the female workers face, these regulations are more effective at addressing ongoing issues than are laws the United States has enacted.

Moreover, employers in the EU are also further removed from the private lives of their employees than their counterparts in the United States. This is partially because of how health insurance is calculated and administered in EU countries, where the separation of a company from its employees' health care ensures that private decisions remain out of the hands of the employer.<sup>25</sup> Outside the scope of health insurance, however, EU countries also mandate that sick leave be subsidized at least in part by an employer or the government.<sup>26</sup> This means that employees have the freedom and ability to balance work and home to the best of their ability without overwhelming concerns about financial affordability of leave.

This comment will focus on two examples which illustrate that the United States disadvantages its female workers when compared to the EU: (1) the FMLA and how it requires employees to choose between their families and their jobs; and (2) United States employers exercising undue influence over the private lives of their employees as a result of the Supreme Court's decision in *Hobby Lobby*.

Section II of this comment will introduce the intersection of the public and private spheres; particularly with respect to what degree employer intrusion in the private lives of employees is permitted, in the United States. Section III will argue that the FMLA

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issues facing women consistently and repeatedly so as to ensure that forward progress continues to be made.

<sup>25</sup> See generally Susanna Grosse-Tebbe and Josep Figueras, *Snapshots of Health Systems*, WORLD HEALTH ORG. (EU) (2005), [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0010/110242/E87303.pdf](http://www.euro.who.int/__data/assets/pdf_file/0010/110242/E87303.pdf) (looking generally at how the pre-2004 member states of the EU handle health insurance); see also *The EU Explained: Public Health*, EUR. COMMISSION 7 (2013), [https://ec.europa.eu/health/sites/health/files/health\\_policies/docs/improving\\_health\\_for\\_all\\_eu\\_citizens\\_en.pdf](https://ec.europa.eu/health/sites/health/files/health_policies/docs/improving_health_for_all_eu_citizens_en.pdf) (explaining that cross-country health care provided at cost a citizen would receive in his country).

<sup>26</sup> *Out of Office: An Overview of Workplace Absenteeism in Europe*, THE ECONOMIST INTELLIGENCE UNIT 9 (2014), [https://www.eiuperspectives.economist.com/sites/default/files/Out%20of%20office\\_WEB.pdf](https://www.eiuperspectives.economist.com/sites/default/files/Out%20of%20office_WEB.pdf).



insufficiently protects the rights of female workers, who are socially expected to take medical leave when a family member falls ill, particularly when compared to leave standards in the EU. Section IV will argue that the Religious Freedom Restoration Act, through its interpretation of *Hobby Lobby*, created an artificial tension with Title VII. This section will compare these recent developments in the United States, with the systems in place in the EU, where female workers are better protected from undue employer involvement in their personal lives. Finally, this Comment will conclude that the United States must do more to protect its female workers, and it will suggest that the United States should use EU laws as a starting point.

## II. INTERSECTION OF THE PUBLIC AND PRIVATE SPHERE

At its most fundamental level, the spheres theory of influence is premised on the idea that men and women had two separate functions; men belonged in the public sphere where they worked and were involved in politics, and women belonged in the private sphere taking care of the house and raising children.<sup>27</sup> While social norms have since shifted to rebut the presumption of gender-exclusivity in each sphere, the idea that a public and private sphere exists is still very much alive.<sup>28</sup>

Today the concept of distinct public and private spheres in the United States has been muddied with the continued involvement of employers in the lives and choices of their employees.<sup>29</sup> This has

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<sup>27</sup> See generally LINDA K. KERBER, TOWARD AN INTELLECTUAL HISTORY OF WOMEN: ESSAYS (THE UNIVERSITY OF NORTH CAROLINA PRESS) (1997).

<sup>28</sup> See JEFF WEINTRAUB & KRISHAN KUMAR, PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 7, 27-34 (THE UNIVERSITY OF CHICAGO PRESS) (1997). Among three other theories of public/private dichotomy, Weintraub references a feminist theory of public/private originating in the divide between the home and the labor force. While two of the three other theories also make a connection between public as society or politics as the public sphere and the home or family as the private sphere, the feminist conception of the public/private differential is the most intuitive to many people and it is that theory which serves as the basis for this paper.

<sup>29</sup> See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (permitting an employer to refuse to provide certain forms of birth control through

manifested itself as an involvement of the company with the private choices made by their employees.<sup>30</sup> The involvement extends to choices of taking medical or parental leave under the FMLA, where the employer has the ability to grant or reject the leave time and request documentation of medical necessity.<sup>31</sup> More recently, employers have been granted the ability to involve themselves in the private lives of their employees with respect to insurance covering contraception.<sup>32</sup>

While FMLA involvement is facially applicable to both men and women, and employers request documentation from both male and female employees, the disproportionate disadvantage that women face comes from a combination of the pay gap and social expectations that they be the ones to take time away from work to care for a medical emergency.<sup>33</sup> Importantly, the rationale of an equal disadvantage to both men and women does not exist in *Hobby Lobby*, where there exists a disadvantage only affecting women insofar as the only forms of contraceptives that employers are refusing to carry are ones that are used by women.<sup>34</sup>

### III. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

#### A. History and Enactment

*“Employees shouldn’t have to choose between the jobs they need and the families*

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health insurance where it conflicts with their religious beliefs thereby dictating available choices to employees).

<sup>30</sup> *Can Bosses Do That? As It Turns Out, Yes They Can*, NATIONAL PUBLIC RADIO (Jan. 20, 2010, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=123024596>.

<sup>31</sup> See 29 U.S.C. § 2613 (2009) (permitting an employer the right to request documentation from a doctor detailing the nature and time necessary for leave before granting FMLA leave).

<sup>32</sup> See generally *Hobby Lobby*, 134 S.Ct. 2751.

<sup>33</sup> *Family and Medical Leave in 2012: Technical Report*, ABT ASSOCIATES INC., 64, 109 (2012), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

<sup>34</sup> *Hobby Lobby*, 134 S.Ct. at 2765-2766 (two morning after pills and two intrauterine, or IUD devices).

*they love.*"<sup>35</sup>

When the Family Medical Leave Act (FMLA) was enacted in 1993, it was hailed as the end of sex-based leave discrimination.<sup>36</sup> Signed under President Clinton, the Congressional representatives who voted in favor of it did so against a wind of business advocates who believed it would damage their ability to run their business.<sup>37</sup>

The FMLA came about as a result of nearly a decade of lobbying efforts on the part of a diverse collection of organizations.<sup>38</sup> Pro-choice and anti-abortion organizations both backed the bill because at its heart was the promise that workers of the United States would no longer be forced to choose between their jobs and their families.<sup>39</sup> Before its eventual enactment into law, the FMLA passed the House and Senate twice where then-President George H.W. Bush vetoed the bill each time.<sup>40</sup>

The staunchest opponents of the FMLA came on the part of the business community.<sup>41</sup> Along with lobbyists for business, the

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<sup>35</sup> Donna R. Lenhoff & Lissa Bell, *Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study*, NAT'L PARTNERSHIP 7, <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> (last visited Dec. 17, 2017).

<sup>36</sup> See *Nevada Dep't. of Human Resources v. Hibbs*, 538 U.S. 721, 722 (2003) (noting that one of the reasons behind the FMLA was to combat the degree to which sex-discrimination and leave existed from state to state).

<sup>37</sup> Donna R. Lenhoff & Lissa Bell, *supra* note 34, at 3.

<sup>38</sup> *Id.* The coalition eventually included Business and Professional Women US, the National PTA, Children's Defense Fund, SEIU, NEA, USW, AARP, Epilepsy Foundation, American Academy of Pediatricians, National Association of Social Workers, American Nurses Association, Catholic Conference, United Methodist Church, Union of American Hebrew Congregations, Businesses for Social Responsibility, Ben & Jerry's, Stride-Rite, Fel-Pro, Burlington Northern Railway, and Control Data Corporation.

<sup>39</sup> *Id.* In particular, the Catholic Conference was involved as part of an anti-abortion push focused on incentivizing options other than abortion.

<sup>40</sup> *History of the FMLA*, NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES, <http://www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html> (last visited Feb. 11, 2014).

<sup>41</sup> Donna R. Lenhoff & Lissa Bell, *supra* note 34, at 9 (2008). Notable figures included the U.S. Chamber of Commerce, the Society for Human Resource

United States Chamber of Commerce stood opposed to the FMLA and refused to negotiate on the language, extent, or contents of the bill.<sup>42</sup>

The FMLA initially contained a provision allowing twelve weeks of unpaid parental leave and up to twenty-six weeks of unpaid medical leave in a single year.<sup>43</sup> Over the decade the FMLA spent in Congress and committee hearings, the leave time provided was combined into a single allotment of both family and medical leave, and that total allotment was reduced to twelve weeks of unpaid leave.<sup>44</sup> Instead of permitting employees to use parental leave and sick leave for two different circumstances, the final bill required employees to take leave of either kind from a single pot.<sup>45</sup> Upon its enactment, supporters of the bill championed it as ending prevailing gender discrimination among state leave laws.<sup>46</sup>

These proponents were correct in asserting that at least facially the FMLA prevents a leading form of gendered employment discrimination from occurring.<sup>47</sup> The anti-retaliation provisions built into the bill were intended to guarantee that a worker would feel free to take time away from work for parental leave or medical emergencies without fearing any job-related consequences upon their return.<sup>48</sup> In reality, as is explained below, this is often not the case.

The FMLA provides employees the opportunity to take up to twelve weeks of unpaid leave over the course of a year, as long as the

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Management, the National Restaurant Association, and the National Federation of Independent Businesses.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.* at 18.

<sup>45</sup> *Id.*

<sup>46</sup> See S.REP. NO. 103-3, at 15 (1993) (noting that while many employers provided leave, many did not, and where the employer did not, women taking pre-birth leave say an average drop of 86% of their earnings and generally had annual earnings of about \$5,000 less than their counterparts whose employers did provide leave).

<sup>47</sup> 29 U.S.C. §§ 2612, 2617 (2009).

<sup>48</sup> 29 U.S.C. § 2615-17 (2009).

reason for this leave falls within the statutory confines.<sup>49</sup> Employees are allowed to take this leave for (1) parental leave following the birth of a child; (2) parental leave following the placement of a child for adoption; (3) for a serious medical condition which afflicts a family member; and (4) for their own serious medical condition.<sup>50</sup> In order to take time away from work for a serious medical condition affecting a family member, that family member must be a parent, a spouse, or a child under the age of 18.<sup>51</sup> Importantly, the FMLA only covers employees who have been employed with the employer for at least 1,250 hours of work the previous year; and does not cover employees whose employer employs less than 50 employees.<sup>52</sup> This means that only a discrete set of employees qualify for the protections of the FMLA.

#### 1. Effect on Already Disadvantaged Female Workers

The intent behind the FMLA was driven at least in part by an effort to reduce sex discrimination in employment leave. But while the FMLA forbids facial discrimination in parental and medical leave, it fails to recognize economic realities faced by female employees.

By providing only unpaid leave, the United States fails to protect its most vulnerable workers. A majority of employees taking FMLA leave indicated in a 2012 survey that they used savings to finance the leave.<sup>53</sup> Additionally, employees also indicated that they put off paying bills in order to finance their leave.<sup>54</sup> As a result, these employees are more likely to continue coming to work when they, or

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<sup>49</sup> 29 U.S.C. § 2612 (2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* If the child is over the age of 18, there must be evidence submitted which indicates that the child is unable to care for themselves due to either mental or physical affliction. Employers may also request certification as to the serious medical condition of the family member and an explanation as to why the employee is needed to be the caregiver.

<sup>52</sup> 29 U.S.C. § 2611(2) (2009).

<sup>53</sup> *Family and Medical Leave in 2012: Technical Report*, *supra* note 33, at 105. Employees could select more than one answer; but 48.3% indicated they used savings specifically marked for this situation, 37% indicated they used savings earmarked for other situations, and 36.5% indicated they put off paying bills.

<sup>54</sup> *Id.*

their immediate relatives, have a serious health condition.<sup>55</sup> Moreover, the inability of an employee to take time away from work because of financial concerns runs contrary to the purpose of the FMLA and its intention to provide time to care for serious health conditions.<sup>56</sup>

While both men and women are both likely to be financially unable to take FMLA offered leave, it is important to realize the financial disadvantages that women face in the employment field.<sup>57</sup> Compared to their male counterparts, current wage gap estimates indicate that for each dollar white men make, white women make \$0.79, black women make \$0.63, Hispanic women make \$0.54, and Asian women make \$0.87.<sup>58</sup> Even in “pink collar” jobs,<sup>59</sup> women face a wage gap.<sup>60</sup> Perhaps not surprisingly, the wage gap is greater in

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<sup>55</sup> *Id.* at 105-6. 31% of those employees surveyed indicated that they cut their leave time short because of financial concerns. Moreover, 43.3% indicated that they would have taken longer if they had received some additional pay, and a combined 62% found it either somewhat or very difficult to take unpaid leave.

<sup>56</sup> See 29 U.S.C. § 2612 (2009), *see also* S.REP. NO. 103-3, at 2 (1993).

<sup>57</sup> *Family and Medical Leave in 2012: Technical Report*, *supra* note 33, at 105.

<sup>58</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 11* (2017). Here, all ratios are measured against white men’s earnings because they constitute the largest workforce demographic, e.g. white women make \$0.78 for every dollar white men make. Looking also at a racial breakdown, Hispanic men make \$.60 for every dollar white men make, Native American and Alaskan Native men make \$.69/white man’s dollar, and African American men make \$.71/white man’s dollar.

<sup>59</sup> ALEXANDRA CAWTHORNE, *THE STRAIGHT FACTS ON WOMEN IN POVERTY 2* (CENTER FOR AMERICAN PROGRESS) (2008) (explaining “pink-collar” jobs as jobs like teaching, child care, nursing, cleaning and waitressing. These are jobs typically dominated by women).

<sup>60</sup> See BUREAU OF LABOR STATISTICS, *LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY*, *supra* note 11, at 70-72. 358 male waiters to 558 female waitresses, where waiters make \$449/week compared to \$400 for waitresses; male housekeepers number 126 and make \$467/week compared to women housekeepers number 605 and making \$406/week; male registered nurses numbering 254 and making \$1,236/week compared to female registered nurses numbering 2,023 and making \$1,086/week, and male educators numbering 1,808 and making \$1,091 compared to female educators numbering 4,782 and making \$888/week.

these jobs than when women work in jobs typically dominated by men.<sup>61</sup>

Moreover, social expectations dictate that women act as caregivers when family members fall ill.<sup>62</sup> This remains true even where extended family exists to help shoulder the responsibility of caring for a sick family member.<sup>63</sup> The reality is that social and normative expectations push women into roles as caregivers.<sup>64</sup> Given the wage disparity between men and women, this means that an already disadvantaged subset of the population is expected to take unpaid time away from work. Essentially, women in this position are asked to choose between their jobs and the needs of their families.

This is not to say that every woman in the employment field faces these disadvantages. Indeed, for some women with a steady income and job security, taking unpaid leave for themselves or a family member may be feasible. The problems with the FMLA arise not from a strict numbers argument, but instead are more readily apparent when we turn from a strictly gender-based differences approach to an intersectional look at economic and social realities.

While the FMLA has made substantial inroads in curbing sex-based leave discrimination, it still disadvantages female workers who need its protections the most: low-income and single-income households. Recent demographics indicate that black and Hispanic

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<sup>61</sup> This is perhaps best explained by the value placed on typically female dominated jobs as less than the value placed on typically male dominated jobs. For example, in computer and mathematical occupations, there were 2,693 men earning \$1,452/week, compared to 928 women earning \$1,174/week. In architecture and engineering occupations, there were 2,209 men earning \$1,403/week, compared to 330 women earning \$1,143/week. See BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: EARNINGS OF MEN AND WOMEN BY OCCUPATION 2 (2014).

<sup>62</sup> S.REP. NO. 103-3, at 7 (1993).

<sup>63</sup> *Family and Medical Leave in 2012: Technical Report*, *supra* note 33, at 109.

<sup>64</sup> *Id.* Women are a third more likely to take leave than men. 15% of employees returning back to work did so because another caregiver took over, compared with 40% who said they could not afford to take any more time off; see also S.REP. NO. 103-3, at 7 (1993), (noting that two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women).

women are more likely to live below the poverty line than any other population.<sup>65</sup> While the intersection of economic reality and feminist theory lies predominantly with the wage gap, it is important to note that race considerations also play a substantial role in dictating average family income.

The 2018 poverty line is set at \$12,140 for a household of one in the 48 contiguous states.<sup>66</sup> In 2017, the United States Census Bureau conducted a survey which found that of the 319,911 total persons surveyed, 40,616 (12.7%) were living below the poverty line.<sup>67</sup> Of the persons surveyed, 259,863 were living in families, of which 27,762 (10.7%) were living below the poverty line.<sup>68</sup>

This survey also broke the results down by gender, finding that of the 163,234 women surveyed, 22,931 (14%) were living below the poverty line in the United States.<sup>69</sup> Comparatively, 156,677 men were surveyed and only 17,685, or 11.3%, were living below the poverty line.<sup>70</sup>

Looking more exclusively at families surveyed, the disparity becomes more readily apparent. Of the 82,854 families surveyed, male-only heads of house comprised 6,452 households (7.8%).<sup>71</sup> Of those households, only 847 (13.1%) were living below the poverty

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<sup>65</sup> ALEXANDRA CAWTHORNE, *supra* note 59, at 1.

<sup>66</sup> Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, U.S. Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs (Jan. 13, 2018), <https://aspe.hhs.gov/poverty-guidelines>, (for each additional person in a household in the 48 contiguous states, the poverty line increases by \$4,320. For households in Alaska, the poverty line is \$15,180 for a household of one, where each additional person increases the line by \$5,400; and for households in Hawaii, the poverty line for a household of one is \$13,960 where each additional person increases the line by \$4,970).

<sup>67</sup> Jessica L. Semega, Kayla R. Fontenot, and Melissa A. Kollar, *Income and Poverty in the United States: 2014 Current Population Reports*, U.S. CENSUS BUREAU, 13, 59 (Sept. 2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 16.



line.<sup>72</sup> By contrast, female householder families numbered 15,581 (18.8%) and 4,138 (26.6%) of those households were living below the poverty line.<sup>73</sup>

These results demonstrate that among households below the poverty line, women are more than twice as likely, on average, as men to be the sole provider to the family. Moreover, the survey demonstrates that in households at or below the poverty line, women are still twice as likely as men, on average, to be the head of house.

The purpose of the FMLA was “to balance the demands of the workplace with the needs of families.”<sup>74</sup> Significantly, it also protects them from retaliatory action being taken if they elect to take time away from work under the FMLA.<sup>75</sup> However, the reality is that for women living paycheck to paycheck, serious medical concerns sometimes take a backseat to work. And while anti-retaliation provisions are explicit in the FMLA, this does not guarantee that women who take leave under the FMLA will see their careers remain on the previous trajectory.<sup>76</sup> Women who take unpaid leave under the FMLA sometimes experience lower expectations at work and a decrease in the likelihood of getting a promotion or being put on a management track.<sup>77</sup> For low-income jobs, it is not out of the question that where women are dependent on weekly hours to pay bills, they may see a decrease in the hours they are given in the weeks following the leave and it may take months to return to their previous income.

For women with low-income salaries, the protection that the FMLA provides is tenuous at best. Without a steady income, these

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 29 U.S.C. § 2601(b)(1) (1993).

<sup>75</sup> 29 U.S.C. § 2617 (2009).

<sup>76</sup> *Family and Medical Leave in 2012: Technical Report*, *supra* note 33, at 111. Where 1.2% reported being worse off after taking leave, 41.9% reported being assigned a different position and 19.9% reported being asked to take a different position. 7.7% reported not returning to work and 23.3% of those did so because they were fired or laid off.

<sup>77</sup> *Id.* at 113. 10% of workers returning reported losing seniority or management track potential and 6.4% ended up losing their job.

women are unlikely to take time away from work in the event of a serious medical condition affecting their families, despite the twelve weeks guaranteed to them by the FMLA. And for women in single income families, this promise is even less tangible. Unless they have a substantial enough amount of money to live off of for twelve weeks they also face uncertain financial stability likely to affect their ability to take FMLA leave.

## B. The EU

The EU and its member states also face the problems of a wage gap and the necessity of providing leave for employees. However, the EU and its member states continue to take steps which recognize and address the ongoing concerns with the intersection of the wage gap and the requirement of leave. The result of this is that the EU and its member states place employees in a situation where they are better equipped to make decisions about their families, than does the United States. While total implementation of these strategies may never be feasible in the United States, they should be examined for their benefits.

### 1. Equal Pay.

The EU has adopted several directives regulating the time that workers can be expected to be at work, including regulations on mandatory yearly paid leave. Importantly, because the EU also mandates that men and women receive equal pay for equal work, this means that the pay gap faced by female workers in the United States does not as severely affect female workers in the EU.

Although the presence of a wage gap exists in the EU, the European Parliament and EU have repeatedly acknowledged its existence as a continuing problem.<sup>78</sup> In 1975, the Council of European Communities recognized the existence of a pay gap

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<sup>78</sup> See Commission Recommendation 2014/124/EU of Mar. 7, 2014, on Strengthening the Principle of Equal Pay Between Men and Women Through Transparency, 2014 O.J. (L 69) 112 (noting that despite efforts taken over the years, women in the EU still earn an average of 16.2% less than men for each hour worked).

between men and women.<sup>79</sup> Since that time, the European Parliament has recognized the existence of a wage gap and has taken continual steps to ensure its eradication.<sup>80</sup> Official steps taken by both the EU<sup>81</sup> and the European Parliament<sup>82</sup> mean that the wage gap is decreasing, albeit at a slow pace.<sup>83</sup>

This insistence by the EU and the European Parliament that the wage gap continue to be recognized as a problem and the steps that they take to fix it means that when compared to the United States, the EU is far ahead.<sup>84</sup> While the United States enacted the

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<sup>79</sup> See Council Directive 75/117/EEC of Feb. 10, 1975, on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19 (recognizing explicitly the existence of a pay gap and providing that discrimination between men and women leading to unequal pay should be abolished).

<sup>80</sup> See Commission Recommendation 2014/124/EU of Mar. 7, 2014, 2014 O.J. (L 69) 112 (recommending an increase in transparency with regard to wages to better able employees to prove cases of pay discrimination). See also European Parliament Resolution of May 24, 2012, Equal Pay for Male and Female Workers for Equal Work or Work of Equal Value, 2012 O.J. (C 265) 75. See also European Parliament Resolution of Nov. 18, 2008, with Recommendations to the Commission on the Application of the Principle of Equal Pay for Men and Women, 2008 O.J. (C 16) 21. See also Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, 2006 O.J. (L 204) 23.

<sup>81</sup> Charter of Fundamental Rights of the European Union art. 21, 23, Mar. 30, 2010, 2010 O.J. (C 83) 396 (forbidding discrimination on the basis of sex, and commanding equality between men and women in pay).

<sup>82</sup> See Commission Recommendation 2014/124/EU of Mar. 7, 2014, 2014 O.J. (L 69) 112-114 (noting that in 2008 and 2012 the European Parliament adopted introductions of wage transparency and gender-neutral job evaluation and classification systems. Further, in 2010, the Council reached out to member states to put in place measures taking on the roots of the gender pay gap, and noting that implementation of equal pay is thought to be hindered by lack of transparency in pay systems and a lack of legal certainty with regard to the concept of work of equal value).

<sup>83</sup> Samantha Grossman, *This Map Shows Just How Big the Wage Gap Between Men and Women Is*, TIME (Mar. 6, 2014), <http://time.com/14153/global-gender-pay-gap-map> (showing that the EU wage gap has dropped from 2008 to 2010 but is slowly increasing).

<sup>84</sup> See Kelli B. Grant, *Guess Which Country has the Largest Wage Gap?*, NRB (Dec. 5, 2014), <http://nrb.com/2014/12/05/guess-which-country-has-the-largest->

Equal Pay Act in 1963, since that time, lawmakers and citizens prefer to pretend that the problem has been solved.<sup>85</sup> Because the EU and the European Parliament recognize that this is an ongoing problem, they are better able to assess workable strategies to eradicate the presence of the wage gap.

## 2. Leave Standards.

Under the EU, employers are required to provide annual leave and sick leave to their employees. The EU Charter on Human Rights specifically recognizes the reconciliation of family and work-life.<sup>86</sup>

The EU's Directive on Working Time requires a certain amount of leave time be granted annually to workers as part of a vacation package.<sup>87</sup> Although each member state is free to increase the annual leave time, the EU explicitly provides for a minimum of four weeks of paid leave.<sup>88</sup> If a worker is sick during that time that leave is rescheduled, but the employee is compensated for both the initial and the rescheduled leave time.<sup>89</sup> This ensures that employees

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wage-gap (comparing EU countries to the United States and concluding that the United States has the largest wage gap).

<sup>85</sup> See Genevieve Wood, *Gender Equality Isn't a Myth. But the Wage Gap is*, THE DAILY SIGNAL (Jan. 17, 2014), <http://dailysignal.com/2014/01/17/gender-equality-isnt-myth-wage-gap> (arguing that the wage gap is attributable to a confidence gap where women simply will not ask their employer for a raise); see also Jason Scheurer, *The 77-Cent Gender Wage Gap Lie*, BREITBART (Mar. 17, 2014), <http://www.breitbart.com/big-government/2014/03/17/77-cents-worth-of-lies> (arguing that "occupational segregation" accounts for the wage gap). See also Kirsten Kukowski, Andrea Bozek, Brook Hougesen, *Misleading Paycheck Fairness Act*, GOP PRESS RELEASE (Apr. 5, 2014), <https://gop.com/misleading-paycheck-fairness-act> (arguing against voting for the Paycheck Fairness Act because the wage gap no longer exists as a result of the Equal Pay Act of 1963).

<sup>86</sup> Charter of Fundamental Rights of the European Union art. 33, Mar. 30, 2010, 2010 O.J. (C 83) 398.

<sup>87</sup> See Directive 2003/88/EC of the European Parliament and of the Council Concerning Certain Aspects of the Organisation of Working Time, 2003 O.J. (L 299) 11.

<sup>88</sup> *Id.*

<sup>89</sup> See *Asociacion Nacional de Grandes Empresas de Distribucion v. Federacion de Asociaciones Sindicales*, Case C-78/11 (2012) E.C.R. (upholding

are allowed time with their family and provides another safeguard whereby if an employee falls ill during their annual leave they do not risk cutting into valuable sick leave.

Moreover, although the degree to which the employer, the state, and the employee cover sick leave varies among European states, each nation-state provides some level of mandatory paid sick leave.<sup>90</sup> At the lowest level, Ireland's government covers 25% of a month of sick leave, leaving the employee to cover the rest.<sup>91</sup> At the highest level of coverage, the Netherlands requires an employer to pay for 69% of a year of sick leave, requiring the employee to cover the rest.<sup>92</sup>

What this means is that in the event that an employee suffers from a serious health condition, they are not automatically forced to choose between their health and their job. Importantly, and in contrast to current US policy, it also means that women who take time away from their job, in the event of a family member suffering from a serious health condition, are not forced to choose between paying bills and taking care of family members.

Critics of the EU approach to healthcare and paid leave often argue that this will lead to a drastic uptick in the amount of leave workers take and will reduce profits and increase the burden on the

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Directive 2003/88/EC concerning annual leave and holding that it was not the same as sick leave; where a worker was sick during annual leave, that leave would be rescheduled later).

<sup>90</sup> See Council of Europe Family Policy Database, Reconciliation of Work and Family Life Leave Arrangements (2009).

<sup>91</sup> *Out of Office: An Overview of Workplace Absenteeism in Europe*, THE ECONOMIST INTELLIGENCE UNIT 9 (2014), [https://www.eiuperspectives.economist.com/sites/default/files/Out%20of%20office\\_WEB.pdf](https://www.eiuperspectives.economist.com/sites/default/files/Out%20of%20office_WEB.pdf). Data gathered on 17 European countries, some countries' data applies only to private sector employees.

<sup>92</sup> *Id.* At one month, the Netherlands covers 75% of an employee's sick leave, requiring an employer to cover 75% and the employee to cover the remaining time. This same graphic notes that Austria, Germany, Belgium, Denmark, and Poland all require an employer to cover 100% of a month of sick leave for an employee.

employer.<sup>93</sup> Without actually enacting legislation designed to ensure paid leave for employees, it is difficult to assess the extent to which these critiques are true. However, studies show that when workers are provided with paid sick leave, they do not use all leave available to them.<sup>94</sup> Moreover, studies also suggest that the cost to the employer would be small and manageable.<sup>95</sup>

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<sup>93</sup> See Mark Koba, *Efforts to Pass Paid Sick Leave Laws Face Backlash*, CNBC (Nov. 29, 2013), <https://www.cnbc.com/2013/11/27/paid-sick-leave-laws-encounter-resistance.html> (explaining that some employers oppose paid sick leave laws because they believe it would provide an incentive for workers to take time off work without actually being sick); see also Alan Greenblatt, *Advocates Back Paid Sick Leave, But Opponents Won't Cough it Up*, NPR (May 8, 2014), <https://www.npr.org/2014/05/08/310426323/advocates-back-paid-sick-leave-but-opponents-won-t-cough-it-up>.

<sup>94</sup> See Jessica Milli, *The Costs and Benefits of Paid Sick Days: Testimony Before the Mayor's Task Force on Paid Sick Leave of Philadelphia*, INST. FOR WOMEN'S POLICY RESEARCH (Aug. 6, 2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwprexport/publications/Milli%20Philadelphia%20Testimony%208-5-14.pdf> (observing workers did not on average take the maximum number of sick days allowed); see also *Briefing Paper Valuing Good Health in Massachusetts: The Costs and Benefits of Paid Sick Days*, INST. FOR WOMEN'S POLICY RESEARCH (May 2012), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B305%20Valuing%20Good%20Health%20in%20Massachusetts.pdf> (finding that under proposed Massachusetts law, businesses with 11 or more employees could expect to see an average leave of 2.5 days annually out of the seven days possible, and businesses with six to ten employees could see an average leave of 2.1 days out of the possible five).

<sup>95</sup> See Claudia Williams and Susan Andrzejewski, *Valuing Good Health in Illinois: The Costs and Benefits of Earned Sick Time*, INST. FOR WOMEN'S POLICY RESEARCH 2, 3 (May 2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B326-Illinois%20CBA.pdf> (finding that employers would face costs equivalent to a \$.10/hour increase in wages for employees); see also Jessica Milli, *Valuing Good Health in Maryland: The Costs and Benefits of Earned Sick Time 2*, INST. FOR WOMEN'S POLICY RESEARCH (2015) (finding that employers would face costs equivalent to a \$.21/hour increase in wages for employees).

## IV. THE RELIGIOUS FREEDOM RESTORATION ACT

*“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”*<sup>96</sup>

## A. History and Enactment

In 1990, the Supreme Court decided *Employment Division v. Smith*.<sup>97</sup> This decision involved two employees who were fired for their use of peyote, who argued that a denial of unemployment benefits violated the First Amendment Free Exercise Clause, as the peyote use was for religious purposes.<sup>98</sup> The Court curtailed religious freedom of expression by finding that a law of neutral and general applicability did not violate the Free Exercise Clause of the First Amendment.<sup>99</sup>

In 1993, as a result of this decision, Congress enacted the Religious Freedom Restoration Act (RFRA), designed to abrogate *Smith* and to codify a strict scrutiny approach to religious expression.<sup>100</sup> In the following years, the Supreme Court struck RFRA, as it applied to the states, finding that Congress had overreached its Constitutional authority by attempting to alter, rather than enforce, the scope of the Fourteenth Amendment.<sup>101</sup> Although the court had the opportunity to deal explicitly with whether RFRA

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<sup>96</sup> *Planned Parenthood of Sw. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

<sup>97</sup> *Emp’t Div. Dept. of Human Res. of Or. v. Smith*, 496 U.S. 913 (1990).

<sup>98</sup> *Id.* at 874.

<sup>99</sup> *Id.* at 879-81.

<sup>100</sup> 42 U.S.C. § 2000bb (1993) (statutorily defining the test to be used for questions regarding the free exercise clause as the compelling governmental interest test as laid out in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wis. v. Yoder*, 406 U.S. 205 (1972)). RFRA has been interpreted as being enacted pursuant to the Necessary and Proper Clause. *See Hankins v. Lyght*, 441 F.3d 96, 106 (2006); *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (2003).

<sup>101</sup> *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress had exceeded its scope of its enforcement powers by enacting a federal law meant to apply to the states).

was unconstitutional or in direct conflict with federal laws governing religious freedom, it did not expressly do so.<sup>102</sup>

RFRA was designed to protect the individual rights of a person to religious expression.<sup>103</sup> Among the concerns raised during the Senate consideration was a reference to the history of the United States and the conception that following *Smith*, protections afforded to the free exercise of religion had been weakened.<sup>104</sup> The House Report reflects similar concerns, specifically the belief that persons whose religious freedoms were being affected by valid laws under *Smith* would be forced to prove motivations behind the enactment of laws in order to protect their religious rights.<sup>105</sup>

#### 1. Interpretation of RFRA through Hobby Lobby and Tension with Title VII.

At least as far back as 1886, the Supreme Court has held that corporations are guaranteed the same rights under the Fourteenth Amendment to the Constitution as persons.<sup>106</sup> This idea of

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<sup>102</sup> See generally *Gonzales v. O Centro Espirita Beneficente Unia Do Vege*, 546 U.S. 418 (2006) (ruling against the government and for religion without expressly ruling on the constitutionality of RFRA), see also generally *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) (finding that federal law including contraceptive mandate, as applied to the states, violated RFRA).

<sup>103</sup> See 42 U.S.C. § 2000bb (1993) (providing a claim or defense to persons whose religious exercise is substantially burdened by government); S. Rep. No. 103-111, at 2 (1993); see also H.R. Rep. No. 103-88, at 2 (1993).

<sup>104</sup> S. Rep. No. 103-111, at 5,7 (1993) (finding that the reason people came over to the United States was to freely exercise their religion without burden from the government, and finding that it was likely that without legislative action, religion in the country would suffer).

<sup>105</sup> H.R. Rep. No. 103-88, at 4 (1993) (finding that it was likely that improper motivations would be necessary to invalidate laws affecting free exercise of religion and that moreover, courts are generally unwilling to impute bad motives to legislatures, meaning that it was likely there would be a decrease in the ability of persons to exercise their free exercise rights).

<sup>106</sup> See *Santa Clara Cty. v. S. Pac. R. Co.*, 118 U.S. 394, 396 (1886) (before argument, Chief Justice Waite declared that “the court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are of the opinion that it does.”); see also *Pembina Consol. Silver Mining & Milling Co. v. Com. of Pa.*, 125 U.S. 181, 188-89 (1888) (reaffirming the doctrine in *Santa Clara County* and



“corporate personhood” was expanded in 2010. In *Citizens United v. Federal Election Com’n* the Supreme Court held that the government cannot suppress the First Amendment freedom of speech rights of any entity, even where that entity is a corporation.<sup>107</sup>

RFRA and *Citizens United* brings the Supreme Court to *Hobby Lobby* and the creation of an artificial tension between RFRA and Title VII.<sup>108</sup> In the Summer 2014 Term, the Supreme Court decided *Hobby Lobby*, in which several closely held corporations sued the government, alleging that the Patient Protection and Affordable Care Act (ACA) and its contraception mandate violated their First Amendment freedom of religious exercise rights.<sup>109</sup> In a 5-4 decision, the Court held that a for-profit, closely held corporation can request an exemption from the contraceptive requirement where there exists a causal nexus between the religious beliefs of the owners and the corporation itself.<sup>110</sup>

Recognizing that corporate personhood confers on corporations a right to religious freedom of expression is unprecedented.<sup>111</sup> As a result, *Hobby Lobby* represents a fundamental

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holding that “Under the designation of ‘person’ there is no doubt that a private corporation is included [under the Fourteenth Amendment]”. The doctrine arising out of these cases has come to be known as “corporate personhood.”

<sup>107</sup> *Citizens United v. Fed. Election Com’n*, 558 U.S. 310 (2010) (holding that the government cannot restrict corporate political free speech, extending *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Nat’l Ass’n for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963)); *see also* *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) (finding that the same principles of free exercise given to persons could be extended to closely held corporations). The effect of this particular decision cannot be understated; it continues to inform our understanding of corporate rights and responsibilities.

<sup>108</sup> Title VII was enacted pursuant to the Commerce Clause. *See* *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207, n.6 (1979). Because a conflict between these two statutes does not necessarily implicate constitutional concerns, it is unclear which statutory canon the Supreme Court would apply to resolve this tension.

<sup>109</sup> *See generally* *Hobby Lobby*, 134 S.Ct. 2751.

<sup>110</sup> *Id.*

<sup>111</sup> While *Hobby Lobby* extended this privilege only to “closely held” corporations, the legal framework arguably exists for the Court to expand this to all corporations.

shift in the degree to which a company can involve itself in the private life of its employees, and it presents a worrying picture for the future of reproductive autonomy on the part of female employees.

It is one thing for a corporation to declare its support for political issues or religious ideals. It is an entirely different matter for a corporation to claim an ability to freely exercise those religious ideals such that the corporation begins to dictate to its employees what choices they make regarding their personal lives. *Hobby Lobby* opens the gates to the possibility that long-standing worker protections can be stripped away if a corporation declares that those protections violate its sincerely held religious beliefs.

As an example, imagine that a closely held corporation, as defined in *Hobby Lobby*, has owners with sincerely held religious beliefs who require that their employees devote thirty minutes to prayer each day, outside of work. Further imagine that this corporation has employees who are of differing faiths and that an employee believes they are entitled to a religious accommodation under Title VII which would exempt them from this prayer requirement. If the employer fires this employee instead of providing an exemption, can the employer be liable under Title VII or can they claim a religious exemption under *Hobby Lobby*?<sup>112</sup>

The result of this example is uncertain, but clearly, the result of *Hobby Lobby* directly conflicts with Title VII and its prohibition against discrimination on the part of race, religion, sex, color, or national origin on the part of a qualifying employer.<sup>113</sup> Applying the facts of *Hobby Lobby* to Title VII demonstrates the degree to which RFRA and Title VII have been brought into tension.

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<sup>112</sup> There is an argument to be made that Congress intended for RFRA to be subordinate to the legislative scheme and contents of Title VII. *See Francis v. Mineta*, 505 F.3d 266, 270 (2007) (“Congress did not intend RFRA to subsume other statutory schemes”). But while this case may shed some light on possible resolutions of the tension between RFRA and Title VII, it should be noted that it dealt with a federal, rather than private, employer. As such, the question as to how a conflict between these two statutes should be resolved is now very much open.

<sup>113</sup> 42 U.S.C. §2000e-2, 3 (2014).

First, there is no question that both plaintiffs in the *Hobby Lobby* decision qualify as employers under Title VII.<sup>114</sup> As a result, the plaintiffs cannot take an adverse employment action<sup>115</sup> against a female employee because of her sex.<sup>116</sup> This extends to denying female employee a raise because of her sex,<sup>117</sup> instituting a pension scheme requiring female workers to pay more than male workers because women live longer than men,<sup>118</sup> and barring female workers from certain jobs out of a concern of harm to future children.<sup>119</sup>

Second, health insurance coverage is available and mandatory for all adults.<sup>120</sup> Those persons who wish to “opt-out” must pay a fine in lieu of paying for health insurance.<sup>121</sup> Corporations whose employees work more than thirty hours in a week are required to

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<sup>114</sup> 42 U.S.C. § 2000e(b) (2014) (defining employer as a person . . . who has fifteen or more employees for each working day . . .).

<sup>115</sup> See The Equal Employment Opportunity Commission Compliance Manual, Section 8: Retaliation (2000) (where adverse employment action is defined as denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, discharge, threats, reprimands, negative evaluations, harassment, or other adverse treatment).

<sup>116</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (clarifying that the language “because of” meant that the employer relied upon sex-based considerations in coming to its decision); see also 42 U.S.C. § 2000e-2(m) (2014) (establishing an unlawful employment practice where the complaining party demonstrates that race, religion, sex, color, or national origin was a motivating factor for the employment practice under the 1991 Amendments).

<sup>117</sup> See generally, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>118</sup> *City of Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702 (1978) (city requiring female employees to make larger contributions to pension fund than male employees was struck in violation of Title VII as sex discrimination because the practice discriminated in its treatment of the sexes).

<sup>119</sup> *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (employer’s policy barring all women except those who had medically documented infertility from working jobs involving lead exposure which could potentially cause harm to future or unborn children violated Title VII because it was facially discriminatory—concerned only about the harm associated with unborn offspring of female employees).

<sup>120</sup> 26 U.S.C.A. § 5000A (2014). This remains true for 2018, but will change in 2019. See *The Wall Street Journal*, *The New Tax Law: The Individual Health-Insurance Mandate* (Feb. 13, 2018), <https://www.wsj.com/articles/the-new-tax-law-the-individual-health-insurance-mandate-1518541795>.

<sup>121</sup> *Id.*

provide those employees with health insurance or pay a fine.<sup>122</sup> Health insurance therefore qualifies as an employee benefit – not unlike a pension scheme – which is subject to Title VII regulation.

Third, refusing to cover contraceptives in a health insurance package likely qualifies as sex-discrimination under Title VII.<sup>123</sup> While at first blush the decision appears to affect both men and women, a closer examination reveals that *Hobby Lobby* only addresses whether corporations could be compelled to provide contraceptives used by women. The contraceptives at issue in *Hobby Lobby* were not ones used by men.<sup>124</sup> Moreover, Hobby Lobby provides insurance coverage for a range of male reproductive benefits, including vasectomies and Viagra.<sup>125</sup> Male reproductive autonomy was therefore not called into question,<sup>126</sup> it was only female reproductive autonomy

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<sup>122</sup> 26 U.S.C.A. § 5000A(f)(2) (2014); *see also* *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2762 (2014).

<sup>123</sup> *See Birth Control benefits*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/birth-control-benefits/> (last visited Feb. 11, 2014) (while sterilization is covered, the majority of contraceptives included in health insurance packages are for use by women only).

<sup>124</sup> *Hobby Lobby*, 134 S.Ct. at 2765-2766 (two morning after pills and two intrauterine, or IUD devices).

<sup>125</sup> *See* Nicole Leinbach-Reyhle, *The Hobby Lobby Mess: 3 Quick Facts You Need to Know*, FORBES (July 2, 2014, 3:29 PM), <https://www.forbes.com/sites/nicoleleinbachreyhle/2014/07/02/the-hobby-lobby-mess-3-quick-facts-you-need-to-know-about/#bc78ae923a84>; Alexander C. Kaufman, *Hobby Lobby Still Covers Vasectomies and Viagra*, THE HUFFINGTON POST (June 30, 2014, 3:52 PM), [https://www.huffingtonpost.com/2014/06/30/hobby-lobby-viagra\\_n\\_5543916.html](https://www.huffingtonpost.com/2014/06/30/hobby-lobby-viagra_n_5543916.html); Steve Strauss, *How the Hobby Lobby Decision Affects Small Business*, USA TODAY (July 27, 2014, 5:01PM), <https://www.usatoday.com/story/money/columnist/strauss/2014/07/13/steve-strauss-hobby-lobby-decision-impact/12595887/>.

<sup>126</sup> *See* Lynn P. Freedman and Stephan L. Isaacs, *Human Rights and Reproductive choice* 20 (1993) (explaining that reproductive autonomy refers to the idea that people have a basic human right to decide the number and spacing of their children). It is important to note here that the contraceptives at issue were referred to by the company as “abortifacients” (drugs inducing an abortion), although they were not designated as such by the FDA. Where, as here, the company objected only to the contraceptives applicable to women, it limits *female* reproductive autonomy without imposing limitations on *male* reproductive autonomy.

which suffered.<sup>127</sup> A decision where an employer refuses to cover contraceptives likely constitutes an adverse employment action on the basis of sex and therefore a violation of Title VII.<sup>128</sup>

There is evidence to suggest that under Title VII, an employer would engage in sex-discrimination where it refused to cover certain contraceptives through its health insurance.<sup>129</sup> *Hobby Lobby* therefore brings RFRA and Title VII into direct conflict with one another.

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<sup>127</sup> Moreover, the counter-argument that *Hobby Lobby* does not affect female reproductive autonomy because there is nothing preventing female employees from individually purchasing contraceptives fails. Most contraceptives are available only with a prescription and if they are not covered by insurance, they range in cost from \$15 per month to \$80 per month. See CENTER FOR AMERICAN PROGRESS, supra note 59?. *Hobby Lobby* pays its employees \$14 per hour. See Leonardo Blair, *Hobby Lobby Raises Minimum Wages to \$14 for Full-Time Employees*, THE CHRISTIAN POST (Apr. 18, 2013). For a full-time worker, it would take anywhere from one to six hours of work to afford a month of contraceptive coverage. For workers with families and other financial obligations, this may very well be an expense they are unable to afford. What these female workers are now effectively being asked to do is forgo their reproductive autonomy so that their employer has a clear conscience.

<sup>128</sup> While certainly the argument can be made that this does not constitute sex-based discrimination because an employer is not refusing to cover *all* female-only contraceptives, just the ones that it objects to as a violation of its religion, this falls apart on closer examination. For certain women, oral contraceptives are not a viable alternative to a contraceptive an employer refuses to cover (an IUD or other) because of harmful side-effects. Moreover, as employers are under Title VII not allowed to make workplace decisions for their employees with an eye towards potential fertility complications, there seems to be little to differentiate the distinction between that situation and a situation here where a female employee is told that her contraceptive will not be covered under a health insurance plan because the employer considers it an abortifacient.

<sup>129</sup> Further, any argument that this does not qualify as sex-discrimination because there are female employees who use contraceptives and female employees who do not use contraceptives relies on the faulty reasoning from *Geduldig v. Aiello*, 417 U.S. 484 (1974) (dividing potential recipients into two groups, pregnant women and non-pregnant persons and finding that because the second group included members of both sexes, there was no discrimination) which was subsequently overturned with the 1991 Amendment to 42 U.S.C. §2000e(k) more commonly referred to as the Pregnancy Discrimination Act.

## 2. Effect on Already Disadvantaged Workers.

Not only does the recent court decision in *Hobby Lobby* create an artificial tension between RFRA and Title VII, it also disadvantages female workers; not just when compared to female employees who work for corporations who may not claim this exemption from the ACA, but also when compared to their EU counterparts.

The wage gap, which has previously been referenced in relation to the FMLA, is also at issue here. Women who take contraceptives face not just the costs of the contraceptives, but also the costs of a doctor's visit to get a prescription for the contraceptives.<sup>130</sup> For an uninsured female in 2012, the cost of a doctor's visit for an oral contraceptive prescription—the most commonly used contraceptive—ranged from \$35 to \$250.<sup>131</sup> On top of that cost was the \$15 to \$80 cost per month of the contraceptive.<sup>132</sup> At the end of the year, total potential costs without insurance were as much as \$1,210.<sup>133</sup> For a single earner family, this could mean forgoing contraceptives entirely without insurance subsidization.

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<sup>130</sup> While Medicaid helps defray the costs of contraceptives, in order to qualify, a person must fit within a narrow band. Guttmacher notes that Medicaid provides an income-based waiver to those persons whose income ceiling ranges either from 133% of the poverty line to 200% of the poverty line. While Medicaid is therefore a viable option for some women, for others without insurance who do not qualify, the cost of contraceptives is still high. See ADAM SONFIELD AND RACHEL BENSON GOLD, GUTTMACHER INSTITUTE: PUBLIC FUNDING FOR FAMILY PLANNING, STERILIZATION AND ABORTION SERVICES, FY 1980-2010 16 (2012).

<sup>131</sup> See GUTTMACHER INSTITUTE, FACT SHEET: CONTRACEPTIVE USE IN THE UNITED STATES (2014); see also CENTER FOR AMERICAN PROGRESS, THE HIGH COSTS OF BIRTH CONTROL 2 (2012).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* For an IUD, the potential cost is \$500 - \$1,000 upfront, once every five to ten years, for Implanon (an etonogestrel implant usually inserted in the arm) the cost is \$500 - \$1,100 upfront every three years. For an injection, the cost ranges from \$195 - \$590 per year, for the patch or a vaginal ring, the cost ranges from \$215 - \$1,200 per year, and surgical sterilization has an upfront cost ranging from \$1,500 - \$6,000.

In addition to financial considerations, allowing an employer to invoke personal religious expression and claim a violation of religion is damaging towards female workers because it blurs the lines between employer decisions and employee decisions. When an employer is allowed to dictate choices that would ordinarily be considered private and personal, an unacceptable blurring of the line between home and work occurs, irrevocably changing a professional work dynamic into an invasive personal relationship.

Where a corporation is allowed to make decisions as which contraceptives are morally acceptable and is then allowed to force employees to comply with that decision by only providing health insurance which covers certain contraceptives (or no contraceptives at all), reproductive autonomy is called into question and the most intimate decisions are made at the mercy of an employer.

## B. The EU

The United Nations (UN) has declared that the right to contraceptives is fundamental to ensuring that all women have the right to choice. While the EU has not taken steps quite as broad as the United Nations in this respect, it does recognize the importance of contraceptive access.<sup>134</sup> Moreover, it is important to note that the EU, in divorcing access to contraceptives from corporate choice, allows that access to remain in the hands of the population. This means that contraceptives are available through healthcare governance as long as a particular government allows for its regulation and sale.

### 1. Health Insurance and Contraception.

The EU sets forth minimum standards for health care, but leaves the majority of decisions to its member states.<sup>135</sup> Many of these

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<sup>134</sup> European Parliament Resolution on Reducing Health Inequalities in the EU, 2011 O.J. C 199 E/26 (urging EU member states to guarantee women easy access to methods of contraception and the right to safe abortion).

<sup>135</sup> See *The EU Explained: Public Health*, European Commission 5 (2013), [https://ec.europa.eu/health/sites/health/files/health\\_policies/docs/improving\\_health\\_for\\_all\\_eu\\_citizens\\_en.pdf](https://ec.europa.eu/health/sites/health/files/health_policies/docs/improving_health_for_all_eu_citizens_en.pdf) (finding that the EU generally has shared health

member states have a system of health insurance which functions directly through the government, leaving corporate-provided health insurance by the wayside.<sup>136</sup> This is hardly a perfect system, as the level of regulation varies among member states.<sup>137</sup> Certain countries allow access to contraceptives to all citizens at no cost, while other countries allow contraceptives only with a prescription from a doctor.<sup>138</sup> Still other states have stricter regulations on contraceptives.<sup>139</sup>

Moreover, some states do not provide contraceptives through their insurance programs, requiring individuals to pay costly amounts on a monthly basis.<sup>140</sup> While the merits of the insurance system implemented by the EU can and should be subject to a discussion concerning to what extent a government should be allowed to regulate reproductive freedoms, the undisputed fact is that a majority

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values and that the EU will protect the health of its citizens, but leaving the major decisions for implementation and regulation to the individual member states).

<sup>136</sup> See Susanna Grosse-Tebbe and Josep Figueras, *supra* note 25 (explaining that a majority of the original EU member states regulate at least some portion of their healthcare through publically funded means. In Belgium, health insurance is publically funded but generally privately administered where participants have the choice of provider and hospital. Comparatively, in France, healthcare is regulated by the state which sets benefits and regulations).

<sup>137</sup> See *id.*

<sup>138</sup> See EU Member States' Positions on Sexual and Reproductive Rights Issues, THE FAMILY FEDERATION OF FINLAND GLOBAL DEVELOPMENT UNIT 12-15 (Feb. 4, 2012), <http://vaestoliitto-fi-bin.directo.fi/@Bin/2a79b31b1786a7dd0363bcf10184c1f3/1514492752/application/pdf/1740298/EU%20Country%20Positions%20on%20Sexual%20and%20Reproductive%20Rights%20Issues.pdf> (a majority of states surveyed provided access to a majority of contraceptives, but only the United Kingdom provides contraceptives free of charge for all of its citizens. Belgium, Denmark, Estonia, France, Luxembourg, the Netherlands, Poland, Portugal, Slovakia and Slovenia provide that contraceptives are covered by health insurance and a majority of those states provide contraceptives free to youths).

<sup>139</sup> *Id.* at 12-15 (where Ireland does not subsidize access to contraceptives).

<sup>140</sup> See *id.* (where Estonia provides 50% coverage for contraceptives with a prescription and Austria does not provide contraceptives free of charge except for adolescents).



of these member states remove undue employer interference from the private lives of their employees.<sup>141</sup>

Access to contraceptives and abortion rises and falls with the collective societal norms of the population of a particular country.<sup>142</sup> In certain European States, access to contraceptives are more strictly regulated than in other States when that population falls more along the spectrum of conservative values.<sup>143</sup>

Corporations, by contrast, do not and cannot represent the social will of a population. Particularly in the EU, where corporations are not considered persons,<sup>144</sup> they do not possess any sort of moral judgment and have no voice in deciding social policy via health insurance.<sup>145</sup> Insurance provided by the government is therefore a better barometer of social issues and values held by the population.<sup>146</sup>

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<sup>141</sup> See Susanne Grosse-Tebbe and Josep Figueras, *supra* note 25, at (a majority of EU member states regulate healthcare through the government or public funds).

<sup>142</sup> See *The Family Federation of Finland Global Development Unit*, *supra* note 135, at 12-15 (Irish and Spanish access to contraceptives not subsidized by their governments because of the prevailing religious beliefs of the country).

<sup>143</sup> *Id.*

<sup>144</sup> With the exceptions of Germany, trade unions in Italy, and the city of London, UK, which allows corporations to appoint voters to represent the workforce, the EU does not have a conception of corporate personhood that can be compared to the United States. See German Const. § I Art. 19 (“the basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits”); see also, Italian Const. Title III, Art. 39 (“registered trade unions are legal persons”); see also, City of London, Worker Registration (“workers as well as residents have the right to vote. If your organization is based in the Square Mile, it can nominate workers to vote in its local elections”).

<sup>145</sup> See Susanne Grosse-Tebbe and Josep Figueras, *supra* note 25, at (explaining that regulation and policy are set by the government and not by a private actor).

<sup>146</sup> See *The Family Federation of Finland Global Development Unit*, *supra* note 135, at 7 (explaining that Ireland technically provides legal abortions but in practicality abortions are inaccessible and women travel to the United Kingdom. This is due in part to the overwhelming Catholic beliefs held by a majority of the country which forbade abortions from being legalized or performed until 1992, following a highly charged case. It was not until 2013, however, that abortion restrictions were reduced to allow abortions where the life of the mother is at risk. Comparatively,

Removing the ability of a corporation to regulate contraceptive coverage provided to its employees also ensures that the dynamic between employer and employee remains one that is removed from private decisions made by an employee. This in turn keeps the relationship between an employer and an employee purely a work-based relationship and ensures that the morality of an employer is not forced upon their employees.

The EU better keeps employers separate from the private lives of their employees by ensuring that decisions about contraceptives are left to the employee. Allowing an employer to dictate which forms of contraceptives are available for use by its employees impermissibly enables an employer to dictate personal choices that should only be made by an employee.

## V. CONCLUSIONS

The United States has made huge strides forward in protecting the rights of its workers over the course of the last century. Yet for all of the progress that has been made, when compared to the EU, the United States continues to disadvantage female employees on two separate grounds.

As the two examples in this comment show, the United States disadvantages predominantly female employees in requiring them to choose between their jobs and their families and allowing employers to invade the private lives of their employees. In each instance, the EU model provides greater employee benefits to women.

First, although the United States enacted the FMLA intending that providing twelve weeks of leave would allow employees to take time away from work to care for their families, evidence suggests that unpaid leave forces predominantly female workers to choose between their jobs and their families. With the existence of a wage gap, female workers are less financially able than their male counterparts to take

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Sweden provides access to abortion on demand while providing gestational limits and requiring that it not be free of charge).

advantage of its protections. Because of social expectations, women are the workers most likely to take leave under the FMLA, and for single-income households and female workers who already experience a wage gap, this can have devastating consequences.

By contrast, the EU provides a minimum of four weeks paid annual leave, and paid leave is available in varying increments from each of its member states. Because the EU is aware of the wage gap and continues to monitor its existence, better progress is made in its reduction. The combination of these two factors means that female workers are not required to choose between their jobs and their families to the same extent as US workers.

Second, under RFRA and the expansion of corporate personhood, the recent *Hobby Lobby* decision places female reproductive autonomy in the hands of an employer who may decline to provide contraceptive access through its insurance plan. This blurs the lines delineating a work relationship from employer/employee to something far more invasive of inherently private choices.

The EU, by contrast, leaves decisions about contraceptives in the hands of the member states, enabling a representative government to determine what level of access to contraceptives to allow. This ensures that employers remain removed from the private decisions of their employees and ensures that a professional relationship remains professional. While the EU is not a perfect system, its system of healthcare remains administered by the government and better represents views towards contraception on the part of the populace.

In short, the United States must do better for its female workers. It must take steps to ensure that reproductive autonomy remains in the hands of the individual whose choice it is to make or risk a slow erosion of the lines between employment and privacy. And it must address concerns about the FMLA in light of an existing wage gap and prevailing social expectation that women take leave from work to care for their families.