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Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models

Kathryn Kroggel*

I. Introduction

On August 5, 1993, the date the Family and Medical Leave Act of 1993 (the “FMLA”) took effect, Patricia Schroeder, a Representative from Colorado, addressed Congress, discussing the legislation she had worked on since its introduction in 1985. She noted that:

When I first introduced the Family and Medical Leave Act in 1985, workers were afraid to mention family responsibilities, for fear they would be stigmatized as poor or second-rate workers. In fact, workers were more apt to complain about parking spaces than childcare problems. Today, that all changes and we begin an era in the American workplace where being family friendly is good for business, good for employees, and good for families.3

This statement reflects the ultimate purpose of the FMLA: to serve the changing needs of the American worker with respect to the demands of both work and family.4 Under the FMLA, parents would be able not only to care for a sick family member, but also to take time off from work to bond with a newborn child without fearing that their jobs would not be waiting for them upon their return.5

The FMLA was intended to

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3. Id. at E 2010.
4. See infra note 42 and accompanying text.
5. See infra notes 18-30 and accompanying text.
create job security and promote growth in business and employment through a national program of family leave. In the words of the act itself, it was designed "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 

However, more than ten years after its enactment, the FMLA’s effects on maternity and especially paternity leave call the effectiveness of the act into question. In the United States, many workers, men in particular, are unable to take time to bond with a newborn child for financial and social reasons. While the FMLA provides for twelve weeks of unpaid leave time, many workers do not take advantage of the law because it would be impossible for the family to survive without the worker’s income, typically the father’s income. The social stigma attached to men who take paternity leave is also a factor. Many feel they will lose their place on the corporate ladder or that, regardless of the law, the same job will not be waiting for them when they return from leave.

A national system of paid paternity leave could lead the way toward solving these problems, as well as bringing the United States up to date with family leave laws that exist in the rest of the industrialized world. The United States is one of the last industrialized countries without a national system of paid family leave, specifically paid paternity leave.

6. See infra note 42 and accompanying text.
8. See Emily A. Hayes, Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993, 421 WM. & MARY L. REV. 1507 (2001) (discussing the origins and original goals of the FMLA, how those goals have not been met, and suggesting future legislative and judicial actions to best effectuate the original intent of the FMLA). See also Michael Selmi, The Limited Vision of the Family and Medical Leave Act, 44 VILL. L. REV. 395 (1999) (arguing that the FMLA created no new benefits and has not actually provided the broad aid to working families that was intended).
9. See infra notes 10-12 and accompanying text.
11. See infra note 12 and accompanying text.
This begs the question, is it time for the United States to implement its own national paid leave system? If so, what system would be best for the nation? Perhaps we can learn from the British model, established by the Employment Act of 2002, which came into force in April of 2003. Or perhaps state-implemented programs, such as that recently enacted in California, be more appropriate for the United States. If so, we must determine if the California model suitable for application to all states or for the nation as a whole.

This Comment primarily addresses the issue of paternity leave at the time of the birth of a child. This time is critical in the development of a bond between a father and child, and the issue of paternity leave is becoming increasingly important to both employers and employees. It is also becoming increasingly clear that without a system of paid leave, the provisions of the FMLA will not be as far reaching and effective as originally envisioned. Efforts to improve upon the leave allocated in the FMLA must take on greater significance in the United States, as they have in many other countries, if the goals of the FMLA are to be met.

Part II of this comment focuses on the current state of national family leave law in the United States, the Family and Medical Leave Act of 1993. This section outlines the basic provisions and legislative history of the act and discusses the goals of the legislation and how those goals have not been met since the FMLA’s enactment. Part III discusses foreign models for paid paternity leave systems. The primary focus of the section is the British model, established by the Employment Act of


14. Employment Act, 2002, c.22 (Eng.).
16. See Stephanie Armour, More Men Seek Better Work-Life Balance, USA TODAY, Oct. 8, 2003, at 5B. The current trend among working fathers appears to be a “scaling back” of work hours and career aspirations to spend time with the family. In response to this trend among employees, employers have responded by offering paid paternity leave programs or allowing fathers to create a more flexible work schedule. Id. See also Anna Bakalis, Paternity Leave, WASH. TIMES (Aug. 12, 2003), available at http://dynamic.washtimes.com/print_story.cfm?StoryID=20030811-091919-9020r (last visited January 23, 2004) (discussing the use of paid paternity leave as a job perk by large employers).
2002. The section will examine the history of the law, the reasons for its enactment, what it provides, and its reception thus far by the British people. Part III also discusses the applicability of the British model in the United States, specifically how the system would be funded and whether the United Kingdom model could withstand an Equal Protection challenge, ultimately concluding that, while aspects of the model might be useful in the United States, overall the United Kingdom model is not likely to be successful if applied to the United States. Part III concludes by briefly discussing the paid paternity leave laws of other countries around the world.

Part IV discusses the state-oriented model, based on the California legislation. This section discusses how the California system functions and is funded, as well as its possible effect on employers and employees. Finally, this section poses the question whether the California model is preferable to the United Kingdom model in terms of applicability to the United States as a whole and concludes that, while the California model is not a perfect system, it is the most likely to be successful if applied to the United States as a whole.

II. The FMLA

A. Basic Provisions and Limitations

The FMLA provides that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following” reasons:

(A) Because of the birth of a child and the need to care for said child, within a twelve-month period beginning on the date of the child’s birth.

(B) Because of the placement of a child either through adoption or foster care, within a twelve-month period beginning on the date of placement.

(C) In order to care for a seriously ill spouse, child or parent.

(D) Because of the employee’s own serious health condition.18

Several limitations apply to this general rule. First, with the

18. The Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1-2). See also The Family and Medical Leave Act of 1993 Regulations, 29 C.F.R. §§ 825.112 (outlining the circumstances under which an employee may take leave), 825.114 (defining “serious health condition”), 825.200 (discussing how much leave any one employee may take).
exception of public agencies, employers that do not employ more than fifty employees within seventy-five miles of the requesting employee’s worksite are not required to provide unpaid leave.\textsuperscript{19} Also, to be eligible for leave, an employee must have been employed for at least twelve months by the employer from whom the leave is requested and have worked at least 1,250 hours for that employer during the previous twelve month period.\textsuperscript{20} With respect to leave taken to care for an ill child, to fall under the FMLA, that child must be under the age of eighteen or, if older than eighteen, incapable of self-care because of a mental or physical disability.\textsuperscript{21} Finally, if a husband and wife are employed by the same employer, they are required to share the twelve available weeks of unpaid leave if it is taken for maternity or paternity reasons under (A) or (B) listed above, or to care for a sick parent under (C).\textsuperscript{22}

All FMLA leave is unpaid, and in the event that the employer provides paid leave for fewer than twelve weeks as part of an employee benefits plan, the FMLA requires additional unpaid leave only to the extent that it is required to attain twelve weeks total.\textsuperscript{23} The employee may also be required to substitute accrued paid leave, such as vacation days, personal leave, or family leave, for part or all of the twelve weeks allowed under the FMLA.\textsuperscript{24} Intermittent leave or a reduced leave schedule is not normally available to employees taking maternity or paternity leave under (A) and (B) listed above.\textsuperscript{25} Additionally, employers are entitled to notice of an employee’s intention to take leave thirty days before the leave period is to begin, or, in the event that leave must begin sooner, notice must be given as soon as practicable.\textsuperscript{26}

An employee’s job position and benefits are protected during the period of unpaid leave.\textsuperscript{27} In general, upon returning from leave, an


\textsuperscript{20} 29 U.S.C. § 2611(2)(A)(i-ii). The term “eligible employee” has been held to include not only current employees, but some former employees. \textit{See e.g.} Smith v. BellSouth Telecomms., Inc., 273 F.3d. 1303, 1307 (11th Cir., 2001). \textit{See also} 29 C.F.R. §§ 825.110-825.111.

\textsuperscript{21} 29 U.S.C. § 2611(12)(A-B). \textit{See also} 29 C.F.R. § 825.113(c)(1-2) (providing definitions of “incapable of self-care” and “physical or mental disability”).


\textsuperscript{23} The Family and Medical Leave Act, 29 U.S.C. § 2612(d)(1).

\textsuperscript{24} \textit{Id.} § 2612(d)(2)(A). \textit{See also} The Family and Medical Leave Act of 1993 Regulations, 29 C.F.R. § 825.207 (discussing the unpaid and paid aspects of FMLA leave).

\textsuperscript{25} 29 U.S.C. § 2612(b)(1). \textit{See also} 29 C.F.R. §§ 825.117 (discussing medical necessity for intermittent leave), 825.203 (discussing intermittent leave generally).

\textsuperscript{26} 29 U.S.C. § 2612(e)(1). \textit{See also} 29 C.F.R. §§ 825.302 (discussing notice from the employee to the employer), 825.304 (discussing employers recourse if employee fails to provide notice).

\textsuperscript{27} \textit{See infra} notes 28-30 and accompanying text.
employee is entitled to be restored to his or her previous position or a comparable position, with equivalent benefits and pay. The employer is required to continue to provide any employment benefits accrued prior to the beginning of a leave period, as well as continuing coverage under the employer’s health care plan.

The FMLA also established the Commission on Leave, the purpose of which was to conduct a comprehensive study of existing or proposed leave policies and the impact such policies have on employers, employees, and the growth of the business and job markets generally. The Commission was also to study the impact of temporary wage replacement, or paid leave, on employers and employees, and report its findings as a whole to Congress within two years of its first meeting.

B. Original Expectations for the FMLA v. the Reality of the Act in Practice

1. Purpose and Goals of the FMLA.

Before the passage of the FMLA in 1993, no national system of family leave existed in the United States, though not for lack of trying; family leave legislation was first introduced in Congress in 1985 and was reintroduced in each subsequent Congress until its passage. The idea of

28. 29 U.S.C. § 2614(a)(1). It has been noted by the courts that “equivalent” does not mean identical or exactly the same; the employer need only have a job available that is substantially equal to the one held by the employee prior to taking leave. Watkins v. J&S Oil Co., 164 F.3d 55, 59 (1st Cir., 1998). See also 29 C.F.R. §§ 825.214 (discussing employee entitlements upon returning from FMLA leave), 825.215 (defining “equivalent position”).


30. Id. § 2614(c)(1). See also 29 C.F.R. § 825.209 (discussing benefits during FMLA leave periods).


32. Id. § 2632(1)(A-G).

33. Id. § 2632(1)(H).

34. The Family and Medical Leave Act, 29 U.S.C. § 2632(2). The FMLA also covers prohibited acts by employers, generally interfering with the exercise of the right to take leave and job discrimination based on taking leave. Id. § 2615. To address these problems, the act provides investigative authority to the Secretary of Labor to ensure compliance with the FMLA, and provides employees with a civil cause of action for which damages may be recovered. Id. §§ 2616-2617. See also The Family and Medical Leave Act of 1993 Regulations, 29 C.F.R. §§ 825.220 (discussing protection of employees under the FMLA), 825.400-825.404 (detailing enforcement mechanisms under the FMLA). The United States Supreme Court recently treated the issue of damages available under the FMLA; see Nev. Dep’t of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003).

35. The Parental Disability Leave Act of 1985 required up to eighteen weeks of unpaid maternity or paternity leave. See Parental and Disability Leave Act of 1985, H.R.
family leave was not a new concept in the mid 1980’s. Rather, it was an issue whose importance fluctuated with the times in the first half of the Twentieth Century and began to gain more vocal support in the 1960’s. Congress took notice when California Congressman Howard Berman spearheaded a movement for a federal statute allowing women to not only take maternity leave, but to return to the job they had left.

2020, 99th Cong. (1985). Additionally, the bill required up to twenty-six weeks of unpaid leave for employees with non-work-related, temporary disabilities or sick children. The bill required the employer to continue health insurance and other benefits and to have the same, or a comparable, job waiting for the employee when he or she returned from leave. Also, the bill established a commission to study and make recommendations on the possibility of income replacement during leave. RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 42 (1995) (providing a detailed legislative history of the FMLA from its origins and introduction in 1984 to its passage and enactment in 1993). The Family and Medical Leave Act of 1986 imposed several limitations on which employees the bill would cover. See Family and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986). The bill created an exemption for small businesses employing up to fifteen employees. It also required employees to work a minimum of 500 hours or three months before they would be eligible for leave. Finally, it restricted the total leave taken by one employee to thirty-six weeks in a two-year period. However, among all these limitations, the bill was broadened, as the right to take leave to care for a sick family member was extended to include not only children, but spouses and elderly parents as well. See ELVING, supra at 66. Both bills were given a lukewarm reception in Congress and, while they spent a great deal of time in committees, never saw action on the floor of the House of Representatives. See ELVING, supra at 77. The 1990 family leave bill, HR 770, actually passed both houses of Congress, but was vetoed by President George Bush, Sr., on June 29, 1990. See ELVING, supra at 196. President Bush Sr.’s veto message stressed his position that “time off for a child’s birth or adoption or for family illness is an important benefit for employers to offer employees,” however, he felt that a “rigid,” “one size fits all” national system would not serve the best interests of the country. President Bush feared that the creation of jobs or growth of business would be stifled by the lack of flexibility in benefits that the law would create. 136 CONG. REC. H4451 (1990). The 1991 version similarly passed and was vetoed; however, Congress came very close to overriding the veto, passing the Senate and lacking only twenty-seven votes in the House. See ELVING, supra at 251-52 (noting that President Bush Sr.’s reasons for the veto were largely the same as those given in 1990 and the vote tallies in the Senate and the House of Representatives on the motion to override the veto). The Family and Medical Leave Act was finally passed in 1993 and signed into law by President Clinton, who stated that this law made sure that Americans no longer had to choose between work and the family. 139 CONG. REC. D111 (official note in the Congressional record of the signing of the bill); see ELVING, supra at 284-85 (describing the signing ceremony); see Hayes, supra note 8, at 1507 (discussing President Clinton’s remarks upon signing the bill).

36. ELVING, supra note 35, at 12.
37. See id.
38. See id. at 17-19. Berman’s involvement can be traced to Lillian Garland, a young woman who took time off from her job at the California Federal Savings and Loan Association after a caesarian section and found her position had been filled when she was ready to return to work two months later. Garland had taken time off under a 1978 California state law which Berman had been integral in passing; the law required employers to allow four months of leave for pregnancy. Id. at 18. She brought suit against her employer, and on March 21, 1984, the United States District Court for the
Patricia Schroeder, who introduced the 1985 bill in Congress, was one of the earliest and longest supporters of the idea of national family leave, although the issue gained support from both sides of the partisan debate, as well as labor unions and special interests groups, by the time the legislation was made law in 1993. The idea of paid leave was considered several times before the eventual passage of the FMLA, but in each instance, the idea was ultimately abandoned because proponents of the bill thought it unlikely to gain support or approval in Congress.

Central District of California found that the 1978 leave law violated Title VII of the Civil Rights Act of 1964 because men were not given equal access to leave under the law. Cal. Fed. Sav. & Loan Ass’n v. Guerra, No. 83-4927R, 1984 U.S. Dist. LEXIS 18387, at *2 (U.S. Dist., Mar. 21, 1984). It was this decision that spurred Berman on in his quest to pass legislation that would reverse the holding of the District Court and provide the benefit of leave to all women across the nation. ELVING, supra note 35, at 19. The United States Court of Appeals for the Ninth Circuit later reversed this decision in April of 1986, and was affirmed by the Supreme Court of the United States in January of 1987. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 758 F.2d 390 (9th Cir., 1985), aff’d, 479 U.S. 272 (1987).

39. Hayes, supra note 8, at 1517-18. See also ELVING, supra note 35, at 59 (noting that the 1985 legislation began with only one sponsor and ended with forty), at 153 (discussing the support for family leave by large labor unions), at 198 (noting that proponents of the 1990 bill were 53 votes shy in the House of Representatives of the number needed to override President Bush’s veto), at 251-52 (noting that proponents of the 1991 legislation lacked only 27 votes in the House to override the veto).

40. During the drafting phase of the original 1985 legislation, the issue of paid leave was considered in light of the European models of family leave in effect at the time, which offered at least partial wage replacement. See ELVING, supra note 35, at 30. While the drafters recognized that the lack of paid leave in American family leave legislation would make such a bill largely unhelpful to single mothers of low income families, they also viewed the situation with a practical eye for politics. Id. They knew a bill that required either federal money, in a time of budget deficits, or private employer compensation, when Congress was concerned with economic competitiveness, would be unlikely to garner support, and so the idea of paid leave was set aside. Id. However, the concept was not completely abandoned, as the 1985 bill introduced the Commission on Leave, id. at 42, which, as noted above, was included in the FMLA as enacted to study, among other things, the possible effectiveness of paid leave. See supra notes 31-34 and accompanying text. The idea of paid leave surfaced again in 1987, when the Democratic Party had a strong base in Congress after the recent elections, a factor which encouraged many supporters of family leave legislation to call for paid leave, as well as the longer leave and fewer restrictions on coverage that had been envisioned for the original legislation. See ELVING, supra note 33, at 77. But again, the politics of bill passage won the day and paid leave was tabled. Id. The issue of paid leave continued to arise in other contexts, such as committee debates. Id. at 108-09. The question of paid leave was raised, rather ironically, by opponents of the bill during Senate committee hearings. Senator Strom Thurmond spoke against family leave legislation in 1988, saying that a blanket, mandatory benefit would have an adverse impact on those people it was most trying to help, employees who might be suffering unequal work treatment due to the needs of the family. Senator Thurmond felt that the bill would lead to unequal hiring practices because employers would be more likely to hire workers that would not need or take family leave. Other Republican opponents noted that, unlike previous labor laws, which had been intended to help broad classes of workers, the leave law under the FMLA only seemed to help those workers wealthy enough to be able to afford twelve weeks
The findings of Congress and the purposes of the FMLA set out in the text of the statute itself state that the number of employed parents was increasing in 1993, with inadequate job security and family leave plans to effectively allow workers to take time off to participate in early childrearing, or to care for a sick family member, activities that were found to be important to the development of children and the family as a whole.\textsuperscript{41} In order to remedy this problem, the FMLA was created, its main purpose being to help workers balance work-life and home-life by allowing family leave in a way that accommodates the concerns of employers and employees alike and is available to both men and women.\textsuperscript{42}

2. The FMLA in Practice

The broad goals of the FMEA were to be effected by allowing certain workers to take twelve weeks of unpaid leave, subject to the limitations discussed above.\textsuperscript{43} However, almost immediately after the FMLA took effect, and in the years since, commentators have noted that the FMLA's limited leave provision has not had the sweeping, curative effect that was intended.\textsuperscript{44} As noted by Nancy E. Dowd, writing in 1993, "[t]he leave provided is paltry in light of the psychological and developmental needs of family, and the social and political implications of ongoing work-family conflict."\textsuperscript{45} It has also been noted that, while the

without an income. \textit{Id}. These arguments are quite similar to those made by the original drafters of the bill in favor of providing paid leave. Paid leave was never a formal part of leave legislation itself, except as an area of focus for the Commission on Leave.


\textsuperscript{42} \textit{Id.} at § 2601(b)(1-5). Specifically, the FMLA states that the purpose of the Act is:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;
(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner, consistent with the Equal Protection Clause of the Fourteenth Amendment [that] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons and for compelling family reasons, on a gender-neutral basis; and
(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

\textsuperscript{43} \textit{See supra} notes 18-26 and accompanying text.

\textsuperscript{44} \textit{See infra} notes 45-48 and accompanying text.

\textsuperscript{45} Nancy E. Dowd, \textit{Family Values and Valuing Family: A Blueprint For Family
act did effect change in that it provided leave to both men and women,\textsuperscript{46} overall, the act did little more than require what was already provided: unpaid leave to employees of large employers.\textsuperscript{47} In short, the FMLA only reaches goals of job security and work-family balance for a limited group of employees: those who work for large employers and whose families can afford to lose one income for up to twelve weeks.\textsuperscript{48}

The idea that the FMLA has essentially failed its primary purpose of helping all workers balance work and home life is supported by the Commission on Leave, based on its findings as reported to Congress in 1995\textsuperscript{49} and 2000\textsuperscript{50} through the Department of Labor.\textsuperscript{51} Based upon the findings of both surveys, only one tenth of private sector employers are covered by the FMLA; those employers employ about half of the private sector employees in the United States.\textsuperscript{52} The difference between covered and uncovered worksites is significant because among those employers not covered by the FMLA, only 32.3 percent offer some sort of parental leave of their own accord, and while that leave is often provided with the guarantee that the employee’s job will be held for him or her, such a


\textsuperscript{46} Hayes, supra note 8, at 1522.

\textsuperscript{47} Selmi, supra note 8, at 396-97.

\textsuperscript{48} See Hayes, supra note 8, at 1523-24 (discussing the achievements and shortcomings of the FMLA).


\textsuperscript{51} See infra notes 52-69, and accompanying text. It is interesting to note that while the statistics themselves seem to support the view encouraged by commentators, that the FMLA has largely failed, the 2000 Commission Report itself claims that the 1995 Commission Report found that the overall impact of the FMLA on employees had been positive, concluding that “The FMLA ... begins to emerge ... as a significant step in helping a larger cross-section of working Americans meet their medical and family caregiving needs while still maintaining their jobs and their economic security—achieving the workable balance intended by Congress.” 2000 Commission Report, supra note 50, Ch. 1.6, quoting the 1995 Commission Report, supra note 49. The 2000 Commission Report also concludes that the FMLA is “becoming a more important part of the experience of establishments and employees,” but that the findings of the 2000 Report indicate that, due to financial constraints caused by the leave period being unpaid, more employees are cutting short the length of leave they take, and that further research into solving this problem would be advisable. Id. Ch. 8.3.

guarantee is not always given and is obviously not required. These statistics underscore the idea that the FMLA was not as broad or useful as intended because it fails to help a significant portion of American workers.

The Commission Reports also demonstrate that not everyone who needs to take family leave is able or willing to do so. The Commission found that utilization of FMLA leave remains fairly low, and that women are more likely than men to take FMLA leave. However, the Reports indicate that when men do take leave, more than 75 percent took leave to care for a newborn or newly adopted child. Among persons who did take leave, the 2000 Commission Report found that not having enough money to pay bills during the period of leave was the dominate concern among employees. Further, the Reports note that to compensate for the income lost during periods of leave, many workers cut their leave short or used their savings, and that 8.7 percent went on public assistance to compensate for the lost income. Finally, the 2000 Commission found that many paid leave programs that are currently in place function by requiring employees to use paid vacation or sick leave toward FMLA leave, as allowed under the Act. Very few employers

53. *Id.* at Major Research Findings, § A. The Commission found that of the 32.3 percent of uncovered employers that provided parental leave, between 84 and 87 percent of those employers provide a job guarantee.

54. *See supra* notes 51-53 and accompanying text.

55. *See infra* notes 56-63 and accompanying text.

56. Dep't of Labor, *Families and Employers in a Changing Economy*, supra note 52, at Major Research Findings, § C. The Commission found that 16.8 percent of employees take some form of family leave; of those employees, about 7 percent, or 1.2 percent of all employees, designate that leave as FMLA leave.

57. 2000 Commission Report, *supra* note 50, Ch. 2.1.3 (noting that 58.1 percent of employees taking leave are female) and Table 4.17 (noting that 75.8 percent of female employees, versus 45.1 percent of male employees, who have young children, took leave; 3.8 percent of male employees with small children needed but did not take leave). The 2000 Commission Report also found that leave-takers are likely to be married, and in higher income groups than leave-takers in 1995. *Id.* This indicates, as stated previously, that leave-takers tend to be those who can afford to lose one family income for the twelve-week period. *See supra* note 48 and accompanying text.

58. 2000 Commission Report, *supra* note 50, at Table 4.19 (indicating that 75.6 percent of males take leave to care for a newborn, newly adopted or newly placed foster child).

59. *Id.* Ch. 4.1. More than 50 percent of employees taking leave said that the lack of money had been a primary concern; loss of employment and impact on job advancement were two other primary concerns. *Id.* at Table 4.1.

60. *Id.* at Table 4.8. Approximately 47 percent of “leave-takers” used their savings to compensate for lost income and 37 percent cut their leave short. *Id.*

61. 2000 Commission Report, *supra* note 50, Ch. 5.2.2 (discussing policies for the continuation of pay during FMLA leave).

62. *See supra* note 24 and accompanying text.
offer further paid leave beyond vacation or sick days.\(^6\)

There are approximately 3,520,000 people, described as "leave-needers" in the 2000 Commission Report, who need, but do not take, FMLA leave.\(^4\) The most frequently noted reason for not taking leave was being unable to afford it,\(^5\) followed by the fear that an employee's work or career would suffer as a result of taking leave,\(^6\) or even that the employee's job would be lost entirely,\(^7\) despite the job security that the FMLA was intended to provide.\(^8\) Among those leave-needers who said they could not afford to take FMLA leave, an overwhelming majority reported that, if some form of paid leave had been provided, they definitely would have taken leave.\(^9\)

These findings combine to support the idea that FMLA leave, on its own, does not meet the needs of American workers, in terms of enabling employees to take leave or to stay on leave as long as they need.\(^0\) A further program of national paid leave is necessary to actually create the balance between work and family life that the FMLA intended. The question then becomes how a system of national paid leave should be structured, especially with respect to fathers, the group of individuals least likely to utilize the current leave system.\(^1\)

63. 2000 Commission Report, supra note 50, Ch. 5.2.2. Of employers covered by the FMLA, 43.3 percent reported that they provided some form of paid leave beyond vacation, sick or disability leave; of employers not covered by the FMLA, 18.5 percent reported that they provided additional paid leave. In total, the percentage of all establishments that provide additional paid leave is 21.2 percent. Id. at Table 5.5.

64. Id. Ch. 2.2. These leave-needers are likely to be hourly workers, separated, divorced, or widowed, and to have small children living at home. Id. Ch. 2.3. As noted by the Commission, the number of leave-needers represents about 2.4 percent of the employee population, a number which is significantly down from the 3.1 percent noted by the 1995 Commission Report. Id. at Table 2.14. However, the 2000 Commission was unable to determine the specific cause for the downward shift in the number of leave-needers, saying that further research was needed to explain this trend. Id. Ch. 2.2.1.

65. Id. Ch. 2.2.4. Being unable to afford unpaid leave time was cited by 77.6 percent of leave-needers as the reason they did not take leave, a number which has gone up significantly since 1995, from 65.9 percent. Id. at Table 2.17.

66. Id. Ch. 2.2.4. In relation to the fear of a negative impact on an employee's career, 52.6 percent of leave-needers felt their work was too important to take leave, 42.6 percent felt that taking leave might hurt their chances for job advancement, and 27.8 percent did not want to risk their job seniority. See also id. at Table 2.17.

67. Id. Ch. 2.2.4. In 2000, 31.9 percent of leave-needers reported that they did not take leave because they felt their job might be lost, a number which has gone up slightly from the 29.7 percent that cited this same reason in 1995. Id. at Table 2.17.

68. See supra note 28 and accompanying text.

69. 2000 Commission Report, supra note 50, at Table 2.18 (noting that 87.8 percent of leave-needers would have taken leave if some or additional pay would have been provided).

70. See supra notes 51-69 and accompanying text.

71. See supra note 57 and accompanying text.
III. Foreign Models of Paid Paternity Leave

As mentioned above, the United States is decidedly behind the times with respect to paternity leave laws. This section presents the systems of paternity leave in several countries, focusing on the newly enacted British System.

A. The United Kingdom: Employment Act 2002

1. Basic Provisions and Limitations

Effective April 6, 2003, working fathers have the right to two weeks paid paternity leave, available in either one week or two consecutive week blocks, subject to certain limitations and employee qualifications. To qualify for paternity leave, an employee must have or expect to have responsibility for the child’s upbringing, be either or both the biological father of the child or the mother’s husband or partner, and be taking leave to either support the mother or care for the child. Also, the employee must have worked continuously for the same employer for twenty-six weeks preceding the fifteenth week before the due date of the child and from that fifteenth week up to the date of birth. Finally, the employee is required to give notice to the employer of the employee’s intent to take leave by the end of the fifteenth week before the due date of the child or as soon as reasonably practicable.

72. See supra note 13 and accompanying text.
74. Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. In this, and all other relevant sections to be discussed, the regulations to the Employment Act 2002 provide the practical details of how the legislation actually operates. Specific to the blocks of time in which leave may be taken, see Paternity and Adoption Leave Regulations, (2002) SI 2002/2788, § 5.
75. See infra notes 76-78 and accompanying text.
76. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. See also Paternity and Adoption Leave Regulations, (2002) § 4 (detailing the qualifications for employees who can take paternity leave). It is interesting to note that under § 4(2)(b)(ii) the mother’s partner may take paternity leave. Partner is defined in the regulations as “a person (whether of a different sex or the same sex) who lives with the mother ... and the child in an enduring family relationship but is not a relative of the mother,” thereby allowing same sex partners to make use of paternity leave. Id. at § 2.
78. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. See also Paternity and
Paternity leave must be taken within fifty-six days of the child’s birth. If an employee qualifies for paternity leave, there are certain other qualifications that the employee must meet in order to receive statutory paternity pay (“SPP”). Most importantly, an employee’s average weekly earnings must be at or above the Lower Earnings Limit for National Insurance Contributions. Essentially, the employee must earn at least £75 per week, approximately $127. The rate of paternity pay is currently £100 per week or 90% of an employee’s average weekly earnings, whichever is less. During the period of leave, the employee is entitled to continuation of job benefits and, upon returning from leave, the Employment Act 2002 requires that the same position or a similar position be available for the employee. The Employment Act 2002 also forbids any detriment to an employee’s standing with respect to advancement or unfair dismissal for taking or requesting paternity

Adoption Leave Regulations, (2002) § 6. The notice that the employee is required to give is quite detailed; the employee must provide: the expected week of the child’s birth; the length of the period of leave that the employee has chosen to take; and the date on which the employee has chosen that his period of leave should begin. Id. at § 6(1)(a-c). Additionally, the employee may be required to provide a signed declaration that states that the employee meets the requirements of § 4, the qualifications and reasons for taking leave. Id. at § 6(3). The DTI recommends the use of a “self-certificate” form, which can be viewed at www.inlandrevenue.gov.uk/pdfs/emp2003/sc3.pdf.


80. See infra notes 81-84 and accompanying text.

81. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 2 (amends the Social Security Contributions and Benefits Act 1992 to provide for SPP). It must also be noted that when a person wishes to receive SPP, there are additional notice requirements, including a direct notification to the employer of the desire to receive SPP at least 28 days before the child’s birth. Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations, (2002) SI 2002/2822, § 9(4).

82. See DTI, Working Fathers—Rights to Leave and Pay: A Guide for Employers and Employees, § 5, available at www.dti.gov.uk/er/individual/patrighsp1517a.htm. DTI notes that if the child is due between 4/6/03 and 7/19/03, the employees’ average weekly earnings must be at least £75; if the child is due between 7/20/03 and 7/17/04, the employees’ average weekly earnings must be at least £77. Id. This number is likely to fluctuate and the Inland Revenue Service should be contacted for the most up to date information at any given time, available at http://www.ir.gov.uk (last visited January 23, 2004).


85. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. See also Paternity and Adoption Leave Regulations, (2002) § 12 (stating that employee is entitled to all benefits that would have been received if the employee were not on leave).

86. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. See also Paternity and Adoption Leave Regulations, (2002) § 13-14 (detailing the right to return to work and what job must be made available).

87. See Employment Act, 2002, at c.22, Pt.1, c. 1, § 1. See also Paternity and
leave.\textsuperscript{88}

SPP is paid to the employee by the employer as ordinary earnings from which pension and income tax deductions may be taken just as they would be taken from regular wages.\textsuperscript{89} Employers are to use the money they collect for a variety of taxes and National Insurance contributions to pay SPP, but if the employer does not have enough funds, it can apply to the Internal Revenue Service for an advance.\textsuperscript{90} In most cases, employers will be able to recover from the British Government a substantial portion of the money they pay out in SPP.\textsuperscript{91} Finally, like the FMLA, the Employment Act 2002 establishes the minimum requirements with respect to paternity leave and pay.\textsuperscript{92} If an employee has a contractual right to longer leave or higher pay during leave, that employee may utilize the more favorable option.\textsuperscript{93}

2. Purpose and Goals of the Employment Act 2002

Prior to the enactment of the Employment Act 2002, unpaid parental leave was available to fathers and mothers\textsuperscript{94} under regulations

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Adoption Leave Regulations, (2002) § 28 (dealing with detriment to the employee by the employer's deliberate act or failure to act).


\textsuperscript{91} Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations, (2002) § 3. Most employers may recapture 92 percent of the amount paid out as SPP; smaller employers can recover fully 100 percent and an additional payment through the Social Security Contributions and Benefits Act 1992. Id. at § 3(1)(a-b).

\textsuperscript{92} See supra note 23 and accompanying text (discussing how employers are only required to provide additional leave, if they already have a leave plan, up to twelve weeks total).

\textsuperscript{93} See Paternity and Adoption Leave Regulations, (2002) § 30.

\textsuperscript{94} The British Government makes further, extensive provisions for both paid and unpaid maternity leave. Under the Employment Act, 2002, which, according to commentators, greatly simplified previous maternity leave law, all female employees are entitled to twenty-six weeks of Ordinary Maternity Leave (OML). This leave is paid at a current flat rate of £100 per week; this system of payment is virtually identical to that of SPP, in terms of rates and employers' ability to recover payments. In addition to OML, employees with twenty-six weeks of previous service at the same employer are entitled to a further twenty-six weeks of Additional Maternity Leave, which is unpaid. See Employment Act, 2002, at c.22, Pt.1, c. 2, §§ 17-21 (amending previous maternity leave law to make the provisions discussed above); see also Equal Pay; Fixed Term Contracts; Flexible Working; Maternity Rights; Parental Leave, Emp. L.B. 2002, 49 (June, 3-5) (discussing generally the changes made to previous law by the Employment Act of 2002 with respect to maternity, paternity, and adoption leave).
made pursuant to the Employment Act of 1996. The Maternity and Parental Leave Regulations, promulgated in 1999, provide employees with thirteen total weeks of unpaid parental leave, useable in week-long blocks, to care for a minor child before that child reaches the age of five. An employee may take no more than four weeks of parental leave in any given year with respect to each individual child.

Shortly after the award of parental leave, legislators began to realize that unpaid leave was not sufficient to help working families balance the demands of work and family life, especially with respect to fathers, who often had to use annual leave time or sick days to be available to support their partner when a new child was born. The leave was also viewed as relatively inflexible; while parental leave was intended to enable more parents to have time to spend with children or to dedicate to their care, by 2000, as few as three percent of parents had used parental

95. Employment Rights Act, 1996, c.18 (Eng.).
97. Id. at § 13. To qualify for this leave, an employee must have been continuously employed for at least a year by the same employer and have, or expect to have, responsibility for the child. Id. at § 13(1)(a-b). An employee is assumed to have responsibility for the child if any kind of parental duty is implied by the relationship or if they are registered as the child's father. Id. at § 13(2)(a-b).
98. Id. at § 15.
100. Id. at c. 3.24. This section discusses specifically the call for paternity leave, saying, "An increasing number of men want to play a more active role in supporting their partner following the arrival of a new child. This was supported at the Ministerial roundtables, with participants repeatedly saying that caring for children is not a woman's issue, but a family issue." Id. These positions were reiterated in January of 2003, after the Employment Act 2002 was passed, in a government paper discussing several recent changes that were intended to aid working families; specifically, the Government stated that the driving trends behind the changes, including the Employment Act 2002, were:
   1) a transformation in the way families organize their work, with a strong trend among couples away from single-earner towards dual-earner families and sustained growth in lone parent employment;
   2) a dramatic increase in the proportion of employees with caring responsibilities; and
   3) the combination of a competitive business environment and the current labor market context, bringing new challenges for employers and employees.

101. See Equal Pay; Fixed Term Contracts; Flexible Working; Maternity Rights; Parental Leave, Emp. L.B. 2002, 49 (June, 3-5); see also The Green Paper, supra note 99, at c. 3.25 (stating that thirty-three percent of men who take time off after the birth of a child use annual leave and that an additional five percent are expected to make the time up later, and discussing the personal experiences of some working fathers).
The British Government made a commitment in 2001 to help parents give more time to their children during the early years of life and took the first step toward doing so by publishing *Work and Parents: Competitiveness and Choice—Green Paper* ("Green Paper"), a comprehensive discussion of possible changes to family leave policy, which called for public responses to the propositions. The Green Paper proposed paternity leave, among other items, noting that an overwhelming number of parents believed that fathers should have the right to paternity leave and that over half of all parents felt that two weeks paid leave was the best option. In addition to the fact that so many working parents wanted this program, the Government also found that women whose partners took time off to support them just after the birth of a child were more likely to return to work themselves. This trend of new mothers returning to their previous jobs was important to employers because they stood to save substantial amounts of money by not having to recruit and hire as many new employees.

The responses to the Green Paper (the "Response Paper") made it clear that paternity leave was very important to working parents and that the two weeks of paid leave were supported by parents and employers alike. Employees wanted paternity leave for several key reasons: in recognition of the important role fathers play at the time of a child’s birth; to enable fathers to take time off around the time of birth; to provide a choice of when paternity leave can be taken; to ensure that paternity leave is paid; and to make paternity leave available to those parents who adopt a child. Employers had concerns, primarily that a system of paternity leave needed to be easy to administer, funded by the


105. *Id.* at c. 3.25 (noting that ninety-four percent of parents believed that fathers were entitled to paternity leave and that just over half of those parents supported the two-week plan). The Green Paper also noted that less than forty percent of fathers already had paternity leave available to them through their employers. *Id.*

106. *Id.*

107. *See* Equal Pay; Fixed Term Contracts; Flexible Working; Maternity Rights; Parental Leave, Emp. L.B. 2002, 49 (June, 3-5) (noting that an estimated £35 million could be saved in recruitment costs alone).


109. *Id.* at 4 (noting the concerns of parents and the ways in which the provisions of the Employment Act 2002 satisfied those concerns).
state, and available only to those employees that have been employed for a substantial period of time.110

The Response Paper concluded that the provisions of the Employment Act 2002 addressed all these concerns,111 and that the cost of administering the program, while not insubstantial at an estimated £63 million a year,112 was justified because of the benefits that would be provided to working families.113 The effects of the Employment Act 2002 remain to be seen, since most provisions only came into effect in April of 2003. However, polls taken before the enactment of the Employment Act 2002 indicate that employers continue to be extremely supportive of family leave time and willing to work with employees to help them balance work and home life.114 Also, the British government has announced that, while it intends to wait three years before making any further changes to the family leave systems, it is considering several "next steps" to further aid families, including allowing fathers additional time off to support mothers before the child is born, extending the period

110. Id. at 7. Specifically, employers’ concerns were “the impact on small employers; the employer funding the right; the administration; the period would go beyond two weeks; and how the employer would manage in the employee’s absence.” Id. at 5. The Response Paper also noted that employers recognized the “important role that fathers can play around the time of their baby’s birth” and that most employers had no problem with the paid leave program, as long as it was funded by the national government. Id. at ¶ 16.

111. Id. at 4, 7, 9-14 (respectively, addressing the key issues for parents, the concerns of employers, and the general framework of the Employment Act 2002 specific to the key concerns of employees and employers).

112. Response Paper, supra note 108, at Annex A 15-18. The cost of administering the program was calculated in the following way. Approximately 450,000 working fathers will be eligible for paternity leave each year. The Government assumes that many but not all fathers will take advantage of the leave provisions; 70 percent or 315,000 are assumed, for the purposes of calculation, to take advantage of the two week entitlement. At a rate of essentially £100 per week, this leads to a total between £60 and £63 million, which would equal $102 to $107 million. Id. Amounts reached using currency calculator, available at http://www.x-rates.com/calculator.html (last visited January 23, 2004).

113. Id. at 16. Specifically, paid paternity leave would obviously provide a financial benefit to families, but it would also enable more men to take leave, especially those that had been denied leave in the past or had been forced to use other forms of leave to take time off for the birth of a child, and it would improve father-child relationships while providing much needed support to mothers. Id.

114. DTI, The Second Work-Life Balance Study: Results From the Employers’ Survey—Executive Summary, at 3, (published Nov. 3, 2003), available at http://www.dti.gov.uk/et/emer errs22ExecSum.pdf (last visited January 23, 2004). This survey found that sixty-five percent of employers supported work-life balancing for employees and that ninety-four percent felt that employees worked better when they are able to balance their home and work lives. Id. Specifically, employers found that work-life balance made employees happier, and had a positive effect on staff retention and motivation. Id. at 10. This survey also found that there was a high level of awareness among employers of the provisions of the Employment Act 2002. Id. at 4.
of paid paternity leave or introducing unpaid paternity leave and extending paid paternity leave for multiple births or disabled children.115

3. Applicability of the British Model in the United States

The British model of paid paternity leave would likely encounter two key problems if applied in the United States. First and foremost is the method of funding. The British model would require the federal government to reimburse employers for a substantial portion of leave payments.116 To do so, the federal government would have to either draw these funds from an existing pool, or impose a new tax to pay for the program. Commentators have noted that "the reluctance to provide additional money has been and remains the major roadblock to the enactment of a program of paid leave."117 As such, new taxes or reallocation of existing government funds seems unlikely to find a great deal of support in Congress. There is also the related issue of whether reimbursement directly to employers118 would be administratively practical in the United States. The size of the United States, as compared to the United Kingdom, tends to indicate that such a system of direct reimbursement might be impractical and costly to administer.

Second, the British model of paid paternity leave could raise constitutional issues if applied in the United States, specifically an equal protection challenge under the Fourteenth Amendment.119 The current law in the United Kingdom provides women with up to twenty-six weeks of paid maternity leave,120 while the new allowance for paid paternity

116. See supra note 91 and accompanying text.
117. Hayes, supra note 8, at 1536-1537.
118. See supra note 91 and accompanying text.
119. As discussed above in note 38, the origins of the FMLA can be traced to the California's courts decision that a law that provided pregnancy leave to women only violated Title VII of the Civil Rights Act of 1964 because men were not given equal access to leave under the law. Cal. Fed. Sav. & Loan Ass'n v. Guerra, No. 83-4927R, 1984 U.S. Dist. LEXIS 18387, at *2 (U.S. Dist., Mar. 21, 1984). This use of the Civil Rights Act of 1964 to invalidate such a maternity leave law is typical of the approach used by the courts after 1964, when courts began to favor an equal protection analysis of such laws over a commerce clause analysis. Anne Lofaso, Pregnancy and Parental Care Policies in the United States and the European Community: What Do They Tell Us About Underlying Social Values?, 12 COMP. LAB. L. 458, II.A. (1991) (discussing the history of American pregnancy laws). With respect to discrimination on the basis of gender, the Supreme Court stated in J.E.B. v. Alabama, "Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-131 (1994).
120. Employment Act, 2002, c. 22, § 18 (Eng.).
leave is only two weeks. \footnote{121} Men and women are paid at the same rate, \footnote{122} but the discrepancy in the possible amount of leave is obvious, and poses a problem that was at the root of the FMLA: equal treatment of men and women with respect to work and family. \footnote{123} Any program implemented in the United States would have to provide not only maternity and paternity leave, but also equal access to that leave.

For the reasons mentioned above, transitioning to a national system of paid paternity leave following the British model in the United States would likely not be easy or successful. However, we can learn from the model and perhaps apply part, if not all of the British process in the United States. Specifically, the interaction between the government and citizens in formulating a plan for family leave, \footnote{124} and the special recognition of the role of fathers in early childrearing \footnote{125} could be useful in the United States, both to gain widespread support for a program of paid family leave and to begin to alleviate the perceived stigma attached to men who take paternity leave. \footnote{126} Involving the public and implementing a program that receives widespread support from parents and employers alike could result in parents being more knowledgeable about paid leave programs and more willing to make use of them. \footnote{127}

\footnote{121}{Id. at c.22, Pt. 1, c. 1, § 1.}
\footnote{122}{For the rate of pay for men, see Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations, (2002) SI 2002/2822, § 2. For the rate of pay for women, see Employment Act, 2002, at c. 22, § 19.}
\footnote{123}{See supra note 42 and accompanying text.}
\footnote{124}{See supra notes 100-113 and accompanying text.}
\footnote{125}{See supra note 105 and accompanying text.}
\footnote{126}{See supra note 11 and accompanying text.}
\footnote{127}{Public involvement, like the public response to parental leave that the British government called for, supra note 104, could increase awareness of a paid parental leave program even before it is enacted. The FMLA includes provisions designed to make workers aware of their right to take leave, accomplished by requiring employers to post notices that outline key provisions of the FMLA. The Family and Medical Leave Act, 29 U.S.C. §§ 2601-2632, § 2619(a)(2003). However, the Commission report in 2000 showed that only 58.2 percent of covered workers have ever heard of the FMLA. 2000 Commission Report, supra note 50, Ch. 3.4. Early public involvement would likely increase awareness, even if through nothing more than additional exposure of the proposed act.}
B. Other Foreign Models of Family Leave—Summary

1. Australia

Unpaid parental leave is available for up to one year, but the employee's job is not necessarily guaranteed upon his or her return. The leave period can be taken by one parent or shared between both parents. In order to qualify, the employee must have been employed continuously by the same employer for over one year. Commentators in Australia are currently urging paid family leave, but have found little support in the legislature.

2. Canada

Canada extended its leave policies in 2001, allowing partially paid leave for thirty-five weeks, with parents able to recover up to fifty-five percent of their weekly pay, up to 420 Canadian dollars (roughly 308 U.S. dollars). This leave can be taken by one parent or shared by both, is available to same-sex partners, and, when combined with maternity and sickness benefits, can allow up to fifty weeks of leave for some couples. To qualify, employees must have worked 600 hours in the previous fifty-two weeks before taking leave.

3. Columbia

On July 23, 2003, the Columbian government enacted a new law that provides four to eight working days of paid paternity leave to

\footnotesize{128. This section does not, and is not intended to, discuss the family leave programs of every country. Instead, I chose to focus on countries that either lack a paid leave system, like Australia and Ireland, or countries that present a recent or unique model of paid leave. For a more extensive overview of international family leave programs, oriented on European counties, please see The Green Paper, supra note 99, at Annex C: International Comparisons.


131. Id.


133. Cherney, supra note 17, at B12.

134. Lene Madsen, Citizen, Worker, Mother: Canadian Women's Claims to Parental Leave and Childcare, 19 CAN. J. FAM. L. 11, 42 (2002).

135. Id. at 43.
husbands or long-term male companions.136 To qualify, employees must present a birth certificate to their employer within thirty days of the child's birth, and have paid social security contributions for at least 100 weeks prior to the birth.137

4. Finland

Twenty-six weeks of parental leave is currently available in Finland.138 It is paid by the State, at differing levels depending on the previous wages of the employee.139 A specific grant of eighteen days paternity leave is also available. New legislation is under consideration that would allow fathers a total of six weeks of paternity leave.140 Under the new legislation, fathers would be entitled to the additional period of paternity leave only if they had already used two weeks of parental leave.141

5. Ireland

Ireland provides employees with fourteen weeks of unpaid parental leave within the first five years of a child's life.142 However, this leave is widely unused, especially by fathers, largely due to the fact that families cannot afford to lose the income provided by the father and the existence of an extremely negative attitude in the workplace toward men who take family leave.143

6. Italy

Ten months of paid parental leave is available to each parent, to be
used anytime until the child is eight years old.\textsuperscript{144} The period of parental leave is extended if paternity leave is taken: if the father takes at least three months of leave, then eleven total months will be available to the family as a whole instead of ten.\textsuperscript{145} Leave is paid by the state at a rate of thirty percent of the employee’s usual wages.\textsuperscript{146}

7. Norway

Considered by some commentators to have the most family-friendly leave program,\textsuperscript{147} Norway provides up to fifty-two weeks of paid parental leave per family,\textsuperscript{148} of which four weeks must be taken by the father or that time is lost to the family as a whole.\textsuperscript{149} Leave is paid by the State at 100 percent of an employee’s wages for forty-two weeks, or eighty percent for the full leave period.\textsuperscript{150} This leave is available to all families in that, even if a parent was unemployed prior to taking leave, they still receive some payment from the State.\textsuperscript{151}

8. Sweden

A total of twelve months of parental leave is available to families with respect to each child, and each parent must take at least one month of leave.\textsuperscript{152} Additionally, fathers have the right to two weeks paternity leave just after the birth of a child.\textsuperscript{153} Parental leave is paid by the state a rate of eighty-percent of wages for 360 days, and a flat rate for the remaining ninety days of the total twelve month period.\textsuperscript{154} To qualify for leave, employees must have worked for at least 270 days before the birth of the child and at least thirty months must have elapsed since the birth

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Ireland Emerges Last in European Table for Paternity Leave}, The Irish Jobs Column (Aug. 6, 2002), available at http://www.exp.ie/advice/paternityrelease.html (last visited January 23, 2004) (discussing the most family-friendly European nations in terms of family, and specifically, paternity leave benefits).
\textsuperscript{149} \textit{Dad’ll Be The Day, supra} note 143. Iceland has a similar policy, employing the set paternity leave period commonly known as “daddy’s weeks.” The program has been highly successful in both countries, with ninety percent of fathers taking at least four weeks of paternity leave. \textit{Id. See also} Arndt, \textit{supra} note 13 (stating that after the institution of “daddy’s weeks” in Norway, the percentage of fathers taking maternity leave jumped from four percent in 1993 to seventy percent in 1995).
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Ireland, supra} note 147.
of a previous child.\textsuperscript{155}

IV. State-Oriented Model of Paid Family Leave: California—S.B. 1661\textsuperscript{156}

\textbf{A. Basic Provisions and Limitations}

S.B. 1661: Disability Compensation—Family Temporary Disability Insurance ("FTDI") builds upon California's existing state disability insurance program ("SDI"), by amending the Unemployment Insurance Code\textsuperscript{157} to offer employees up to six weeks of paid family leave\textsuperscript{158} each year.\textsuperscript{159} Family leave may be used to care for a seriously ill child, spouse, parent, or domestic partner, or to care for and bond with a newly born or newly placed child.\textsuperscript{160} Employees are eligible for FTDI benefits on any day they need to take leave for any of the reasons listed above, provided they are not also receiving other unemployment compensation, cash benefits, or state disability benefits.\textsuperscript{161} FTDI benefits are also subject to a waiting period of seven consecutive days, during which no leave benefits are paid,\textsuperscript{162} and the requirement that the employee requesting FTDI benefits be the only available caregiver.\textsuperscript{163}

\textsuperscript{155} Id.

\textsuperscript{156} Twenty-eight states have considered paid family leave legislation. For more information on state laws, other than the California legislation, see www.nationalpartnership.org (maintains information about the history and current status of paid family leave law in all twenty-eight states).

\textsuperscript{157} Specifically, FTDI amends §§ 984, 2116, 2601, 2613 and 3254 of the Unemployment Insurance Act, and adds Chapter Seven, commencing with § 3300, to Part Two of Division One of the Act. \textit{See} S.B. 1661, 2001-02 Reg. Sess. (Cal., 2002) (enacted).

\textsuperscript{158} Family leave, or "family care leave," is defined by the statute as leave for the reason of the birth of a child, the placement of a child due to adoption or foster care, or the serious health condition of a child, spouse, domestic partner, or parent. Cal. Unemp. Ins. Code § 3302(b)(1-2), (2003).

\textsuperscript{159} \textit{See also} S.B. 1661, 2001-02 Reg. Sess. (Cal., 2002) (enacted) (discussing, generally, the existing law in California and the proposed changes of S.B.1661).

\textsuperscript{160} Cal. Unemp. Ins. Code § 3301(a).

\textsuperscript{161} \textit{Id.} at § 3303(a-d).

\textsuperscript{162} \textit{Id.} at § 3303(a).

\textsuperscript{163} \textit{Id.} at § 3303(e). Specifically, this section states "an individual is not eligible for FTDI benefits with respect to any day that another family member is able and available for the same period of time that the individual is providing the required care." This poses an interesting question with respect to the rights of mothers and fathers at the time of the birth of a child: Can a father claim FTDI benefits if he takes family leave as a form of paternity leave, i.e. just after the birth of a child in order to bond with and help care for the child, if the mother of the child is on maternity leave at the same time and therefore, arguably, "able and available" to care for the child? Does it make a difference if the mother is taking maternity leave under a different leave law? Section 3301 notes that nothing in the newly added Chapter Seven of the Unemployment Insurance Act "shall be
FTDI benefits are financed through employee contributions and the benefits replace wages at a rate of between fifty-five and sixty percent of base earnings, up to $728 in 2004. Employees contribute through a mandatory payroll deduction that is paid into the Disability Fund. The Director of Employment Development determines the rate each year, based upon a statutory formula. The contribution rate cannot exceed 1.5 percent of an employee's wages, nor be lower than 0.1 percent. It is estimated that at the current rates, which will be increased slightly to cover the start-up costs of the FTDI program, the average worker's contribution would be $50 a year.

FTDI leave must be taken concurrent with FMLA leave if the employee is eligible for both programs and, similar to the FMLA, an employer may require an employee to count two weeks of unused accrued paid vacation time toward FTDI leave. However, unlike the


166. Id.
167. Id. at § 984(a)(3).
168. The Director is required to increase the rate by 0.08 percent for the 2004 and 2005 calendar years. See Cal. Unemp. Ins. Code § 984(a)(2)(B).
170. Cal. Unemp. Ins. Code § 3303(f). This provision also applies if the employee is eligible for leave under the California Family Rights Act. Id.
171. See supra note 24 and accompanying text.
172. Cal. Unemp. Ins. Code § 3303(g). If an employer requires an employee to use vacation days, such leave days may be applied to the seven-day waiting period, thus enabling the employee to have at least some income for the entire leave period. Id. S.B. 1661 also allows employers to administer voluntary plans (VP) for paid family leave instead of FTDI, as long as the VP is approved by the Director of Employment Development. VP's will be approved if, among other things: the rights afforded under the plan are greater than those provided for under FTDI; the plan is made available to all
FMLA, FTDI provides benefits to all private sector employees, regardless of the number of employees employed at a particular job site. With only limited exceptions, the FTDI program does not cover state-government employees.

B. Purpose and Goals of S.B. 1661

The provisions of S.B. 1661 became effective on January 1, 2004, and the payment of benefits commenced on or shortly after July 1, 2004, as provided in the bill. However, before the bill was even enacted, proponents and opponents alike were vocal in their opinions about the measure. Arguing for the bill, the California Labor Federation and the California National Organization for Women stated that workers simply could not afford to take time off without wage replacement. Providing paid leave was therefore a “family values issue”; these two organizations felt that S.B. 1661 would be a great aid to working families, as employees would not longer be in the position of deciding between work and family. Opponents of the bill were chiefly concerned with the financial burden on employees, as contribution to the Disability Fund was mandatory, and on employers, in the form of additional benefits and by virtue of the fact that all employers, regardless of size, were subject to the law. These concerns were related to the Senate Committee on employees of the employer within California, including part-time employees; and a majority of the employees have consented to the plan. See Cal. Unemp. Ins. Code § 3254. This is similar to the way in which both the FMLA and the Employment Act 2002 create a minimum level for leave benefits; employers may offer their own programs as long as they equal or exceed the statutorily prescribed benefits. See supra notes 85-86 and accompanying text.

173. See supra note 19 and accompanying text.
175. Id. at 7. Local public officers may elect this type of coverage for certain employees, as long as such election is the “result of a negotiated agreement.” Id. at 8. Also, employees of the State of California are not eligible for this program, but are instead covered by NDI, which is funded through the general fund and is perhaps less advantageous than FTDI because the payments under NDI are taxed as income. Id.
177. See generally Cal. S. Report, supra note 164, at 10-14 (noting the opinions of various groups and associations with respect to paid family leave legislation).
178. Id. at 11-12.
179. Id.
180. Id. at 12-14. The version of S.B. 1661 before the committee at this time provided that only fifty percent of the paid leave benefits would be funded by the Disability Fund. Employers were required to make up the balance through direct payments, additional insurance, or matching contributions to the Disability Fund. Id. at 8. The California Manufacturers and Technology Association felt that requiring employers to provide such benefits on a mandatory basis was unreasonable, and that, based on past experience with similar legislation, a program such as that described in S.B. 1661 would be very expensive. Id. at 12. The California Chamber of Commerce
Labor and Industrial Relations in a hearing on May 14, 2002, one of many hearings and amendments that would create the final version of S.B. 1661 that was signed into law in September of 2002.

As stated in the text of S.B. 1661 as enacted, the Legislature of California found that the need for some form of paid family leave had intensified in recent years as the number of working parents increased, and that the need for leave would only continue to grow in the years to come. The Legislature also found that the majority of workers in California could not take leave because they could not afford to lose their income. The lack of paid leave also created a greater demand on the state’s unemployment and welfare systems, as they were utilized as a form of wage replacement by those workers who did take leave. In response to these problems, the Legislature created FTDI with the intent that the program would help workers balance the demands of work and home life, in a way that would benefit both employees and employers.

The question of costs that was a key concern of opponents of the bill was addressed in July of 2002 in a study focused on the costs and benefits of implementing S.B. 1661. In short, the study found that California employers could potentially save $89 million, as a program of paid family leave would increase employee retention and decrease turnover, two concerns that were also key for British employers with respect to the Employment Act 2002. The study also found that the State of California itself could save $23 million annually, as the

opposed the bill based on the new taxes that would be imposed on all employers and employees. Id. at 13. The Chamber of Commerce also had concerns about the fact that no small-business exception was created by S.B. 1661, which would perhaps create too much expense and difficulty for small business owners. Id. at 14.

184. Id. at § 3300(e).
185. Id.
186. Id. at § 3300(f).
187. Cal. Unemp. Ins. Code § 3300(f). Specifically, the statute states that “Developing systems that help families adapt to the competing interests of work and home not only benefits workers, but also benefits employers by increasing worker productivity and reducing employee turnover.”
189. Id. at Table 8: Turnover Cost Reduction from Paid Family Leave.
190. See supra notes 106-107 and accompanying text.
provision of paid leave would likely decrease the use of assistance programs, such as welfare or unemployment compensation, as a means of wage replacement.\textsuperscript{191} These findings indicate that the major concern of opponents of the bill was likely addressed and solved with careful drafting, and that at least one of the goals of the legislature, lessening the demands on public assistance programs, has been met. As with the Employment Act 2002, the effectiveness of S.B. 1661 to fully carry out the intent of the legislators remains to be seen.

C. Applicability of the California Model in the United States

1. Applicability on the National Level

The California model, like the United Kingdom Model, would likely encounter two key problems if applied to the United States as a whole. Again, funding is an issue. The California model would require that a new, mandatory tax be imposed on all workers.\textsuperscript{192} The history of the FMLA indicates that new taxes to pay for family leave have not gained support in the past.\textsuperscript{193} Perhaps more importantly, the administration of the California model raises the issue of whether the federal government or the governments of the individual states should administer the paid leave program.

If the federal government administers the program, the issue of our nation's principles of federalism could be raised, in that traditionally our system of government has been to allow the states to govern themselves to the greatest extent possible. However, careful drafting of a federally administered program could allow the law to follow in the footsteps of the FMLA by working with statutes that may already exist in the various states and simply setting the minimum requirement for the nation as a whole.\textsuperscript{194}

If the states are allowed to administer the program, drawing on a pool of federal money, concerns could arise as to uniformity of law and proper administration of funds. However, drafters of a paid leave program based on the California model could perhaps avoid these problems by learning from the experience of the Birth and Adoption Unemployment Compensation Regulations (the “BAA-UC”).\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{191} Labor Project Report, supra note 188, at Table 9: Public Assistance and Paid Family Leave.
\item \textsuperscript{192} See supra note 164 and accompanying text.
\item \textsuperscript{193} See supra note 40 and accompanying text.
\item \textsuperscript{194} See supra note 23 and accompanying text. See also Hayes, supra note 8, at 1512 (discussing the interaction of the FMLA with other statutes).
\item \textsuperscript{195} For a discussion of the general background of the BAA-UC, see Hayes, supra
Promulgated in June of 2000, the BAA-UC allowed states to experiment with using Unemployment Compensation funds to provide partial wage replacement to employees taking family leave. This program avoided the issue of funding by drawing on an existing pool of funds, but created uniformity of law problems since the BAA-UC did not dictate any particular model for the states to apply. The BAA-UC also gave rise to concern over whether such programs were an appropriate use of unemployment compensation funds.

The BAA-UC regulations were revoked in October of 2003, largely because the Department of Labor (DOL) decided that these regulations were an inappropriate use of unemployment compensation funds. The issue of uniformity of law was not discussed because, as of the date of revocation, no state had made use of the BAA-UC. With this history in mind, if the California model is applied, the question of inappropriate use of funds could be avoided by the establishment of the Disability Fund, separate from any other unemployment compensation funds.

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note 8, at 1532-36.

196. See Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000), codified at 20 C.F.R. pt. 604 (2003), repealed by Unemployment Compensation—Trust Fund Integrity Rule; Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003). As noted by the Department of Labor (DOL), the BAA-UC was not meant to be “paid FMLA” or “paid family leave,” per se. Id. at 37,212. While BAA-UC would likely be available to employees concurrent to FMLA leave, BAA-UC was not mandated by the federal government and was strictly within the province of the states to administer. Id.

197. Hayes, supra note 8, at 1534.

198. Id. at 1535 (noting that the United States Chamber of Commerce felt that parental leave was not an appropriate expenditure of unemployment funds because the people on leave were not actively seeking to rejoin the work-force). However, the DOL, in promulgating the regulations, felt that using unemployment funds to pay for parental leave was consistent with the intended use of the funds because, when interpreting the longstanding “able and available to work” requirement, exceptions had been made for other situations, such as approved training, jury duty, illness and temporary layoffs. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,210-37,211. The DOL found that such an exception should be created for the BAA-UC experiment, in order to “test whether this opportunity to provide the initial care that the child will need, to form a strong emotional bond with the child, and to establish a secure system of child care, will promote the parents’ long-term attachment to the workforce.” Id. at 37,211.

199. See Unemployment Compensation—Trust Fund Integrity Rule; Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003). Specifically, the DOL found that an exception could not be made to the “able and available” (A&A) requirement for unemployment compensation (UC), stating that “the BAA-UC experiment is poor policy and a misapplication of federal UC law relating to the A&A requirements.” Id. at 58,540.

200. Id. at 58,540 (discussing the effect of the repeal).

201. In repealing the BAA-UC, the DOL made clear that the states “remain free to create a paid family leave-type program using state moneys from sources other than the state’s unemployment taxes deposited into its unemployment fund.” Id. California’s FTDI program essentially does just that. See supra notes 156-161 and accompanying
The issue of uniformity of law disappears if one particular model is suggested as, at the very least, the minimum requirement of what must be provided by the states, as in the FMLA.  

2. Is the California Model Preferable to the United Kingdom Model?

Keeping in mind the concerns discussed above, it seems likely that the California model is a more appropriate system for application in the United States, for several key reasons. First, there is the issue of funding. Although neither a new tax nor a reallocation of existing funds is likely to prove popular with Congress or with the American people, the new mandatory tax proposed by the California legislation seems likely to garner more support from the employees themselves. There is a trend indicating that paid family leave is very important to the younger generation of workers, so much so that paid family leave is often used as a hiring perk to attract and retain the best employees. Perhaps if the California model proves successful on the state level, taxpayers may be more willing to consider a new tax in light of the benefit that paid leave could be to working families in terms of effectively balancing the concerns of work and home life.

Second, the California model appears to be a better fit with the United States Constitution and its general system of government. The California model poses no equal protection issues, as this model makes paid family leave available equally to both men and women, unlike the United Kingdom model. The California model also recognizes the general reluctance of the United States government to provide funding for a paid family leave program by instituting a tax to help the system pay for itself. The United Kingdom model fails to recognize what has been called "the basic dichotomy involving the roles of social programs in Europe and the United States": essentially that European governments are more willing to be involved in the lives of their citizens

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202. See supra note 23 and accompanying text.
203. See supra note 16.
204. See Bakalis, supra note 16. See also Keith Cunningham, Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family, 53 STAN. L. REV. 967 (2001) (discussing paternity leave within the specific context of law firms).
206. See supra notes 120-123 and accompanying text.
207. See supra note 40 and accompanying text for an example based on the history of trying to fund paid leave under the FMLA during its enactment.
208. Hayes, supra note 8, at 1537.
to the extent that the United Kingdom model would require.\textsuperscript{209} For these reasons it seems more likely that the United States could make the transition from unpaid leave under the FMLA to paid leave more smoothly by using a system based on the California model, rather than the United Kingdom model.

V. Conclusion

The Family and Medical Leave Act of 1993 was designed "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."\textsuperscript{210} These goals were to be accomplished through the provision of twelve weeks of unpaid leave to those workers who qualified.\textsuperscript{211} However, more than ten years after its enactment, the FMLA has fallen far short of accomplishing its goals, as parents, particularly fathers, are unable to make use of FMLA leave because of the crippling effect that the loss of income would have upon a worker's family,\textsuperscript{212} and the continuing social stigma attached to fathers who take parental leave.\textsuperscript{213} In order to fully realize the original goals of the FMLA, a system of paid family leave must be implemented in the United States, with specific attention given to paid paternity leave.

Examination of the paid family, and specifically paternity, leave systems established in Europe provides several useful models that point to one very clear conclusion: that the establishment of paid leave, with specific provisions designed to enable and encourage fathers to take time off at the birth of a child, has, by and large, been successful and widely supported by employee-parents and employers alike. The United States should be guided by the models that have been established in the European communities, learning from their successes and perhaps implementing aspects of their systems in our own nation, for example, the public involvement that was key in the United Kingdom model.

However, to create a practical model that has a high likelihood of

\textsuperscript{209} Writing in 2001, Hayes proposed several avenues of change to improve the effectiveness of the FMLA, one of which was the implementation of a paid leave program. Hayes reached the conclusion that, based on the differing social systems of the United States and the European communities in general, it was likely that European models of paid family leave could be "useful as a guide," but not an exact fit with American Society. \textit{Id.}


\textsuperscript{211} \textit{Id.} at § 2612(a)(1-2). \textit{See also supra} notes 18-19 and accompanying text (discussing limitations upon which workers qualify for leave under the FMLA).

\textsuperscript{212} \textit{See} Sahadi, \textit{supra} note 10. \textit{See also} 2000 Commission Report, \textit{supra} note 50, Ch. 2.2.4.

\textsuperscript{213} \textit{See} Rafter, \textit{supra} note 12. \textit{See also} Prince, \textit{supra} note 12.
success in the United States, our country must look inside itself to the advancements in family leave law that are being made by our own states, specifically California. Application of the California model to the United States as a whole could help our nation to finally affect the sweeping change that the FMLA intended, and by learning from and incorporating aspects of European family leave law, the United States could finally be on its way to actually helping all Americans balance work and family life.