Using Financial Incentives to Achieve the Normative Goals of the FMLA*

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the Family and Medical Leave Act attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

—Chief Justice William H. Rehnquist, Majority Opinion, Nevada Department of Human Resources v. Hibbs

I. Introduction

Ten years after Congress passed the Family and Medical Leave Act (FMLA) of 1993, the Supreme Court in Nevada Department of Human Resources v. Hibbs revisited one of the Act’s primary aims: the production of a workforce that does not discriminate against women on the basis of presumed obligations to private-sphere responsibilities. To achieve this goal, the drafters of the FMLA sought to adjust the baseline of worker expectations to produce a norm that family leave is both socially acceptable and consistent with workplace standards. Unfortunately, as the Hibbs decision reflects, such gendered stereotyping and family-unfriendly workplace norms persist in the American workforce. The Act has done little to change the gendered patterns of leave taking for family-care purposes, and social research indicates that entrenched gender-role norms perpetuate patterns in which men devote time to work while women take up responsibilities for family health and functioning. In light of the Court’s recent reflections in Hibbs, as women still do take on the majority of family responsibilities, has the FMLA made enough progress toward reducing employers’ incentives to

* I want to thank my mother, Monica Sellers, whose incredible work as a mother and a professional showed me the importance and challenge of finding balance for working parents. I also want to thank Professor Joseph Fishkin for his guidance in developing this Note and the members of the Texas Law Review for their efforts in preparing it for publication.

discriminate based on stereotyped expectations of women’s attendance, productivity, or commitment? To make the FMLA work as envisioned, we must first see some necessary change in the social underpinnings upon which it is built. The gender-neutral guarantees in the FMLA cannot manufacture equality. Instead, they will only reflect equality when applied to a society that is willing to embrace and encourage that equality. I argue in this Note that such social aims are not outside the reach of the law. To the contrary, the law must endeavor to remedy these underlying social problems, lest statutes like the FMLA become hollow promises.

When the FMLA went into effect, it became our nation’s first federal family leave statute. The Act entitles employees of qualifying employers to take up to twelve weeks of unpaid leave per twelve-month period to care for a newborn or newly adopted child; to care for a spouse, child, or parent who is suffering from a serious medical condition; to receive treatment for the employee’s own serious medical condition; or to respond to exigencies created by a family member’s active military duty.

The FMLA was enacted, at least in part, to produce antidiscriminatory effects and to reduce gender inequality in certain workplaces. Although its major shortcomings in achieving those goals quickly became apparent, nearly twenty years later the statutory scheme still stands without major amendment. Meanwhile, the social problems it aimed to remedy are ever present. Of primary significance, women still take FMLA caretaking leave much more frequently than men do, and as a result, women continue to face stereotypes that hinder their professional advancement and keep men in superior and more stable positions in the workforce. The FMLA may in some cases even function to entrench these differences by recreating and validating social and market incentives for women to shoulder the burden of family responsibilities.

This Note first chronicles the history and effects of the FMLA. It then proposes measures to increase its effectiveness as a vehicle for social change and as a mechanism for reducing stereotyping and discrimination in employment. Part II details the social and legislative history that informed the Act’s passage. This history is helpful in determining the proper goals and scope of the Act, as Congress’s original priorities provide a good foundation

on which to develop a reform agenda. Part III analyzes the effects of the FMLA on workplace discrimination and gender equality, and reveals some particular areas of concern. Part IV investigates some of the measures that have been proposed to improve the FMLA, including attempts at legislative action and proposals from legal scholars and social scientists. Part V introduces several proposals to use tax incentives in conjunction with reform to the FMLA itself to produce the normative social change envisioned when the FMLA was enacted. Part VI concludes.

II. Historical Foundations of the FMLA

Beginning in the 1950s, women entered the workforce in increasing numbers. They did so in a social, political, and economic context that positioned men—specifically, married men with supportive wives organizing their private obligations—as “ideal workers.” Although women were taking on additional responsibilities in the public sphere, the division of labor in the private sphere underwent few changes. Until the feminist movement gained momentum in the 1970s and 1980s, women were typically subject to outright discrimination and disparate treatment. Even as the social acceptability of outright disparate treatment diminished as a result of feminist gains, women continued to be disadvantaged by persistent stereotypes of women as caregivers, by real obligations to their families, and by employers’ unwillingness to modify enduring and outmoded workplace norms. Women’s responsibilities for homemaking and family care were not distributed to their spouses, and the responsibilities produced unique tensions between work and family obligations. Women required more time off from work than their male counterparts, causing women to suffer in terms of job security, tracking to less desirable positions and discrimination in hiring and advancement. Although the feminist movement was able to achieve

8. Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 19–30 (2000) (taking stock of commonly held notions that employers are entitled “to demand an ideal worker with immunity from family work”); see also Albiston, supra note 3, at 5 (“With regard to gender, that [historical] model of work and social life had at its center the family wage ideal, which presumes that the most common and most desirable family configuration is the male breadwinner/stay-at-home housewife model.”).
9. Williams, supra note 8, at 27.
10. Albiston, supra note 3, at 8.
11. Id. at 8–10.
12. See Young, supra note 7, at 115 (citing research that women who became employed reduced the amount of time spent weekly on housework but that their spouses’ domestic workload did not increase, and explaining that society has expected women to choose between work and family obligations).
13. See infra note 48 and accompanying text.
significant gains using Title VII antidiscrimination suits, family responsibilities continued to weigh unequally on female workers to the detriment of their professional achievement.

These disparities were met with strong critiques from legal thinkers and social scientists that recommended fairer leave policies reflecting the new division of labor between the public and private spheres. In response to these critiques, some states enacted family leave policies aimed at increasing gender equality and reducing discrimination against working parents—particularly women. By 1993, thirty-four states offered family leave policies, although the scope of benefits varied widely across jurisdictions. States chose to provide leave benefits for a variety of activities, including personal illness, family caretaking, childbirth or adoption, and even parent–teacher conferences. Policies also showed wide variance in the duration allowed for leave and in the standards for eligibility. Only Massachusetts, in formulating its family leave policy, considered or included wage-replacement programs. Some employers also enacted family leave policies, although leave was often offered to women only. These policies, viewed by many as paternalistic, were subject to attack under Title VII and were viewed as inconsistent with the equal-treatment underpinnings of antidiscrimination law.

Congress first took up the issue of caretaking leave when it considered the Parental and Disability Leave Act (PDLA) of 1985. The original draft

14. See Joan C. Williams & Stephanie Bornstein, The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias, 59 Hastings L.J. 1311, 1357 (2008) (finding that FRD litigation under Title VII has proven useful for alleviating workplace discrimination, both for individual plaintiffs and employees as a whole, as the success of the lawsuits changes employer practices).

15. See Steven K. Wisensale, Family Leave Policy: The Political Economy of Work and Family in America 117–18 (2001) (discussing states’ responses to the “political momentum” for family-friendly policies). In 1985, the few existing policies were limited to pregnancy-related disability and paid little attention to caretaking responsibilities. Id. at 119. Intergenerational caretaking leave was not introduced in the states until Connecticut passed a law protecting family-care leave in 1987. Id. at 123. Between 1987 and 1990, ten states proposed legislation that confined leave benefits solely to women. Id. at 126.

16. Id. at 118.

17. Id. at 118–19.

18. Id.

19. Id. at 124–25.

20. See Young, supra note 7, at 116 (discussing a pre-FMLA survey, which revealed that 37% of employers responding to the survey offered parental leave to men, while 52% offered parental leave to women).

21. See Julie C. Suk, Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work–Family Conflict, 110 Colum. L. Rev. 1, 42–44 (2010) (arguing that in passing the FMLA, Congress was influenced by the belief that federal parental-leave laws had to be gender neutral to comply with Title VII and that the Supreme Court cemented this notion when it “upheld the FMLA as a valid exercise of Congress’s Fourteenth Amendment Section 5 power to enforce the Equal Protection Clause”).

22. The Family and Medical Leave Act 4 (Michael J. Ossip et al. eds., 2006).
of the Act was spearheaded by a coalition of feminist activists who viewed gender-neutral policies embracing both sexes’ right to leave as essential to securing significant long-term benefits without the threat of discriminatory application.23 The PDLA, had it become law in 1985, would have provided at least eighteen weeks of unpaid leave for the birth, adoption, or serious illness of a child, and an additional twenty-six weeks of unpaid disability leave for nonoccupational medical reasons.24 By combining family and medical leave to encompass situations applicable to nearly every worker, early proponents believed the bill would generate broader support and avoid the challenges associated with “special treatment.”25 The PDLA would have contained additional measures to prevent employers’ retaliation against employees who had taken leave under the statute.26 Over the next eight years, the PDLA was modified, amended, filibustered, vetoed, and renamed.27

By the time the FMLA became law in 1993, its protections were significantly circumscribed and its benefits were drastically reduced from its 1985 predecessor.28 After the Act was vetoed for a second time by President Bush in 1992, it was reintroduced and President Clinton ultimately signed it into law the following year.29 In a statement accompanying the 1993 Act, the House Report situated the FMLA among other minimum-labor-standard laws, such as “the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.”30 The House used this analogy to note that the FMLA was to be a vehicle for societal change and to “take broad societal concerns out of the competitive process” of employers.31 Congress made a judgment that employers could not or would not, if left to their own devices, self-regulate to produce equality or equal opportunity. Leaving these decisions to employers created a system that could not be fair to those also performing the essential social role of family caretaking.

24. The Family and Medical Leave Act, supra note 22, at 4.
26. The Family and Medical Leave Act, supra note 22, at 5.
27. Id. at 6–16. For additional discussion of the legislative history, see Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal, 16 J. Gender Soc. Pol’y & L. 459, 469–74 (2008).
28. See generally Elving, supra note 23 (discussing the significant compromises that bill proponents made to achieve passage of the FMLA). The final manifestation of the FMLA resulted from a combination of state initiatives in Minnesota, Oregon, and Rhode Island. Wisensale, supra note 15, at 124.
31. Id. at 22.
Although employers have a narrow, self-serving focus, Congress aimed to make decisions for employers that it believed would benefit society.

Those social aims are reflected in the text of the FMLA, which aims to minimize “employment discrimination on the basis of sex by ensuring generally that leave is available . . . for compelling family reasons, on a gender-neutral basis” and “to promote the goal of equal employment opportunity for women and men.” Clearly, then, Congress sought some amount of social change as a result of the FMLA. The Act—produced in light of changing social values, altered workplace demographics, and feminist calls for action—should not be viewed as successful unless it achieves those objectives.

III. Observed Effects Post-passage

Immediately after the Act’s passage, Congress was primarily concerned with the Act’s effects on employers and employers’ satisfaction with the law. Meanwhile, social scientists and legal scholars began to document the failings of the Act. While heralded for its symbolic value, most critics noted that the Act did little to change existing patterns of leave taking, with women still acting as primary caretakers and, while able to return to work, suffering certain stigmatic effects associated with leave taking and with gendered stereotypes of family responsibilities.

As a primary observation, Professor Michael Selmi wrote that “the FMLA largely replicated leave that was already being offered.” At best, he suggested, the Act provided “some additional unpaid sick leave.” Just over five years after the passage of the Act, Professor Selmi pointed to data indicating that FMLA leave had been infrequently used, even when employees took time off for reasons that would have qualified for such leave. Moreover, the majority of FMLA leave takers used the law to take additional personal-care time off, as opposed to using it for family-caretaking.

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33. Id. § 2(b)(5), 29 U.S.C. § 2601(b)(5).
34. See generally 140 CONG. REC. H2360-01 (1994), 1994 WL 130158 (statement of Rep. Ford) (introducing into the Congressional Record a New York Times article that “surveyed many in the human resources field and concluded that the supporters of the [FMLA] were right and that the opponents were not”).
35. See, e.g., Michael Selmi, The Limited Vision of the Family and Medical Leave Act, 44 VILL. L. REV. 395, 410 (1999) (“Certainly, one can argue for the importance of having federal legislation as a means of advancing the issue or as a first step in trying to bring family leave into the workplace.”).
36. E.g., ALBISTON, supra note 3, at x–xi.
37. Selmi, supra note 35, at 397.
38. Id. at 407.
39. Id. at 408.
Beyond these statistical observations, Professor Selmi argued that the FMLA is a poor vehicle for remedying gendered divisions in the labor market because it “does little more than recreate the preexisting market incentives that apply to questions of childrearing.”

For example, women—who on average earn less than men—are still disproportionately incentivized to take leave because, when wage replacement is unavailable, the lower wage earner in a couple is the logical choice for leave taking. Essentially, the FMLA’s provisions have little effect in instituting social change.

In addition to leaving intact the market-based structures that produced gendered imbalances in leave taking, the FMLA has been criticized for its lack of impact on gendered stereotyping. Professor Deborah Anthony took aim at Congress’s apparent naïveté in presuming that gender-neutral legislative action could make significant progress in changing social norms, writing that “changing the law merely masks . . . social stereotypes, assumptions, and expectations of women’s caregiving roles and does not repair the problem.”

At the heart of this analysis is the proposition that creating benefits in the public sphere is only effective if necessary change occurs in the private social structure. Professor Catherine Albiston described the relationship between leave and social norms in writing about one female leave taker: “Her problems with leave arose in part because gendered assumptions about work and family gave meaning to her use of leave.”

In this case, social norms about work and family dictate that women take on the role of primary caregiver, and given that the law gives both men and women a choice to take leave, the law does little to subvert existing social structures that inform those choices.

In the years after the passage of the FMLA, social science research has confirmed the continuing patterns of gendered leave taking. A 2005 study indicated that nearly 60% of individuals taking FMLA leave were women. The division of responsibilities becomes starker when considering that nearly 60% of men who take leave do so to care for themselves, not for family members. In contrast, “[w]omen are twice as likely as men to take leave to care for their children or parents, and four times as likely to take leave to care

41. Selmi, supra note 35, at 397.
42. Albiston, supra note 3, at 10.
43. Anthony, supra note 27, at 473.
44. See id. (“A law that refuses to take gender into account is effective only if the private social structure does not itself perpetuate women’s inequality . . . .”).
45. Albiston, supra note 3, at 169.
47. Id. at 8.
Men and women both report that workplace norms discourage men from taking leave, and indeed some employers report that it is never acceptable for men to take family leave.

It appears that leave taking continues to be associated with lack of commitment to employment responsibilities; it has not become the norm, and those who take leave report feeling disadvantaged upon their return to work. The traditional model of the “ideal worker” remains in place and continues to disadvantage women and men who seek both to work and to maintain a healthy family life. Despite the existence of the FMLA and its protections, workers continue to experience real pressures to avoid family leave at all costs, and when such leave becomes necessary, social standards and stereotypes dictate that women, and not men, take leave.

*Hibbs* reflects these enduring stereotypes; the case was about a male worker who faced challenges in securing family leave despite the FMLA guarantees. The plaintiff in this case sought leave to care for his wife, who had been badly injured in an automobile accident. In upholding Congress’s extension of FMLA liability to public employers, the Court noted that “because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave,” leading to discrimination that was “difficult to detect on a case-by-case basis.” However, more than ten years after the FMLA was enacted, *Hibbs* and other similar cases demonstrate that family leave remains a battleground for gender discrimination, and the growing number of suits by male employees seeking to secure family leave benefits reveals the resilience of the very discriminatory patterns the FMLA intended to address.

### IV. Survey of Proposed Changes

Changes to the FMLA have been proposed formally in Congress and informally through academic discourse and extralegal calls for action. Existing proposals run the gamut and have varying aims. However, because this Note focuses primarily on the issue of rectifying gender imbalances in

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49. *ALBISTON*, *supra* note 3, at 169.
50. Young, *supra* note 7, at 117.
51. See *ALBISTON*, *supra* note 3, at 167 (“[M] any women found that taking leave changed perceptions of them at work because it seemed to signal that they were no longer committed to their jobs.”).
52. See *supra* note 8 and accompanying text.
53. See id. at 174 (discussing the norms that dictate that women prioritize motherhood and men prioritize work outside the home).
55. *Id.*
56. *Id.* at 736.
57. For another prominent case brought by a male employee seeking full FMLA benefits, see generally *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).
family leave taking, discussion in this part is limited to reforms that address this problem. Among the more salient proposals are calls for creating a system of paid leave, imposing mandatory leave for fathers, rethinking the gender neutrality of the FMLA, giving federal contract incentives to employers with gender-equal leave statistics, and creating tax incentives for FMLA promotion.

A. Paid Leave

A common refrain, dating back to the initial adoption of the FMLA, has been that providing paid leave will rectify many of the shortcomings of the Act and of family leave policy writ large. Indeed, paid leave was part of the earliest discussions of a federal family leave act. Providing paid leave would reduce economic incentives for lower-wage-earning women to take leave instead of higher-wage-earning men because the financial impact of the leave period would become less significant. Couples would be afforded a much greater amount of financial flexibility, even if wage replacement did not cover the entire amount of the leave taker’s salary.

Of course, opposition to these proposals often springs from concern about how paid leave will be financed. One suggestion is to create a payroll tax as opposed to requiring employers to fund extended family leaves. Indeed, almost all pragmatic proponents of paid leave recognize that employer-funded FMLA leave is unlikely to be successful for a number of reasons, including employer resistance and social-policy concerns.

Professor Suk argues that the legislative combination of family leave and personal sick leave has hobbled the potential efficacy of family leave legislation, particularly in terms of achieving a paid family leave statute. Although employers frequently oppose expansion of the Act, their primary concerns are the costs they would incur. Notably, however, personal sick leave accounts for far more financial loss to employers than does family

59. ELVING, supra note 23, at 27.
60. Young, supra note 7, at 154.
61. See id. (“Wage replacement should be at a level sufficient to remove the financial disincentives for leave-taking by men and by the working class.”).
63. Young, supra note 7, at 156.
64. See, e.g., id. (discussing the tension between the idea that paid parental leave operates for the benefit of society in general—meaning that the burden should be shouldered broadly and not isolated to individual employers—and the potential for discriminatory effects if women are presumed to be more expensive to hire).
65. See Suk, supra note 21, at 19 (“It appears that employers’ most serious complaint about FMLA arises in opposition to intermittent leave, most often to care for an employee’s own illness, rather than to care for babies or other family members.” (footnote omitted)).
The majority of FMLA leave is taken for personal illness, which increases employer cost due to its unpredictability and intermittence, whereas family leave is often anticipated and planned. Employers also express concerns that the FMLA is used for fraudulent and unnecessary leave, and they advance these claims to oppose expansion of the statute’s guarantees. However, personal disability is a more fertile ground for fraud than the birth or adoption of a child, which is difficult to falsify.

California is the only state that has introduced paid leave as a standard for FMLA-type workplace leave, although over half of the states have considered paid-leave legislation. California adopted its policy in 2002 in response to a standing invitation from the Clinton Administration for states to use unemployment insurance to fund family-care leave. California funds its program through its State Disability Insurance Program, which is financed entirely by employee contributions; employers are under no obligation to contribute to the fund. The policy offers up to six weeks of paid leave to care for a newborn or newly adopted child, or to care for a seriously ill family member. Qualifying leave takers receive as much as 55% of their salary for the six-week period at a cost of about $3 per month to the average worker paying into the system.

The results of California’s program indicate that paid leave alone may not be sufficient to produce even patterns of leave taking between genders and suggest that the norm remains that women are to take on primary-caretaker roles. However, while early results created fears that the law would have few effects on the gender balance of leave taking, recent studies are more promising in that respect. One year after the statute went into effect, statistics showed that 88% of program participants took leave to care for a newborn; more than 80% of those individuals were women. Of the remaining 12% of participants who took family-care leave, 70% were women. Recent research, however, shows that men in California are now taking paid family leave at higher rates than they were in 2005 and that more

66. Id. at 19–20.
67. Id.
68. Id. at 21.
69. Id.
71. Id. at 181–83.
72. Id. at 184.
73. Id. at 183.
74. Id. Payouts are subject to a weekly cap, adjusted annually according to California’s average weekly wage. Id.
75. Id. at 188.
76. Id.
men are taking leave to bond with their children. 77 Employers report that men are also now taking longer family leaves than before the passage of the law. 78 Researchers have suggested that “[p]erhaps this is because of the availability of substantial wage replacement” or because “the fact that the benefits are part of a state-sponsored program . . . makes using it more legitimate in the eyes of men, and in the eyes of the employers they work for.” 79 This “legitimacy” points to adjustments in norms about the propriety of leave taking and the appropriate member of the household to do so. Nevertheless, there have been no significant increases in men’s participation in family-care (i.e., nonbonding) leave, and as of 2009, women still comprised three-quarters of bonding leave takers. 80 Although paid leave appears to have contributed to some norm changing, simply offering paid leave looks unlikely to resolve gender imbalances.

Paid-leave amendments and initiatives have appeared before Congress regularly in the years since the FMLA passed but have found no success. These measures include the Family Income to Respond to Significant Transitions Act 81 and the Federal Employees Paid Parental Leave Act of 2009. 82

B. Mandatory Leave

A more radical proposition to reduce gendered associations with family care is to force men and women to take leave. 83 Mandatory leave would clearly reduce gender-based disparities in leave taking, but other benefits have also been suggested. These benefits include forcing employers to fully evaluate the costs and benefits of leave policies and providing men a meaningful opportunity to choose primary parenting. 84 If both sexes took family leave, employers’ tendency to adopt stereotypes about the balance of care-taking responsibilities would be reduced, and it would be less sensible for employers to engage in statistical discrimination against women based on presumptions about leave taking. 85 Mandating leave could also help change

78. Id. at 18.
79. Id. at 17.
80. Id. at 18 fig.3.
84. Selmi, supra note 35, at 411.
85. See Ali, supra note 83, at 206 (“The absence of paid leave has . . . prevented the Act from changing social stereotypes regarding women and motherhood. Without mandating paid leave,
social patterning as men grow accustomed to sharing primary-caretaking roles and begin to seek them out in a context where work and family could more easily coincide.

These policies are in effect in several European countries and have been positively evaluated by some American scholars.\textsuperscript{86} However, as is discussed in more detail in the following subpart, mandatory leave is often granted in conjunction with policies that do not assign leave benefits evenly between the genders and that are built on stereotypical, norm-perpetuating ideas of the balance of family responsibilities.

Given U.S. courts’ reception of mandatory-leave policies in the past, it seems unlikely that these types of programs would find success from a pragmatic or constitutional standpoint. In \textit{Cleveland Board of Education v. LaFleur},\textsuperscript{87} the Supreme Court invalidated on due process grounds an employer’s policy mandating leave for pregnant employees.\textsuperscript{88} Although the leave in question was unpaid, it is probable that the Court’s constitutional concerns would have persisted even if the employer had compensated its pregnant employees during the time they were prohibited from working.\textsuperscript{89} Although the employer-mandated leave in \textit{LaFleur} only applied to women, it seems likely that due process concerns weighing against involuntary child-care leave would prevail regardless of the gender of the leave taker. From a pragmatic standpoint, employment interests would be almost certain to vehemently and persuasively oppose legislation \textit{requiring} their workers to reduce their own productivity.

C. Rethinking Gender Neutrality

There has been significant debate over the effects of gender neutrality on the successes and failures of the FMLA. Some have suggested that for the FMLA to provide real social benefits in terms of reducing conflict between work and family, legislators should abandon gender-neutral provisions in favor of guarantees that take into consideration the gendered patterns of leave taking that exist in the workforce.\textsuperscript{90} The gender neutrality of the FMLA developed from already-existing methods of securing leave for women and from the Title VII framework used to achieve those gains.\textsuperscript{91} Early proponents of federal family leave also saw gender neutrality as a way to avoid scenarios in which benefits conferred to improve conditions for women are

\begin{itemize}
  \item women are likely to continue bearing the brunt of the burden when it comes to taking [parental] leave . . . .
\end{itemize}

\textsuperscript{86}. See infra notes 93–103 and accompanying text.
\textsuperscript{87}. 414 U.S. 632 (1974).
\textsuperscript{88}. Id. at 651.
\textsuperscript{89}. Suk, supra note 21, at 52.
\textsuperscript{90}. E.g., id. at 68.
\textsuperscript{91}. Id. at 40–41.
later used to women’s detriment. In contrast, many European states address family leave issues by guaranteeing and even mandating parenting leave for women under different terms and with different qualities from the leave benefits allocated to men. Professor Julie Suk argues that while most Americans view these policies as unacceptably paternalistic, nations using gendered family leave laws have achieved successes in women’s professional achievement that have not—and cannot—be replicated under our gender-neutral approach.

Professor Suk argues that less neutral policies will produce better results in terms of reducing stigmatization of leave taking and of women’s ability to participate in the workforce while carrying out their family-caretaking responsibilities. Suk looks to family leave policies in France and Sweden to suggest that their gender-conscious allocation of rights has produced normative effects in the workforce that are beyond the reach of the FMLA. Both French and Swedish (albeit to a lesser extent for the latter) policies take for granted the assumption that women are primary caregivers to children and give far more generous benefits for maternity leave than paternity leave. In fact, both nations have created some form of mandatory maternity leave. France’s policy features a strict guarantee that women returning from family leave be reinstated to the same position or to a different position that pays at least as well.

However, even Suk acknowledges that European systems are imperfect, especially in terms of changing the distribution of leave taking between genders. While apparently successful in moderating employers’ incentives and ability to deny leave and in keeping women in the workforce, traditional norms are allowed to persist and individual choice—a cornerstone of American constitutional jurisprudence—is defeated.

92. ELVING, supra note 23, at 22–23.
93. See Suk, supra note 21, at 26–30 (discussing the special provisions of French law applicable to maternity leave and prenatal care).
94. See id. at 51 (“It is assumed in U.S. law that state paternalism is an affront to women’s equality, but the European experience shows how some forms of paternalism can strengthen the ability of employees to exercise their rights, which can strengthen women’s continued participation in the labor market.”).
95. See id. at 53 (noting that mandatory maternity leave may actually save women from having to make a difficult choice to take maternity leave and may reduce workplace backlash stemming from the pursuit of family responsibilities).
96. Id. at 68–69.
97. Id. at 49–50.
98. Id. at 64.
99. Id. at 31.
100. Id. at 63–66.
101. See id. at 66–68 (“[P]roposals that would be unimaginable in the United States are possible in Europe, which underscores another distinctive American barrier to progress on work–family policy: The strong rejection of paternalism . . . . Paid or unpaid, mandatory rules that limit choice, particularly in family matters, are constitutionally problematic.”).
Suk’s argument is weakest in suggesting that abandoning gender neutrality is the only—or even the best—way to fix the normative hurdles affecting patterns of leave taking in the United States. Although she demonstrates a correlation between gendered policies in Europe and some results that American reformers would like to see take hold domestically, she comes far from establishing a causal relationship and is too quick to dismiss the shortcomings of these policies. Suk sees gender stereotyping as one of the root causes of European programs’ success, but she fails to separate the effect of stereotyping from other differences in policies, such as the distinction between sick leave and family leave or the provision of paid family leave. Moreover, Suk minimizes the significance of gender inequalities that remain rooted in European societies despite women’s increased success in maintaining employment following family caretaking leave.

In any case, the viability of developing national family leave policies that apply different standards and provide different benefits to men and women is highly questionable. American courts have interpreted Title VII to provide strict limits on gendered policies. Mimicking European mandatory leave provisions would be even more difficult because due process concerns would be added to the list of legal challenges.

D. Pecuniary Incentives

Professor Selmi has proposed offering business incentives to employers that demonstrate gender equality in leave taking. He proposes a set-aside program for federal contracts, benefitting employers who meet some base number—he proposes 30%—of each gender taking advantage of family leave policies. Selmi notes that this program would be acceptable under Title VII’s gender-neutral standards because its requirements would treat men and women alike.

In the context of a general discussion of tax policies that may advance feminist causes, Professor Anne Alstott introduced the idea of using tax incentives to improve the FMLA, although the scope of her consideration was limited to incentivizing employers to encourage use of FMLA-authorized leave. Professor Alstott’s proposal aimed to use tax incentives to address economic concerns that cause employers to skirt FMLA mandates generally, and she did not reach the issue of stigmatic leave-taking

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102. See supra notes 20–21 and accompanying text.
104. Selmi, supra note 35, at 412.
105. Id.
106. Id.
patterns. Specifically, she suggested that “tax incentives for family leave, part-time work, or flex-time could encourage [the use of] these arrangements while spreading their cost to the taxpaying public.” While these incentives suggest the potential effect of tax benefits on the FMLA’s effectiveness, they offer only minimal hope with regard to challenging the stigmatic effects of leave taking because they continue to advance the gender-neutral framework that has thus far perpetuated gender imbalances in leave taking. In short, Alstott’s proposal does not adjust the baseline norms that affect family leave.

V. New Proposals: Adjusting the Baseline Through Financial Incentives

The following proposals are aimed at adjusting the private-sphere norms that have prevented gender-neutral FMLA policies from affecting patterns of family leave taking. At their core, these proposals are geared to produce a system where family responsibilities and work duties are compatible and where women are not forced to shoulder a disproportionate and unwanted burden in striking a balance between public and private spheres. Because few would contend that family health is an unimportant social value and because caregiving is an essential component of family stability, these proposals reveal preferences that workers take leave when it is necessary and appropriate and that employers accommodate and validate these responsibilities. However, these proposals are deliberately formulated to be gender neutral so that they may survive Title VII challenges.

To the extent possible, I advocate incentives in the form of positive benefits rather than penalties. Especially in the context of social engineering, I argue that it is more productive to encourage behavior than to discourage behavior—to tell individuals and employers what they can do to improve their position rather than force action with threats of previously inapplicable penalties. The latter seems likely to foster resentment toward the policies themselves and toward the social goals that they are intended to promote.

These proposals, like most American legislation pertaining to family values and benefits, presuppose a heterosexual child-rearing couple. This focus is especially practical in this case, since many of the normative changes that hinder workplace equality come from a gendered division of family responsibilities driven by stereotypes of men’s roles in relation to women’s roles. In most cases, these proposals are equally effective when taking into account homosexual partnerships, single-parent households, and other alternative family arrangements in that the proposals ultimately represent blanket encouragement of leave taking for family responsibilities. However, I have
tried to address effects on nontraditional child-rearing and caretaking situations where the predominant hetero-normative assumptions fail to account for the effects on same-sex partnerships and single parenting.

A. Paid Leave

Paid leave is an important first step in improving the FMLA. For every family, paying the bills is a bottom-line consideration. Providing workers with a meaningful choice to fulfill family responsibilities is inevitably tied to financial security. The past nineteen years under the FMLA have shown that the absence of a paid-leave requirement produces inequalities in leave taking—with respect to both class status and to gender—in light of historical discrimination and resulting patterns of wage earning. Foreign policies and California’s Paid Family Leave legislation indicate that offering wage replacement increases the range of individuals who take leave and, to some degree, increases male participation in leave programs.\(^{111}\) For any additional progress to take place, significant wage replacement must exist as a baseline standard. The availability of paid leave will benefit dual-parent households, who will have more flexibility to distribute caretaking responsibilities and will provide much-needed support for single parents who today risk losing their entire household income when taking family leave.

The obligation to fund this leave should not be left to employers, which already sacrifice profits when workers take FMLA leave. As many have suggested, employer-funded leave is unlikely to be adopted from a political and pragmatic standpoint. As Professor Suk identifies, the current relationship between caretaking leave and sick leave compounds the practical difficulties associated with moving toward paid leave, especially when costs come out of employers’ profits.\(^{112}\) Employer-funded leave also runs contrary to the social policy underlying paid leave, which seeks to assign independent value to family caretaking.

Instead, the wage-replacement system should be funded by worker contributions. As a general rule, funding for paid FMLA benefits should come out of payroll taxes. In addition to increasing employer support for paid leave, this arrangement may have positive normative effects. If workers, as a norm, pay taxes to fund family leave, they are more likely to seek to benefit from their contributions by taking leave when it is available and appropriate. As California’s example has indicated, payroll-funded paid-leave programs can operate at minimal cost to workers yet provide significant social benefits.\(^{113}\)

The federal program may benefit from following California’s example with regard to the amount of compensation that employees receive while on

\(^{111}\) See supra notes 70–74, 93–101 and accompanying text.

\(^{112}\) See supra notes 65–67 and accompanying text.

\(^{113}\) See supra note 74 and accompanying text.
leave. California’s system pays workers up to 55% of their regular salary, with a cap that varies based on average income among state citizens. Developing a national figure to cap compensation would be tricky; the federal government should instead take into account income in varying localities. This endeavor has proven to be successful in other forums such as compensation for federal employees, which takes into account the cost of living in various metropolitan areas.

Although wage replacement makes FMLA leave feasible for larger numbers of the population in more gender-equal patterns, additional incentives are necessary to fuel the underlying normative change necessary to reduce statistical discrimination in workplaces. Some may be resistant to accepting the government’s role in normative change, but I am not alone in suggesting that “government deserves to have, and in any case inevitably does have, a large role in norm management.” It seems clear that the purpose of the FMLA implicates a change in social norms, and efforts to improve the Act should properly consider this objective.

B. Tax Incentives

I propose to generate normative change through a system of tax incentives. These incentives would reward either employers or employees who engaged in gender-equal leave taking. Depending on levels of support, the policy may be directed at employers, rewarding those companies whose male and female employees take leave in proportional numbers, or it may involve an employee-directed benefit, providing tax breaks or credits to households in which both parents take leave. As Selmi suggested, pairing financial incentives with paid leave could provide real progress toward reconstructing common understandings of the work–family divide. Taking into account Selmi’s and Suk’s accounts of employer disdain for the personal-medical provisions of the FMLA, I would recommend that these incentives be applied only to family leave. This would help to achieve the narrow objectives of achieving equality in family caretaking while avoiding potential employer opposition to these proposals.

Professor Dorothea Kübler notes that there are two factors influencing norms that can be regulated by “norm entrepreneurs,” which include government actors and other organizations interested in social change. For normative change to occur, there must be an incentive that motivates indi-

114. See supra note 74 and accompanying text.
117. See supra notes 104–06 and accompanying text.
118. See supra notes 65–69 and accompanying text.
viduals to follow a new norm, and there also must be positive reputational value in doing so.\textsuperscript{120} Successful policies address both the motivational and reputational aspects of the norm—both the motives and the meaning.\textsuperscript{121} I believe that the following proposals may be successful based on their potential to affect both aspects of norm making.

The tax incentives could be directed either at employers or employees, as both options involve benefits and drawbacks. Employer-directed tax incentives reflect Kübler’s “motives and meaning” approach to “norm entrepreneurship,” although they are perhaps more “meaning” oriented in that the reputational impacts of leave taking will be positive when employers have a reason to encourage individuals to take necessary leave. If employers take an interest in seeing gender-equal leave patterns, then negative attitudes and stigmatic effects of leave taking should be reduced. Indeed, one hopes that corporate human-resources departments would encourage individuals to take FMLA leave when their circumstances qualify them for such benefits. On the “motives” end, the hope is that existing desires among men to spend more time with family and children, complemented by women’s desires to strike a meaningful balance between work and family\textsuperscript{122}—which implicates partners’ participation in family obligations—mean that the motivational requirements for norm changing are already in place. The simultaneous transition to a paid-leave mandate should also increase individual motivations to participate in norm shifting.

While the employer-directed approach makes its primary impact on the “meaning” end of norm changing, the employee-directed approach, by putting additional money in workers’ pockets, does much more to address the individual motivational aspects. Reputational effects may still be present given that financial incentives may become known motivators for men to take leave. In corporate cultures that now stereotype men as breadwinners, financial incentives offer a transitional narrative that may help straddle the reputational line between two norms; under the proposed system, men can take care of their families while earning monetary benefits that reference the traditional breadwinner role. Nevertheless, employee-centered programs would undoubtedly face much greater challenges in reworking public workplace norms. Although the cost may be prohibitive, an ideal solution would be to conduct both employer- and employee-incentive programs for maximum effect on motive and meaning as norms undergo change. Should the initiative prove successful, such broad policies may become less

\textsuperscript{120. }\textit{Id.} at 452–53.

\textsuperscript{121. }\textit{Id.} at 472.

\textsuperscript{122. }See WILLIAMS, supra note 8, at 246 (describing one woman’s dilemma in balancing ideal-worker norms and her desire for a fulfilling career with the demands of her family responsibilities in light of her husband’s own demanding job); \textit{cf.} \textit{id.} at 273 (“People now in their twenties, men as well as women, want to put limits on work time in order to leave time for family life.”).
necessary, and the gender-neutral provisions of the FMLA alone may be able to work as originally intended.

1. Employer-Directed Tax Incentives: Baseline Compliance.—Employer-directed initiatives would provide tax breaks for companies that could demonstrate patterns of leave taking that meet certain gender-equality standards. Those standards could involve a baseline—for example, employers who can demonstrate that 25% or more of each gender has taken two or more weeks of FMLA leave would qualify for the tax breaks. This initiative is somewhat reminiscent of Selmi’s federal-contracting proposal, but it opens up the possible effects to a much broader range of workers. This rubric benefits from the establishment of minimum standards for family leave taking. Employers are therefore given an incentive to publicize and promote FMLA leave generally as well as to create workplace norms that encourage both sexes to attend to family responsibilities and to do so openly.

The primary concern would be that FMLA leave is still restricted to those who qualify under the statute. Employers, while able to encourage leave taking, would be unable to control the incidence of qualifying family illness, childbirth, or adoption among their workforce. Nevertheless, baseline standards could (and should) be tailored to reflect the average incidence of qualifying events triggering leave eligibility and could reasonably ensure that most workforces may meet those numbers. Additionally, employers with workforces whose personal obligations did not generate the numbers to qualify one year would still have an incentive to promote FMLA leave in subsequent years.

2. Employer-Directed Tax Incentives: Proportionality.—Alternately, standards in an employer-directed initiative could be based on proportionality in leave taking. For example, so long as the percentage of female employees taking FMLA leave is within five percentage points of men taking such leave, the employer would qualify for the tax breaks. This arrangement solves the problem in the baseline-contingent approach discussed above in that employers may be eligible for tax breaks even if their employees have few FMLA-qualifying obligations. Employers would only be responsible for encouraging leave equally between sexes, and not for generating FMLA use generally. However, the downside of this approach is the concern that it might reward employers who discourage leave generally or who grant leave sparingly based on these tax considerations. At worst, it may encourage employers to deny women FMLA leave in order to equalize leave statistics. Although wage replacement would certainly provide workers additional general incentives to aggressively pursue appropriate leave, the minimum-standards approach to employer incentives is preferable as a method of promoting family leave.

123. See supra notes 104–06 and accompanying text.
3. **Employer-Directed Tax Incentives: Sliding-Scale Benefits.**—Both the bottom-line and proportionality-based approaches to employer-directed incentives have shortcomings, and an employer-directed tax-incentive program may be best enacted through some sort of sliding-scale benefit. If employers receive more tax benefits as more of their workforce takes leave in gender-equal patterns, it should make employers more willing to support all eligible leave takers and to be more conscious of the patterns they see developing. At the same time, the sliding scale removes the perverse incentives to have employees out on leave when they are not FMLA-eligible, or to discourage leave once a certain number of employees have qualified the company for the tax benefit. This arrangement may also make sense to employers who view the tax incentives as a way to recoup the costs they incur when employees take leave to care for their families. When employers know that they can avoid larger financial sacrifices by fostering a truly gender-neutral and encouraging corporate culture with regard to family leave, it seems likely that these initiatives will achieve their intended success.

4. **Employee-Directed Tax Incentives.**—An alternative method of using tax incentives to create gender-equal patterns of leave taking would be to offer incentives to individuals instead of employers. This could be done through a tax benefit that becomes available if both members of a couple took FMLA leave in a calendar year. In heterosexual couples, this would encourage men to consider the balance of family labor in the household and may stimulate increased balancing of private-sphere responsibilities. In combination with paid leave, employee-directed tax incentives may encourage men to take paternity leave in situations where they may have otherwise left primary-care responsibilities to their children’s mother. The benefit should also be designed to apply to single parents and homosexual couples in the interests of equal treatment, promoting the value and legitimacy of taking adequate care of family responsibilities and in a continued push toward making family leave the norm for all workers.

This policy may be criticized by employers as promoting unnecessary or excessive leave taking given its tendency to encourage the participation of two caretakers for one family member. However, since the FMLA was written to address the presence of both genders in the workplace and to create adaptability between the public and private spheres, the promotion of balanced family responsibilities is a reasonable way to facilitate continued participation of men and women in the workplace. Instead of having one family member shoulder constant primary-care responsibility, the burden could be shared between two members, ultimately reducing the impact on professional obligations and attrition from the workforce.
VI. Conclusion

The FMLA’s attempt to reduce the career setbacks experienced by workers who take family leave has fallen short of its goals. Because one set of workers continues to take family leave less frequently than another, the conception of an ideal worker has not changed to accommodate family responsibilities that generate tension with workplace responsibilities in a dual-wage-earner society. As a result, negative career consequences continue to follow leave takers, the majority of whom continue to be women. While the FMLA made leave taking acceptable in a formal sense, it failed to adjust baseline norms that would make leave taking acceptable for all workers in a practical sense. This gap between formal guarantees and real-world effects is largely attributable to the consequences of mapping a gender-neutral policy onto a society that recognizes an enduring history of social norms that envision men as wage earners and women as caretakers of family and domestic responsibilities. Given these underlying prescriptive stereotypes, gender-neutral policies like the FMLA can do little to offset the effects of a gendered society.

Vindicating the normative aims of the FMLA requires action to adjust the underlying social norms that have fueled gender-differentiated patterns of leave taking. In this Note, I have proposed internal changes to the FMLA and policies external to the Act that I suggest will work together to shift pervasive norms affecting the acceptability of leave taking for family care. As a threshold matter, separating family leave from personal-medical leave will focus the issue on the specific social problem of family caretaking and will reduce resistance from employers concerned about FMLA abuse. Providing worker-funded paid leave will increase the feasibility of leave taking for single parents and for dual-earner households that will be more equipped to survive financially, even if the higher wage earner takes leave. Finally, a program of positive incentives for employers, employees, or both to take full advantage of family leave policies on a gender-equal basis will help reduce workers’ concerns about the stigmatic effects of family leave.

—Kristin M. Malone