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"YOUR WIFE SHOULD HANDLE IT": THE IMPLICIT MESSAGES OF THE FAMILY AND MEDICAL LEAVE ACT

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Abstract: In The Mommy Myth, Susan Douglas and Meredith Michaels examine the heightened standards of motherhood that pervade modern American society. They contend that the media has perpetuated an ideal of motherhood that defines women in relation to their children and established a standard of motherhood that is impossible to achieve. This Book Review analyzes the Family and Medical Leave Act as a woman's first concrete interaction with the mommy myth, and asserts that instead of helping women balance work and family, the Family and Medical Leave Act perpetuates the mommy myth.

INTRODUCTION

Gone are the days of Leave It to Beaver, when the father brings home the paycheck and the mother dutifully stays home to nurture her children.1 Or are they? This popular stereotype portrayed women as happily devoting their lives to their children and the home.2 Under the old stereotype, a mother did not work outside the home because she was totally devoted to her family.3 Today, popular magazines portray women adoringly holding their children and claiming that ultimate fulfillment can be found in having a child.4

2 Id. at 34. Douglas and Michaels describe the old stereotype as "that of the selfless, never complaining, always happy wife and mother who cheerfully eradicated whatever other identities she might have had and instead put her husband, her children, and the cleanliness of her house first." Id. Indeed, an assault on women's confinement in the home was the basis of The Feminine Mystique, Betty Friedan's seminal work of the 1960s women's movement. Id. at 33.
3 Id. at 34.
4 Id. at 115; see Joey Bartolomeo, How Love Has Changed Me, US WKLY, Oct. 25, 2004, at 49. The cover of the October 25, 2004 issue of US Weekly declares, "J. Lo talks to US. 'I'm
The media urges mothers to be super vigilant and constantly on the lookout for new dangers to their children. From germ-laden toys to dangerous vaccinations, mothers are told not to look away, even for a moment, from the well-being of their children. Leave It to Beaver may not be a relic of the past after all.

At the same time, women from all strata of society comprise a larger proportion of the American labor force than ever before. Yet women still do more of the household work than their male counterparts. Today’s young women face a future where society champions their participation in the labor force and also demands that they spend every moment concentrating on the well-being of their children.

In The Mommy Myth: The Idealization of Motherhood and How It Has Undermined Women, Susan Douglas and Meredith Michaels argue that the modern media has perpetuated a new form of the feminine mystique. Women are inundated with the new “momism,” a set of beliefs and ideals that define women in relation to motherhood. This new momism dictates that women are not true and complete women until they have a child, and to be a decent mother, a woman must devote her entire being and life to her child. In addition, the new momism asserts that women are the best and natural caregivers of children.

Ready for a Baby! The cover story tells of Jennifer Lopez’s marriage to Marc Anthony and cites “baby lust” as a potential reason for her three marriages. Id. Throughout The Mommy Myth, Douglas and Michaels point to the media as the primary way the new momism is communicated to the women of America. Although the authors do not define the boundaries of the media referred to in the book, the primary sources include popular magazines, television shows, the evening news, popular radio broadcasts, and parenting books. See generally DOUGLAS & MICHAELS, supra note 1.

6 Id. at 299.
7 Id. at 298–99.
9 Edmund L. Andrews, Survey Confirms It: Women Outjuggle Men, N.Y. TIMES, Sept. 15, 2004, at A23. A recent survey by the Department of Labor indicates that, on average, women spend about twice as much time on household chores and child care as men. Id.
10 See discussion infra Part II.B; see also Jeremy Borer, Note, You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the “Glass Ceiling,” 50 WASH. U. J. URB. & CONTEMP. L. 401, 404–05 (1996) (pointing to the dichotomy of the cultural belief that women are homemakers, but are welcome to attempt the corporate ladder only if the demands of home and family will not conflict).
11 DOUGLAS & MICHAELS, supra note 1, at 5.
12 See id. at 4.
13 Id.
14 See id.
The Mommy Myth does not offer legal solutions to rectify the stratified gender norms that it presents, but this Book Review argues that family leave is a logical place to begin, because parental leave is a parent’s first interaction with the demands of balancing work and family, and often a woman’s first personal interaction with the new momism.

The federal leave legislation that attempts to help women navigate the demands of a new family and work is the Family and Medical Leave Act of 1993 (FMLA). Instead of helping mothers, however, the FMLA perpetuates the notion that the mother is the ideal primary caretaker of children. Furthermore, the FMLA contains deeply embedded assumptions and cultural values. California, however, enacted legislation in 2004 that provides compensation to parents who take time to care for a new infant. California’s Paid Family Leave Program offers a viable option to begin to rectify the stratified gender norms that, despite progress, are still present in twenty-first century American society.

Part I reviews the development of the “mommy myth” as presented by Douglas and Michaels. Part I also analyzes the media’s depiction of women as the best primary caregivers of children. Part II then examines how the FMLA, intended to help mothers balance work and family, has actually perpetuated the idea that women should remain the primary caregivers of children. Part II further explores how this continued gender stratification has undermined and undervalued women. Finally, Part III suggests California’s Paid Family Leave as a model for future family leave that values women in their own right and not in comparison to men.

I. THE “MOMMY MYTH”

In The Mommy Myth, Douglas and Michaels argue that the media has promoted a new momism, which is a set of standards and ideals that govern motherhood and define women in relation to their children. The primary tenets of the new momism state that a woman is not truly complete until she has a child, and that to be a good mother, a woman must devote all of her time, energy and attention to her

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16 See Bornstein, supra note 15, at 104.

17 Id. at 81.

18 CAL. UNEMP. INS. CODE § 3301 (a) (1) (West Supp. 2004).

19 DOUGLAS & MICHAELS, supra note 1, at 22.
child. Additionally, the new momism asserts that women are the best primary caretakers of their children. Motherhood defines women, while the standards for what constitutes a "good mother" are impossible to achieve. The new momism does not demand that a woman stay at home with her children, but instead asserts that women have been to the workforce and now should make the "right" choice to stay at home with their children.

Douglas and Michaels chronicle the development and perfection of the "mommy myth" over the past thirty years. Beginning in the 1970s, the media perpetuated "a set of ideals, norms, and practices . . . that seem on the surface to celebrate motherhood, but which in reality promulgate standards of perfection that are beyond [the mother's] reach." The rise of the "celebrity mother" in the 1980s romanticized motherhood. Women who had succeeded in their respective fields stated that their greatest fulfillment came from motherhood. Talk of the ambivalence of motherhood was no longer acceptable; instead women proclaimed the unending joys of children.

The mid-1980s witnessed the media sensationalize the widespread danger to children when the mother's attention was not focused on the child. The media carried stories of abducted children and child molestation in day care. Many of the stories later proved to be largely fabricated. Nevertheless, these stories scared parents,

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20 Id. at 4.
21 See id.
22 See id. Women's role models for motherhood are celebrities featured in the media. See id. at 115; see also infra note 27 and accompanying text. The celebrities portrayed as the ideal mothers, however, have infinite resources. See Douglas & Michaels, supra note 1, at 4. Because the average mother does not have these resources, she cannot attain the high standard of motherhood. See id.
23 Douglas & Michaels, supra note 1, at 23.
24 See generally id.
25 Id. at 4-5.
26 Id. at 113.
27 Id. at 116. Douglas and Michaels detail a story from InStyle with Kirstie Alley from February 1994. Id. at 111. In the article, Kirstie Alley, the star of Cheers and Look Who's Talking, tells of her life in her island home in Bangor, Maine with nannies and cooks, and finding a new way to look at the world through her son. Id.
28 Id. at 116.
29 Douglas & Michaels, supra note 1, at 85.
30 Id. at 93-98.
31 Id. at 95. In 1984, the McMartin Preschool scandal grabbed headlines as one of the biggest child molestation cases on record. Id. at 94. It was claimed that at least 125 children had been molested at a day care center in California. Id. In the end, the scandal turned out to have been largely manufactured by unlicensed "therapists." Id. at 95.
particularly mothers, into believing that no one could be trusted with their children; the best and safest care was the care of the mother.32

With the romanticization of motherhood and the terror of day care services came a corresponding increase in the rhetoric of family values.33 This rhetoric, coupled with media messages refined the image of the ideal mother, and vilified those who strayed from the new momism.34 The welfare mother was demonized as the epitome of a mother gone wrong.35 Instead of examining the plight and poverty of the mother on welfare, the media emphasized that welfare was the cause of poverty and that "welfare moms" had children simply to increase their payroll.36 The "welfare mom" was not the only type of mother who was demonized for failing to conform to the heightened standard of motherhood.37 Mothers who killed their children were likewise portrayed as the antithesis of the new momism, because they had failed to find unending joy in their children.38 The power of the new momism, which proclaimed motherhood as romantic and perfect, prevented an examination into the ambivalence of motherhood and the real conditions that some mothers faced.39

Concurrently, the media pitted working mothers against mothers who chose to stay home and glorified a return to domesticity.40 A few popular television shows rejected the new momism, but most celebrated intensive mothering and a return of women to the domestic

32 See id. at 98.
33 Id. at 88.
34 At the same time, the Reagan presidency and the rise of the religious right led to a well-funded and often vehement backlash against feminism, most frequently expressed as "family values," which meant Dad should be the boss again and Mom should make family heirlooms out of the lint from the clothes dryer.
35 Id. at 204–05.
sphere. At every turn the media broadcast the message that although women could work, the “right” choice for women was to return to the home and care for their children.

Magazines targeting parents and the mainstream media in the 1990s perfected the new mommy myth and the heightened standards of motherhood. New advertising targeted at mothers portrayed a world where “the grim reaper lurks everywhere, just one maternal misstep away.” From the germs on a child’s toy, to defective toys, to fear of Sudden Infant Death Syndrome, mothers were urged to be constantly vigilant for the next potential deathtrap to their child. Furthermore, instead of simply giving a child a stuffed animal to play with, mothers were urged to foster the intellectual development of their children from the time of conception. Radio broadcasters, such as Dr. Laura, urged mothers to be “their kid’s mom,” never hire a babysitter and reject feminism and the advances brought to society by feminism, and instead return to a mother’s best and natural role as the primary caretaker of her children. By the end of the twentieth century, the mommy myth was perfected—children and the standards of motherhood that were impossible to reach defined women.

The Mommy Myth presents a stark portrayal of the popular return to 1950s standards for what constitutes a good woman and mother, and women’s subsequent struggle to maintain a career and balance the needs of her family. The new standards dictate that mothers should be scared to turn away from their child for even a moment, let alone surrender their child to day care. Fathers are nowhere to be

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41 Id. at 209. For example, the popular show Roseanne rejected the new momism, and instead was meant to represent the working class and portray a view of motherhood that was more ambivalent and frank. Id. at 217–19. Indeed, some shows explicitly rejected intensive mothering and depicted the new momism as stuffy and overly obsessive. Id. at 218–19. In contrast to Roseanne were shows like thirtysomething, which celebrated the new momism and intensive mothering. Id. at 217. Thirtysomething depicted the “new traditionalism” where women were not forced to stay home, but instead, elected to return to the home because of her moral obligations to her child. Id. at 209.

42 Id. at 23.
43 Id. at 299.
44 DOUGLAS & MICHAELS, supra note 1, at 299.
45 Id. at 298–99.
46 Id. at 293. For example, one popular toy, the Mozart Music Cube played Mozart for the toddler when he or she arranged the blocks in the correct order. Id.
47 See id. at 310.
48 See id. at 299.
49 DOUGLAS & MICHAELS, supra note 1, at 4.
50 Id. at 93–98. In the 1970s, proposals for federally funded child care were turned down on the claim that state-funded day care was akin to turning your child over to the
found in the new momism—the responsibility for children falls squarely on the mother. As a result, mothers are cast as the best primary caretakers for their children, without concern for the father's role or the mother’s career. *The Mommy Myth* offers few solutions, but maternity leave, a woman’s first encounter with balancing work with her children, is a logical place to begin.

II. THE DISCRIMINATORY EFFECTS AND ENTRENCHED ASSUMPTIONS OF THE FMLA.

The federal leave legislation enacted to help working families balance the demands of employment and family, the FMLA, perpetuates the gender-stratified norms presented in *The Mommy Myth*. The FMLA was intended to be gender neutral while also promoting the cause of women in the workplace, but its specific provisions, combined with the effects of the legislation do not challenge the discriminatory structures of family and work that were in place prior to its enactment.51 The effects of the FMLA on paternal leave taking have been the subject of much scholarship, yet the implicit messages sent to women have not been explored in detail.52

A. Brief Background of the FMLA

In 1993, as his first act as President, William Clinton signed the FMLA into law, declaring an end to the battle between Congress and the White House for family leave legislation.53 The FMLA is the first federal legislation aimed at helping working families by mandating

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53 See Mitchell Locin, *Family Leave Signed, Hailed as Gridlock End ‘Embrace’ Law*, Chi. Trib., Feb. 6, 1993, § 1, at 3. Congress sent two bills to the White House prior to the FMLA that addressed family leave. Id. The two bills were vetoed by President George H. Bush out of concerns that mandated family leave legislation would be too expensive to the costs of doing business in the United States. Id.
family leave.\textsuperscript{54} The United States is the last industrialized nation to enact family leave law, and remains the only industrialized nation that does not provide paid family leave.\textsuperscript{55}

To be eligible for leave under the FMLA, both the employer and the employee must meet certain requirements.\textsuperscript{56} The FMLA requires that employers allow eligible employees to take twelve weeks of unpaid leave in one year to care for a new infant or an adopted child.\textsuperscript{57} The provisions that allow parents to care for a new child, expire one year after the birth or adoption of the child.\textsuperscript{58} When the employee returns to work, the employer is required to restore the employee to the same or an equivalent position, with the same pay and benefits.\textsuperscript{59}

The FMLA excludes certain employers and employees.\textsuperscript{60} Employers with fewer than fifty total employees within a seventy-five mile radius of the company are exempt from the FMLA's provisions.\textsuperscript{61} In addition, employees must have been employed by the employer for at least twelve months and worked at least 1,250 hours during the previous year.\textsuperscript{62} Further, an employee who is considered a "highly compensated employee" may be denied restoration if the denial is necessary "to prevent substantial and grievous economic injury to the operations of the employer."\textsuperscript{63} Even with these restrictions, the FMLA was heralded for its gender neutrality.

The FMLA is praised because it provides needed family leave without direct reference to gender.\textsuperscript{64} The statute neither limits the

\textsuperscript{54} See id.
\textsuperscript{55} See Jane Waldfogel, Understanding the "Family Gap" in Pay for Women with Children, 12 J. Econ. Persp. 137, 141 (1998).
\textsuperscript{57} Id. § 2612(a)(1)(A), (B). The FMLA also provides for eligible employees to take twelve weeks to care for a sick child, spouse or parent, or their own medical conditions. Id. § 2612(a)(1)(C), (D). Discussion of these provisions, however, is outside the scope of this Book Review.
\textsuperscript{58} Id. § 2612(a)(2).
\textsuperscript{59} Id. § 2614(a)(1)(A), (B).
\textsuperscript{60} See id. § 2611(2), (4).
\textsuperscript{62} Id. § 2611(2)(A)(i), (ii). The 1,250 hour requirement for eligibility correlates to approximately a twenty-four hour work week for the previous year.
\textsuperscript{63} Id. § 2614(b). A "highly compensated employee" is an employee who is "salaried and among the highest paid ten percent of the employees employed by the employer." Id. § 2614(b)(2).
\textsuperscript{64} See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729–33 (2003). The Court held that state employees may recover money damages in federal court if the state fails to comply with the family-care provisions of the FMLA. Id. at 724–25. However, businesses feared the impact of the mandatory leave provisions, and the potential negative repercussions for businesses. See Bornstein, supra note 15, at 78–79. Businesses claimed that mandatory fam-
leave to the mother of the child nor exempts the father. Congress specifically stated that one purpose of the legislation was to promote equal employment for both men and women and to minimize the potential for gender-based discrimination.

The FMLA has been active law for over ten years, and continues to be touted for its gender neutrality. In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court examined the past discrimination of women, and praised the FMLA for its attempts to rectify past subordination of women. Indeed, the Court considered that when the FMLA was passed, gender discrimination was still pervasive in American society. Closer examination, however, reveals that the FMLA is not gender neutral, and thus fails to halt the perpetual subordination of women that the FMLA was intended to address.

Although the language of the FMLA is gender-neutral, its effect is to promulgate the gender-stratified norms expounded in *The Mommy*
Myth. This is because the FMLA is based on embedded social norms and unstated assumptions that subordinate women.\textsuperscript{70} Indeed, the FMLA is a reflection of the social understandings and values of the time when it was enacted.\textsuperscript{71} The legislation was created within the social context of 1993, a time—which the Supreme Court noted—when gender discrimination was still pervasive within the United States.\textsuperscript{72} Indeed, a Congressional finding of the FMLA stated that, “responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”\textsuperscript{73} Women continue to be portrayed as the principal caregiver of children—one element of women’s subordination—in part because the FMLA was enacted within a social context that was and still is governed by a patriarchy.\textsuperscript{74} The FMLA’s entrenched assumptions are not readily apparent, yet they become so when one contrasts the effect of the legislation on both men and women.

B. Parental Leave Taking

The FMLA discourages fathers from taking leave following the birth or adoption of a child, and yet encourages mothers to take family leave.\textsuperscript{75} The reason why family leave is under-utilized by fathers has

\textsuperscript{70} Bornstein, supra note 15, at 91. Indeed, as Professor Bornstein states, “In attempting to analyze the Family and Medical Leave Act, we can employ a public values approach in which norms that both ‘reflect and help constitute social experience’ are seen as embedded in the legal rules we create.” Id.

\textsuperscript{71} See id.


\textsuperscript{73} 29 U.S.C § 2601 (a) (5) (1999).

\textsuperscript{74} See Bornstein, supra note 15, at 81, 104.

been the subject of much scholarly debate. Indeed, critics speculate that a combination of social stigma, financial pressures and specific provisions of the FMLA act to keep men from fully utilizing family leave, while encouraging women to take family leave.\textsuperscript{76}

Despite the passage of the FMLA, gendered social norms persist regarding family leave and parenting.\textsuperscript{77} The ideal worker in American culture is the male worker with no responsibilities outside of the workplace.\textsuperscript{78} Fathers fear that deviation from this ideal worker norm will endanger their careers.\textsuperscript{79} Women, however, are expected to deviate from this norm and take unpaid family leave.\textsuperscript{80} The FMLA does nothing to disrupt this pattern.\textsuperscript{81} In addition, pervasive norms regarding parenting persist.\textsuperscript{82} The workplace has become more sensitive to the needs of balancing work and family, but this sensitivity is often directed toward women and against men.\textsuperscript{83} As one scholar states, "Men's accommodation requests are often met by, 'Your wife should handle it.'"\textsuperscript{84} Though many companies offer paternal leave to appear gender neutral, it is often a hollow policy that is not intended to be utilized by fathers.\textsuperscript{85} This is because within the workplace, childcare remains the

\begin{itemize}
\item\textsuperscript{76} See supra note 52.
\item\textsuperscript{77} Naomi Cahn, \textit{The Power of Caretaking}, 12 YALE J.L. & FEMINISM 177, 184, 188 (2000).
\item\textsuperscript{78} See Bornstein, supra note 15, at 95–96.
\item\textsuperscript{79} Malin, supra note 52, at 1078. Professor Malin references a research study done by the research group Catalyst during the mid-1980s of family leave policies among large employers. \textit{Id.} at 1049. The study found that 63\% of large employers found it unreasonable for a father to take any parental leave, and 17\% found paternal leave reasonable only where the leave was limited to two weeks or less. \textit{Id.} at 1078. Malin concludes that "[f]athers who take parental leave justifiably fear for their jobs and their families' financial security." \textit{Id.; see also} Cahn, supra note 77, at 185 (asserting that "[b]ecause society has traditionally viewed the woman as the primary caregiver, many men are reluctant to step out of their role as providers").
\item\textsuperscript{80} See Malin, supra note 52, at 1089; \textit{see also} Bornstein, supra note 15, at 102.
\item\textsuperscript{81} See Selmi, supra note 51, at 765–66, \textit{see also} Bornstein, supra note 15, at 81 (arguing that the moral code of the FMLA perpetuates many of the problems that the legislation was intended to rectify).
\item\textsuperscript{82} Cahn, supra note 77, at 184. For example, "[w]hen we think of ideal parenting, we typically envision 'mothering,' rather than 'fathering.'" \textit{Id.} at 183.
\item\textsuperscript{83} Malin, supra note 52, at 1077.
\item\textsuperscript{84} \textit{Id.}
\item\textsuperscript{85} Bornstein, supra note 15, at 116.
\end{itemize}
mother’s responsibility.86 Fathers are playing an increasing role in parenting, but nonetheless, parenthood remains a gendered concept with different standards for mothers and fathers.87 In parenthood, there is no equality; the mother is the primary parent and the father has the primary career.

In addition to workplace concerns, financial concerns keep men from taking the unpaid family leave provided by the FMLA and encourage women to take the subordinate financial position.88 Unfortunately, it is still true that men earn more than women in the same occupations across different age groups and professions.89 Men remain the primary financial providers for their families.90 When a child is born or adopted, new financial considerations arise.91 The mother, at least temporarily, is not working and there is an additional person to support.92 Fathers often respond by working more to compensate for the loss of income and increased expenses.93

The FMLA provides for only unpaid leave. Few families can afford to forgo both the income of the mother and the father.94 Thus,

86 See Malin, supra note 52, at 1077 (stating that employers are willing to accommodate mothers’ family responsibilities, but employers are unwilling to make similar accommodations for fathers).
87 Cahn, supra note 77, at 188 (stating that despite the increasing role of fathers in parenting, the actual performance of caretaking within the home demonstrates the continued presence of different standards for fathers and mothers).
88 Malin, supra note 52, at 1073–74.
89 Selmi, supra note 51, at 714–15; see also Kathryn Branch, Note, Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy, 1 DUKE J. GENDER L. & POL’Y 119, 119 (1994) (stating that women are worth less than men in the labor market because traditional gender roles result in the assignment of women to the home). Indeed, in 2002, women earned $0.77 for each dollar that men earned. PROFESSIONAL WOMEN, supra note 8. The wage gap is larger for African American and Latina women, where the wage gap is 67% and 55%, respectively. Id. The wage gap persists across occupations and even in those occupations where women outnumber men. Id. For example, “[f]emale registered nurses earn 12% less than their male colleagues.” Id.
91 Malin, supra note 52, at 1074.
92 Id.
93 Id.
94 Malin, supra note 52 at 1073. As Professor Malin states:

When the leave available to the mother is paid and the leave available to the father is not, it sends a signal to the parents that the mother is expected to take leave and the father is not. It becomes easy for the father not to take leave by reasoning that the children will be cared for with little or no drop in household income if only the mother stays home.

Id.; see also Peterson, supra note 52, at 268 (stating that without wage replacement fathers cannot afford to take family leave).
“[b]ecause men’s wages continue to be significantly higher than women’s, it would be economically rational for a married woman to take the leave alone, as she would forgo a smaller income than her husband would, and his larger income would continue.”95 Therefore, financial concerns constrain fathers from taking unpaid family leave.96

The highly compensated employee provision furthers gendered patterns of leave-taking.97 The provision provides that employers are not required to reinstate highly compensated employees to a similar position when they return from family leave.98 If a mother-to-be is part of the highest paid 10% of employees of an employer, the mother is not guaranteed a restoration of the high position when she returns from maternity leave.99 Fathers who fall into this category are discouraged from taking leave to retain their high position and continue to accrue seniority.100 The effects of the FMLA translate into implicit messages for parents.

C. The Implicit Messages of the Family and Medical Leave Act

The Family and Medical Leave Act sends implicit messages to the women of America.101 These messages, norms, and assumptions embedded within the words and effects of the FMLA are not readily apparent.

The FMLA operates on entrenched assumptions.102 The FMLA, like all legislation, contains the cultural values of the government that enacted it.103 These values are reflected in the assumptions and effects

95 Bornstein, supra note 15, at 116.
96 Malin, supra note 52, at 1074; see also Bornstein, supra note 15, at 116 (arguing that fathers are less likely to take parental leave without wage replacement).
98 29 U.S.C. § 2614(b) (1999). Highly compensated employees are those who fall into the highest 10% of salaried employees within seventy-five miles of the worksite. Id. § 2614(b) (2).
99 Bornstein, supra note 15, at 118.

Because women are more often responsible for child rearing and solely for childbearing, this exemption disproportionately affect women in management positions. A woman who “wants to start a family may hesitate to pursue the fast track up the corporate ladder if she will lose her ability to take FMLA leave.”

Id.
100 See Bornstein, supra note 15, at 118–19; Peterson, supra note 52, at 270.
101 See Bornstein, supra note 15, at 91.
102 Id. at 81.
103 Id. As stated by Professor Bornstein, “[t]he Family and Medical Leave Act can be viewed as a proxy for national public values regarding the working family. The provisions
of the FMLA.104 The FMLA assumes that a secondary source of income exists that allows mothers to take unpaid leave; that is, the FMLA assumes that mothers are dependent on another person.105 This cultural value embedded within the FMLA operates to value the traditional family structure and ignore single or unconventional parents.106 Single parents and many women cannot afford unpaid leave.107 Yet, the FMLA operates on the assumption that mothers can afford to take leave because mothers are not independent.

Moreover, the FMLA casts mothers as the primary caretakers of children. Parenthood in American society is equated with motherhood.108 This cultural assumption of mother as primary parent begins immediately following the birth of the child.109 Under the structure set in place by the FMLA, the mother is the most culturally and financially able to take leave following the birth of the child.110 Patterns of caretaking begin when a child is born or adopted and are perpetuated throughout the life of the child.111 Indeed, when the mother is the parent at home caring for the child after its birth, the mother learns about the care and needs of the child.112 The father does not learn as much as the mother about the child and is immediately placed in a secondary position of care.113 Both parents come to

of the Act embody and sustain the values that the government is willing to advance on behalf of the working family.” Id.

104 Id.

105 See Young, supra note 50, at 142. One commentator, Angie Young argues that children of single parent families are made vulnerable by provisions of the FMLA that may force a single mother to choose between employment and caring for her child. Id.

106 See Bornstein, supra note 15, at 104. Furthermore, the FMLA requires that the child be “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.” 29 U.S.C. § 2611(12) (1999). Therefore, a lesbian or gay parent may be precluded from taking leave to care for a new child because that child is not “legally” their child. Bornstein, supra note 15, at 111.


108 See Cahn, supra note 77, at 193. Professor Cahn points to societal proscriptions in the form of advice books, novels, and other media, as in The Mommy Myth, that equate parenthood with motherhood and tell women how to care for their children. Id.

109 See Malin, supra note 52, at 1055.

110 Id. at 1073–74.

111 Young, supra note 50, at 124.

112 Malin, supra note 52, at 1054–55. The belief that women have a natural maternal instinct that makes them the better caregivers of children has not been supported by scientific, sociological, or anthropological evidence. Id. Indeed, evidence does not support that mothers are better at nurturing or caring for children, but that nurturing and caring for a child is a learned skill. Id. Thus, parenting is a skill developed following the birth or adoption of a child. Id.

113 Young, supra note 50, at 124–25.
perceive the mother as the more capable parent since she has the most knowledge and experience with the child.\textsuperscript{114} As stated by Professor Young, “[t]hough a first-time mother and father may begin with the same level of parenting skills, the perception that mothers have greater skills can be a self-fulfilling prophecy.”\textsuperscript{115} By the time the father attempts to fill the role of caregiver, he has been subjugated to a position of visitor with the child and is not a primary caretaker.\textsuperscript{116}

Fathers who do not take leave and participate in the care of the child immediately following the child’s birth or adoption fall behind on the skills needed to care for the child.\textsuperscript{117} Indeed, “once men step out [of a caregiving role], it becomes hard for them to get back in.”\textsuperscript{118} The mother is therefore cast as the primary caregiver of the child.\textsuperscript{119} Because the patterns of care-taking are established in the days and weeks following the birth or adoption of the child, the FMLA ensures that the burden for caregiving falls on the mother.\textsuperscript{120} Further, the FMLA works to undermine the position of women in the workplace.

The FMLA perpetuates the belief and stereotype that women are less committed to the workplace, because her focus is on the home.\textsuperscript{121} The sensitive issue of paternal and maternity leave often arises during the crucial years when advancement to partner, tenure, or management is scrutinized and the demand at work peaks.\textsuperscript{122} Employers rationally assume that their employees will follow prescribed gender norms and that the women will therefore be less committed to the workforce.\textsuperscript{123} Women are penalized for the perception that they will

\textsuperscript{114} Id; see also Malin, \textit{supra} note 52, at 1057 (stating that when fathers do not take parental leave following the birth or adoption of a child, the father is marginalized in the child care and the primary burden is placed on the mother).

\textsuperscript{115} Young, \textit{supra} note 50, at 124.

\textsuperscript{116} Malin, \textit{supra} note 52, at 1056.

\textsuperscript{117} Id. at 1057.

\textsuperscript{118} Young, \textit{supra} note 50, at 125.

\textsuperscript{119} See id.

\textsuperscript{120} See Bornstein, \textit{supra} note 15, at 99, 115.

\textsuperscript{121} See Cahn, \textit{supra} note 77, at 193–94. Professor Cahn illustrates the myth by referencing a commentary by a \textit{New York Times} editor, who stated that a mother will have less energy to expend on her work because her energy is divided between work and home, and she will probably be less successful than her male counterparts. \textit{Id}.

\textsuperscript{122} Bornstein, \textit{supra} note 15, at 97.

\textsuperscript{123} Id. at 95. As Professor Bornstein stated, “Employers take rational gamble[s] that workers adhere to traditional gender roles in offering career advances and salary increases to men and assigning the responsibility for children and home to women.” \textit{Id} (alteration in original); see also Branch, \textit{supra} note 89, at 127 (stating that men are assigned a greater level of workforce attachment on the gamble that they will adhere to traditional gender roles).
have children and at least temporarily leave the work force.\textsuperscript{124} By ensuring that the mother of the child is the parent who takes family leave, the FMLA substantiates, validates, and reinforces the logical gambles that employers take that women are not committed to the workforce.\textsuperscript{125} Although the FMLA was intended to help women balance work and family, it has served to perpetuate the underlying stereotypes that are the basis of workplace discrimination.\textsuperscript{126}

The FMLA mandates only unpaid leave.\textsuperscript{127} Federally required unpaid leave undermines women in the workplace. Because more women than men take leave under the FMLA, the lack of compensation affects women in greater numbers.\textsuperscript{128} Unpaid leave undervalues women by presuming two key details: it not only assumes that women can afford to take the leave because it is not essential to their livelihood, but it also assumes that a mother’s financial contribution and involvement in the workplace are insignificant.\textsuperscript{129}

\textbf{D. The Status Quo is Subordination}

In preserving the status quo, the Family and Medical Leave Act perpetuates the legal subordination of women. Scholars have commented that the FMLA does little to help working mothers and families balance the demands of home and the family; nor does the FMLA advance women in the workplace.\textsuperscript{130} The FMLA does little to alter the

\textsuperscript{124} Selmi, \textit{supra} note 51, at 726. Selmi illustrates that women indeed only leave temporarily by pointing to studies that show that women who worked full time prior to taking leave tend to return to full time work, and it is rare for a woman to move from full time to part time work. \textit{Id.} at 733. Furthermore, following the birth of a child, the majority of women return to work within six months and between 40 and 65\% return within three months. \textit{Id.} “Even after controlling for differences in characteristics such as education and work experience, researchers typically find a family penalty of 10–15 percent [in earnings] for women with children as compared to women without children.” Waldfogel, \textit{supra} note 55, at 143.

\textsuperscript{125} See Young, \textit{supra} note 50, at 148. “[A]lthough favoring women in parental leaves may help working mothers in the short term by providing for those most in need, such a policy would inevitably perpetuate the stereotype of women as ‘caretakers of newborn infants.’” \textit{Id.}

\textsuperscript{126} See Bornstein, \textit{supra} note 15, at 81, 117–18; Selmi, \textit{supra} note 51, at 711.

\textsuperscript{127} See \textit{29 U.S.C. \textsection 2612(c) (1999)}.

\textsuperscript{128} See \textit{Highlights}, \textit{supra} note 75. Men do take family leave, but it tends to be under provisions of sick leave or personal days. \textit{Id.}

\textsuperscript{129} See Bornstein, \textit{supra} note 15, at 118; Selmi, \textit{supra} note 51, at 711.

\textsuperscript{130} See Bornstein, \textit{supra} note 15, at 91, 118; Selmi, \textit{supra} note 51, at 710–11; see also Branch, \textit{supra} note 89, at 151 (stating that a primary reason that no comprehensive family program exists to address family leave and childcare is that such a program would challenge the traditional assumptions about the appropriate gender roles).
position of women except guarantee a minimum level of unpaid leave.\textsuperscript{131} The FMLA does not challenge the workplace or family structures that were in place prior its passage; instead its embedded assumptions, norms and values perpetuate the mother as the only caregiver of children, which is the status quo.\textsuperscript{132} Thus, perpetuation of the status quo is perpetuation of the subordination of women, because the United States has a history rooted in the discrimination of women.\textsuperscript{133} However, mere perpetuation of the status quo does even greater harm to women, because it allows acknowledgement of the problem without necessitating a remedy.\textsuperscript{134} The structure perpetuated by the FMLA is the same as seen and argued in \textit{The Mommy Myth}.

\section*{III. Paid Leave: Toward a Model of Equality}

The new California Paid Family Leave Law offers the viable next step toward the equality of men and women in both the home and at work. Though paid leave will not completely rectify the gendered patterns of leave-taking or the subordination of women, it provides a step in the right direction.

\subsection*{A. Paid Family Leave of California}

On September 23, 2002, California became the first state in the nation to enact a comprehensive paid family leave program.\textsuperscript{135} The law provides eligible employees with 55\% of their weekly earnings, up to a maximum of $728 per week\textsuperscript{136} for six weeks\textsuperscript{137} to care for a new child.\textsuperscript{138} The program is funded entirely by a payroll tax on employees and is built upon California's existing State Disability Insurance sys-

\begin{footnotesize}
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\item \textsuperscript{131} \textit{Id}.
\item \textsuperscript{132} \textit{See} Bornstein, \textit{supra} note 15, at 123.
\item \textsuperscript{133} \textit{See} Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729-30 (2003); \textit{see also} Cahn \textit{supra} note 77, at 186 (pointing to doctrines of coverture and marital rape for the assertion that the law has constructed gendered identities for husbands and wives, while also noting that twenty-five states continue to treat marital rape differently than other forms of rape).
\item \textsuperscript{134} Bornstein, \textit{supra} note 15, at 91.
\item \textsuperscript{135} Milkman & Appelbaum, \textit{supra} note 75, at 45. Other states have enacted provisions that provide some assistance to caregivers who work. Bell & Newman, \textit{supra} note 107, at 2. For example, five states and Puerto Rico have stated administered Temporary Disability Insurance (TDI) programs or require employers to offer TDI. \textit{Id}. These programs provide partial pay for workers who are disabled for medical reasons, which includes pregnancy. \textit{Id}. These states include, California, New York, New Jersey, Rhode Island and Hawaii. \textit{Id}.
\item \textsuperscript{136} \texttt{CAL. UNEMP. INS. CODE § 2655 (West 1986).}
\item \textsuperscript{137} \textit{Id.} § 3301(d) (West Supp. 2004).
\item \textsuperscript{138} \textit{Id.} § 3302(a)(1).
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tem. Californians began paying into the program on January 1, 2004 and the benefits were available on July 1, 2004.

The Paid Family Leave program is more extensive in coverage and purpose than the FMLA. Unlike the FMLA, the Paid Family Leave program is not dependent upon the size of the employer, and covers all private sector employees. Further, the requirements for eligibility are not as stringent as those under the FMLA. Indeed, the employee must only earn $300 during any quarter in the "base period," five to seventeen months before filing a claim. Furthermore, Paid Family Leave specifically permits leave to care for the birth of a child of the employee's domestic partner.

The Paid Family Leave program not only includes more families who need to take leave, but also addresses the primary hurdle to taking family leave. In passing Paid Family Leave, the California legislature specifically found that the majority of workers who needed to take family leave were unable to do so because they could not afford leave without pay. The legislature thus aimed to create a program that would help dual income parents, single parents, and non-traditional families, alike, balance the demands of work and family.

Groups that claim paid family leave is essential to help families balance the demands of work and family champion the Paid Family Leave Program, while the businesses of California criticize it for the economic hardships the new law could impose. Supporters of paid

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139 Milkman & Appelbaum, supra note 75, at 45. Employee contribution is capped at $55.06 per worker per year for 2004 and at $63.53 for 2005. Id. at 4.
140 Id. at 1, 4. However, the paid family leave program is in some respects less protective of the employee's job because it does not guarantee reinstatement to the same or an equivalent position. See CAL. UNEMP. INS. CODE § 3301. The legislation claims that there are other protections in place to protect the employee's job such as the FMLA, Pregnancy Discrimination Act, and Title VII. Id. § 3300(d).
141 Milkman & Appelbaum, supra note 75, at 48.
142 Id. at 4 n.5.
143 CAL. UNEMP. INS. CODE § 3302(e) (1), (f).
144 See id. § 3301(a) (1).
145 Id. § 3300(f).
146 Id. § 3300(a).
147 Id. § 3300(a).
148 See Debora Vrana & Gabrielle Banks, New Parents Applaud Paid Family Leave Law, L.A. TIMES, June 30, 2004, at C1. However, evidence from the Swedish system of paid parental leave is to the contrary. See Arielle Horman Grill, The Myth of Unpaid Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?, 17 COMP. LAB. LJ. 373, 382 (1996). The Swedish Act on Child-Care Support provides a combined paid leave of one year to parents. Id. at 375. Each parent may take 180 days of leave, and 150 days can be transferred to a spouse. Id. Employers support the policy of paid leave because they believe that they receive direct and indirect benefits from the program. Id. at 382. Indeed,
family leave herald the new legislation for its expansive coverage and seek to inform workers of the new law.149 Opponents of the new legislation fear that the economic costs will adversely affect businesses in California, especially those smaller businesses that are exempt from the FMLA.150 These fears echo concerns about the FMLA immediately after it became law, which, ten years later, have proved largely unfounded.151

B. Paid Family Leave as a Viable First Step

No perfect or single solution exists to eliminate the gendered patterns of leave-taking, the new momism, or the subordination of women in the home and workplace. Yet paid family leave offers a viable first step towards rectifying the inherent problems of the FMLA, and the California Paid Family Leave Program can serve as a model and test case for the rest of the nation.152

Paid family leave can undermine the stereotype of the mother as primary caretaker, because it will increase the opportunity for fathers to take leave immediately following the birth of a child.153 Financial inability is the main reason that fathers cannot do so, because fathers remain the primary breadwinners in most households.154 Partial wage replacement, as in the Paid Family Care Program in California, will remove the primary obstacle to paternal leave taking.155

Productivity increases when employees can take time to care for a child after its birth, and the employers benefit from a stable and happy workforce. Id. 149 Morning Edition: California Workers Have New Paid Family Leave Option (NPR radio broadcast, July 14, 2004), available at 2004 WL 5613689. However, problems with the Paid Family Leave program are already apparent. Milkman & Appelbaum, supra note 75, at 49. The family leave benefits have been deemed taxable by the Internal Revenue Service. Id.

150 See Vrana & Banks, supra note 148. Employers cite concerns over replacing workers for extended periods of time, the loss of flexibility and competitive advantage. Id.

151 See Bornstein, supra note 15, at 78.

152 See Bell & Newman, supra note 107, at 4–5.

153 Selmi, supra note 51, at 771. Selmi states that “[p]roviding six weeks of paid leave should induce some fathers to take parental leave, perhaps as much as 20%.” Id. Furthermore, in order to alter the existing gender norms of parenting, family leave must address the prevalent social and cultural constructions of motherhood and fatherhood that prevent fathers from becoming a primary caretaker and continue to reinforce the mother as the primary parent. See Nancy E. Dowd, Family Values and Valuing Family: A Blueprint for Family Leave, 30 HARV. J. ON LEGIS. 335, 349 (1993).

154 See Bornstein, supra note 15, at 117.

155 Young, supra note 50, at 154 (stating that “[b]y offering a reasonable amount of wage replacement, employers can take some of the traditional burden off of men to work longer hours as ‘provider’ and ‘breadwinner’ during the critical period immediately after the birth of a child.”).
Alleviating the fundamental barrier to paternal leave will enable fathers to gain competence in the care of the child and become a primary caregiver.\textsuperscript{156} Indeed, the father who takes leave will learn how to care for and nurture the child along with the mother;\textsuperscript{157} both parents’ skills will progress at the same rate.\textsuperscript{158} The mother will no longer be perceived as the primary caregiver, because her skills, practice, and knowledge of caregiving will be equal with those of the father.\textsuperscript{159} Paid family leave will enable fathers to care for a child from its birth, and break the cycle of the more knowledgeable mother as primary caregiver.\textsuperscript{160} Paid family leave will help to alleviate the marginalization of fathers in the care of their new children and therefore help fathers become a primary caregiver of the child, along with the mother.\textsuperscript{161}

Paid family leave helps to reduce the wage penalty associated with motherhood and will help decrease gender inequality in the workplace.\textsuperscript{162} Providing paid leave to mothers when they are biologically required to, at least temporarily, leave the workforce allows women to be economically autonomous; women are able to depend on their own wages to support themselves and their new child.\textsuperscript{163} Paid leave recognizes the contribution mothers make to the labor market by valuing the time that they have worked in the past and providing assistance when it is necessary to take time to care for family in the present and future.\textsuperscript{164}

\textsuperscript{156} See Malin, supra note 52, at 1057, 1074.
\textsuperscript{157} Id. at 1058. “[F]athers who took parental leave were significantly more likely to share in child-care responsibilities and in performing specific child-care tasks, including preparing food, shopping, doing laundry, diapering, bathing, getting up at night, reading, comforting, and taking the child to the doctor.” Id.
\textsuperscript{158} See id. at 1054–55.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{161} Malin, supra note 52, at 1057.
\textsuperscript{162} Milkman & Appelbaum, supra note 75, at 47. The wage penalty for motherhood exists even after controlling for differences in factors such as education and work experience. Waldfogel, supra note 55, at 143. Also, no such penalty exists for women without children or for men, regardless of whether a man has children. Id. Indeed, married men, most of whom have children, earn more than other men. Further, men benefit from a “marriage premium;” married men earn ten to fifteen percent more than their unmarried counterparts. Id.
\textsuperscript{163} BELL & NEWMAN, supra note 107, at 1. For example, “[o]ver the course of a lifetime, caregivers sacrifice an average of $566,000 in wages.” Id.
\textsuperscript{164} See Milkman & Appelbaum, supra note 75, at 47; see also Grill, supra note 148, at 381 (stating that Sweden’s policy of paid leave has “helped Sweden maintain the world’s highest labor market participation rate among females: 91% of women between the ages of twenty-five and forty-nine are employed.”). Paid leave around the birth or adoption of a child has the effect of women working further into their pregnancies and returning to work sooner. INST. FOR WOMEN’S POLICY RESEARCH, FACT SHEET: PAID FAMILY AND MEDICARE.
Furthermore, if the state begins to recognize the value that mothers have in the labor market, employers will no longer be able to make the gendered assumption that women are not committed to the workplace and are therefore less deserving of seniority.165

Significantly, Paid Family Leave does not overvalue the traditional family or traditional roles within the family. For low-income women, paid leave is an absolute necessity, because most do not have access to employer-provided paid sick leave.166 "More than three in four employees need, but don’t take, family and medical leave because they can’t afford to miss a paycheck."167 Furthermore, working mothers are less likely to have access to paid sick leave in general than employed fathers.168 Mothers who shoulder the burden for family caregiving are forced to choose between caring for their families and economic security.169 Paid Family Leave recognizes non-traditional families by providing leave to care for a partner or a partner’s child.170 The Paid Family Leave program values women by recognizing non-traditional families and single parents. California’s Paid Family Leave provides a viable option for the rest of the states in the nation to facilitate the equality of women and to begin to debunk the mommy myth.

Indeed, California’s Paid Family Leave program can operate as a model and test case for the rest of the states and the federal government.171 Because the Paid Family Leave program has been operating

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166 See Milkman & Appelbaum, supra note 75, at 48.
167 Bell & Newman, supra note 107, at 1.
168 Milkman & Appelbaum, supra note 75, at 48.
169 Id.
171 Although California is the first state to implement a paid leave program, paid leave legislation has been introduced in twenty-one states, and twelve states have held or scheduled hearings on paid family leave. Nat’l P’ship for Women & Families, State Legislative Round-Up: State Paid Leave Initiatives in 2004 and Prior State Legislatures: Making Family Leave More Affordable 3 (2004), available at: http://www.nationalpartnership.org/ports/p3/library/PaidLeave/StateRoundUp2004ExecSumm.pdf [hereinafter State Legislative Round-Up]. The primary hurdles to implementing a paid leave program will be: first, the opposition from businesses; and second, that the Paid Family Leave program in
for only six months, the success of the program has not yet been determined. Nevertheless, the success of the program in California will have a large effect on the implementation of future paid leave programs throughout the United States. However, the underlying principles, paid leave to more workers and more diverse types of families, offer a viable paradigm for the rest of the nation.

CONCLUSION

The new momism is seen throughout American society in not only the messages promulgated by the media, but also in the words and effects of the FMLA. The FMLA perpetuates the stereotype of women as the best primary caregiver of children by discouraging fathers from taking leave following the birth or adoption of a child, while also devaluing the contribution mothers make to the labor force by providing for only unpaid leave.

The FMLA was touted as the help that working families needed in modern society, but the benefits of the Act have been largely symbolic. Instead, FMLA has hindered women's progress in the home and at work, because it does not advocate change of the structure of the family or the workplace. Instead, the FMLA perpetuates the status quo; a standard that devalues mothers and has a history rooted in the discrimination of women.

The California Paid Leave Program advocates for change. Indeed, the first paid leave program of the country values the contribution of women and encourages change. Although there is no simple solution to women's subordination, legislation cannot simply maintain the discriminatory practices that are seen throughout the American workforce. Legislation and legislators must recognize the changes of modern society and the need for change, and family leave policy must reflect this new understanding.