

## Family Needs, Family Leave in 2023

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### I. INTRODUCTION

Instituting support for women and children is a difficult task to imagine in a world that is removing reproductive freedom and healthcare. In this hypothetical, do we treat the removal of abortion care as a *force majeure*, natural disaster, or an earthquake? If so, after the earthquake, the community bands together and works tirelessly to compensate for what has happened. But the removal of abortion care was not a natural disaster—it was planned, and it is embedded in background conditions that are pushing further away from support for women and children.

The primary task of this Article is to respond to the reality that *Dobbs v. Jackson Women's Health* reflects a legal and social movement seeking to diminish support for those at risk of pregnancy. Given this reality, the Article focuses on realistic incremental changes that can be made to existing leave policies that can shift the frame of the relationship between employment and parenting. An improved frame would see that childbirth and unusual health crises are only a few of the events that employers need to accommodate to support parents. While the primary task of this Article is to explore the promising dynamics of incremental change to leave policy, this Article also acknowledges the range of support a state could provide if we were not in this era—if indeed *Dobbs* were a *force majeure* and the community were completely committed to mitigating its impact.

Part II of this Article considers the meaning of forced parenting and its financial impact on parents. Part III enumerates a broad list of reforms that could form a supportive fabric for parents raising children, but that would first require a far more parent-friendly social conception than the *Dobbs* world indicates. Part IV focuses in on

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parental leave laws and highlights existing examples of particular reforms that could improve the welfare of people forced to parent. The focus on existing reforms is intended to highlight the achievability of these reforms, focusing on what can be done for parents in the political conditions of 2023.

## II. FORCED PARENTING

Through *Dobbs v. Jackson Women's Health*,<sup>1</sup> the Supreme Court authorized states to force women to carry pregnancies to term, and in roughly half of the states, that is precisely what is happening.<sup>2</sup> This practice of forced pregnancy and childbirth imposes an enormous physical, mental, and social burden and risk that follows from pregnancy and childbirth. For some, this process is particularly cruel because their fetus has no chance of surviving once born. But many others will give birth to a child who needs rearing. The anti-abortion movement, and the *Dobbs* opinion itself, have taken the position that a person's obligation ends after giving birth because a child may be placed for adoption.<sup>3</sup> It seems that for some, this neatens up the projected burden of denying abortion care.

This "adoption cure" represents magical thinking on the part of anti-abortion activists. After being denied an abortion, 91 percent of people who give birth to an infant that survives will raise that child, with only 9 percent choosing to place the child to be parented by someone else through adoption.<sup>4</sup> After giving birth, the overwhelming majority of people who did not want a baby and who sought an abortion do not view placing the child for adoption as a viable option.<sup>5</sup>

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 69 (U.S. June 24, 2022).

<sup>2</sup> Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion Or Are Likely To Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup>.

<sup>3</sup> *Dobbs*, slip opinion at 34 (U.S. June 24, 2022) ("States have increasingly adopted 'safe haven' laws, which generally allow women to drop off babies anonymously; and [] a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.").

<sup>4</sup> Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 141-142 (2017), [https://www.whijournal.com/article/S1049-3867\(16\)30348-6/fulltext#secsectitle0010](https://www.whijournal.com/article/S1049-3867(16)30348-6/fulltext#secsectitle0010); Olga Khazan, *Why So Many Women Choose Abortion Over Adoption*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759>.

<sup>5</sup> Sisson et al., *supra* note 4, at 136, 141-142.

The idea that adoption is an off-ramp to the full costs of parenting is not “grounded in the reality of women’s decision making.”<sup>6</sup> It is essential for policy-makers to come to terms with this reality: imposing pregnancy means imposing parenting. The choice of placing a child for adoption cannot cover for the fact that people feel overwhelmingly unable to choose that path. To reckon with the costs of the *Dobbs* decision, it is essential to go beyond evaluation of the substantial health impacts of pregnancy and childbirth, to reckon with the full social, emotional, and financial impact of parenting.

A. *Financial Status of Those Seeking Abortion*

According to a 2014 study by the Guttmacher Institute, half of individuals who needed abortion care were living below the federal poverty level, and an additional one quarter of those who sought abortion care were defined as low-income, falling between the federal poverty level and up to two times the federal poverty level.<sup>7</sup> Those who seek abortion care must understand the financial resources it takes to raise a child in evaluating their own ability to do so.

B. *The Financial Cost of Parenting*

The financial cost of raising a child is not unknowable. It has been calculated for many decades by the U.S. Department of Agriculture (USDA) using data from the U.S. Bureau of Labor Statistics and informs child support tables in many jurisdictions. The financial cost of raising a child varies with region of the country, age of the child, and household income. In 2015, the USDA determined that a single parent spends \$172,200 raising a child.<sup>8</sup> The lowest income families in the dataset spend around \$10,000 each year in 2015 dollars with higher income families spending twice that amount.<sup>9</sup> Reputable sources place the amounts higher in light of inflation of ordinary goods, with a recent Brookings report placing the average lifetime number per child born in 2015 at \$310,605.<sup>10</sup>

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<sup>6</sup> *Id.* at 136.

<sup>7</sup> JENNA JERMAN ET AL., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 7 (John Thomas ed., 2016).

<sup>8</sup> MARK LINO ET AL., U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2015–13 (2017), <https://fns-prod.azureedge.us/sites/default/files/resource-files/crc2015-march2017.pdf>.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> Isabel V. Sawhill, Morgan Welch & Chris Miller, *It’s Getting More Expensive to Raise Children. And Government Isn’t Doing Much to Help.*, BROOKINGS (Aug. 30, 2022),

The cost of raising a child is not the only financial penalty imposed on parents by the *Dobbs* decision. Those who give birth to and raise a child pay a substantial price in wages,<sup>11</sup> and those who parent before they have completed their education will pay a higher lifelong wage penalty.<sup>12</sup> The very condition that requires the expenditure of several hundred thousand dollars brings with it a *decline* in earning that only exacerbates the financial impact of bearing the child.

When a government denies people abortion care, then, in addition to imposing an extraordinary physical cost, that government is in effect imposing an extraordinary financial burden on individuals. What serious work can be done by that same government to compensate for these burdens and support parents as they undertake this enormous obligation that the State has conscripted them into? Speaking metaphorically, what is the just compensation for this taking of their lives and labor?

### III. FABRIC OF POLICIES THAT CAN SUPPORT PARENTS

A government that fully supported parents in their role as caregivers would not limit reproductive control, given that more than half of abortion-care seekers are already parents,<sup>13</sup> and given the testimony of abortion-care seekers that being a good parent to existing children is one motivating factor in seeking abortion care.<sup>14</sup> It is within the envelope of the counter-hypothetical that we need to consider state policies. For that reason, this Part brings a particular focus to leave policies that exist currently in some jurisdictions and improve the lives of parents. These policies could be extended to cover more parents. In addition, this Part considers the implied image of the relationship

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<https://www.brookings.edu/blog/up-front/2022/08/30/its-getting-more-expensive-to-raise-children-and-government-isnt-doing-much-to-help>.

<sup>11</sup> *The Motherhood Penalty*, AAUW, <https://www.aauw.org/issues/equity/motherhood> (last visited Jan. 23, 2023).

<sup>12</sup> Catherine Doren, *Which Mothers Pay a Higher Price? Education Differences in Motherhood Wage Penalties by Parity and Fertility Timing*, 6 SOCIO. SCI. 684, 693 (“For women with less than a college degree, the transition to motherhood was associated with about an 11.3 [percent] wage penalty ( $p < 0.001$ ). Women with a college degree or more experienced a penalty of about half the magnitude, of about 4.8 [percent] ( $p < 0.10$ ).”).

<sup>13</sup> JENNA JERMAN ET AL., *supra* note 7.

<sup>14</sup> Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 113–114, <https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives> (last visited Feb. 2, 2023).

among parents, employers, and the state expressed by these policies. This Part urges shifts in that image that could put these policies on the best path to improvement. In particular, some policies show greater awareness that the experience of parenting goes well beyond the first twelve weeks and makes demands on parents that go well beyond serious medical emergencies. Before turning to these policies and their social vision, this Part takes notice of what a more broad-based supportive state response to parents would include if the social, cultural, and political conditions were different than they are.

A. *Post-Traumatic Stress and the Momnibus*

Perhaps the first thing parents who have been forced to carry a pregnancy and give birth need is support for the post-traumatic stress caused by being forced to carry the pregnancy to term.<sup>15</sup> A dozen recent bills were introduced in the 117th Congress to improve maternal healthcare, gathered under the name The Black Maternal Health “Momnibus” Act of 2021. The Momnibus contained provisions for post-partum care in a variety of settings, including for incarcerated people post-partum and for veterans.<sup>16</sup> Of the twelve parts of the Momnibus, only the provision offering support to Veterans was enacted into law. Other portions passed the House of Representatives over the “no” votes of many anti-abortion, purportedly pro-life Representatives.<sup>17</sup>

B. *Universal Basic Income*

Given that those who seek abortion are disproportionately struggling financially, financial support, whether direct or indirect, is essential to compensating for forced parenting among those who are denied abortion care. Universal Basic Income (UBI) pilot programs have produced promising results, reducing income volatility and

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<sup>15</sup> Efrain Nogueira, Laura Gil & Ana Cristina Gonzalez V, *Unwanted Pregnancy, Forced Continuation of Pregnancy and Effects on Mental Health*, GLOB. DRS. FOR CHOICE NETWORK 5, 13 (2011), <https://globaldoctorsforchoice.org/wp-content/uploads/Unwanted-Pregnancy-Forced-Continuation-of-Pregnancy-and-Effects-on-Mental-Health-v2.pdf>.

<sup>16</sup> H.R. 959, 117th Cong. (2021–2022); H.R. 6878, 117th Cong. (2021–2022). For a list of companion bills, see also *H.R. 959, Black Maternal Health Momnibus Act of 2021*, CONGRESS, <https://www.congress.gov/bill/117th-congress/house-bill/959/related-bills> (last visited Apr. 12, 2023).

<sup>17</sup> Kylie Cheung, *90 Republicans Vote Against Bill Protecting Pregnant Women from Solitary Confinement*, JEZEBEL (Dec. 1, 2022), <https://jezebel.com/house-republicans-pregnant-women-in-custody-act-1849843727>.

allowing people to find full-time employment.<sup>18</sup> While they are politically and ideologically controversial, so is forced parenting. A seriously supportive state would invest in a UBI system to meet the needs of parents.<sup>19</sup> Some countries provide a UBI specifically to parents and similarly situated caregivers,<sup>20</sup> and a similar program came briefly into existence during COVID in the United States in the form of the child tax credit.<sup>21</sup> Some viewed the emergency child tax credit as a natural experiment in a parent-focused UBI, and the results were impressive.<sup>22</sup> Well-designed improvements in the SNAP program and child tax credits as a part of COVID relief programs produced a reduction in child poverty.<sup>23</sup>

### C. *Other Financial and Services Support*

In the absence of UBI, states should focus on points of intervention that have made substantial improvements for parents. For example, access to safe, affordable childcare is an indirect intervention. Additionally, paid parental leave is another example of an indirect intervention. Both of these examples have an enormous impact on the financial and larger wellness of parents. An employment relationship that fully understands parenting is also

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<sup>18</sup> STACIA WEST ET AL., PRELIMINARY ANALYSIS: SEED'S FIRST YEAR 16, 19, [https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/603ef1194c474b329f33c329/1614737690661/SEED\\_Preliminary+Analysis-SEEDs+First+Year\\_Final+Report\\_Individual+Pages+2pdf](https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/603ef1194c474b329f33c329/1614737690661/SEED_Preliminary+Analysis-SEEDs+First+Year_Final+Report_Individual+Pages+2pdf) (last visited Apr. 17, 2023); E. Napoletano, *An Unexpected Outcome of the Covid-19 Pandemic: A Slew of Universal Income Programs*, FORBES: ADVISOR (May 12, 2022, 12:08 PM), <https://www.forbes.com/advisor/personal-finance/universal-basic-income-programs>; Sigma Samuel, *Where the Guaranteed Income Movement Is Going Next*, VOX (Apr. 28, 2022, 6:30 AM), <https://www.vox.com/future-perfect/2022/4/28/23044957/ubi-guaranteed-income-baltimore-new-york-mississippi>.

<sup>19</sup> See Diana Orozco, *What We Can Learn from a Universal Basic Income for the Expanded Child Tax Credit*, CLASP, <https://www.clasp.org/blog/what-we-can-learn-universal-basic-income-expanded-child-tax-credit> (last visited Feb. 1, 2023).

<sup>20</sup> See Sigma Samuel, *Everywhere Basic Income Has Been Tried, in One Map*, VOX (Oct. 20, 2020, 9:50 AM), <https://www.vox.com/future-perfect/2020/2/19/21112570/universal-basic-income-ubi-map>.

<sup>21</sup> See Napoletano, *supra* note 18.

<sup>22</sup> Robert Kuttner, *Biden's Child Tax Credit as Universal Basic Income*, THE AMERICAN PROSPECT (Mar. 16, 2021), <https://prospect.org/economy/bidens-child-tax-credit-as-universal-basic-income>.

<sup>23</sup> CTR. ON POVERTY & SOC. POL'Y AT COLUM. UNIV., NOVEMBER CHILD TAX CREDIT PAYMENT KEPT 3.8 MILLION CHILDREN FROM POVERTY (2021), <https://www.povertycenter.columbia.edu/news-internal/monthly-poverty-november-2021>.

essential to successfully supporting parents, including the provision of these benefits (childcare and leave), as well as the provision of policies such as flextime, work-from-home options, and excellent health insurance.

A non-exhaustive catalog of the policies that might support the parenting of people who have been forced to bear children can illustrate what we need and what we impose on parents by removing abortion care. We could provide more permanent “Temporary Assistance for Needy Families” (TANF). We could provide parents with flexible work options, affordable childcare, parenting education, and parenting group support programming. We could require employers to provide on-site childcare. We could provide access to affordable housing and legal services to protect parents from eviction. We could provide tax subsidies to families with children, universal healthcare coverage for children and parents, and publicly funded pre-kindergarten and preschool programs. We could provide health screening programs for both parents and children. We could provide services for parents of children with special needs. We could provide all parents access to healthy food and nutrition programs. We could provide parents free or subsidized public transportation. We could provide young parents with home visit programs from nurses or other healthcare professionals. We could provide parents with access to mental health services. We could provide parents with access to legal services in disputes with child services, a co-parent, or the criminal justice system. We could build infrastructure for respite care for families under stress. While this Article focuses on leave policies, a family-supportive state needs serious work on each of these, and no policy—including leave policy—can function effectively on its own.

One set of policies that are promising, ripe for improvement, and show important positive outcomes is better parental leave policies. Those include paid policies that extend to all workers for longer periods of time and for more ordinary familial events. The premise of this Article is that a seriously pro-life culture would focus on the needs of parents. By taking parental leave as an example, we can see just how mismatched our policies are with the pro-life rhetoric.

#### IV. PARENTAL LEAVE POLICY

Within the current policy framework of mandated parenting leave, there is a tendency to focus on discrete events siloed from the day-to-day burdens of balancing employment and parenting. This Article looks at ways to improve our existing leave policies, in particular by adding wage replacement. It highlights leave policies that begin to

re-imagine the parent's relationship to the workplace, including sick leave policy, education leave policy, and small necessities leave policy. Digging into provisions helps to understand the theory of parent, state, and economy that underlie the policy.

When childbirth is followed by child rearing, those who give birth have immediate medical needs for themselves. They also need intensive time to care for an infant and adapt to the relationships between parent and infant.<sup>24</sup> Those who breastfeed need time to establish a solid breastfeeding relationship.<sup>25</sup> While a parent's workforce attachment has long-term benefits for both parent and infant,<sup>26</sup> a period of leave from work contributes positively to the health and well-being of both parent and infant.<sup>27</sup> For these reasons, all industrialized nations allow time off from work following childbirth.<sup>28</sup> A portion of this leave is medical for the parent, but a portion is what may be called bonding leave, meaning an undifferentiated bundle of recovery from childbirth, nursing, and family adjustment. That initial leave, with its medical but also relational quality intertwined, could set the stage for a better policy understanding of parenting.

At the most basic level, parental leave policy addresses two basic issues. One is the right to return to the same or equivalent position in the same workplace after taking leave. This job guarantee ensures that a new parent is able to re-establish her work patterns in a secure and familiar place with the same wages. The second component of most leave provisions worldwide is wage replacement, or pay, for the time

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<sup>24</sup> Darby Saxbe, Maya Rossin-Slater & Diane Goldenberg, *The Transition to Parenthood as a Critical Window for Adult Health*, 73 AM. PSYCH 1190, 1191 (2018); Lindsey Rose Bullinger, *The Effect of Paid Family Leave on Infant and Parental Health in the United States*, 66 J. HEALTH ECON. 101, 102 (2019); Zara Adams, *The Urgent Necessity for Paid Parental Leave*, 53 AM. PSYCH. ASS'N (Apr. 1, 2022), <https://www.apa.org/monitor/2022/04/feature-parental-leave>.

<sup>25</sup> Jianghong Liu, Patrick Leung & Amy Yang, *Breastfeeding and Active Bonding Protects Against Children's Internalizing Behavior Problems*, 6 NUTRIENTS 76, 77, 81 (2013); Sarah Coombs, *Mom & Babies Series: Paid Leave Is Essential for Healthy Moms and Babies*, NAT'L P'SHIP FOR WOMEN & FAMS. NAT'L BIRTH EQUITY COLLABORATIVE 1-2, <https://www.nationalpartnership.org/our-work/resources/health-care/paid-leave-is-essential-for-healthy-moms-and-babies.pdf> (last visited Feb. 7, 2023).

<sup>26</sup> MAUREEN PERRY-JENKINS, WORK MATTERS: HOW PARENTS' JOBS SHAPE CHILDREN'S WELL-BEING 7-9, 114-115, 166, 182 (2022).

<sup>27</sup> *Id.* at 63-64, 162-163.

<sup>28</sup> Gordon B. Dahl et al., *What Is the Case for Paid Maternity Leave?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19595, 2013).



away. All industrialized nations except for the United States have this second component.<sup>29</sup>

When Congress enacted the Family and Medical Leave Act in 1993, it became the first parental leave legislation passed at the federal level.<sup>30</sup> The benefit offered by the FMLA, however, was only a guarantee of job return following an unpaid leave of absence.<sup>31</sup> Advocates at the time understood that this was simply a down payment on further leave legislation, as unpaid leave disproportionately benefits those with a greater financial cushion to absorb lost wages.<sup>32</sup> Compounding that problem, the FMLA only applied to employers with fifty or more workers, leaving out a substantial portion of the workforce and further advantaging those with greater financial resources who are more likely to work for large employers.<sup>33</sup>

#### A. Paid Parental Leave Policy

Recall that those who seek abortion care overwhelmingly hover near or below the federal poverty line.<sup>34</sup> By contrast, over the thirty-year life of the FMLA, it is higher earners who disproportionately use the parental leave that they are entitled to under the FMLA, and lack of wage replacement is the main reason that people do not use available family leave.<sup>35</sup> In February 2023, on the thirtieth anniversary of the FMLA, President Biden issued a statement urging the implementation of paid family leave, and explicitly tying paid family leave to a series of broader ways to support parenting:

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<sup>29</sup> Maya Rossin-Slater et al., *The Effects of California's Paid Family Leave Program on Mothers' Leave-Taking and Subsequent Labor Market Outcomes*, 32 J. POL'Y ANALYSIS & MGMT. 224, 224 (2013).

<sup>30</sup> Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654.

<sup>31</sup> *Id.*

<sup>32</sup> See Eileen Appelbaum & Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, CTR. FOR ECON. & POL'Y RSCH., 2011, at 3–5, 24–25 (“Access to employer-provided benefits like paid sick leave, vacation, disability, and parental leave is far greater for some workers than others. Exempt employees (mainly managers and professionals) have more access than non-exempt, male employees have more access than female, and those in high-quality jobs (those that pay over \$20 per hour and include employer-provided health insurance) have more access than those in low-quality jobs.”).

<sup>33</sup> Barbara Gault et al., *Paid Parental Leave in the United States*, INST. FOR WOMEN'S POL'Y RSCH., Mar. 2014, at 1.

<sup>34</sup> JERMAN ET AL., *supra* note 7, at 7.

<sup>35</sup> Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, ABT ASSOCS., July 2020, at 45.

During the depths of the COVID-19 pandemic, my Administration expanded the Child Tax Credit to give millions of families a little more breathing room, helping cut child poverty to the lowest rate on record. We gave 200,000 childcare providers the funding needed to keep their doors open, serving over 9.5 million children nationwide. We invested \$145 million in the National Family Caregiver Support Program, which gives family and other informal care providers counseling, training, and respite care to support loved ones. I recently signed the Pregnant Workers Fairness Act to ensure that employers make reasonable accommodations related to pregnancy, childbirth, or related medical conditions.<sup>36</sup>

The President's full statement puts a primary focus on adding paid leave while highlighting the fabric of policy needed to provide for families with children. While parental leave reform focuses on gaps in coverage, the White House statement integrates correcting gaps in coverage with maintaining a vision of a supportive state.

The United States is the only remaining industrialized nation that does not offer paid leave from work after the birth of a child.<sup>37</sup> Although fewer than a quarter of states have filled the gap with paid leave programs, there is substantial evidence that paid leave programs are particularly important for the more financially precarious demographic seeking abortion care.<sup>38</sup> Paid parental leave laws disproportionately benefit lower-income parents.<sup>39</sup>

Parents who leave the workforce even briefly after giving birth are at risk of not returning to the labor force, which takes an immense downward financial toll on them and their children.<sup>40</sup> Those parents who have access to paid parental leave are *more* likely to return to the paid labor force.<sup>41</sup> In addition, after leaving the labor force, parents who must look for new work rather than returning to their prior jobs

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<sup>36</sup> Proclamation No. 10520, 80 Fed. Reg. 25 (Feb. 3, 2023).

<sup>37</sup> Dahl et al., *supra* note 28, at 1.

<sup>38</sup> Rossin-Slater, *supra* note 29, at 4; Holly Elser et al., *Inequities in Paid Parental Leave Across Industry and Occupational Class: Drivers and Simulated Policy Remedies*, 18 POPULATION HEALTH 1, 1 (2022).

<sup>39</sup> *Id.*

<sup>40</sup> Appelbaum & Milkman, *supra* note 32, at 5; Charles L. Baum II, *The Effects of Maternity Leave Legislation on Mothers' Labor Supply after Childbirth*, 69 S. ECON. J. 772, 772 (2003).

<sup>41</sup> Appelbaum & Milkman, *supra* note 32, at 5; Baum, *supra* note 40, at 774.

lose ground in wage growth, and paid parental leave increases the likelihood that parents will return to the same position.<sup>42</sup>

Paid Parental Leave has enormous measurable financial benefits.<sup>43</sup> This makes it all the more problematic that those who have access to paid parental leave are disproportionately those with greater wealth and education.<sup>44</sup> Fortunately, in the past several years, there has been a renewed push for paid leave at both the federal and state level, with a handful of successes in state law, discussed below.

#### B. *Paid Parental Leave Updates*

While the federal government does not mandate wage replacement under the FMLA, as of the end of 2022, eleven states require paid parental leave.<sup>45</sup> State parental leave laws have improved upon the FMLA, which only offers a guaranteed return to work.<sup>46</sup> Paid leave states are listed below in the order they enacted paid parental leave, which allows us to see a political progression, the acceleration of paid leave adoption, and the paradoxical alignment of paid leave with protection for abortion care. This alignment underscores the perspective that we cannot treat *Dobbs* as a *force majeure* when trying to fit it into the political landscape, but need to see it as concurrent with other policies that are destructive of parents and children.

- California's provision,<sup>47</sup> enacted September 26, 2002, as the first in the nation, began paying benefits in 2004. Employees may receive a portion of their wages for a six-week family leave.

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<sup>42</sup> See Appelbaum & Milkman, *supra* note 32, at 25.

<sup>43</sup> HEATHER BOUSHEY ET AL., CTR. FOR AM. PROGRESS, THE ECONOMIC BENEFITS OF FAMILY AND MEDICAL LEAVE INSURANCE 1 (2013), <https://www.americanprogress.org/article/the-economic-benefits-of-family-and-medical-leave-insurance/#:~:text=Family%20and%20medical%20leave%20insurance%20would%20grow%20the%20labor%20force,from%20an%20illness%20or%20pregnancy>; Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSPS. 137, 138 (1998).

<sup>44</sup> COUNCIL OF ECON. ADVISERS, THE ECONOMICS OF PAID AND UNPAID LEAVE 1 (2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/leave\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf); Gault et al., *supra* note 33, at 20.

<sup>45</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE PAID FAMILY & MEDICAL LEAVE INSURANCE LAWS 2 (2022) <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf>.

<sup>46</sup> See generally *Paid Leave Implementation Timelines*, A BETTER BALANCE (July 18, 2021), <https://www.abetterbalance.org/resources/paid-leave-program-implementation-timelines>.

<sup>47</sup> CAL. UNEMP. INS. CODE §§ 2601-3308 (2020).

- New Jersey's provision,<sup>48</sup> enacted May 2, 2008, began providing a twelve-week paid leave in any twenty-four-month period in 2009.
- Rhode Island's provision,<sup>49</sup> enacted July 11, 2013, began providing benefits in 2014. Rhode Island employees are entitled to thirteen weeks of paid family leave, but only once in a two calendar year cycle, and only if their employer employs fifty or more workers.
- New York's provision,<sup>50</sup> enacted April 1, 2016, began providing benefits in 2018. New York's law provides twelve weeks of paid leave.
- Washington, D.C. enacted the Universal Paid Leave Act on February 17, 2017, and extended the paid leave from eight weeks to twelve weeks beginning October 1, 2022, through the Universal Paid Leave Amendment Act of 2022.<sup>51</sup> The provision covers private-sector employers, which excludes the many government employees living in the district.
- Washington State enacted its provision July 5, 2017,<sup>52</sup> and in 2020 began providing twelve weeks of paid leave annually up to \$1000 per week, depending on a worker's income.
- Massachusetts<sup>53</sup> passed legislation in 2018 that began providing twelve weeks of paid parental leave in 2021.<sup>54</sup>
- Connecticut enacted its provision<sup>55</sup> on June 25, 2019, and employees began receiving benefits in 2022 of up to twelve weeks of paid leave.
- Oregon enacted its provision<sup>56</sup> on August 9, 2019, and benefits will begin on September 1, 2023. Employees will be entitled to twelve weeks of paid leave, but employers

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<sup>48</sup> D.C. CODE § 32 (2023).

<sup>49</sup> Temporary Disability Insurance, R.I. GEN. LAWS § 28-39 (2022).

<sup>50</sup> N.Y. WORKERS' COMP. LAW §§ 201-242 (2023).

<sup>51</sup> D.C. CODE § 32 (2023).

<sup>52</sup> WASH. REV. CODE § 50A.

<sup>53</sup> MASS. GEN. LAWS ch. 175m.

<sup>54</sup> *Massachusetts Passes Groundbreaking Paid Family and Medical Leave Law*, A BETTER BALANCE (June 28, 2018), <https://www.abetterbalance.org/massachusetts-passes-groundbreaking-paid-family-and-medical-leave-law>.

<sup>55</sup> CONN. GEN. STAT. § 31.

<sup>56</sup> OR. REV. STAT. §57B (2021).

with fewer than 25 employees are exempt from providing paid leave.

- Colorado's provision<sup>57</sup> was passed by ballot initiative on November 3, 2020. It will begin to provide a twelve-week paid leave benefit in 2024.<sup>58</sup>
- Maryland passed legislation<sup>59</sup> in April of 2022 that will begin to provide benefits in 2025, allowing employees to take up to twelve weeks of paid leave.
- Delaware enacted a provision<sup>60</sup> in May 10, 2022, and workers can begin to receive benefits in 2026. Employers will need to provide twelve paid weeks of family leave in a twenty-four-month period.

While a small handful of states—California, New Jersey, Rhode Island, and New York—have had paid leave programs for five or more years, the remaining eight states that have adopted a paid leave program have either just begun paying benefits or have not yet begun paying benefits as of early 2023. The past few years, then, have seen dramatic accelerating progress at the state level in the adoption of paid leave plans, relative to the full thirty-year arc between the passage of the FMLA's protection of job security following unpaid family leave. Despite this acceleration, twelve of fifty-one jurisdictions offer paid parental leave. There is tremendous room for growth, and advocates are appropriately focused on advancing paid leave across the states and at the federal level. Despite challenges, this reform is realistic in many places.

These state statutes precede the *Dobbs* opinion taking away the constitutional right to reproductive control, so these new paid leave policies cannot be described as a response to *Dobbs*. One might speculate that the timing demonstrates renewed activism at the state level as a reflection of national politics, as states sought to shore up social services, but these programs are not triggered by *Dobbs* itself.

Yet there is a striking and perverse correlation between the availability of abortion care and the availability of paid parental leave in the states. The Guttmacher Institute identifies twelve states as entering 2023 with a complete or nearly complete ban on all abortion:

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<sup>57</sup> COLO. REV. STAT. §§ 8-13.3-505 (2020).

<sup>58</sup> *Paid Leave Implementation Timelines*, *supra* note 46.

<sup>59</sup> Time to Care Act of 2022, MD. LAB. & EMPL. ch. 48, [https://mgaleg.maryland.gov/2022RS/chapters\\_noln/Ch\\_48\\_sb0275E.pdf](https://mgaleg.maryland.gov/2022RS/chapters_noln/Ch_48_sb0275E.pdf).

<sup>60</sup> 83 Del. Laws ch. 301 (2022).

Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia.<sup>61</sup> Not one of those states is among the twelve that provide paid parental leave. Other states have a gestational age ban, a complete ban which its state courts have currently blocked, or are in the process of trying to ban abortion and have the political power to do so. Those states include Arizona, Florida, Georgia, Utah, Indiana, Wyoming, Ohio, Iowa, Montana, or Nebraska.<sup>62</sup> Not one of those additional ten states is on the list of states that now provide some form of paid parental leave. Rather than being a substitute for abortion care, a form of compensation for the involuntary imposition of parenthood, paid parental leave is coordinated with abortion care in those states that have both abortion care and paid parental leave. In those states, support is the connective tissue: whether a person wants to terminate a pregnancy or give birth and raise a child, the twelve states that offer paid parental leave are prepared to support either decision.

### C. *Other Characteristics of Leave Laws*

While the accelerating march forward toward obtaining paid parental leave has become the organizing cause of leave advocacy, there is contested terrain over a variety of other attributes of family leave. Even as state law is beginning to coalesce around a standard for many of these attributes, there is still plenty of time to redirect each as new paid leave statutes develop in the states.

#### 1. Who Is Covered?

Among the most urgently discussed issues is who will be covered by a leave policy. Policy-makers must decide whether the policy applies to a given workforce, which medical or social conditions or challenges qualify a worker to take leave, and if that leave is to care for someone else—which people in relation to the worker justify obtaining leave under the policy.

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<sup>61</sup> Elizabeth Nash & Isabel Guarneri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), [https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup#:~:text=States%20Where%20Abortion%20Is%20Banned,abortion%20with%20very%20limited%20exceptions;see%20John%20Raby,%20Lawsuit:%20Wva%20Abortion%20Ban%20Irrational,%20Unconstitutional,AP%20NEWS%20\(Feb.%201,%202023\),https://apnews.com/article/abortion-west-virginia-state-government-jim-justice-health-61085d84b9d2f937f238a32c73bf32ad](https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup#:~:text=States%20Where%20Abortion%20Is%20Banned,abortion%20with%20very%20limited%20exceptions;see%20John%20Raby,%20Lawsuit:%20Wva%20Abortion%20Ban%20Irrational,%20Unconstitutional,AP%20NEWS%20(Feb.%201,%202023),https://apnews.com/article/abortion-west-virginia-state-government-jim-justice-health-61085d84b9d2f937f238a32c73bf32ad).

<sup>62</sup> Nash & Guarneri, *supra* note 61.

## 2. Does a Policy Apply to a Given Workforce?

The FMLA applies only to employers with fifty or more employees. This excludes around 15 percent of the American labor force based on the size of the employer alone.<sup>63</sup> FMLA coverage excludes another 21 percent because they fail to meet two other prerequisites: having worked for the employer for at least twelve months; and having worked at least twenty-four hours per week on average.<sup>64</sup> Another 7 percent fail both qualifications, for a total of 43 of the workforce left uncovered by the FMLA.<sup>65</sup> Some state policies seek to fill in these gaps by shortening the requisite service time or reducing the requisite employer size. For example, Oregon's paid family leave statute applies to employers with fewer than twenty-five employees,<sup>66</sup> while Massachusetts' paid family leave law applies to all employers regardless of size.<sup>67</sup> Other states have copied criteria from the FMLA, solidifying their importance. Rhode Island, for example, exempts employers with fewer than fifty employees, mirroring the FMLA.<sup>68</sup>

## 3. Is a Worker in an Employment Relationship?

As paid leave laws are developing in states requiring employers to accommodate family needs of parents in the workplace, a contrary trend has emerged that undermines all labor laws. Specifically, the gig economy, which has a strong tendency to classify workers as independent contractors rather than employees, has grown substantially in recent years.<sup>69</sup> While the solutions to this problem in Work Law are beyond the scope of this Article, a discussion of new employment benefits and better accommodation for worker parenting

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<sup>63</sup> SCOTT BROWN ET AL., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FMLA: WHO IS ELIGIBLE? 1 (2020).

<sup>64</sup> *Id.*; SCOTT BROWN ET AL., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 6–8 (2020).

<sup>65</sup> BROWN, *supra* note 63, at 1.

<sup>66</sup> OR. REV. STAT. § 675B.150 (2022).

<sup>67</sup> MASS. GEN. LAWS ch. 175M, § 2 (2018).

<sup>68</sup> 28 R.I. GEN. LAWS § 28-48-1 (2013).

<sup>69</sup> Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 U. MEM. L. REV. 627, 627 (2022); Samantha J. Prince, *The AB5 Experiment—Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43, 43 (2022); Veena B. Dubai, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 65 (2017); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1673 (2016).

requires acknowledgement of the serious limitations of Work Law in the early twenty-first-century.

4. Does a particular relationship qualify for family leave?

A worker may take FMLA leave for their own medical needs under the “medical” portion of the Act. A worker may also take a twelve-week unpaid leave in order to care for a family member with a serious health condition, so long as that family member is a spouse, child, or parent.<sup>70</sup> The federal government has worked to take an expansive reading of those three statutory terms, for example, including foster children within the definition of “child.”<sup>71</sup> Still, there is longstanding criticism of the narrow definition of “family” in the FMLA because the term does not provide protection to the actual kinship networks that absorb family care.<sup>72</sup>

Some statutes have expanded the list of the people for whose care an employee can take leave to reflect a more realistic understanding of family care. The District of Columbia’s leave law includes spouses or a domestic partner, children, parents, grandparents, and siblings. Family can be biological, in-laws, step-related, adopted, or foster.<sup>73</sup> Hawaii only has an unpaid leave policy, but that policy allows civil union partners and siblings, and was recently revised to add grandchildren as valid family members for family leave.<sup>74</sup> Rhode Island includes domestic partners and in-laws.<sup>75</sup> Each of these expansions seeks to respond to the reality of family caregiving arrangements that go beyond both the limited and formal definitions of the FMLA.

In 2022, California took a completely new approach to expanding the list of family members that qualify under leave laws. In addition to a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner, the newly expanded legislation allows for a “designated person,” or what is sometimes called ‘chosen family,’ to take leave without meeting any formal family law definitions that characterize the

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<sup>70</sup> 29 U.S.C. § 2612.

<sup>71</sup> 29 C.F.R. § 825.121 (2015).

<sup>72</sup> E.g., Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 407–09 (2008); Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 37 (2013).

<sup>73</sup> D.C. CODE § 32-541.01. (2023)

<sup>74</sup> HAW. REV. STAT. § 398-3 (2022).

<sup>75</sup> 28 R.I. GEN. LAWS § 28-48-1.



FMLA.<sup>76</sup> The bill provides the definition of a “designated person” as any individual either related by blood or whose relationship with the employee is the “equivalent of a family relationship.” An employer may hold an employee to one named “designated person” every twelve-month interval. The provision built on existing local ordinances in Berkeley, Oakland, and San Francisco.<sup>77</sup> This approach focuses on function (caregiving for those in a close relationship in the event of a serious medical condition) instead of form and allows for flexible evolution in policy as caregiving networks continue to evolve.<sup>78</sup>

### 5. Length of Time

As long ago as 2011, the average number of paid weeks of leave in the Organization for Economic Cooperation and Development (OECD) nations was forty-two.<sup>79</sup> Forty-two weeks allowed parents to step back temporarily from labor force participation to tend to the care work of the early months of a baby’s life. Meanwhile, the United States is the only OECD state that does not offer paid parental leave of any length.<sup>80</sup> With the FMLA anchoring a “normal” absence from the workforce at twelve weeks, that length is the overwhelming favorite among paid state policies as well. The impact of longer paid leaves on labor force equality has been contested at times, with some evidence that lengthier leaves impede advancement in the workplace in European countries and Canada for those who take them,

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<sup>76</sup> AB 1041 amends section 12945.2 of the Government Code, and amends section 245.5 of the Labor Code. A.B. 1041, 2021–22 Cal. State Assemb. (Cal. 2022).

<sup>77</sup> Paul R. Lynd & Jeffrey B. Weston, *California Allows Employees Leave for a “Designated Person”*, ARENTFOX SCHIFF (Nov. 9, 2022), [https://www.afslaw.com/perspectives/alerts/california-allows-employees-leave-designated-person#:~:text=Currently%2C%20San%20Francisco%2C%20Oakland%2C,spouse%20or%20registered%20domestic%20partner; San Francisco, Oakland, Emeryville, and Berkeley Paid Sick Leave Designation Form, PG&E, http://www.mypgebenefits.com/pdfs/SF\\_paid\\_sick\\_leave\\_designation\\_form.pdf](https://www.afslaw.com/perspectives/alerts/california-allows-employees-leave-designated-person#:~:text=Currently%2C%20San%20Francisco%2C%20Oakland%2C,spouse%20or%20registered%20domestic%20partner; San Francisco, Oakland, Emeryville, and Berkeley Paid Sick Leave Designation Form, PG&E, http://www.mypgebenefits.com/pdfs/SF_paid_sick_leave_designation_form.pdf) (last visited Apr. 13, 2023).

<sup>78</sup> See Lindsay Mahowold & Diana Boesch, *Making the Case for Chosen Family in Paid Family and Medical Leave Policies*, CTR. FOR AM. PROGRESS (Feb. 16, 2021), <https://www.americanprogress.org/article/making-case-chosen-family-paid-family-medical-leave-policies>.

<sup>79</sup> Gordon B. Dahl et al., *What is the Case for Paid Maternity Leave?* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 19595, 2013), [https://www.nber.org/system/files/working\\_papers/w19595/w19595.pdf](https://www.nber.org/system/files/working_papers/w19595/w19595.pdf).

<sup>80</sup> *Id.*

disproportionately women.<sup>81</sup> If we achieve lengthier leave in the United States, we will have the benefit of the European experience in developing offsetting policy.<sup>82</sup> At this time, policymakers in the United States are not talking about European length leave as a model, and are instead focusing on expanding pay during the twelve-week norm, and on expanding the number of people who have access to leave.

#### 6. Job Protection?

Surprisingly, not all of the paid leave provisions provide workers with job protection if they take a paid leave. Instead, they must fall back on state or FMLA protections, which may not cover their employer even where state leave policy does.<sup>83</sup>

#### 7. Renewal Cycle?

Some states put the twelve weeks of paid leave on a two-year cycle rather than a one-year cycle, presumably to protect employers. Of course, families may not conform to that two-year cycle, and in those states they will only be able to access the FMLA's twelve weeks of leave without pay.<sup>84</sup>

#### 8. Pay In

States use different mechanisms to fund paid leave. Many of these mechanisms are modeled on an employer pay-in over time comparable to disability insurance.<sup>85</sup>

#### 9. Reimbursement Rate

Most states' paid parental leave policies have wage replacement structures that provide workers with either a percentage of wage replacement less than 100 percent, or cap out at a dollar amount that has a similar impact.<sup>86</sup> Those dollar caps focus wage replacement

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<sup>81</sup> Ivona Hideg et al., *Do Longer Maternity Leaves Hurt Women's Careers?*, HARV. BUS. REV. (Sep. 14, 2018), <https://hbr.org/2018/09/do-longer-maternity-leaves-hurt-womens-careers>.

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., CONN. GEN. STAT. §§ 31-49e–31-49t (2019); CAL. UNEMP. INS. CODE §§ 2601–3308 (West 2002).

<sup>84</sup> E.g., R.I. GEN. LAWS ch. 39, <http://webserver.rilin.state.ri.us/Statutes/TITLE28/28-39/INDEX.HTM>.

<sup>85</sup> E.g., CAL. UNEMP. INS. CODE §§ 2601-3308.

<sup>86</sup> E.g., WASH. REV. CODE § 50A.15.020(5)–(6)(a) (2020).

where it belongs—on lower wage workers. At the same time, some higher wage families may find themselves under budget as a result.

D. *What is “Leave,” and Why Do We Need It?*

As states march forward adopting leave policies and advocates seek to expand leave statutes by covering more workplaces, adding pay, and extending definitions of family, this Article argues that it is also important to remember *why* parents need leave. Sometimes, we see conceptions of the interaction between parents and the economy embedded in leave policies.<sup>87</sup> Employers may prefer a worker who comes back after leave unchanged in their ability to be present in all ways, at all scheduled work hours, and at many unscheduled ones. This ideal worker is not juggling caregiving responsibilities with employer demands.<sup>88</sup> The ideal worker is typically male.<sup>89</sup> At the end of the twentieth century, some women, particularly those with wage privilege, were able to occupy the ideal worker role by avoiding caregiving, delegating caregiving, or running themselves into the ground hiding their balancing act after returning from the newly available FMLA twelve-week leave of absence.<sup>90</sup> The twelve week leave, whether unpaid or paid, does not provide well for the remaining seventeen-and-a-half years of impact that caregiving has on parents’ work lives. Actual caregiving responsibilities are persistent, minor emergencies are recurrent, and the need for flexibility and accommodation does not end after the return from a twelve-week leave. The employment relationship, nudged along by law, needs to adapt in order to provide an economy supportive of parents.<sup>91</sup>

The FMLA leave and paid leave policy in most states allows for family leave beyond that first twelve weeks. Additional leave is available

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<sup>87</sup> See Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL’Y 193, 194 (2004).

<sup>88</sup> JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–2 (2000); Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the “Ideal Worker”*, HARV. BUS. REV. (May 11, 2020), <https://hbr.org/2020/05/the-pandemic-has-exposed-the-fallacy-of-the-ideal-worker>.

<sup>89</sup> *Id.*

<sup>90</sup> See Williams, *supra* note 88; see WILLIAMS, *supra* note 88, at 3, 5, 70–72, 115.

<sup>91</sup> See JOSEPH B. FULLER & MANJARI RAMAN, THE CARING COMPANY: HOW EMPLOYERS CAN HELP EMPLOYEES MANAGE THEIR CAREGIVING RESPONSIBILITIES—WHILE REDUCING COSTS AND INCREASING PRODUCTIVITY 2, 4, 28 (Jan. 2023), [https://www.hbs.edu/managing-the-future-of-work/Documents/The\\_Caring\\_Company.pdf](https://www.hbs.edu/managing-the-future-of-work/Documents/The_Caring_Company.pdf).

only in the case of a “serious health condition.”<sup>92</sup> Like the period after childbirth, serious health conditions are conceived of as temporary events and crisis events. By the very term “serious health conditions,” these health events are not the normal balance of life, but the lowest moments. The regulation explaining this provision says: “For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.”<sup>93</sup> Under the FMLA, a serious health condition for either the employee or the employee’s qualifying family member explicitly *excludes* most common illnesses, including the “common cold, [] flu, ear aches, upset stomach . . . headaches . . . [and] routine dental or orthodontia problems [or complications].”<sup>94</sup> The FMLA crisis leave is valuable, but its conception of the life of a working parent is an ideal worker most of the time, peppered with the occasional medical crisis that defies the otherwise normal ability of a worker to function as though parenting were not ever present.

What would family leave policy look like if it acknowledged that containment to twelve weeks and then to serious emergencies relies on a fictionalized conception of work life for parents? In that case, family leave policy would accommodate the need for leave as a normal, not a pathological, event.<sup>95</sup> The need to exit work, however briefly, to attend to care responsibilities is not an oddity to be managed on an ad hoc basis. It is instead an entirely normal, routine event. Parents need to be able to take leave in smaller bursts, for smaller reasons, especially in low-income families that may have a less layered safety net.<sup>96</sup> In a world where we have so little legal guarantee of paid parental leave at the

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<sup>92</sup> Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

<sup>93</sup> 29 C.F.R. § 825.113(a) (2023) (emphasis omitted).

<sup>94</sup> 29 C.F.R. § 825.113(d) (2023) (“Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.”); *see also* “What is a Serious Health Condition Under FMLA?”, NAT’L INSTS. OF HEALTH, <https://hr.nih.gov/about/faq/benefits/leave/family-medical-leave-act-fmla/what-serious-health-condition-under-fmla> (last visited Mar. 8, 2023).

<sup>95</sup> *See* Silbaugh, *supra* note 87, at 193–95.

<sup>96</sup> *See What’s the Difference? Paid Sick Leave, FMLA, and Paid Family and Medical Leave*, DEP’T OF LAB. 1–2 (Sept. 2016), <https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf>.

time of a child's birth, it may seem unrealistic to talk about the paid leave that families need to effectively parent a child through to adulthood and to stay attached to the paid labor force in a way that's beneficial to parent and family alike. Yet there is cause for modest optimism on this front.

#### 1. Paid Sick Leave as Family Leave

Fortunately, there has been a parallel march forward of policies designed to address more ordinary needs for temporary workplace leave. Most of these policies are characterized as sick leave policies. If those policies met the short term health needs only of the worker themselves, sick leave might be the appropriate term. In every jurisdiction that mandates paid sick leave, these policies are also family leave, invisibly swept into the sick leave terminology<sup>97</sup> because workers may use them to care for a sick family member.<sup>98</sup>

There's more than incremental policy at stake with what we call paid sick leave when it is actually available to meet family needs, not just worker illness. There's a missed opportunity to recognize that parenting is not a twelve-week event, and to rearrange expectations of employers and employees alike. The FMLA distinguishes between two kinds of needs. First, it recognizes a worker's need for medical leave to manage their own serious health condition without risking their ability to return to their former position (meaning, their own medical leave). In addition, it recognizes a worker's need for family leave, (meaning the leave time needed because a worker is also a caregiver, either for a newborn or newly adopted child, or because their caregiving role meets a medical crisis for a family member). Paid sick leave policies are doing some of the work of normalizing family leave, but they miss some of the social impact that such policies could have if they were more accurately labeled, in line with the FMLA, as family leave.

#### 2. Federal Sick Leave Policy

There continues to be no federal paid sick leave law. Nonetheless, in 2015, President Obama signed Executive Order 13706 ("Obama Executive Order") requiring federal contractors to provide paid sick

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<sup>97</sup> See *Paid Sick Leave Laws by State for 2023*, PAYCOR (Jan. 1, 2023), <https://www.paycor.com/resource-center/articles/paid-sick-leave-laws-by-state>.

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

leave.<sup>99</sup> Workers on federal contracts must accrue an hour of paid sick leave for every thirty hours worked, up to fifty-six hours of paid sick leave.<sup>100</sup> The mechanism of strong incentives placed on federal contractors through an executive order, rather than a statutory mandate, has proved effective at shifting norms and expectations in the labor force in the past, prior to the adoption of full statutory mandates.<sup>101</sup> The Obama Executive Order kickstarted the spread of paid sick leave in states and municipalities, which accelerated during the COVID-19 pandemic.

Some form of State law mandating paid sick leave, including family paid sick leave, has been adopted in Arizona, California, Colorado, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.<sup>102</sup> In addition to state adoption of sick leave policies, a number of municipalities have adopted paid sick leave policies at the local level, including notable jurisdictions like Austin, Texas,<sup>103</sup> Seattle, Washington, Los Angeles, California, and Chicago, Illinois.<sup>104</sup> Given how important the family portion of paid sick leave is to parents, these advances both at the state and the municipal level give further cause for cautious optimism and deserve some celebration as we advocate for more.

### 3. Small Necessities Leave

Paid sick leave is becoming an important new front in the effort to address the normality of the need for parents to miss work to attend to the needs of their children. Health needs, however, are not the only reason a parent's work life can be disrupted by caregiving responsibilities. In recognition of this need to normalize caregiving as

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<sup>99</sup> Exec. Order No. 13706, 3 C.F.R. 54,697 (2015); *Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/government-contracts/sick-leave#:~:text=Executive%20Order%2013706%20was%20signed,leave%20allowing%20for%20family%20care> (last visited Mar. 8, 2023).

<sup>100</sup> *Id.*

<sup>101</sup> See David C. Roth, *Executive Orders and the Struggle for Workplace Equality*, LOUIS JACKSON NAT'L STUDENT WRITING COMPETITION 51, Apr. 2015, at 18–19.

<sup>102</sup> *Paid Sick Leave Laws by State for 2023*, *supra* note 97.

<sup>103</sup> Richard V. Reeves, *Let Workers Decide Who Counts as 'Family' for Paid Sick and Family Leave*, BROOKINGS (Feb. 20, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/02/20/let-workers-decide-who-counts-as-family-for-paid-sick-and-family-leave>.

<sup>104</sup> *Paid Sick Leave Laws by State for 2023*, *supra* note 97.

a part of a worker's identity, some jurisdictions have passed laws creating what is called "Small Necessities Leave."<sup>105</sup> These provisions allow for leave in small quantities to take care of many of the ordinary activities parents nonetheless experience as sources of tension with work.<sup>106</sup> Massachusetts, for example, provides twenty-four hours of leave each year to: participate in school activities; accompany a child "to routine medical or dental appointments"; and accompany an elderly relative to routine medical, dental, or other personal care-related appointments.<sup>107</sup>

Other jurisdictions have created leave for engagement with a child's educational experience, sometimes called "School-Related Parental Leave."<sup>108</sup> Though these new forms of leave are largely unpaid,<sup>109</sup> they set the terms of a workplace that should bend to the ordinary aspects of parenting that can be so challenging. For example, in Illinois, the "School Visitation Rights Act" requires that employees be permitted eight hours of leave each year to attend their children's school conferences, behavioral meetings, or academic meetings if these events cannot be scheduled during non-work hours.<sup>110</sup> Eleven states have similar provisions.<sup>111</sup> Given how small the number of hours permitted are in these laws<sup>112</sup> and how conditioned eligibility is on matters like expending other available leave first,<sup>113</sup> one of the primary benefits of these legislative reforms is that they normalize accommodation to attend school conferences and team meetings. Through normalization, these reforms re-negotiate the expectations of each side of the employment relationship about these basic aspects

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<sup>105</sup> E.g., *Time Off for Family Responsibilities*, MASSLEGALHELP, <https://www.masslegalhelp.org/employment-unemployment/time-off/small-necessities> (last visited Apr. 11, 2023); Shanna Wall, *Small Necessities Leave: What Is It and What Should Your Business Cover?*, HRDIRECT (Sept. 11, 2017), <https://www.hrdirectapps.com/blog/small-necessities-leave-act-for-small-business>.

<sup>106</sup> See Wall, *supra* note 105.

<sup>107</sup> MASS. GEN. LAWS ch. 149, § 52D(b) (2023).

<sup>108</sup> *State Family and Medical Leave Laws*, NAT'L CONF. OF STATE LEGS., (Sept. 9, 2022), <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws>.

<sup>109</sup> See *id.* (citing the chart on school-related parental leave provisions); *School Related Parental Leave—State Laws*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/school-related-parental-leave-state-law> (last visited Mar. 8, 2023) (explaining school-related parental leave laws).

<sup>110</sup> 820 ILL. COMP. STAT. 147/15.

<sup>111</sup> *State Family and Medical Leave Laws*, *supra* note 108.

<sup>112</sup> *Id.*

<sup>113</sup> 820 ILL. COMP. STAT. 147/15.

of parenting. In effect, these laws teach employers to bend to the brief family events that characterize parenting and teach parents that they may attend to these family events without risking their employment relationship.

A few jurisdictions identify being a victim of domestic violence as a cause for leave. Colorado, for example, allows three days of leave if a person is the victim of domestic or sexual violence or abuse.<sup>114</sup> Parents who are victims of abuse have an added burden of ensuring the safety and well-being of their children as well as themselves, and this leave may be of particular significance to parents.

#### V. CONCLUSION

This is a moment of despair for those who care about parents and children. Abortion care has been denied with what seems from public evidence to be a poor understanding of the role abortion care plays in people's lives. Against this moment, this Article seeks to surface some points of good news, in the form of promising experiments and trends. There is more to be done, but the most promising reforms provide more financial support for leave while shifting our understanding of what is normal accommodation for parents at work.

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<sup>114</sup> *E.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a) (2022); MASS. GEN. LAW ch. 149, § 52E (2014).