The Family Medical Leave Act of 1993—
Why Does Parental Leave in the United States Fall
so far Behind Europe?

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I. INTRODUCTION

Until the passage of the Family and Medical Leave Act of 1993 ("FMLA"), the United States was one of the few nations that did not have a federally mandated maternity leave policy. As the first bill signed into law by President Bill Clinton, the FMLA was the first U.S. federal legislation that guaranteed working parents would be able to take time off work for the birth or adoption of a child. The second part of this comment provides an in-depth review of the passage of the FMLA; including its history, purpose, scope, and shortcomings.

The third part of this comment presents a brief survey of the maternity, paternity, and parental leave laws of France, Germany, and Sweden. Each of these countries was chosen for its thriving economy and its expansive paid benefits program. France has a comprehensive system of paid maternity and paternity leave and allows for unpaid parental leave. Germany, while not providing paternal leave by statute, also has a comprehensive system of maternity and parental leave benefits. Sweden's system of maternity, paternal, and parental leave and benefits has generally been considered the best in the world.

3. Rasnic, supra note 2, at 105.
4. The FMLA covers more than just time for the birth or an adoption of a child; however, this paper will focus only on those provisions. See 29 U.S.C.A. § 2601 (2006). The FMLA allows for 12 weeks of unpaid leave for one or more of the following:
   (A) Because of the birth of a son or a daughter of the employee and in order to care for such son or daughter.
   (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
   (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
   (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
5. See infra Part II.A.
6. See infra Part IV.B.
7. See infra Part III.C.
Finally, the fourth section of this comment will discuss multiple theories for the differences between the FMLA and European laws. One theory for the difference in social benefits policy is that, unlike the United States, the majority of European countries are considered to be social states. Another theory is that there has not been a war fought within the United States’ borders since the Civil War, where in Europe almost every country suffered major devastation from both World Wars. Additionally, the argument will be made that polices may differ because demographic needs differ between the United States and European Nations. Finally, the policies may differ because of the conflicting goals of the feminist movements in the United States and in Europe. Whereas in the United States the feminist movement focused on gaining equal treatment for men and women, in Europe the movement focused on gaining special treatment for mothers.

II. THE FMLA: HISTORY, PURPOSE, SCOPE, AND CRITIQUE

A. History of the FMLA

The issue of maternity leave in the United States waxed and waned throughout the twentieth century. For example, the issue gained importance during World War II when many women were employed outside the home. Between 1943 and 1945 the labor force participation rate for women aged 20 to 24 years ranged from 53.1% to 55.3%. The issue then became less pressing at the end of the war when men came home and replaced women as the primary workforce. The topic of maternity leave, within the broader context of parental leave, again gained strength during the feminist movement that began in the 1960s. From 1966 through 1970 the labor participation rate for females aged 20 to 24 shot up from 51.5% to 57.8%. This generated renewed interest in family leave and helped spawn the forerunner to the FMLA, the Pregnancy Discrimination Act of 1978 (“PDA”).

9. Id.
10. BUREAU OF THE CENSUS, U.S. DEPT’ OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970—PART 1, 132 (1975), available at http://www2.census.gov/prod2/statcomp/documents/CT1970p1-01.pdf [hereinafter HISTORICAL STATISTICS]. In 1942 the participation rate for the same group of laborers was only 48.7% and in 1946 the rate fell back to 46.6%. Id.
11. Hayes, supra note 8, at 1516.
12. Id.
13. HISTORICAL STATISTICS, supra note 10, at 132.
1. The Forerunner to the FMLA, the PDA

The civil rights movement of the 1960s included the beginning of the American feminist movement. The civil rights movement focused on equal treatment of people regardless of race, color, religion, or national origin. Accordingly, the feminist movement in the United States focused on equal treatment for men and women unlike similar movements in other parts of the world that were aimed at gaining special treatment for mothers. Therefore, the feminist movement, as it gained force in the United States, stood for the idea that women had the same right to work as their male counterparts, regardless of the fact that they were pregnant or may become pregnant.

As a consequence of the civil rights movement, the Civil Rights Act of 1964 was passed. Title VII of the Civil Rights Act ("Title VII") specifically made it illegal "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ..." Then, "[i]n the early 1970s, efforts were made to use Title VII ... and the equal protection clause of Article XIV of the United States Constitution to remedy discrimination against pregnant women and working mothers and fathers who sought to fulfill parental responsibilities." However, in 1976, the U.S. Supreme Court denied this methodology, finding that classification based on pregnancy did not work to discriminate against any definable group or class because not all women were going to become pregnant. The setbacks that this decision caused to the efforts to remedy discrimination against pregnant women, ultimately led to the passage of the PDA, an amendment to the Civil Rights Act of 1964.

17. Id. at § 703(a)(1).

The Equal Employment Opportunity Commission, charged with implementation of Title VII, interpreted the Act to include discrimination based on pregnancy. The EEOC guidelines, as amended in March 1972, state that excluding applicants or employees from employment because of pregnancy or related medical conditions is a violation of Title VII.
The declared purpose of the PDA was to amend Title VII "to clarify Congress' intent to include discrimination based on pregnancy, childbirth, or related medical conditions in the prohibition against sex discrimination in employment." The PDA made it illegal for employers to have employment policies that required termination or mandatory leave for pregnant employees. The PDA guaranteed pregnant women the right to work "until childbirth or until medical complications of pregnancy render[ed] their continued work attendance medically inadvisable . . . ." Furthermore, the PDA guaranteed that women who took time off work due to pregnancy, childbirth, or related medical conditions would be able to return to work "on the same basis as other temporarily disabled workers." In other words, under the PDA "[w]omen who become disabled because of pregnancy-related conditions are entitled to paid sick leave . . . [and other benefits] . . . on the same basis as other disabled workers."

While the PDA was a step in the right direction, it did not address all employment problems related to pregnancy and childbirth. Because the PDA was passed as an anti-discrimination statute, it simply required that employers treat all

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Specifically, these guidelines require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities. It is the Committee's view that these guidelines rightly implemented the Title VII prohibition of sex discrimination in the 1964 Act.

Eighteen Federal district courts and all seven Federal courts of appeals which have considered the issue have rendered decisions prohibiting discrimination in employment based on pregnancy, in accord with the federal guidelines.

Contrary to these rulings and guidelines, the Supreme Court, in General Electric Co. v. Gilbert, decided in favor of General Electric's disability insurance plan, which excluded coverage for women with pregnancy-related disabilities. The Court concluded that this exclusion in the company's benefits policy was not gender-related but condition-related. It went on to indicate that because the plan did not exclude any disability that could be incurred by both men and women, it was not discriminatory.

Justice Brennan, in a dissenting opinion, supported the EEOC guidelines as a reasonable interpretation and implementation of the broad social objectives of Title VII. He pointed out that since the plan included comprehensive coverage for males, and failed to provide comprehensive coverage for females, the majority erred in finding that the exclusion of pregnancy disability coverage was a nondiscriminatory policy. Furthermore, Justice Stevens, in his dissenting opinion, argued that "it is the capacity to become pregnant which primarily differentiates the female from the male."

It is the Committee's view that the dissenting Justices correctly interpreted the Act.

Id. (internal citations omitted).

21. Id.
23. Id.
24. Id.
25. Id.
employees equally.\textsuperscript{26} By its nature, the PDA, as an anti-discrimination law, leaves gaps in the protection of pregnant women.\textsuperscript{27} For example, if an employer has no sick leave policy in place, or does not allow employees to take unpaid leave for disability, a pregnant woman would not be given these rights either. Under the PDA, an employer only has to give a pregnant woman the same benefits that all other employees would have if they were not able to work.

2. The Passage of the FMLA

By the mid-1980s the failure of the PDA as a method of providing employment benefits to pregnant women had become obvious. Amazingly, just prior to the passage of the FMLA, the United States and South Africa were the only industrialized countries in the world without a national maternity or parental leave policy.\textsuperscript{28} In contrast, many third world countries had laws in place that required “employers to provide some form of maternity or parental leave.”\textsuperscript{29} In all, “[o]ne hundred and thirty-five countries provide[d] at a minimum maternity benefits, 127 with some wage replacement.”\textsuperscript{30} At that time, the average minimum paid leave among the major industrialized countries was twelve to fourteen weeks.\textsuperscript{31} Many of those countries “also provid[ed] the right to unpaid, job-protected leaves for at least 1 year.”\textsuperscript{32} However, it should be noted that although there was no federal maternity leave policy in the United States, prior to 1993 thirty-five states provided for some form of maternity or parental leave.\textsuperscript{33} Although, the coverage and policies underlying the laws of each state varied greatly.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 11.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} Rasnic, \textit{supra} note 2, at 105.
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} Rasnic, \textit{supra} note 2, at 106.
\item \textsuperscript{34} \textit{Id.} For example, at the time of consideration of the FMLA: California provided up to sixteen weeks of leave over a two-year time period for the birth or adoption of a child. S. REP. NO. 103-3, at 20. That law applied to employers of fifty or more workers. \textit{Id.} Employers of five or more workers were required by law to provide women with reasonable pregnancy disability leave of up to four months. \textit{Id.} California now has family temporary disability insurance which provides “up to six weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption.” CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2007).
Vermont law provided twelve weeks of family and medical leave per year. S. REP. NO. 103-3, at 20. There, employers of ten or more workers were required to provide leave to care for a newborn or adopted child. \textit{Id.}
\end{itemize}
In 1985, U.S. Representative Patricia Schroeder (D-Colo.) first introduced a family leave bill.\textsuperscript{35} Unfortunately, that bill never made it out of the legislative branch.\textsuperscript{36} Prior to the passage of the FMLA, two similar bills did pass muster in Congress, but were ultimately vetoed by President George H. W. Bush.\textsuperscript{37} It was not until 1993 “that the need for a parental leave policy was recognized by both the legislative and executive branches.”\textsuperscript{38} Upon signing the FMLA into law “on February 8, 1993, President Clinton declared that ‘American workers will no longer have to choose between the job they need and the family they love.’”\textsuperscript{39} In contrast to the PDA which focused solely on treating male and female employees equally, the FMLA mandates equal treatment of the sexes, but it also creates and guarantees certain rights. Primarily, the FMLA guarantees that employees will be able to take time off work upon the occurrence of certain family related issues.

B. The Purpose of the FMLA

In its report to the Senate, the Labor and Human Resources Committee stated that “[t]he purposes of [the FMLA] are to balance the demands of the workplace and the needs of families; to entitle employees to take reasonable leave, for family or medical reasons; and to accommodate the legitimate interest of employers.”\textsuperscript{40} Both the Senate and the House of Representatives, during consideration of the FMLA, noted that the bill would not have been required if proper voluntary corrective measures had been taken by the majority of private employers.\textsuperscript{41} For example, the Senate Labor and Human Resources Committee found that “[v]oluntary corrective

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\textsuperscript{36} \textit{See id.} at 373 n.3.


\textsuperscript{38} Grill, supra note 35, at 373.

\textsuperscript{39} Hayes, supra note 8, at 1507 (quoting Remarks on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 49 (Feb. 5, 1993)).


\textsuperscript{41} \textit{See id.} at 5; H.R. REP. NO. 103-8(1), at 22 (1993).
actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly.\textsuperscript{42} The committee related the passage of the FMLA to the passage of other labor standards, such as child labor laws and minimum wage laws, reporting that a "central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers."\textsuperscript{43}

Although the committee seemed to suggest that the majority of employers were being harmed by a relatively small group of "unscrupulous employers," a 1990 survey of 253 U.S. corporations showed that only 27\% of those firms surveyed had some form of parental leave program.\textsuperscript{44} Furthermore, the same survey found that of the firms that did not have a parental leave program, 62\% would only offer such a program if required to by the state or federal government.\textsuperscript{45}

In passing the FMLA, Congress sought to address "the growing conflict between work and family" as an effect of recent economic and social changes.\textsuperscript{46} For example, the House Committee on Education and Labor noted that "workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities."\textsuperscript{47} The reason for these "outmoded workplaces" was probably that until relatively recently, workers were often unencumbered by family responsibilities. The workforce in the United States had historically been predominated by males. Furthermore, the societal norm was that females were responsible for the upbringing and care-giving of children, while males were responsible for "bringing home the bacon." The "outmoded workplaces" that the House committee spoke of were simply a product of centuries of societal perpetuation of the stereotypes of the different roles of men and women.

It was not until the 1950s that the size of the female civilian labor force started increasing rapidly; growing by approximately one million women each year between 1950 and the early 1990s.\textsuperscript{48} In 1990, "nearly 57 million women were working or looking for work—more than a 200 percent increase since 1950."\textsuperscript{49} As of 1993, over 45\% of the total labor force in the United States was made up of women.\textsuperscript{50} The reason for this increase likely stemmed from a combination of the feminist movement and the steady decline in real wages; by 1985, it took two incomes for a family to

\begin{itemize}
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id. at 15.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id. at 4.
  \item \textsuperscript{47} H.R. Rep. No. 103-8(1), at 17 (1993).
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} Id. at 6.
\end{itemize}
have the same standard of living that it could have maintained on one income in the 1950s.\textsuperscript{51} Furthermore, by the early 1990s two incomes became an economic necessity for families in many parts of the country.\textsuperscript{52}

At the same time that millions of women were entering the workforce for the first time, the number of single parent households dramatically increased.\textsuperscript{53} In 1988, the Census Bureau reported that "single parents accounted for 27 percent of all family groups with children under 18 years old . . . more than twice the 1970 proportion."\textsuperscript{54} Further, that same report stated that in 1987, "20 percent of all children under age 6 lived with single mothers."\textsuperscript{55} Again, by the early 1990s it was obvious that "mothers' employment [was] often critical in keeping their families above the poverty line."\textsuperscript{56}

In combination with this obvious societal problem, many studies relied on by Congress reported that the most vulnerable workers—those that were the least educated and least privileged, particularly women—were least likely to have any type of pregnancy or parental leave.\textsuperscript{57} With all of this in mind, the Senate Labor and Human resources Committee found that "without job-secured family and medical leave and its promise of a steady paycheck, upon return from leave, low-wage workers in the midst of family or medical emergency risk debt, welfare, and even homelessness."\textsuperscript{58} Thus, a recurring theme throughout the Senate and House reports was the desire to reduce costs to society that would be caused by the sacrifice of jobs for family.\textsuperscript{59}

In short, the ultimate purpose of the FMLA was that "[a] woman should not have to choose between her job and becoming a mother and a couple should not be

\textsuperscript{51} Grill, \textit{supra} note 35, at 385.
\textsuperscript{52} H.R. REP. NO. 103-8(I), at 54-55.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 15-16 (1993). (discussing the outcomes of studies, addressing the connection between sex, education, employment, and wages, conducted by The Institute for Women's Policy Research; the Census Bureau; Economist Eileen Trzcinski of Cornell University, and The Families and Work Institute).
\textsuperscript{58} Id. at 16.
\textsuperscript{59} \textit{See, e.g.}, H.R. REP. NO. 103-8(I), at 56 (1993) ("We all bear the cost when workers are forced to choose between keeping their jobs and meeting their personal and family obligations. When they must sacrifice their jobs, we all have to pay for the essential but costly social safety net."); \textit{id.} at 17 ("When families fail to carry out [their] critical functions, the societal costs are enormous."). \textit{See also} S. REP. NO. 103-3, at 7, \textit{as reprinted in} 1993 U.S.C.C.A.N. 3, 9 (When there is no one to provide care [for developing children], individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults." ).
punished for becoming a family." Given the findings of both the Senate and the House of Representatives, the official purposes of the FMLA were as follows:

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

C. Coverage and Scope of the FMLA

Generally, the FMLA provides an eligible employee a total of twelve work weeks of leave during any twelve-month period for the birth or adoption of a child and/or to care for that child. The leave guaranteed by the Act is unpaid. However, paid leave may be substituted upon election of the employee or as a requirement of the employer. As a rule, "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for... any part of the 12-week period." Furthermore, "if an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required... may be provided without compensation." The twelve weeks of leave guaranteed under the FMLA cannot be taken by an employee intermittently or on a reduced leave schedule unless it is agreed to by both the employer and the employee. And, "[i]n any case in which the necessity for

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63. 29 U.S.C. § 2612(c); 5 C.F.R. § 630.1205(a) (2006).
64. 29 U.S.C. § 2612(d)(2)(A); 5 C.F.R. § 630.1205(b),(c).
66. 29 U.S.C. § 2612 (d)(1); 5 C.F.R. § 630.1205(a), (b).
leave [for the birth or adoption of a child] is foreseeable based on expected birth or placement, the employee shall provide the employer with not less than 30 days notice, before such date the leave is to begin. The employee, of course, will not always be able to give thirty days notice. In cases where the notice requirement cannot be met, "the employee shall provide such notice as is practicable."

For the purposes of the Act, as applied to private employers, the term "eligible employee" means a person who has been employed by the same employer to whom leave is requested for at least twelve months, and for at least 1250 hours in the previous twelve month period. An important exception to the term "eligible employee" is that it does not include "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." Another important thing to note about the Act is that the entitlement to leave for the birth or adoption of a child expires at the end of the twelve-month period beginning on the date of birth or adoption. Another significant exception to the FMLA comes into play when two spouses are employed by the same employer. When both a husband and a wife entitled to leave are employed by the same employer, the total number of workweeks of leave that may be taken between the two is limited to a total of twelve weeks.

Finally, when leave is taken by an eligible employee, that employee shall be entitled, upon return from leave, to be restored to the same position the employee held when leave commenced, or to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." The one major exception to this subsection concerns highly compensated employees. Under that exception, an employer may deny restoration of position for the following reasons:

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

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68. 29 U.S.C. § 2612(e)(1); 5 C.F.R. § 630.1206(a) (2006).
69. 29 U.S.C. § 2612(e)(1); 5 C.F.R. § 630.1206(a).
70. 29 U.S.C. § 2611(2)(A) (2000). To work at least 1,250 weeks in one year, a person must work approximately 25 hours per week.
73. 29 U.S.C. § 2612(f).
While the FMLA is a step in the right direction, it is not perfect. The FMLA has guaranteed a long-needed benefit to American families but has many shortcomings. Commentators have been especially critical of a couple provisions, both before the Act’s passage and since.

1. Inadequate Scope and Coverage

The first area of critical focus has been on the scope of coverage of the FMLA. As stated above, the FMLA (as applied to private employers) only applies when an employee works for an employer that employs fifty or more employees within a seventy-mile radius. The problem with this provision is that, as of 1993, it excluded almost 95% of the businesses in the United States. However, even though the coverage of the FMLA only applies to approximately 5% of commercial enterprises in this country, it actually covers approximately 40% of the labor force. So while the coverage of the Act is not as bad as it initially sounds, it still leaves approximately 60% of the workforce without any guaranteed family leave benefits.

2. “Hollow Right”

The second major grievance commentators have with the FMLA is that it is nothing more than a “hollow right” for many workers because it only guarantees unpaid leave. As discussed above, dual income families have become the norm because of the decrease in real wages over the past fifty years. In many areas of the country both husband and wife must work to stay afloat. The fact is that in many situations both incomes are needed to simply pay the bills from month to month; thereby a benefit that only guarantees unpaid leave is largely symbolic. Because many American workers cannot afford to sacrifice the income associated with unpaid

75. 29 U.S.C. § 2614(b)(1). A “highly compensated employee” is defined in the FMLA as “a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.” 29 U.S.C. § 2614 (b)(2).


78. Grill, supra note 35, at 376.

79. Id. at 383.

leave, many new parents must immediately return to work, forgoing bonding with their new child and recovery from child birth.81 In this way, “[t]he FMLA . . . does not respond to the needs of the majority of Americans.”82

Even though it is commonly thought by medical professionals that the amount of time needed for recovery from childbirth is at least six weeks, one study found that “nineteen percent of new mothers returned to work within six weeks of giving birth because they ‘could not afford to take time off.’”83 This idea conforms to findings of the General Accounting Office that many eligible employees do not take leave because they cannot afford it, even when it is needed for valid reasons.84

Unfortunately, while one of the goals of the FMLA is to provide equal parental benefits for both men and women, the burden caused by unpaid leave may be heavier on men than it is on women.85 Men have traditionally been the bread-winners in their families and may feel compelled to return to work because of the importance of the “good-provider role” they traditionally assumed.86

Furthermore, the absence of compensation during leave results in a benefit to middle and upper-class workers who are most likely able to afford leave, and a “disproportionate disadvantage [to] working-class parents,” who probably cannot afford to live on a single income for an extended period of time.87 In reality, the FMLA meets its original goals of family and job-security only to the extent that a worker or family can afford to lose at least one income for the period of leave.88

Unfortunately, “[w]ith little public debate, the United States has chosen a radically different approach to maternity leave than the rest of the developed world. The United States and Australia are the only industrialized countries that do not provide paid leave for new mothers nationally.”89 Moreover, a study conducted in 1994 by Harvard University showed that out of 168 nations in the world, 163 had some form of paid maternity leave.90 The current U.S. policy of unpaid leave puts the “United States in the company of Lesotho, Papua New Guinea, and Swaziland” as among the few nations in the world that do not provide paid maternity or parental leave.91 The fact is that most, if not all, countries with strong economies provide

82. Id.
83. Id. at 383-84 (citing Expand Family, Medical Leave Act through Bargaining, Seminar Told, Gov't Empl. Rel. Rep. (BNA) No. 31, at 1557. (Nov. 29, 1993)).
84. Id. at 383.
85. Id. at 384.
87. Hayes, supra note 8, at 1523.
88. Id. at 1524.
89. U.S. Stands Apart, supra note 15.
90. Id.
91. Id.
more assistance and parental leave benefits to families than the United States.\textsuperscript{92} Furthermore, these countries provide benefits and assistance without any apparent injury to their competitiveness in the world marketplace.\textsuperscript{93}

3. Adequate Leave Not Allowed

The last provision of the FMLA that is often criticized is the amount of leave allowed. As mentioned above, the time believed to be adequate for physical recovery from childbirth is at least six weeks.\textsuperscript{94} Also, pregnant women frequently develop serious health conditions that require them to take time off work. Therefore, "a woman who becomes pregnant and takes leave due to her own serious health conditions related to pregnancy could use up a good portion of her twelve weeks leave before her child is born," leaving her with insufficient time to fully recover from the physically taxing birth and bond with her newborn child.\textsuperscript{95}

In addition to a woman not having enough time to physically recover from childbirth, twelve weeks is simply not a sufficient amount of time for parents to bond with a new child.\textsuperscript{96} For proper bonding to take place, many early-childhood experts recommend at least six months time for parent and child to interact on a full-time basis.\textsuperscript{97} Additionally, many adoption agencies require that at least one parent be able to stay home with a new child as long as four months before they will place the child in a home.\textsuperscript{98}

III. A Survey of Three European Countries' Maternity and Parental Leave Laws

The countries examined in this section are France, Germany, and Sweden. Each of these countries was chosen for its thriving economy and generous maternity and parental leave benefits.

As discussed above, the FMLA falls in a couple of major areas. It has too narrow scope and coverage, only applying to about 5% of the commercial enterprises

\textsuperscript{92} Martha Minow, Legislative Approaches to Work and Family, 26 Harv. J. on Legis. 295, 297 (1989).
\textsuperscript{93} Id.
\textsuperscript{94} Grill, supra note 35, at 383-84 (citing Expand Family, Medical Leave Act through Bargaining, Seminar Told, Gov't Empl. Rel. Rep. (BNA) No. 31, at 1557. (Nov. 29, 1993)).
\textsuperscript{96} Craig, supra note 95, at 56-57; Nancy E. Dowd, Family Values and Valuing Family: A Blueprint for Family Leave, 30 Harv. J. on Legis. 335, 341 (1993).
\textsuperscript{97} Dowd, supra note 96, at 341.
in the country and 40% of the labor force. It provides a hollow right because it only guarantees unpaid leave of which many workers cannot afford to take advantage. Finally, it does not allow for enough leave, as a woman may use up a significant portion of her leave before the birth of her child due to conditions related to her pregnancy, thus leaving her little or no time to bond with her child. On the other hand, the laws in France, Germany, and Sweden overcome the downfalls of the FMLA by providing broader coverage (all workers in some cases), paid benefits, and longer (sometimes mandatory) leave periods.

A. France

France has traditionally been afflicted by high unemployment rates, and as a consequence, the country has used family leave benefits as a means of keeping possible workers out of the labor pool. France has a comprehensive system of paid maternity, paternity, and unpaid parental leave. All benefits are financed through social security and local sickness insurance funds, which all workers pay into.

1. Maternity Leave

Whereas in the United States a woman is entitled to a maximum of twelve weeks leave regardless of the situation, the French maternity leave provisions allow a woman guaranteed leave for a period of at least sixteen weeks; six weeks before and ten weeks after the expected date of birth. If a woman is giving birth to her third or later child, the leave period is extended to twenty-six weeks total; eight weeks prior to, and eighteen weeks after, the expected date of birth. Furthermore, leave may be

99. H.R. REP. No. 103-8(II), at 37 (1993); Grill, supra note 8, at 376.
100. Grill, supra note 8, at 383.
101. See supra notes 95-97 and accompanying text.
102. Dowd, supra note 80, at 331.
107. Id. This provision also applies if the household is in charge of two or more children,
extended because of complications arising out of pregnancy or childbirth for a period of two weeks before and four weeks after the birth.\(^{108}\) Again, there is no extension under the FMLA because of complications due to the pregnancy or childbirth—leave is limited to twelve weeks total.

Not only is the maternity leave guaranteed, but unlike the FMLA, French law actually makes some period of maternity leave compulsory.\(^{109}\) In France, a woman must take at least eight weeks of maternity leave, six of which must be taken after the child’s birth.\(^{110}\) Also in contrast to the United States, a portion of the maternity leave is transferable to the father if the mother dies in childbirth or during maternity leave.\(^{111}\) In that case, the father may take up to ten weeks after the birth of the child for caretaking purposes.\(^{112}\)

In terms of scope, the coverage of the French maternity leave regulations is broad. The maternity leave protection covers all persons employed on the basis of a contract of employment.\(^{113}\) The only qualifying condition to the leave is that the woman must inform her employer of the expected dates of the leave and the reason.\(^{114}\) This condition is similar to one in the FMLA, in which an employee must notify her employer thirty days before leave will be taken (or the date of expected birth).\(^{115}\)

The biggest difference between France’s law and the FMLA is that France provides generous cash maternity benefits. Mothers are entitled to cash maternity benefits for the total amount of maternity leave taken, including any extensions.\(^{116}\) The cash benefit is one hundred percent of the worker’s normal wage up to an amount fixed by social security.\(^{117}\) The benefits are financed and paid by local sickness and insurance funds.\(^{118}\)
The cash benefits are available to all employees, as well as most workers covered by the general social insurance scheme and self-employed women who are covered by the sickness and maternity insurance for the self-employed.119 To claim maternity cash benefits, claimants must have been registered with the local sickness fund for at least ten months prior to the expected date of birth, and must have been employed for 200 hours in the calendar quarter or the ninety days preceding the date of conception or have contributed a certain amount to the sickness insurance fund during the six months prior to conception.120 Because there is a compulsory maternity leave period, the cash benefits are only available if the woman takes the compulsory eight weeks leave.121

2. Paternity Leave

Like the FMLA, the French laws also offer paternity leave. But again, unlike the FMLA, paternity leave is paid. Paternity leave is available to a father upon the birth of his child.122 The period of leave available is generally eleven days, but may be extended to eighteen days in the case of multiple births.123 All paternity leave taken must be taken consecutively, and generally must be taken within the first four months following the birth.124

Paternity leave is available to all men employed on the basis of a contract of employment in the private and public sectors.125 The only qualifying condition is that the employee must notify the employer of his intent to take leave and the date on which he expects to return to work at least one month before the date the leave will start.126 Again, this notice requirement is similar to that in the FMLA.

Cash benefits are also available for fathers who choose to take paternity leave. Benefits are available for the total amount of paternity leave taken, and are equal to one hundred percent of the father’s basic wage up to a ceiling fixed by social security.127 Furthermore, self-employed fathers can receive a daily flat rate for the

119. Social Security Code, supra note 103, at §§ L311-2, L311-3, L615-1. Workers that are covered by the general social insurance scheme include homeworkers, sale representatives, taxi drivers, insurance agents, and artists. Id.
120. Social Security Code, supra note 103, at §§ L331-3, R313-1, R313-3. Id.
121. Id.
123. Id.
124. Id. The paternity leave may be taken after the first four months following the birth if the child is hospitalized during that period or if the mother dies. Id. If the mother dies, the paternity leave should be taken during the first four months after the end of the maternity leave that was transferred to the father. Id.
125. Id. at § L120-1.
126. Id. at § L122-25-4.
The total amount of paternity leave taken, on the stipulation that they stop all economic activity during paternity leave. 128 The scope and qualifying conditions for paternity leave are the same as for maternity leave. 129 A father must stop all economic activity during leave to be eligible for cash benefits. 130

3. Parental Leave

Finally, working parents in France are entitled to unpaid parental leave or to work part-time. 131 Remember, the leave guaranteed under the FMLA cannot be taken on a reduced leave schedule unless it is agreed to by both the employer and employee. 132 In France, not only can leave be taken on a reduced leave schedule, the law actually provides parents with an additional amount of unpaid leave with which to do so. The leave (or part-time work schedule) is guaranteed for an initial period of one year, and is available until the child turns three years old. 133

The parental leave regulations cover all persons employed on the basis of a contract of employment in the private and public sectors. 134 To be qualified to take parental leave, the employee must have accrued at least one year of seniority in the enterprise by the date of birth or adoption. 135 This is the only area of leave in the French leave system where there is a seniority requirement similar to that required under the FMLA. 136 Additionally, the worker must inform his or her employer of the starting date and expected end date of the leave or part-time work schedule to be taken. 137

128. Id.
129. See id. at §§ L311-2, L311-3, L615-1 (scope of paternity leave); Id. at §§ L331-8, R313-1 (qualifying conditions for paternity leave).
130. Id. at §§ L331-8, R313-1, R313-3.
131. Labor Code No. 73-4, supra note 103, at §§ L122-28-1, L122-28-6. “Part time works” requires a minimum of sixteen hours per week. Id. Seniority rights may be accrued during parental leave at fifty percent of the time that would have worked if leave had not been taken. Id.
133. Labor Code No. 73-4, supra note 103, at §§ L122-28-1, L122-28-6. In the case of an adopted child, the leave extends until the anniversary of the third year after the date the child was placed in the home. Id. Parental leave or part-time work may be extended for an additional year in the case of sickness, accident, or severe handicap of the child. Id.
134. Id. at § L120-1.
135. Id. at § L122-28-1.
136. 29 U.S.C. § 2611(2)(A) (2000). An eligible employee is a person who has been employed by an employer for at least twelve months and has worked for at least 1250 hours in the previous twelve month period. Id.
137. Labor Code No. 73-4, supra note 103, at § L122-28-1.
B. Germany

Germany has had some type of legislation protecting pregnant working women since 1878.\footnote{Mona L. Schuchmann, The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany, 20 J. CORP. L. 331, 335 (1995).} However, Germany has long had one of the lowest birthrates in the world.\footnote{See Map: Parenthood Policies in Europe, BBC NEWS, MAR. 24, 2006, http://news.bbc.co.uk/2/hi/europe/483722.stm [hereinafter Map]; Wolfgang Tietze & Debby Cryer, The Silent Crisis in U.S. Child Care: Current Trends in European Early Child Care and Education, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 175, 179 (1999).} Accordingly, German laws have been amended and now provide coverage for both men and women. Presumably, Germany aims to encourage women to have more children while remaining a part of the labor pool.\footnote{See Map, supra note 139.} Accordingly, while in place for different reasons, Germany, like France, has a comprehensive system of maternity and parental leave benefits.

Germany offers a system of paid maternity leave and cash benefits, which are available with little or no pre-qualifying conditions. Also, new parents in Germany may have an extended amount of unpaid parental leave during which they may work part-time at another job. Finally, while no paternity leave exists under statute, collective bargaining agreements generally include one or two days of paid paternal leave to be taken after the birth of a child.\footnote{Database of Conditions of Work and Employment Programme, http://www.ilo.org/travaildatabase/servlet/maternityprotection?pageclass=org.ilo.legislation.work.web.ReferencePage&LinkId=10750 (last visited May 24, 2006).}

1. Maternity Leave

Maternity leave in Germany is granted to all women in an employment relationship.\footnote{Gesetz zum Schutz der erwerbstatigen Mutter (MuSchG) § 1 (F.R.G), translated in Database of Conditions of Work and Employment Programme, available at http://www.ilo.org/public/english/protection/condtrav/database/index.htm (follow, for example, “maternity protection” hyperlink; “country/subject” hyperlink, then add “Germany” and “Maternity Leave” search criteria, then follow “perform search”) [hereinafter Maternity Protection Act]. “Women in an employment relationship” includes homeworkers. Id.} The period of leave that may be taken in Germany is generally a total of fourteen weeks; six weeks before birth and eight weeks after, a length of time ranging in between the period of leave granted by the FMLA and French laws.\footnote{Id. at §§ 3(2), 6(1).} A woman may continue to work until the end of her pregnancy if she explicitly declares herself able to work.\footnote{Id. at § 3(2).} If no explicit declaration is made, or the declaration is revoked, there is a compulsory leave period that starts six weeks before the expected...
date of birth.\textsuperscript{145} That compulsory leave period continues for eight weeks after birth and is extended to twelve weeks in the case of a premature birth or multiple births.\textsuperscript{146} To contrast, in France there is a mandatory post-birth leave period of at least six weeks, while in the United States, there is no such compulsory leave period in existence.\textsuperscript{147}

To qualify for leave, a pregnant woman must inform her employer of her pregnancy and the expected date of birth as soon as she discovers she is pregnant.\textsuperscript{148} At the request of the employer, the pregnant employee must provide a medical statement from a doctor or midwife testifying to the pregnancy and expected date of delivery.\textsuperscript{149} The employer may not reveal the employee’s pregnancy to any third party without the explicit permission of the employee.\textsuperscript{150}

Payment of maternity benefits is covered by statutory health insurance programs, the state, and individual employers. Women who are covered by a statutory health insurance program are entitled to receive maternity benefits known as a “maternity grant.”\textsuperscript{151} This grant will be paid for the duration of any maternity leave taken.\textsuperscript{152} To receive the grant, the woman must be entitled to sickness benefits in the case of unfitness for work or she cannot receive wages during her maternity leave.\textsuperscript{153} If the insured woman is receiving any wages or income from work, the grant entitlement will be suspended until such time as no income from employment is being received.\textsuperscript{154}

The grant amount paid by the statutory health insurance is the employee’s average daily wage,\textsuperscript{155} minus certain statutory deductions, and is capped at 13 Euro per day.\textsuperscript{156} Any amount of the average daily wage that is over 13 Euro will be paid

\textsuperscript{145} Id.
\textsuperscript{146} Id. at § 6(1).
\textsuperscript{147} Labor Code No. 73-4, supra note 103, at § I.224-1. In France, a woman is required to take a total of eight weeks of leave from work. Id. At least six of those eight weeks must be taken after she has given birth to her child. Id.
\textsuperscript{148} Maternity Protection Act, supra note 142, § at 5(1).
\textsuperscript{149} Id. The cost of the statement must be born by the employer. Id. at § 5(3).
\textsuperscript{150} Id. at § 5(1).
\textsuperscript{151} Id. at § 13(1).
\textsuperscript{152} Id.; Reichsversicherungsordnung (RVO) § 200(3) (F.R.G), translated in Database of Conditions of Work and Employment Programme, available at http://www.ilo.org/public/english/protection/constrav/database/index.htm (follow, for example, “maternity protection” hyperlink; “country /subject” hyperlink; then add “Germany” and “cash benefits” search criteria; then follow “perform search”) [hereinafter National Insurance Regulation].
\textsuperscript{153} National Insurance Regulation, supra note 152, at § 200(1).
\textsuperscript{154} Id. at § 200(4).
\textsuperscript{155} Id. at § 200(2). The average daily wage is calculated using wages earned over the three calendar months immediately proceeding the prenatal leave period. Id.
by the employer or the state according to the provisions in the Maternity Protection Act.\textsuperscript{157} If the insured is covered by the sickness benefit, the grant will be paid to the extent of the sickness benefit instead of being capped at 13 Euro per day.\textsuperscript{158}

Women who are not covered by a statutory health insurance scheme also receive a maternity grant; however, it is paid entirely by the state.\textsuperscript{159} The amount paid will be calculated in the same way as if the woman was covered by a statutory health insurance plan (average daily wage), but will be capped at 210 Euro instead of 13 Euro per day.\textsuperscript{160}

2. Parental Leave

Like in France, parents in Germany are entitled a period of unpaid parental leave or part-time work ("reduced leave schedule"). Generally, unpaid parental leave is available to either parent for a period of up to three years after the birth (or adoption) of a child.\textsuperscript{161} However, up to one year of the parental leave may be taken anytime before the child’s eighth birthday with the permission of the employer.\textsuperscript{162} Parental leave may be taken by either parent or by both at the same time.\textsuperscript{163} To be qualified for leave, parents must request leave from their employers, in writing, six to eight weeks before the leave is going to start.\textsuperscript{164} Additionally, employees must notify their employers of the extent and period of their expected parental leave.\textsuperscript{165} A parent may stop working for his or her employer at the end of parental leave only if that parent gives the employer three months notice.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{157} National Insurance Regulation, \textit{supra} note 152, at § 200(2).
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} Maternity Protection Act, \textit{supra} note 142, at § 13(2).
\item \textsuperscript{160} \textit{Id.} On May 29, 2006, 210 Euro equaled approximately $269 U.S. \textit{See} Historic Exchange Rates, \textit{supra} note 156.
\item \textsuperscript{161} Bundeserziehungsgeldgesetz (BerzGG) §15(2) \textit{translated in} Database of Conditions of Work and Employment Programme, available at http://www.ilo.org/public/english/protection/condtrav/database.index.htm (follow, for example, "maternity protection" hyperlink; "country/subject" hyperlink; then add "Germany" and "Related Types of Leave"; then follow "perform search") [hereinafter Child Benefits and Parental Leave Act]. Parental Leave is available for a child of which the worker has custody, the child of the worker’s spouse or partner, an adopted or foster child, or a child for which the worker does not have custody but for which they are entitled child care benefits because the child and worker live in the same home and the worker is caring for the child personally. \textit{Id.} at § 15(1).
\item \textsuperscript{162} \textit{Id.} at § 15(2).
\item \textsuperscript{163} \textit{Id.} at § 15(3).
\item \textsuperscript{164} \textit{Id.} at § 16(1). An employee must request leave at least six weeks ahead of time if the leave will start immediately following the baby’s birth or maternity leave. \textit{Id.} Eight weeks notice must be given if the leave will start during any other period. \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at § 19.
\end{itemize}
Each parent taking parental leave may accept gainful employment as long as that employment does not exceed a total of thirty hours per week. A reduced work schedule must be agreed upon between the worker and the employer within four weeks of the date the worker made the request to leave. Working part-time for another employer or taking on self-employment during parental leave requires the permission of the original employer.

While parental leave is unpaid, parents who live in the same household as a child or children that they take care of and work less than thirty hours per week, will receive a child care benefit. The child care benefit is paid from the date of birth until the child becomes either one or two years old. If the benefit is taken until the child is one year old, it will equal 450 Euro per month. If the benefit is taken until the child reaches two, it will equal 300 Euro per month. The child care grant will be further limited depending on the parents’ income and will be offset by any maternity benefits. The child care benefit is entirely financed by the German government.

C. Sweden

Like Germany, Sweden was one of the first counties in the world to provide leave to working women after childbirth. The Swedish benefits system covers maternity, parental, and paternity leave and is generally considered to be the best in the world. Because the benefits are excellent, Swedish parents, unlike their American counterparts, are more able and likely to take the majority of their allowed leave time. For example, “[t]he average Swedish couple takes 300 out of a

167. Id. § 15(4). The thirty hour per week limit is the agreed weekly working time, and each parent taking leave is entitled to work up to the thirty hour limit. Id.

168. Id. § 15(5).

169. Id. § 15(4). The employer may reject such a request for an urgent valid business reason. Id.

170. Id. at §§ 1-7.

171. Id.

172. Id. 450 Euro equals approximately $577 U.S. See Historic Exchange rates, supra note 156.


175. Id. at § 11.

176. Grill, supra note 35, at 374. Sweden’s first maternity leave policy was implemented in 1937. Id. at n.12.


possible 360 days off from work, and more than ninety-five percent of all Swedish parents utilize the first nine months of parental leave.\textsuperscript{179}

Due to the organization of applicable Swedish laws, the following section will address “benefits” separately from “leave provisions.”

1. Maternity Leave

In Sweden, all women workers are guaranteed maternity leave.\textsuperscript{180} Maternity leave must be granted regardless of how long a woman has been employed.\textsuperscript{181} The normal duration of maternity leave is a total of fourteen weeks; seven taken before, and seven taken after, the expected date of birth.\textsuperscript{182} As in France and Germany there is a compulsory leave period. Under Swedish law, two of the fourteen weeks of leave are compulsory.\textsuperscript{183} In order to qualify for leave, the law requires a woman to notify her employer of her intent to take leave at least two months before the leave is expected to start.\textsuperscript{184} Again, like in France, this notice requirement is similar to that required under the FMLA; however, in Sweden notice is required an extra month before it is required in the United States. In Sweden, notice of intent to take leave should include the duration of the leave to be taken.\textsuperscript{185} If a woman is unable to give the two months notice, she should give notice as soon as she is able.\textsuperscript{186}

2. Paternity Leave

All male workers may take ten days of paternity leave from work in connection with the birth or adoption of a child.\textsuperscript{187} While this is much less time that allowed under the FMLA, it is paid leave (as will be seen in the section covering benefits), and each parent can take parental leave in addition to maternity or paternity leave.

\textsuperscript{179} \textit{Id.} (internal citations omitted).
\textsuperscript{180} Parental Leave Act, \textit{supra} note 180, at § 4.
\textsuperscript{181} \textit{Id.} at § 3.
\textsuperscript{182} \textit{Id.} at §§ 4, 13.
\textsuperscript{183} \textit{Id.} at § 4.
\textsuperscript{184} \textit{Id.} at § 13.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} Svensk författningssamling, No. 381 Ch. 4 §§ 10, 12 (1962) as amended up to No. 476 (2004), \textit{translated in} Conditions of Work and Employment Programme, \textit{available at} http://www.ilo.org/public/english/standards/decworks/52trav/database.htm (follow, for example, “Maternity Protection” hyperlink; “Country/Subject” hyperlink; then add “Sweden” and “Related Types of Leave” search criteria’ then follow “Perform Search”) [hereinafter Public Insurance Act].
3. Parental Leave

Parental leave is granted to all Swedish working parents. Full leave is available to workers who have been "employed by the employer for the six month period or for a combined period of at least twelve months during the preceding two years [before the expected date of leave]." Full leave may be taken until the child reaches eighteen months old. Leave may be taken regardless of whether the parent receives parental cash benefits.

A parent on leave may interrupt the leave upon notifying his or her employer. However, if the parent has already taken more than one month of parental leave, the employer does not have to allow the employee to resume work until the expiration of one month after the receipt of notice.

In addition to full leave, as in France and Germany, partial leave (or a reduced work schedule) may be taken by workers on the same basis as full leave. In Sweden, partial leave entitles parents to a reduction of the normal hours of work up to twenty-five percent. Partial leave can be taken for the care of a child who is under the age of eight and has not completed the first year of school.

4. The Parental Leave Benefits System

Parental leave benefits are available to all citizens and residents of Sweden. The Swedish parental leave benefits system covers maternity, paternity, and parental leave. All parental benefits are paid by social insurance funds.

Parental leave benefits are aggregated between both parents and are payable for a total of 480 calendar days. Either parent may claim the parental leave benefits (they may be transferred between parents) except for a period of sixty days. If those sixty days are not taken by the father they are lost. Benefits (and
corresponding leave time) are extended by 180 days for each additional child in the case of multiple births.\textsuperscript{203}

For Swedish parents who have been insured by the public insurance program for at least 240 consecutive days before birth, the benefits amount to eighty percent of normal earnings and 60 SEK per day for the remaining ninety parental leave days.\textsuperscript{204} Swedish residents that do not meet the insurance requirement are still eligible to receive a basic level of cash benefits\textsuperscript{205} for the first 390 calendar days, then 60 SEK for the remaining parental leave time.\textsuperscript{206}

IV. WHY DO U.S. AND EUROPEAN MATERNITY AND PARENTAL LEAVE LAWS DIFFER SO GREATLY IN SCOPE AND BENEFITS?: SOME COMMON THEORIES

Commentators have long questioned why the parental leave policies and benefits differ so greatly between the United States and European countries. The question has often been asked if it is even possible for the United States to put in place laws similar to those found within the European Union. As a part of this question, many theories have been formed as to why U.S. policies differ so greatly from those of E.U. nations.

A. The Social Welfare State Versus the Capitalist State

The first and most obvious rational for the difference between U.S. and European policies is that a majority of European countries are considered social states, something which is considerably different from American society. For example, both France and Sweden "accept an expansive concept of the welfare state and provide a level of social welfare services that far exceed American social programs."\textsuperscript{207} As was discussed in part I of this comment, one of the main purposes behind the passage of the FMLA was to ultimately keep people from drawing on the social benefits that are available. Basically, "Americans are very tax-adverse and would decrease social expenditures rather than increase taxes in order to balance the government's budget."\textsuperscript{208} And, unlike in social welfare states where citizens "accept high tax levels in exchange for a federal welfare system that accounts for all citizens,"\textsuperscript{209} the American capitalist economy, "continues to be based upon the

\begin{footnotes}
\item[203] Id.
\item[204] Id. 60 SEK (Kroner) equals approximately $8.25 U.S. dollars. See Historic Exchange Rates, supra note 156.
\item[205] Public Insurance Act, supra note 187, Ch. 4 §§ 3, 6. 180 SEK (Kroner) per day in 2004. Id.
\item[206] Id.
\item[207] Dowd, supra note 80, at 339.
\item[208] Grill, supra note 35, at 388. See also Schuchmann, supra note 138, at 344.
\item[209] Schuchmann, supra note 138, at 344.
\end{footnotes}
Protestant belief that not every person deserves to have social protection—that those who work hard will be able to fend for themselves.210

One important thing to note about the social welfare ethic found in European countries is that the upbringing of children is often viewed as a societal responsibility.211 On the other hand, Americans tend to have an individualistic outlook on life and tend to view the upbringing and care of children “in individual and voluntary terms.”212 Collective responsibility for children is virtually unknown in the United States.213 “The U.S. situation seems to assume that pregnancy [and child rearing to a large extent] is sort of a private hobby, which must be borne at your own expense.”214 Therefore, European governments may feel more pressure to support parents and the family as the “social unit with primary child-rearing responsibility.”215

But, the question arises, the United States has a common history with Europe, so why are so many European nations social states and the United States not? One explanation is that nations such as France “simply followed the lead of neighboring Germany when Chancellor Bismarck216 established the world’s first comprehensive social security program.”217 Germany’s current system of social security began to form when the first social security legislation was passed as early as 1883, and included old age, survivors’, and disability income statutes.218 Similar laws did not even begin to work their way into American society until the Great Depression and

210. Id.
211. Dowd, supra note 80, at 339. See also, Grill, supra note 35, at 387 (“Swedish society makes its children and the stability of its families a priority.”).
212. Dowd, supra note 80, at 339.
213. Grill, supra note 35, at 388.
216. Otto von Bismarck (1815-1898), Prusso-German statesman, ... was the architect of German unification and the first chancellor (1871-1890) of the united nation. Through Bismarck’s efforts, Germany was transformed from a loose collection of small states into the German Empire, the strongest industrialized nation in continental Europe. A unified Germany permanently changed the European balance of power. Though Bismarck dominated German and European politics for nearly 30 years, his career was a series of paradoxes. An ultraconservative, he initiated social and welfare reform. A master politician, he despised parliaments and parties. A Prussian patriot, he created a German empire.
217. Rasnic, supra note 2, at 144.
218. Id. at 135-36.
the presidency of Franklin D. Roosevelt over fifty years after Germany’s laws first were enacted.

Another reason proffered for the differences in American and European social policies is that, unlike Central and Western Europe, the United States has not had a war fought within its borders since the Civil War.\footnote{Rasnic, supra note 2, at 144.} In contrast with the United States;

[V]irtually every country in Europe suffered devastation from the ravages of both world wars, and from World War II in particular. Modern warfare and air attacks escalated the damage and suffering so that the necessity for immediate building was overwhelming. Destruction was so widespread that it was incumbent upon the respective governments to provide basic support structure requisite to survival.\footnote{Id.}

Ultimately, whatever the reason, it is obvious that the United States, unlike Sweden, France, and Germany, is simply not a social welfare state and does not have the structure in place for a comprehensive social insurance system.\footnote{Grill, supra note 35, at 386.}

B. Differing Demographic Needs

A second reason that the United States’ and European countries’ policies may differ is because they have different demographic needs. Ever since World War II, European countries such as Germany and France have suffered from falling birth rates.\footnote{U.S. Stands Apart, supra note 15 (interview of Jeanne Brooks-Gunn, Professor of Child Development and Education at Columbia University). See also Map, supra note 139.} Many European countries “expanded maternity leave after World War II to fight falling fertility and encourage childbearing.”\footnote{US. Stands Apart, supra note 15 (interview of Jeanne Brooks-Gunn, Professor of Child Development and Education at Columbia University).}

For example, data collected in the Nineteenth Century, “when France adopted family support policies, [support the idea that those policies were enacted] to counter a falling birthrate and the devastation to its population wrought by war.”\footnote{Dowd, supra note 80, at 330.} More recently, in Germany, which has long had one of the lowest birth rates in the E.U., the government has placed the birth rate at the top of its political agenda.\footnote{Map, supra note 139.} Essentially, these countries need more children for the perpetuation of society, therefore justifying the social support and benefits they provide.\footnote{Dowd, supra note 80, at 330.} On the other hand, the United States

\footnotetext{219.}{Rasnic, supra note 2, at 144.}
\footnotetext{220.}{Id.}
\footnotetext{221.}{Grill, supra note 35, at 386.}
\footnotetext{222.}{U.S. Stands Apart, supra note 15 (interview of Jeanne Brooks-Gunn, Professor of Child Development and Education at Columbia University). See also Map, supra note 139.}
\footnotetext{223.}{U.S. Stands Apart, supra note 15 (interview of Jeanne Brooks-Gunn, Professor of Child Development and Education at Columbia University).}
\footnotetext{224.}{Dowd, supra note 80, at 330.}
\footnotetext{225.}{Map, supra note 139.}
\footnotetext{226.}{Dowd, supra note 80, at 330.}
has never experienced the problems caused by falling fertility rates because immigration has always ensured population growth.\textsuperscript{227}

C. \textit{Differing Labor Market Needs}

Another reason commonly accepted for the differences between United States’ and European countries’ polices is the way these countries choose to deal with labor market needs. The policies of Nordic countries, such as Sweden, “arose in response to labor shortages in the 1960s and reflect a conscious decision to eschew other alternatives, such as immigration, in favor or tapping the pool of women who then remained at home outside the paid work force.”\textsuperscript{228} By allowing mothers to have adequate maternity leave and work part-time so they could also spend time with their children, the Swedish government introduced millions of needed laborers into the country’s workforce.

France, on the other hand, has traditionally been afflicted by high rates of unemployment.\textsuperscript{229} There is evidence that French polices were put in place to actually remove workers from the labor pool.\textsuperscript{230} By encouraging women to have children and stay home and take care of those children, “the number of individuals seeking work in the traditional paid labor market” is greatly reduced.\textsuperscript{231}

The United States, like France, has focused on reducing the unemployment rate.\textsuperscript{232} But unlike France, instead of trying to find ways of keeping potential workers out of the traditional labor force, the United States has focused on finding jobs for the unemployed.\textsuperscript{233} The United States’ goal of reducing the unemployment rate is simply not compatible with “facilitating parents’ entry into the labor market.”\textsuperscript{234} Therefore, while not overt, the United States’ policies may be simply a means of trying to force individuals into being laborers or parents, but not both.

An additional reason proffered for the policy differences discussed, mainly the difference in scope of coverage, has to do with the predominance of small businesses in the United States.\textsuperscript{235} As noted in the first section of this article, the FMLA only applies to businesses that employ fifty or more employees.\textsuperscript{236} This provision makes the FMLA applicable only to about five percent of the businesses in this country. As of the mid-1990s, small businesses—those employing twenty-five or fewer

\begin{itemize}
\item \textsuperscript{227} U.S. Stands Apart, supra note 15.
\item \textsuperscript{228} Dowd, supra note 80, at 318.
\item \textsuperscript{229} Id. at 331.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Grill, supra note 35, at 387.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id. at 388.
\end{itemize}
employees—created seventy percent of all new jobs in the United States since 1980. Any leave policy proposal that would include employer-generated wage replacement would definitely face strong disagreement from small businesses and their lobbyists. Possible arguments small businesses would make include: "(1) their profitability would be threatened if they were forced to make contributions for employees who take family leave, and (2) it would be difficult for them to find temporary replacements for workers on leave."238

However, while this theory may explain the United States’ policy, it does not explain why policies such as Sweden’s are so different. Swedish policies show that countries predominated by small businesses can still afford to offer generous labor benefits. The Swedish economy consists overwhelmingly of small businesses, yet continues to offer outstanding parental leave and benefits.239

D. Differing Goals of Feminist Movements

A final reason offered for explaining the policy differences has to do with the differing goals of the feminist movements that took place in the United States and Europe.240 As discussed above, in Europe the focus on the feminist movement was mainly on gaining special treatment for mothers to allow them to work while still maintaining their traditional role as caregivers.241 Conversely, the feminist movement in the United States focused exclusively on the equal treatment of men and women.242 For example, a chief spokeswoman for the U.S. feminist movement, Wendy Williams, stated "[w]e can’t have it both ways . . . so we have to think carefully about which way we want to have it;" [thus arguing] that feminists should choose policies that treat men and women the same.243 Because of this, separate maternity leave policies, such as those seen in the countries of Europe, were never created in the United States.244

238. Id.
239. Grill, supra note 35, at 388. ("[N]inety-seven percent of Swedish economic enterprises have fewer than fifty employees.").
241. Id.
242. Id.
244. Even if separate maternity leave policies and provisions were enacted in the United States, it is unlikely that they would ultimately be successful because they would not likely survive a strict equality analysis if litigated.
V. CONCLUSION

The debate and enactment of the FMLA has a long history. The FMLA was ultimately enacted because of a combination of factors, including the civil rights and feminist movements, changes in the labor market, and economic necessity. While one of the main goals of the FMLA was to allow parents to work while raising a family, the benefits created are mainly hollow because the majority of Americans cannot afford to use them.

Differing from the FMLA, many of the countries of Europe have maternity and parental leave benefits that are longer and provide income supplementation. At the same time these countries provide far greater social benefits than does the United States and maintain economies that are competitive in the world marketplace.

While there are many reasons suggested as to why the FMLA and European countries' policies differ so greatly, it is unlikely that any single reason can really explain the differences. In the end, the policies differ due to a combination of many factors, creating an equation that will prove challenging to solve.