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Getting Off the Mommy Track: An International Model Law Solution to the Global Maternity Discrimination Crisis

Caraline Rickard

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ABSTRACT

Women's roles in workplaces around the globe have been growing steadily for the past half-century. Yet, in everything from pay to advancement, workplace gender discrimination persists, much of it based on women's unique role as child bearers. Of the countless domestic and international efforts to address maternity discrimination, none has been completely successful. Drawing from the history of maternity leave legislation and the examples of domestic and international regimes, this Note proposes a unique solution to an international problem: an international model law. The Global Maternity Protection Act model law proposed here provides global protection for a global problem and aims to make all women equal by providing all women with the same benefits and protections, regardless of nationality. A model law solution is easily adopted and enforced and provides universal equality, a combination of objectives that is unattainable through legislation that is either purely domestic or purely international.

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I. INTRODUCTION

For every one hundred men who graduated with a college degree of some kind in 2013, 140 women did the same.[1] This phenomenon is hardly new. Women have outpaced men in earning post-secondary degrees every year since 1982, earning a total of 44.1 million degrees between 1982 and 2013—nearly 10 million more degrees than men earned in the same period.[2] In 2013, the U.S. Department of Education projected that women would "earn 61.6 [percent] of all associate's degrees," "56.7 [percent] of all bachelor's degrees," "59.9 [percent] of all master's degrees," and "51.6 [percent] of all doctor[ate] degrees" taken home that year.[3]

Yet something is happening to women between graduation and retirement. While women earned 46 percent of law degrees in 2011, they held only 31 percent of legal jobs and 15 percent of equity partnerships.[4] In 2011, 36.8 percent of MBA graduates were women, but in 2014, only 5.2 percent of Fortune 1000 CEOs were women.[5]

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1. Mark J. Perry, *Stunning College Degree Gap: Women Have Earned Almost 10 Million More College Degrees Than Men Since 1982*, AEI IDEAS (May 13, 2013, 11:19 PM), http://www.aei-ideas.org/2013/05/stunning-college-degree-gap-women-have-earned-almost-10-million-more-college-degrees-than-men-since-1982/ (last visited Aug. 28, 2014) [http://perma.cc/V57S-K3NE] (archived Sept. 9, 2014).

2. *See id.* (highlighting that between 1982 and 2013, men only earned 34.4 million degrees, while women earned 44.1 million, constituting a difference of 9.7 million).

3. *Id.*

4. ABA COMM'N ON WOMEN IN THE PROFESSION, *A Current Glance at Women in the Law 2011*, Jan. 2011, at 1, 3, *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011. authcheckdam.pdf [http://perma.cc/368-AGTG] (archived Sept. 14, 2014).

5. *Women CEOs of the Fortune 1000*, CATALYST (Aug. 27, 2014), http://www.catalyst.org/knowledge/women-ceos-fortune-1000 [http://perma.cc/M8ZG-U3ZK] (archived Sept. 9, 2010); *Women's Share of MBAs Earned in the U.S.*, CATALYST (July 8, 2014), http://www.catalyst.org/knowledge/womens-share-mbas-earned-us [http://perma.cc/TK26-EDSB] (archived Sept. 9, 2010).

Women have earned the majority of PhDs since 2001 but in 2003 held "only 35 percent of tenured or tenure-track faculty" professorships.[6]

Commentators have pointed to four main theories to account for this staggering disparity between the number of women qualified for jobs and the disproportionate number of men who receive them.[7] First, the "glass ceiling" explanation focuses on gender discrimination due to various social causes, such as gender stereotyping.[8] These stereotypes include frowning upon the same personality traits in women that are prized in male leaders—traits like assertiveness and independence. These social causes also include the expectation for women to work in staff positions, "such as human resources and administrative services, rather than . . . positions" controlling business operations.[9] The second theory, the "pipeline" argument, suggests that the historically lower number of qualified women in occupations means few women are "in the pipeline" for leadership positions.[10] This argument is discredited by the fact that, for the past thirty years, the majority of qualified graduates flowing into the "pipeline" have been women.[11] Third, the "evolutionary psychology" approach suggests "that women are not genetically predisposed to [leadership] roles."[12] Finally, the "24/7 economy" has been used as an explanation for why women are unable to keep pace with "the time and energy needed . . . in today's competitive business environment."[13] Under the 24/7 economy theory, scholars argue that women are more likely to be the head "of [a] single-parent household[] and remain responsible for" the majority of "parenting [and household] duties in two-parent households," and, therefore, are unable to keep up with the demands of "traditional working arrangements . . . configured around a career model established in the nineteenth century" that expect complete career dedication.[14]

Building on this fourth approach, researchers at the University of Kentucky have proposed a fifth explanation, the "family-work conflict bias."[15] "The family-work conflict bias means that just being a

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6. Jenny M. Hoobler, Grace Lemmon & Sandy J. Wayne, *Women's Underrepresentation in Upper Management*, 40 ORGANIZATIONAL DYNAMICS 151, 152 (2011), *available at* http://www.uky.edu/Centers/iwin/RTOCT12/ HooblerWomenin Management.pdf [http://perma.cc/ZB6H-YUQ6] (archived Sept. 9, 2014).

7. *See id.* at 151–52 (evaluating the four primary theories for the absence of women in "top jobs").

8. *Id.*

9. *See id.* (comparing stereotypes of men and women in the workplace).

10. *See id.* at 152 (explaining the argument that fewer women are in, or headed for, leadership positions because women have not traditionally enrolled in educational programs that prepare them for leadership).

11. *See* Perry, *supra* note 1 (noting that "women have earned the majority of [bachelor's] degrees for every college class since 1982").

12. Hoobler, Lemmon & Wayne, *supra* note 6, at 152.

13. *Id.*

14. *Id.*

15. *Id.*

woman signals to a manager that her family will interfere with her work, irrespective of whether or not that woman actually has family-work conflict, is married, has children, or has children of a certain age."[16] The researchers interviewed managers (both male and female) who reported that they felt "that higher-level positions required . . . more availability" than lower-level positions, flexibility that they thought women's family responsibilities made them unable to provide.[17] The managers "generally viewed women as having a greater [degree of] family-work conflict."[18] The managers believed that this family-work conflict "is incompatible with a work environment that demands long hours and 'face time.'"[19]

Independent empirical information from around the world supports the family-work conflict bias theory. Numerous studies have shown that "mothers are judged as less competent . . . and are less likely to be hired and promoted" than either men or childless women.[20] Women regularly report being made to sign pledges that they will not become pregnant, being forced to undergo pregnancy tests by their employers, or being harassed or fired after becoming pregnant.[21] Two-thirds of young Arab women cannot enter the workforce "because of weak gender discrimination laws and lack of childcare solutions."[22] According to a 2013 report by the United Kingdom's House of Commons Library, nearly "14 [percent] of the 340,000 women who take maternity leave" in the UK each year find their jobs threatened upon return.[23] The Business, Innovation and Skills Committee of the House of Commons also reported in 2012 that

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16. *Id.*

17. *See id.* at 153 (describing managers' explanations for "why women were not promoted as often as males").

18. *Id.*

19. *Id.*

20. *See* Amy J. C. Cuddy & Elizabeth Baily Wolf, *Research Symposium: Prescriptions and Punishments for Working Moms: How Race and Work Status Affect Judgments of Mothers*, HARV. BUS. SCH. GENDER & WORK: BACKLASH & THE DOUBLE BIND, 2013, at 4–6, *available at* http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/cuddy.pdf [http://perma.cc/C6JC-LPHE] (archived Sept. 10, 2014) (providing studies that have evaluated perceptions of mothers in the workplace in comparison to men and women without children).

21. *See, e.g.*, *Maternity Protection: Not Just a Personal Issue*, INT'L LABOUR ORG. [ILO] (Nov. 23, 2012), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_193975/lang--en/index.htm (last visited Aug. 31, 2014) [http://perma.cc/WP86-UA5K] (archived Sept. 10, 2014) ("ILO research has uncovered cases of women being harassed and sacked after becoming pregnant, women being made to sign pledges that they will not become pregnant, being forced to undergo pregnancy tests by their employers and being denied paid maternity leave.").

22. *Id.*

23. Oliver Wright, *Mind the Maternity Gap: 50,000 Women a Year Don't Get Jobs Back After Taking Leave*, INDEPENDENT (U.K.), Aug. 27, 2013, http://www.independent.co.uk/news/uk/home-news/mind-the-maternity-gap-50000-women-a-year-dont-get-jobs-back-after-taking-leave-8785059.html (last visited Aug. 31, 2014) [http://perma.cc/5HJ4-EVB4] (archived Sept. 10, 2014).

"an estimated 30,000 [UK] women . . . lost their jobs as a result of pregnancy discrimination," a staggering "8% of all pregnant women in the workforce." [24] The Canadian Saskatchewan Human Rights Commission reports that 10 percent of workplace discrimination complaints cite to pregnancy discrimination.[25]

Recognizing the problem with maternity discrimination, nearly every country in the world has implemented workplace parental protections. Most prominently, every country in the world has implemented paid maternity leave except for Suriname, Papua New Guinea, and the United States.[26] Three international instruments—the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the International Labour Organization's Workers with Family Responsibilities Convention of 1981, and the International Labour Organization's Maternity Protection Convention of 2000—address the right to paid maternity leave and other protections. The benefits of paid maternity leave regimes—including long-term child health, [27] maternal mental health,[28] decreased dependence on public social welfare programs,[29] greater likelihood that women will return to work, [30] and social

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24. BUSINESS, INNOVATION AND SKILLS COMMITTEE, WRITTEN EVIDENCE SUBMITTED BY MATERNITY ACTION, 2012, H.C., ¶ 4.2 (U.K.) *available at* http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342vw27.htm (last visited Sept. 10, 2014) [http://perma.cc/S3UM-DG4Z] (archived Sept. 10, 2014).

25. *See* ILO, *Maternity Protection*, *supra* note 21 ("The Saskatchewan Human Rights Commission in Canada says that one in ten workplace complaints of discrimination is related to pregnancy.").

26. For an interactive map showing maternity leave policies around the world, see *Is Paid Leave Available for Mothers of Infants?*, WORLD POLICY ANALYSIS CTR., http://worldpolicyforum.org/global-maps/is-paid-leave-available-for-mothers-of-infants/ (last visited Aug. 31, 2014) [http://perma.cc/VD24-TNYY] (archived Sept. 10, 2014) [hereinafter WORLD POLICY ANALYSIS].

27. *See* Christopher J. Ruhm, *Parental Leave and Child Health* 4, 18–21, 28 (Nat'l Bureau of Econ. Research, Working Paper No. 6554, 1998), *available at* http://www.nber.org/papers/w6554 [http://perma.cc/HR2J-CW2S] (archived Sept. 10, 2014) (finding a substantial negative correlation between maternity leave and postneonatal fatalities and discussing the beneficial effect of maternity leave on child health).

28. *See* Pinka Chatterji & Sara Markowitz, *Does the Length of Maternity Leave Affect Maternal Health?*, 8, 19–27 (Nat'l Bureau of Econ. Research, Working Paper No. 10206, 2004), *available at* http://www.nber.org/papers/w10206 [http://perma.cc/HB9Z-T3TS] (archived Sept. 10, 2014) (finding that longer maternity leave "may reduce the number or frequency of depressive symptoms").

29. *See Rutgers Study Finds Paid Family Leaves Leads to Positive Economic Outcomes*, RUTGERS TODAY (Jan. 19, 2012) [hereinafter Rutgers Study], http://news.rutgers.edu/news-releases/2012/01/rutgers-study-finds-20120118#.UnkIpXFJuCg (last visited Aug. 31, 2014) [http://perma.cc/S4Q-YYAJ] (archived Sept. 10, 2014) ("[W]omen who take paid leave are 39 percent less likely to receive public assistance and 40 percent less likely to receive food stamps in the year following a child's birth, when compared to those who do not take any leave.").

30. *See id.* (noting "that women who use paid leave are far more likely to be working nine to 12 months after a child's birth than those who do not take any leave"); Olivier Thévenon & Anne Solaz, *Labour Market Effects of Parental Leave Policies in*

morality[31]—made these regimes an attractive option for combatting maternity discrimination. Yet, despite global efforts, discrimination persists. In short, professional women all over the world are finding themselves on the proverbial "mommy track"[32]—working shorter hours with fewer responsibilities, lower pay, and less chance of advancement[33]—despite the many levels of protection offered in different paid regimes.

Paid maternity leave is not enough to solve the problems of maternity discrimination, gender inequality in the workplace, and lack of representation of women in leadership. Recent research shows that the biggest effect of paid maternity leave may be a nod to the idea of equality and inclusion, more than an actual tool for it.[34] Without sufficient antidiscrimination legislation behind paid leave regimes, most nations with paid leave have been as helpless as the United States in attempting to stop the discrimination that women often face when returning to work.

This Note examines the benefits and failures of existing maternity protection regimes and proposes a new solution rooted in

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OECD Countries ¶¶ 2, 31–32, 36, 64–67 (OECD Soc. Emp't & Migration Working Papers, No. 141, 2013), *available at* http://www.oecd-ilibrary.org/social-issues-migration-health/labour-market-effects-of-parental-leave-policies-in-oecd-countries_5k8xb6hw1wjf-en [http://perma.cc/4GZX-UZEY] (archived Sept. 10, 2014) (finding that extensions of paid maternal leave lead to slightly higher female employment rates).

31. *See* Lisa Belkin, *The Only Argument for Paid Maternity Leave: 'Because It Is Right'*, HUFFINGTON POST (Nov. 6, 2013, 6:02 PM), http://www.huffingtonpost.com/2013/11/06/argument-for-paid-maternity-leave_n_4228669.html (last visited Aug. 31, 2014) [http://perma.cc/XBR2-67US] (archived Sept. 10, 2014) (arguing that the rightness of paid maternity leave supersedes economic and social justifications).

32. The phrase "mommy track" was popularized after the publication of an article in the Harvard Business Review by feminist writer and activist for corporate women Felice N. Schwartz. Schwartz proposed that employers create two career "tracks" for their employees, one for people dedicated to their careers and one for those with family responsibilities who wanted extra flexibility. *See* Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., 65, 69–71 (1989). While Schwartz did not use the phrase "mommy track," the phrase was subsequently coined in a *New York Times* story reporting on the debate over proper work-life balance following the article. *See* Tamar Lewin, *'Mommy Career Track' Sets Off a Furor*, N.Y. TIMES, Mar. 8, 1989, http://www.nytimes.com/1989/03/08/us/mommy-career-track-sets-off-a-furor.html [http://perma.cc/JN7T-UQ6A] (archived Sept. 10, 2014) (discussing the various reactions to Schwartz's article, including some who see "a great danger in expanding the 'mommy track,' in which women with family responsibilities are shunted into dead-end, lower-paying jobs"). The phrase, which was originally meant to describe Schwartz's proposal for accommodation of family responsibilities for women who *chose* this second path, has come to be used mainly to describe the frustration women feel at the inability to maintain their careers after becoming mothers.

33. *See* Lewin, *supra* note 32 (proposing putting women on either a career-oriented track or a family-focused track and suggesting that a woman on the family track would be "valuable to the company for her willingness to accept lower pay and little advancement in return for a flexible schedule").

34. *See* Yehonatan Givati & Ugo Troiano, *Law, Economics, and Culture: Theory of Mandated Benefits and Evidence from Maternity Leave Policies*, 55 UNIV. CHI. J.L. & ECON. 339, 341–49, 353–55 (2012) (finding a correlation between a language's use of gender neutral pronouns, gender equality, and the length of maternity leave).

existing domestic and international antidiscrimination legislation. The Note focuses on three maternity leave regimes: the United States, United Kingdom, and Sweden. Part II outlines the factual background of the maternity discrimination problem, including the social, health, and economic consequences for women and the history and effectiveness of paid maternity leave as a solution. Part III analyzes the different protection regimes that have been implemented to fight discrimination, both international and domestic, and the successes and failures of each. Part IV proposes a new reform, the Global Maternity Protection Act, a model law that draws from the best domestic and international proposals and can be adopted by every state and modified to their unique needs. Drawing from the best features of existing maternity protection regimes, the proposed Global Maternity Protection Act would thus be the most comprehensive maternity protection system in practice.

II. FACTUAL BACKGROUND

For the purposes of this Note, maternity discrimination is defined as inequitable workplace treatment of women with children as compared to other workers, including both women without children and men.[35] The problems with maternity discrimination are threefold. First, discrimination adds to societal gender inequality.[36] Second, women are often forced to make parenting decisions based on their fear of workplace discrimination, decisions that have a serious, long-lasting impact on the physical and mental health of both mother and child. [37] Third, empirical data shows that maternity discrimination has a negative impact on the mother—the so-called "motherhood penalty"—as well as on the wider economy.[38] This Part analyzes these problems as well as the history and efficacy of paid maternity leave as a solution to these problems.

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35. *Cf.* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 11, U.N. Doc. A/Res/34/180 (Dec. 18, 1979) [hereinafter CEDAW], *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm [http://perma.cc/75JF-WN6G] (archived Sept. 10, 2014) (urging State Parties to prohibit discrimination based on pregnancy, maternity leave, or marital status).

36. *See infra* Part II.A (indicating that maternity discrimination undermines women's position in society).

37. *See id.* (discussing the increased health risks to mother and child associated with delaying child bearing).

38. *See* T. Hogart & P. Elias, *Pregnancy Discrimination at Work: Modelling the Costs* (Manchester: Equal Opportunities Comm'n, Working Paper No. 39, 2005) (finding substantial cost to employers and the state for maternity discrimination); *see also infra* Part II.A (discussing the negative economic impacts of maternity discrimination on the mother and overall economy).

A. *The "Motherhood Penalty" and Other Problems of Maternity Discrimination*

As detailed in the Part I, the overarching problem of maternity discrimination is a lack of career stability and advancement for women. This lack of stability and advancement has broad consequences not only for the women affected but also for the wider economy and society.

First, maternity discrimination is a basic human rights concern. Building on the foundational affirmation of universal equality in the United Nations Universal Declaration of Human Rights, [39] international actions such as the UN's adoption of the Convention on the Elimination of All Forms of Discrimination Against Women[40] and the establishment of the United Nations Entity for Gender Equality and the Empowerment of Women[41] show that gender equality is a global policy priority. In addition to these global initiatives, numerous regional agreements and associations, including the Charter of Fundamental Rights of the European Union,[42] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women,[43] and Inter-American Commission of Women,[44] recognize the importance of gender equality. Many states have adopted independent standards for gender equality as well. [45] Maternity

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39. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III), art. 2 (Dec. 10, 1948) (recognizing a universal entitlement for individuals to certain human rights "without distinction of any kind").

40. *See* CEDAW, *supra* note 35. ("[T]he States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.").

41. *See* UN WOMEN, *About UN Women*, http://www.unwomen.org/en/about-us/about-un-women (last visited Feb. 26, 2014) [http://perma.cc/53J4-KZHP] (archived Aug. 29, 2014) (asserting UN member states took a "historic step" in promoting gender equality with the creation of the entity).

42. *See* Charter of Fundamental Rights of the European Union, art. 23, 2000 O.J. (C 364) 1, *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf [http://perma.cc/3NJF-BAYC] (archived Aug. 29, 2014) (affirming that "equality between men and women must be ensured in all areas, including employment, work and pay").

43. *See* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, July 11, 2003, at 2, *available at* http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf [http://perma.cc/KT58-WTNL] (archived Aug. 29, 2014) (emphasizing the Protocol's aim of "[r]eaffirming the principle of promoting gender equality as enshrined in in the Constitutive Act of the African Union") (emphasis omitted).

44. *See CIM Mission and Mandate*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/cim/about.asp (last visited Feb. 26, 2014) [http://perma.cc/XCL8-V8XU] (archived Aug. 29, 2014) (stating that "the Inter-American Commission of Women (CIM) was the first inter-governmental agency established to ensure recognition of women's human rights").

45. *See Gender Equality Laws*, IWRAW ASIA PACIFIC, http://www.iwraw-ap.org/laws/genderequalitylaws.htm#list (last visited Feb. 26, 2014) [http://perma.cc/U6CG-K6PL] (archived Aug. 29, 2014) (listing gender equality laws by state).

discrimination undermines these policies not only because maternity discrimination is de facto gender discrimination but also because it undermines the traditional tools for fighting for human rights, including economic development and political action, by lessening women's power in society.[46]

Second, maternity discrimination impacts women's choices about parenting, often with negative consequences. In 2011, the world average age for women at the birth of their first child was between twenty-seven and twenty-eight, while the most recent U.S. average is twenty-five.[47] In the United States, the labor force participation rate of women with children under age eighteen peaked in 2000 at 73 percent, up from approximately 47 percent in 1975.[48] According to the Organisation for Economic Co-operation and Development (OECD),[49] in 2011, the median age of mothers at the birth of their first child was nearly twenty-eight.[50] In 2013, the labor force participation rate for women aged 25–29 was 81.9 percent, 77.2 percent, and 73.6 percent for Sweden, the UK, and the United States, respectively.[51] Based on these numbers, one can assume that the majority of new mothers in

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46. *See infra* Part II.B; Sabin Bieri & Annemarie Sancar, *Power and poverty. Reducing Gender Inequality By Ways of Rural Development?*, FAO-IFAD-ILO Workshop, 27 (2009), *available at* http://www.oecd.org/social/gender-development/42806451.pdf (last visited Oct. 11, 2014) (focusing on economic development as a tool for gender equality and suggesting three fields of action for achieving gender equality: political participation, economic participation and decision making, and social protection).

47. *See* OECD FAMILY DATABASE, *Mean Age of Mothers At First Childbirth* (July 2014), http://www.oecd.org/els/soc/SF_2_3_Mean_age_of_mother_at_first_childbirth_Jul2014.pdf (last visited Sept. 10, 2014) [http://perma.cc/6UEV-H68A] (archived Sept. 10, 2014) [hereinafter OECD, *Mean Age of Mothers*] (comparing the "[m]ean age of women at the birth of the first child" in 2011 from a variety of states and noting that the statistical information for the United States was from 2008).

48. Bureau of Labor Statistics, *Labor Force Participation Rates Among Mothers*, U.S. DEP'T OF LABOR (May 7, 2010), http://www.bls.gov/opub/ted/2010/ted_20100507.htm (last visited Feb. 26, 2014) [http://perma.cc/922A-VBEW] (archived Aug. 29, 2014).

49. Founded in 1961, the OECD brings together 34 member countries "to help governments foster prosperity and fight poverty through economic growth and financial stability." Because all three states profiled in this Note are members of the OECD, OECD reports and statistics are relied on throughout. *See History*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/ history/ (last visited Feb. 26, 2014) [http://perma.cc/P7ZB-ZV9K] (archived Aug. 29, 2014); *What We Do and How*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/whatwedoandhow/ (last visited Feb. 26, 2014) [http://perma.cc/ZAX9-VQS6] (archived Aug. 29, 2014).

50. OECD, *Mean Age of Mothers*, *supra* note 47 (finding that, in 2011, mothers in OECD countries had their first child between the ages of 27 and 28).

51. OECD StatExtracts, *Labor Force Statistics by Sex and Age – Indicators*, *available at* http://stats.oecd.org/Index.aspx?DatasetCode=LFS_SEXAGE_I_R (last visited Oct. 11, 2014) [http://perma.cc/T5AD-MZ85] (archived Oct. 22, 2014) (showing graph providing the employment/population ratio, labor force participation rate, and unemployment rate from 2000–2013 for every OECD state).

Sweden, the UK, and the United States are likely to be in the labor force when their children are born.[52]

In the United States, median maternal age at first birth rose over roughly the same time frame as mothers' participation in the workforce.[53] In 1970, the median age of a new mother was twenty-two; by 2006, it was twenty-five.[54] Over the same period, the number of first-time mothers over the age of thirty-five increased nearly eight times, from one in 100 births to one in twelve.[55] These numbers may suggest that many women are choosing to postpone having children rather than having them early in their careers. A recent national study showed that most women spent an average of five years on the job before becoming pregnant.[56] For women working in salaried positions, the average age at first birth was thirty-one.[57] The decrease in women's pay and career advancement over a similar age range[58] could suggest that worries about career impact are part of the calculation. Indeed, research from Northeastern University has shown that women who wait longer to have children make more money over their lifetimes.[59]

There is a dark side to waiting. Female fertility begins to drop around age twenty-five; by her late thirties, a woman's chances of

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52. *See supra* notes 47–49 and accompanying text (demonstrating that the birth of a woman's first child is likely to occur during the woman's mid- to late-twenties, an age when the majority of women in OECD countries are working).

53. *Compare* Bureau of Labor Statistics, *supra* note 48, (noting an increase in the participation of mothers in the workforce), *with* T.J. Matthews & Brady E. Hamilton, *Mean Age of Mother, 1970-2000*, 51 NAT'L VITAL STATISTICS REPS. No.1, Dec. 11, 2002, at 2, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf (last visited Sept. 24, 2014) [http://perma.cc/JLT6-KLBU] (archived Aug. 29, 2014) (providing a graph demonstrating the trend over the period between 1970–2000 of increasing average age of women at the time of their first child birth).

54. *Compare Median Age of Mother by Live-Birth Order*, CTR. FOR DISEASE CONTROL, http://www.cdc.gov/nchs/data/ statab/t941x05.pdf (last visited Feb. 26, 2014) [http://perma.cc/8YES-BCAV] (archived Aug. 29, 2014) (providing the 1970 statistic), *with Births: Final Data for 2011*, 62 NAT'L VITAL STATISTICS REPS. No. 1, June 28, 2013, at 2, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01_tables.pdf (last visited Sept. 15, 2014) [http://perma.cc/ZZ6E-4B4Y] (archived Sept. 15, 2014) (providing the 2006 statistic).

55. T.J. Matthews & Brady E. Hamilton, *Delayed Childbearing: More Women are Having Their First Child Later in Life*, NCHS DATA BRIEF NO. 21, 2009, at 2, *available at* http://www.cdc.gov/nchs/data/databriefs/db21.pdf.[http://perma.cc/68UU-LQL9] (archived Aug. 29, 2014).

56. *See* Jenna Goudreau, *When Should You Become a Mom?*, FORBES (Mar. 2, 2010, 9:00 AM), http://www.forbes.com/2010/03/01/family-career-working-mother-forbes-woman-time-best-age-to-have-children.html (last visited Feb. 26, 2014) [http://perma.cc/EU24-SL3U] (archived Aug. 29, 2014) (citing a study by Villanova University's Ginamarie Ligon-Scott on the average time women spent working before becoming pregnant).

57. *Id.*

58. *See supra* Part I.

59. *See* Goudreau, *supra* note 56.

conceiving can be as low as 52 percent.[60] At the same time as chances of conceiving begin to decline, the chances of complications climb: women in their forties have a one-in-seventy-five chance of fetal Down syndrome and a 50 percent chance of miscarriage.[61] Advanced maternal age has also been linked to significantly higher rates of autism. [62] According to a decade-long study conducted at the University of California, Davis, the chances of autism increase by 18 percent for every five-year increase in maternal age, so that a child born to a woman over forty had a 50 percent greater chance of developing autism than a child born to a woman in her late twenties.[63] Advanced maternal age has also been linked to a variety of other birth-related conditions, including low birth-weight, chromosomal aberrations, and congenital abnormalities.[64] In short, women's decisions to put off having children in order to further their career goals may have significant medical consequences.

Finally, and perhaps with the most universal appeal, is the economic burden of the "motherhood penalty." Studies suggest that, on average, women suffer a wage penalty of 5 percent per child, a reduction that cannot be accounted for by human capital or occupational factors.[65] According to the Pew Research Center, in 2012 women's hourly wages were, on average, 84 percent of what men made in the same job.[66] For young women ages 25–34, the pay gap is closer to 93 percent. [67] Because motherhood is a factor in this disparity, this likely means that the pay gap between non-mothers and mothers is roughly the same as between non-mothers and men—9 percent versus 7 percent.[68]

Another poll from the nonprofit group Family Inequality showed women's wages as a percentage of men's, adjusted for two variables:

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60. *Id.* (noting that "at the ages of 35 to 39" a woman "ha[s] only a 52% likelihood of becoming pregnant in the first year of trying").

61. *Id.*

62. *See* Univ. of Calif. Davis Health Sys., *Link Between Advanced Maternal Age and Autism Confirmed*, SCIENCE DAILY (Feb. 10, 2010), http://www.sciencedaily.com/releases/2010/02/100208102411.htm (last visited Feb. 26, 2014) [http://perma.cc/C4H5-C28B] (archived Aug. 29, 2014) (citing Janie F. Shelton, Daniel J. Tancredi & Irva Hertz-Picciotto, *Independent and Dependent Contributions of Advanced Maternal and Paternal Ages to Autism Risk*, AUTISM RESEARCH (2010)).

63. *Id.*

64. *See id.* ("Earlier studies have observed that advanced maternal age is a risk factor for a variety of other birth-related conditions, including infertility, early fetal loss, low birth-weight, chromosomal aberrations and congenital anomalies.").

65. *See* Cuddy, *supra* note 20, at 4.

66. *On Pay Gap, Millennial Women Near Parity—For Now*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (Dec. 11, 2013), http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/ (last visited Feb. 26, 2014) [http://perma.cc/YR27-JWHW] (archived Aug. 29, 2014).

67. *Id.*

68. *See id.* (stating that motherhood is one factor for the disparity in pay for women aged 25–34 and women over 34).

children and education.[69] While average wages for women hovered at approximately 70–80 percent of men's at every education level, there was a stark difference between the overall average for women and women in the "never married, no kids" category.[70] Women in the latter category earned between 83 and 93 percent of what men did, compared to the overall average of between 71 and 79 percent.[71] Having no children was a greater indicator of wage equality even than working more than fifty hours a week.[72] The data also suggests that even women who do not yet have children might be suffering from the early effects of the motherhood penalty: while the income parity was better for the category containing women who were married but childless, it was still lower than that for unmarried, childless women, at between 80 and 87 percent of comparable men's salaries.[73] This data suggests that even the possibility of impending motherhood, as suggested by marriage, may be an economic penalty to women.[74]

These demonstrable economic penalties to motherhood not only threaten the economic stability of these women but also have a negative impact on the economy as a whole. A 2011 McKinsey study showed that increasing women's participation in the U.S. workforce to a level more comparable to Sweden's could add 3 to 4 percent to the size of the U.S. economy.[75] Moreover, economists theorize that, because women are more likely to spend additional income, the cumulative effect of closing the pay gap "could be extremely

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69. *See* Belinda Luscombe, *Ten Things You Didn't Know About the Gender Gap*, TIME (Nov. 11, 2013), http://healthland.time.com/2013/11/11/ten-things-you-didnt-know-about-the-gender-gap/ (last visited Feb. 26, 2014) [http://perma.cc/J5RT-8LGW] (archived Aug. 29, 2014) (displaying women's median earnings as a proportion of men's, by education in graph 2) (citing *2011 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S0201&prodType=table (last visited Nov. 7, 2014) [http://perma.cc/C4QS-3FN2] (archived Nov. 7, 2014)).

70. *See id.* (displaying the gap in earnings between single and married women as well as married with children women in graph 2).

71. *Id.*

72. *See id.* (showing on graph 1 that women working 49–59 hours per week earned 87.3 percent as much as male counterparts, while women working over 60 hours per week earned 85 percent as much as men).

73. *See id.* (finding that across all education levels, married women with no children in this study earned less than their female single peers who also did not have children).

74. *See id.* (explaining that "[m]arital status has more influence on the wage differential between men than education does" and that having kids increases the wage differential).

75. See Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy*, WALL STREET JOURNAL EXECUTIVE TASKFORCE FOR WOMEN IN THE ECONOMY 2011, 2011, at 4, *available at* http://www.mckinsey.com/careers/women/Insights_and_publications/~/media/Reports/Women/ExecSummWSJPreviewSpecialReport.ashx [http://perma.cc/B8BK-QGSD] (archived Oct. 22, 2014).

important in terms of products purchased and jobs created."[76] In short, "[i]f you're not using your human resources to your full capacity, you're leaving money on the table."[77]

Keeping in mind the problems of maternity discrimination that maternity protections are designed to combat, Part II.B examines, first, the history of paid maternity leave as the major mechanism of protection in modern maternity protection regimes and, second, its effectiveness in combatting these problems.

B. *From Paternalism to Parity: The History of Paid Maternity Leave Reform*

Maternity leave began as a function of industrialization in Europe in the mid- to late-nineteenth century.[78] High infant mortality rates proliferated during the early industrial revolution, most likely as a function of urbanization and unsafe methods of artificial feeding for mothers who were unable to breastfeed.[79] Contemporaries posited that the high rates of infant deaths were due to the increasingly large percentage of women working outside the home, under the dual theories that married women working outside the home was a general threat and that working-class women were ignorant and incapable of proper childcare.[80] These attitudes were typical of Victorian morality, which held that a woman's proper place was the domestic sphere; thus, "the assumption that a working mother entailed a neglected child was sacrosanct."[81]

Calls for maternity leave began in the late nineteenth century largely out of concern for the welfare of the child rather than any concern for the working conditions of the mother.[82] A paper delivered at the 1892 Annual Meeting of the British Medical Association that claimed to link maternal employment to infant mortality rates defined the literature on infant mortality for the next two decades.[83]

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76. Laura Bassett, *Closing the Gender Wage Gap Would Create "Huge" Economic Stimulus, Economists Say*, HUFFINGTON POST (Oct. 24, 2012), *available at* http://www.huffingtonpost.com/2012/10/24/gender-wage-gap-economic-stimulus_n_2007588.html (last visited Oct. 11, 2014) [http://perma.cc/U6V4-GVVF] (archived Oct. 22, 2014).

77. *Id.*

78. *See* Carol Dyhouse, *Working Class Mothers and Infant Mortality in England, 1895-1914*, 12 J. SOC. HIST. 248 253–54 & n.2 (1978) (highlighting the push in industrialized England to reduce its infant mortality rate among working women).

79. *See id.* at 251 (noting a correlation between the infant mortality rate and inadequate forms of sewage disposal as well as artificial breastfeeding).

80. *See id.* (noting a commonly held assumption of the time that a working mother meant a neglected child).

81. *Id.*

82. *See id.* at 252 (citing a study focusing on infant mortality in the county of Staffordshire).

83. *See id.* (describing how the paper led to a resolution presented to Parliament).

In England, the First National Conference on Infant Mortality of 1906 issued resolutions calling for the government "to extend . . . a legal prohibition on the industrial employment of women" for three months after childbirth.[84] By that time, Germany had already adopted a compulsory maternity leave law, in 1883; Sweden came next in 1891.[85] In 1919, the International Labour Organization (ILO) (then an organization of the League of Nations) made a multinational recommendation "advocat[ing] three fundamentals of maternity protection: a leave period, cash benefits, and job protection."[86] Outside Europe, in 1910, the International Feminist Congress meeting in Buenos Aires, Argentina, put forward a comprehensive program that called for women's suffrage, access to education, and wide-ranging social legislation to protect working women.[87] However, the primary motivation for these laws continued to be protectionist rather than feminist.[88]

It was not until the 1960s that maternity leave evolved from a policy designed to prohibit women from working shortly after childbirth to one meant to offer new parents time off with their newborn as well as job security.[89] During the next two decades, countries that already had leave requirements added job protections, while other states enacted new regimes providing job-protected maternity leave.[90] This shift in goals can be traced through the revisions in the Maternity Protection Conventions of 1919, 1952, and 2000.[91] The 1919 convention required that "a woman shall not be *permitted* to work during the six weeks following her confinement," reflecting the predominant focus on paternalism, and permitted employers to dismiss women if their absence exceeded six weeks or gave rise to an illness "rendering her unfit for work," evidencing a

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84. *Id.* at 253–54.

85. *See* Christopher J. Ruhm & Jackqueline L. Teague, *Parental Leave Policies in Europe and North America* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 5065, 1995), *available at* http://www.nber.org/papers/w5065.pdf [http://perma.cc/3GEU-4RTV] (archived Aug. 29, 2014) (discussing the spread of legislated maternity leave across Europe).

86. *Id.*

87. *See A Brief History of the Inter-American Commission on Women*, ORGANIZACIÓN DE LOS ESTADOS AMERICANOS [ORGANIZATION OF AMERICAN STATES], http://www.oas.org/en/cim/history.asp [http://perma.cc/7QT3-U894] (archived Aug. 29, 2014) (describing the creation of the Pan American Association for the Advancement of Women).

88. *See* Ruhm & Teague, *supra* note 85, at 2–3 (noting that the laws were focused on "the health of the child and the mother" and were meant to "restore women to their 'proper' roles as mother and wife").

89. *See id.* at 3 (noting the shift towards promotion "of time off work to care for newborns" and "job security for parents").

90. *See id.* ("Portugal, Spain, Finland and Canada instituted job-protected leave during the 1969-71 period.").

91. *See* discussion *infra* Part III.B(iii) (detailing the Maternity Protection Convention of 2000); *infra* note 278 and accompanying text (summarizing the requirements of the 1919 and 1952 Conventions).

lack of concern with job security.[92] By 1952, the convention had adopted the term "maternity leave" for a period of twelve weeks, with at least a six-week mandatory leave.[93] While both these changes may suggest a more liberal view of the purposes of maternity leave than the 1919 convention, the 1952 convention allowed for dismissal of employees on leave without the limiting justifications present in the 1919 convention, thus providing even less job security.[94] The 2000 convention lengthened the leave period to fourteen weeks, with six weeks of compulsory leave, and reversed the prior conventions' positions on dismissal by affirmatively stating "[i]t shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave," evidencing concern both for giving women more leave and for job security after leave.[95]

The endurance of compulsory leave laws through this shift has left lingering questions about the motivation of these laws: do they stand as part of a paternalistic desire to ensure women fulfill their roles as mothers,[96] or do they offer additional job security protections for women who might otherwise feel pressured to return to work early? Today, nearly all industrialized nations offer periods of maternity leave, which may or may not be compulsory, along with income support.[97]

Paid leave has been effective in combatting many aspects of the problems detailed in Part II.A. Some commentators view social morality as the ultimate purpose of offering paid maternity leave,[98] in line with the shifting purposes behind the laws beginning in the 1960s. As for health, the provision of paid parental leave has been linked to a number of positive health outcomes for both mothers and children. A 2004 study of U.S. mothers found that returning to work

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92. *See* ILO, C003 – Maternity Protection Convention, 1919 (No. 3) arts. 3(a), 4, Oct. 29, 1919 [hereinafter 1919 MPC] (emphasis added), *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C003 [http://perma.cc/S6EF-7N77] (archived Oct. 23, 2014).

93. *See* ILO, C103 – Maternity Protection Convention (Revised), 1952 (No. 103) art. 3(2)–(3), June 28, 1952 [hereinafter 1952 MPC], *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C103 [http://perma.cc/SU2N-RX9Z] (archived Oct. 23, 2014).

94. *See id.* art. 6.

95. *See* ILO, C183 – Maternity Protection Convention, 2000 (No. 183) arts. 4(1), 4(4), 8(1), June 15, 2000, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 [http://perma.cc/W2PV-BPJG] (archived Oct. 23, 2014).

96. *See* Ruhm & Teague, *supra* note 85, at 2–3 (noting that the laws were meant to "restore women to their 'proper' roles as mother and wife").

97. *See id.* ("Income support is provided during the leave period in almost all industrialized countries, with wage replacement rates generally exceeding 50% and often surpassing 80%.").

98. *See, e.g.*, Belkin, *supra* note 31 (arguing that economic considerations should not enter into a decision to provide paid maternity leave but that "[t]he only real reason is because it is right").

later may reduce the quantity and frequency of depressive symptoms in new mothers.[99] Moreover, a twenty-five year study of nine European countries found that more generous leave policies substantially reduced the risk of death for infants and young children,[100] echoing the original purpose behind maternity leave policies, and concluded that parental leave may be a cost-effective way of bettering child health.[101] This conclusion highlights both the health and economic benefits of maternity leave policies.[102]

Similarly, a twelve-year U.S. study concluded that providing maternity leave was an economic benefit to both families and businesses. The study found that women who use[d] paid leave were significantly more likely to be back at work nine to twelve months following childbirth and reported increased wages.[103] Researchers also discovered lower costs to businesses "in the form of employee replacement costs" and lower costs to the government due to decreased dependence on public social welfare programs.[104] A forty-year study of OECD countries confirmed this positive impact on women's ability to return to work on an international scale, finding a positive influence on female employment rates, on the gender ratio in employment, and on the average number of hours worked by women relative to men for leave policies of no more than two years.[105]

However, paid leave policies have not been without their problems. As discussed above, there is a debate about whether compulsory leave policies reflect a continued paternalistic motive of the state to force a woman into her "traditional role."[106] Moreover, the same examination of OECD findings cited above also found that the provision of paid leave "widen[ed] the earnings gender gap among full-time employees."[107] Commentators have pointed out that even in countries like Sweden, where paid leave policies are most generous

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99. *See* Chatterji, *supra* note 28, at 26–27 ("The results suggest that longer leave from work is associated with considerable declines in depressive symptoms.").

100. Ruhm, *Parental Leave and Child Health*, *supra* note 27, at 2, 18–19 (describing the study and finding that "[p]arental leave is estimated to have a substantial negative effect on infant mortality").

101. *See id.* at 28 ("This analysis leads considerable credence to the view that parental leave has favorable and possibly cost-effective impacts on pediatric health.").

102. *See id.* at 25–32 (discussing the relationship between economic and health benefits of parental leave).

103. *See* Rutgers Study, *supra* note 29.

104. *Id.*

105. *See* Thévenon, *supra* note 30, ¶¶ 2, 12, 32, 65, 68–70, 80–81 (finding positive influence of short-term paid leave on female employment indicators at a macro level).

106. *See* Ruhm & Teague, *supra* note 85, at 3 ("Often the motivation for the policies was to restore women to their 'proper' roles as mother and wife.") (footnote omitted) (citing Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States*, *in* ZIGLER AND FRANK, THE PARENTAL LEAVE CRISIS 3–22 (1988)).

107. *See* Thévenon, *supra* note 30, ¶¶ 2, 79, 82.

and most successful, the majority of women work in the public sector and are even more unrepresented in corporate management than in the United States.[108]

Taken together, the history, successes, and failures of modern maternity leave programs offer three conclusions. First, the modern maternity leave system is a vestige of a scheme developed over a century and a half ago with very different policy goals than today. Nonetheless, the modern goals of maternity leave, including gender equality, children's and maternal health, and economic development, continue to be served by periods of extended, paid maternity leave. However, paid maternity leave alone is not an effective policy for providing long-term equality or economic benefits to professional women. This makes sense given that the initial Victorian framers of maternity leave regimes never envisioned a system aimed at achieving gender goals of any kind, much less equality.[109] Thus, a successful scheme of maternity protection must include not only maternity leave but other protections as well. Part III examines different types of maternity protection regimes, both domestic and international in scope, to determine what works and what does not.

III. ANALYSIS

As discussed in Part II.A, gender equality and the need for maternity protection have been recognized repeatedly on the international stage as human rights concerns. Numerous domestic and international solutions have been proposed. Part III.A discusses maternity protection regimes of three countries, including provisions for both maternity leave and other protections, to determine the most and least successful parts of each. Part III.B offers a discussion of

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108. *See infra* Part III.A(iii) (discussing the benefits and problems of Sweden's regime); *We Did It!: The Rich World's Quiet Revolution: Women are Gradually Taking Over the Workplace*, ECONOMIST (Dec. 30, 2009) [hereinafter *We Did It!*], *available at* http://www.economist.com/node/15174489 (last visited Aug. 31, 2014) [http://perma.cc/TTW6-9G9P] (archived Sept. 11, 2014) (noting that the Scandinavian countries "have the highest levels of female employment in the world and far fewer of the social problems that plague Britain and America"); Organisation for Economic Co-operation and Development [OECD], *Closing the Gender Gap: Act Now – Sweden*, OECD Country Note (Dec. 17, 2012) [hereinafter *Closing the Gender Gap*], *available at* http://www.oecd.org/sweden/Closing%20the%20Gender%20Gap%20-%20Sweden%20FINAL.pdf (last visited Aug. 29, 2014) [http://perma.cc/P4VV-FWQB?type=pdf] (archived Aug. 29, 2014) (summarizing Sweden's policies and showing the workforce participation rate of women in Sweden, including in senior management).

109. *See* Carolyn Malone, *The Gendering of Dangerous Trades: Government Regulation of Women's Work in the White Lead Trade in England, 1892-1898*, 8 J. WOMEN'S HIST. 15, 26–30 (1996) (explaining that regulations of women's labor during the Victorian period, which were based on morality, women's health, infant mortality, and motherly duties, were designed to severely limit women's work and ultimately force women back into the home).

three international conventions that speak to maternity and their successes and failures.

A. *Domestic Efforts*

Nearly every state mandates that employers offer some kind of maternity leave.[110] These regimes have four significant categories, variations in which set one system apart from another: (1) the percentage of their salaries women continue to receive (ranging from 100 percent of normal salary[111] to federal minimum wage[112]), (2) the amount of time and flexibility offered (from sixty days[113] to 480 days,[114] with time sometimes offered both before and after birth[115]), (3) who actually pays the benefit (the employer [116] or social security[117]), and (4) whether the benefit is also available to spouses and co-parents.[118]

The three states discussed here are representative of the major variations in these four features. The Family and Medical Leave Act (FMLA) is representative of low-protection regimes and reflects only category (2), requiring that employers offer at least twelve weeks of leave for general family and medical situations, including the birth of a child.[119] Employers who choose to pay benefits do so themselves.[120] The United Kingdom's Maternity and Parental Leave Regulations of 1999 represent all four categories: women receive (1) both a percentage of their salary and a flat fee, (2) up to one year of leave, (3) benefits are paid by employers, and (4) parental leave is available to

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110. *See* WORLD POLICY ANALYSIS, *supra* note 26 (indicating that the United States, Suriname, and Papua New Guinea are the only three countries that have no paid maternity leave).

111. *See* Alyson Hurt, Erin Killian & JoElla Straley, *Time with a Newborn: Maternity Leave Policies Around the World*, NPR (Aug. 8, 2011, 3:58 PM), http://www.npr.org/2011/08/09/137062676/time-with-a-newborn-maternity-leave-policies-around-the-world (last visited Feb. 26, 2014) (subscription required) [http://perma.cc/KN78-SD9V?type=image] (archived Sept. 15, 2014) (indicating that China and Russia have policies of this nature).

112. *See id.* (indicating that Australia has a policy of this nature).

113. *See id.* (indicating that Mozambique and Malaysia have policies of this nature).

114. *See id.* (indicating that Sweden has a policy of this nature).

115. *See id.* (indicating that Croatia has a policy of this nature).

116. *See id.* (indicating that Saudi Arabia and Syria have policies of this nature).

117. *See id.* (indicating that France and Sweden have policies of this nature).

118. *See id.* (indicating that Norway has a policy of this nature).

119. *See Family and Medical Leave Act*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/fmla/ (last visited Aug. 31, 2014) [http://perma.cc/S54U-MUKQ] (archived Sept. 15, 2014) (providing an overview of the Family and Medical Leave Act).

120. *See generally* Kenneth Matos & Ellen Galinsy, *2012 National Study of Employers*, FAMILIES & WORK INST. (2012), http://familiesandwork.org/downloads/2012NationalStudyofEmployers.pdf (last visited Sept. 18, 2014) [http://perma.cc/Z9XR-KR8G] (archived Sept. 18, 2014).

both parents.[121] Sweden's Parental Leave Act of 1995 also represents all four categories, but on different terms than the UK's: women receive pay (1) at or near their full salary (2) for up to 480 days (3) to be paid by social security, (4) with part of that time reserved for use by their co-parent.[122] All three systems are discussed in detail below.

1. The United States

The United States does not have a national and comprehensive regulatory regime dealing with maternity leave and discrimination. Instead, four major federal statutes cover various pregnancy-related employment issues. The FMLA requires that employers offer at least twelve workweeks of leave per year for a number of family, caregiving, and medical situations, including the birth of a child and caring for the child within the first year after birth.[123] However, the FMLA does not require that this leave be paid. [124] Next, the Pregnancy Discrimination Act of 1978 (PDA) amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination in employment "on the basis of pregnancy, childbirth, or related medical conditions."[125] The PDA creates an actionable mandate that affected women "shall be treated the same for all employment-related purposes, including receipt of benefits."[126] Third, the Americans with Disabilities Act

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121. *See generally* Terms and Conditions of Employment: The Maternity and Parental Leave etc. Regulations 1999, 1999, S.I. No. 3312 (U.K.) [hereinafter UK Regulations], *available at* http://www.legislation.gov.uk/uksi/1999/3312/pdfs/uksi_19993312_en.pdf (last visited Sept. 18, 2014) [http://perma.cc/UJX2-4GMY] (archived Sept. 18, 2014) (indicating that parental leave is available and outlining parental leave rights); *Maternity Pay and Leave*, GOV.UK, https://www.gov.uk/maternity-pay-leave/overview (last updated July 29, 2014) [http://perma.cc/74MX-R4W5] (archived Sept. 11, 2014) (discussing the various forms of employee benefit programs employers offer).

122. *See generally* Föräledighetslag [Parental Leave Act] (Svensk författningssamling [SFS] 1995:584) (Swed.) [hereinafter Parental Leave Act], *available at* http://www.notisum.se/rnp/sls/lag/19950584.htm (last visited Sept. 19, 2014) [http://perma.cc/9FF8-6LTJ] (archived Sept. 19, 2014), *translated in* Parental Leave Act (1995:548), *available at* http://www.government.se/content/1/c6/10/49/85/f16b785a.pdf. [http://perma.cc/MYF6-V59Q] (archived Sept. 11, 2014) (outlining the availability of parental leave in Sweden); *Gender and Equality in Sweden*, SWEDEN.SE, https://sweden.se/society/gender-equality-in-sweden/ [http://perma.cc/YHE6-5QLP] (archived Sept. 11, 2014) (detailing the benefits available to parents under Sweden's maternity and paternity leave policy).

123. Family and Medical Leave Act, Pub. L. No. 103-3, § 102, 107 Stat. 6, 11 (1993) (amended 2009) [hereinafter FMLA] (setting forth the terms of the mandatory leave requirement).

124. *See id.* (failing to implement employer-paid leave requirements).

125. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012) [hereinafter PDA], *available at* http://www1.eeoc.gov//laws/statutes/pregnancy.cfm?renderforprint=1 (last visited Aug. 31, 2014) [http://perma.cc/87EG-V238] (archived Sept. 11, 2014).

126. See *id.* (setting forth legal protections for women affected by "pregnancy, childbirth, or related medical conditions").

(ADA) covers impairments relating to pregnancy that amount to temporary disabilities, including gestational diabetes and preeclampsia.[127] Supreme Court cases had previously limited an employee's ability to bring a disability claim based on pregnancy.[128] However, the ADA Amendments Act of 2008 (ADAAA) broadened the statutory definition of "disability," which had previously been narrowly interpreted by the Supreme Court, and made it easier to establish that a condition is a statutory disability.[129] It has been suggested that the enactment of the ADAAA might change this determination.[130] Most recently, in 2010, the passage of the Affordable Care Act included an amendment to the Fair Labor Standards Act (FLSA) giving nursing mothers the "right to pump."[131] Providing an additional workplace protection to new mothers, the "right to pump" requires employers to offer new mothers break time and a private location to pump breast milk while at work.[132]

However, even in combination, these laws provide incomplete protection for new mothers and fall far below the standards of most industrialized states.[133] While the U.S. system makes it an outlier

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127. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331–33 (1990) [hereinafter ADA] (preventing employment discrimination against individuals with disabilities); *Pregnancy Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited Aug. 31, 2014) [http://perma.cc/8HLQ-DRXE] (archived Sept. 11, 2014) (explaining that "impairments resulting from pregnancy (for example, gestational diabetes or preeclampsia . . .) may be disabilities under the Americans with Disabilities Act (ADA)").

128. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 143–44 (1977) (holding that excluding pregnancy-related absences from disability compensation coverage was not per se discrimination and that Title VII only applied if a "plaintiff [could] demonstrate that exclusion of pregnancy from compensated conditions [was] a mere pretext . . . to effect . . . discrimination against . . . one sex or the other"); Geduldig v. Aiello, 417 U.S. 484, 489–91, 494–97 (1974) (upholding California's exclusion of normal pregnancy from the definition of disability).

129. *See Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Aug. 31, 2014) [http://perma.cc/KG4E-VUEH] (archived Sept. 12, 2014) (providing an overview of the scope and effect of the ADAAA).

130. *See generally* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (noting that, since the enactment of the ADAAA, some district court cases have addressed the question of whether pregnancy is a disability); *see also* sources cited *infra* note 162.

131. *See* 29 U.S.C. § 207(r) (2012) (setting forth accommodations employers must provide for nursing mothers); *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. DEP'T OF LABOR (August 2013), http://www.dol.gov/whd/regs/compliance/whdfs73.htm (last visited Sept. 16, 2014) [http://perma.cc/3M72-YJB7] (archived Sept. 16, 2014) (explaining how the PPACA modified the FLSA to mandate accommodations for nursing mothers).

132. *See* 29 U.S.C. § 207(r) (setting forth accommodations employers must provide for nursing mothers); *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, *supra* note 131.

133. *See* Hurt, Killian & Straley, *supra* note 111 (explaining that "the U.S. is the only industrialized nation that does[] [not] mandate" paid parental leave).

among other nations, that the national government has maintained a hands-off approach is not surprising. Commitments to state sovereignty and free markets in particular hinder the United States government's ability and desire to offer nationwide mandates.[134]

Beginning with state action, only three U.S. states—California, New Jersey,[135] and Rhode Island[136]—mandate paid maternity leave.[137] These state efforts offer some room for hope that this state action can be a model for national legislation. For example, the recent amendment to the FLSA came after over a dozen states adopted similar "right to pump" laws; similarly, Congress adopted the FMLA after twenty-three states put similar measures in place.[138] Recently, Washington became the fourth state to begin taking steps toward mandating paid maternity leave.[139] If more states join California, New Jersey, Rhode Island, and Washington, the federal government may be more likely to follow.[140] In fact, at the White House Summit on Working Families, held in June 2014, U.S. President Barack Obama called for equal pay, paid leave, workplace flexibility, greater access to child care options, and increased workplace discrimination protections, including protections against pregnancy discrimination.

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134. *See* Luisa Blanchfield, CONG. RESEARCH SERV., R40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 1, 8 (2010) (discussing the U.S.'s concern that commitments to international treaties will "undermine national sovereignty").

135. Both California and New Jersey provide for up to six weeks of paid leave, available to either parent. Both states implemented the law as an expansion of their disability insurance program and offer partial wage replacement paid from payroll taxes. *See Expecting Better: A State-by-State Analysis of Laws that Help New Parents*, NAT'L P'SHIP FOR WOMEN & FAMILIES 23–24, 36 (2d ed. May 2012) [hereinafter *Expecting Better*], http://www.nationalpartnership.org/research-library/work-family/expecting-better.pdf (last visited Sept. 12, 2014) [http://perma.cc/43SL-A24F] (archived Sept. 12, 2014) (describing the maternity leave requirements provided in California and New Jersey's disability insurance programs).

136. *See* Liza Mundy, *Daddy Track: The Case for Paternity Leave*, ATLANTIC (Dec. 22, 2013, 9:25 PM), http://www.theatlantic.com/magazine/archive/2014/01/the-daddy-track/355746/ [http://perma.cc/3WXS-Z4GD] (archived Sept. 12, 2014) (indicating that Rhode Island offers four weeks of paid leave for both mothers and fathers).

137. For an interactive map illustrating the pregnancy and nursing protections in the American states, see *Employment Protections for Workers Who Are Pregnant or Nursing*, U.S. DEP'T OF LABOR WOMEN'S BUREAU, http://www.dol.gov/wb/map/ (last visited Oct. 23, 2014) [http://perma.cc/KE48-AGHM] (archived Oct. 23, 2014).

138. *See Expecting Better*, *supra* note 135, at 11–12 (citing J. Waldfogel, *Family Leave Coverage: Family Leave Coverage in the 1990s*, MONTHLY LABOR REV., Oct. 1999, at 13, *available at* http://www.bls.gov/mlr/1999/10/art2full.pdf [http://perma.cc/U99Q-BKGQ] (archived Sept. 12, 2014)) (describing the right to pump policy added in the 2010 amendments to the FLSA and noting that "23 states passed FMLA laws prior to the 1993 enactment of the federal FMLA").

139. *See id.* at 47 (noting that Washington appears to be following California and New Jersey in mandating paid maternity leave).

140. *See id.* at 12 (explaining that state laws paved the way for the federal government to pass the national FMLA, which indicates that "state innovation can pave the way for national change").

This may be a sign that national leaders are beginning to support a more comprehensive and protective regime.[141]

The federal government traditionally favors private, free-market solutions to employment issues. Unfortunately, businesses have responded with only marginal maternity protections. According to the Families and Work Institute, in 2012, approximately 58 percent of U.S. employers offered some replacement pay for maternity leave.[142] However, of those employers, only approximately 9 percent offered full pay to women on leave, while 63 percent offered only partial pay.[143] Another 28 percent of employers said it depends upon the situation.[144] Notably, these numbers were down from the Families and Work Institute's 2005 estimates, where fewer employers reported offering pay, but approximately 17 percent of employers who offered some type of pay reported offering full paid leave.[145] The current numbers leave 42 percent of women without any replacement pay, with the vast majority of the remaining women receiving only partial pay.[146]

In addition to state action and free-market solutions, court decisions also impact U.S. domestic policy. The landmark U.S. case on pregnancy discrimination is *General Electric Co. v. Gilbert*, in which the Supreme Court refused to recognize pregnancy as a disease or discrimination based on pregnancy as sex or disability discrimination.[147] The Court based this conclusion on the fact that, because not all women were pregnant, discrimination against pregnancy did not ordinarily equal sex discrimination.[148] One year later, in *Nashville Gas Co. v. Satty*, the Court held that that provision

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141. *See The White House Summit on Working Families: The Issues*, WORKINGFAMILIESSUMMIT.ORG (June 23, 2014), http://workingfamiliessummit.org/issues [http://perma.cc/MX7J-3F5P] (archived Oct. 23, 2014) (summarizing the strategies "to give all workers the best chance to succeed at work and at home"); *Remarks by President Obama at the White House Summit on Working Families*, WHITEHOUSE.GOV (June 23, 2014, 1:51 PM), http://www.whitehouse.gov/the-press-office/2014/06/23/remarks-president-obama-white-house-summit-working-families-june-23-2014 [http://perma.cc/6PKT-XHG3] (archived Nov. 17, 2014).

142. On average, 54 percent of small employers (50–99 employees) and 68 percent of large employers (1,000 or more employees) offer some form of replacement pay to women during maternity leave. *See* Matos & Galinsy, *supra* note 120, at 20, tbl.7 (evaluating replacement pay offered to women by employers during parental leave).

143. *Id.* at 21, tbl.8.

144. *Id.*

145. *Id.*

146. *See id.* at 21, tbl.7 (indicating that 58 percent of women on maternity leave receive "at [l]east [s]ome [r]eplacement [p]ay," while the remaining 42 percent of women on maternity leave receive no replacement pay).

147. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976) (explaining that pregnancy "is . . . confined to women, but it is in other ways significantly different from the typical covered disease or disability" and recognizing "[t]he District Court [determination] that [pregnancy] is not a disease").

148. *See Gilbert*, 429 U.S. at 135.

of sick pay for other temporary disabilities and illnesses, but not pregnancy-related disability and illness, did not violate Title VII of the Civil Rights Act of 1964.[149] However, the Court also held that this policy would violate Title VII if the employee was denied payment as a "pretex[t] designed to effect an invidious discrimination against the members of one sex."[150] Thus, employers could opt out of providing pregnancy benefits as part of their disability plan without violating any employment law.[151] These cases essentially foreclose challenges under Title VII to all but the most blatant maternity discrimination.

Following the decisions in *Gilbert* and *Satty*, Congress passed an amendment to Title VII known as the Pregnancy Discrimination Act, which provided a definition of discrimination "because of" or "based on sex" that included discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions" and required that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[152] The legislative history of the PDA shows that Congress was motivated by its understanding that "[t]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is the root of the discriminatory practices which keep women in low-paying and dead-end jobs."[153] Still, even after the PDA's passage, *Gilbert*'s rationale persevered.[154]

However, there has been new movement in litigation regarding pregnancy discrimination and the definition of disability since the enactment of the ADAAA.[155] While courts continue to follow the long-standing rule of refusing to recognize pregnancy as a per se disability,

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149. *See Satty*, 434 U.S. at 142–43 (explaining that "[i]f a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company from applying these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policies may burden female employees").

150. *Id.* at 144.

151. *See id.* (holding that the disputed "disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities").

152. 42 U.S.C. § 2000e(k).

153. H.R. REP. NO. 95-948, at 3 (1978).

154. *See, e.g.*, AT&T Corp. v. Hulteen, 556 S. Ct. 701, 702 (2009) (rejecting the claims of women whose pensions were calculated using a pre-PDA method that gave less credit for pregnancy leave than disability leave because, under *Gilbert*, "an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender based discrimination at all.").

155. *See, e.g.*, Jeudy v. Holder, No. 10-22873-CIV, 2011 WL 5361076, at *4 (S.D. Fla. Nov. 7, 2011) (explaining that pregnancy is not generally considered a disability without unusual circumstances, but "[w]hether a person is disabled . . . must be determined on a case by case basis"); Sam-Sekur v. Whitmore Group, Ltd., No. 11-CV-4938 (JFB)(GRB), 2012 WL 2244325, at *7–8 (E.D.N.Y. June 15, 2012) (explaining that pregnancy is not generally considered a disability but could be in extremely rare cases).

since the enactment of the ADAAA, federal district courts have become more willing to evaluate pregnancy on a case-by-case basis in cases alleging disability discrimination.[156] However, as of February 2014, no case has used the ADAAA to recognize pregnancy as a disability, at least not without evidence of an aggravating health condition.

The combination of the PDA and ADAAA offers one of the most effective maternity protections in the U.S. regime.[157] This is because the ADAAA expands an employer's duty to accommodate temporary disability[158] The PDA, in turn, requires that pregnant employees be treated the same as those with temporary disabilities. [159] This combination offers an added level of job security to pregnant women on top of that already offered by the PDA, as well as making it possible for more women to continue working during pregnancy through accommodation.[160] The United States' regime is thus fairly successful in protecting women during their pregnancy. However, this protection does not extend past childbirth. The U.S. tradition of at-will employment regimes, in which most employees can be fired at any time for any reason or no reason at all, offers little protection for women who find themselves demoted, passed over, or fired after

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156. *See Holder*, 2011 WL 5361076, at *4 (holding that disability "must be determined on a case-by-case basis"); *Sam-Sekur*, 2012 WL 2244325, at *7–8 (finding that pregnancy and "conditions that arise out of pregnancy" can "qualify as a disability" in rare situations).

157. *See The Pregnancy Discrimination Act and the Amended Americans with Disabilities Act: Working Together to Protect Pregnant Workers*, NAT'L WOMEN'S LAW CTR. 1, 1 (Aug. 2013), [hereinafter *Protect Pregnant Workers*] http://www.nwlc.org/sites/default/files/pdfs/pda_adaaa_preg_workers_fact_sheet.pdf [http://perma.cc/TQR3-2C9H] (archived Aug. 31, 2014) (explaining that the combination of the PDA and the ADAAA "mean[s] that employers must provide reasonable accommodations for many pregnant workers who need them" because, under the acts, "[a]n employer must make a reasonable accommodation for a pregnant worker with a pregnancy-related impairment that rises to the level of a disability . . . [and] make a reasonable accommodation for a pregnant worker who is limited in her ability to work when the employer would accommodate a worker with a similar limitation arising out of a temporary disability").

158. Temporary disabilities are those that do not meet the traditional definition of impairment. *See id.* (noting that "[t]he ADAAA expanded the definition of 'disability' to include temporary impairments and less severe impairments . . . . [meaning that] even relatively minor impairments" are included).

159. *See* 42. U.S.C. § 2000e(k) (providing that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability *or inability* to work" (emphasis added)); *Protect Pregnant Workers*, *supra* note 157 ("The PDA says that pregnant workers must be treated as well as those temporarily disabled employees.").

160. *See Protect Pregnant Workers*, *supra* note 157 (describing an array of modified or alternative work assignments employers are required to offer to pregnant workers).

returning to work.[161] Remedies for this kind of adverse employment action vary, but the most common are claims for denials of FMLA leave and gender discrimination under Title VII.[162]

In addition to failing to offer paid maternity leave and postpartum protections for new mothers, the United States also fails to provide a number of other maternity protections. Unlike Sweden and a number of other more successful maternity regimes, the United States has no provision specifically addressing childcare for new parents.[163] Professor Waldfogel has highlighted the high cost of private childcare as one of the key failures of both the United States' and the United Kingdom's maternity protection regimes because of the added expense of private child care for new parents.[164] Moreover, the United States has no national provision for paid paternity leave, another key feature of regimes like Sweden's.[165] While fathers as well as mothers are entitled to take up to twelve weeks of FMLA leave per year for any reason, only California and New Jersey require that men be allowed to take six weeks of paid paternity leave, the same as its requirements for new mothers.[166] Additionally, the FMLA's general leave allowances are in no way compulsory.[167] While the purpose of

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161. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66–68 (2000-2001) (explaining that the employee at-will doctrine, which gives employers the authority to dismiss employees at the employer's discretion, had become an integral element of U.S. employment law as early as 1930).

162. *See* John C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: the Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 185 (2006-2007) (noting that "many employees who have experienced [family responsibilities discrimination] are using current antidiscrimination laws successfully to sue their employers"); Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. L. 293, 294 (2006-2007) (noting that, in addition to Title VII and the PDA, "plaintiff's attorneys have found creative and effective ways to prove . . . claims under the FMLA, Americans with Disabilities Act (ADA), Equal Pay Act (EPA), and even the employee Retirement Income Security Act (ERISA)").

163. *See* Jane Waldfogel, *Understand the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 140–42,148 (1998) (illustrating that the maternity protections in the United States lag behind Europe because the United States has not developed a policy "specifically address[ing] the problems posed by the presence of children" and instead "relies to a larger extent than most other countries on private market provision of [child] care").

164. *See id.* at 148 ("Both the United States and Britain also rely more extensively than other countries on private market child care, at a relatively high out-of-pocket cost.").

165. *See* Mundy, *supra* note 136; *see also infra* Part IV (discussing the benefits of paternity leave).

166. *See* Mundy, *supra* note 136 (noting that "in 2002 California became the first U.S. state to guarantee six weeks of *paid* leave for mothers and fathers alike" and reporting that "Rhode Island and New Jersey have followed suit with four and six paid weeks, respectively").

167. FMLA, *supra* note 123, § 102 (a)(1) (indicating that certain employees are *entitled* to, but not required to take, up to twelve weeks of leave each year under certain circumstances).

compulsory leave is sometimes suspect, compulsory leave also alleviates pressure from women to return to work prematurely.[168] The FMLA's generic provisions offer no protection to women who feel pressured to return to work without taking their full twelve-week leave.[169] In fact, most U.S. women do not take the entire FMLA period: according to census data, 25 percent of mothers return to work within two months, while 10 percent return to work in four weeks or less.[170]

2. The United Kingdom

The United Kingdom offers a second, intermediate level of maternity protection in the comprehensive Maternity and Parental Leave Regulations of 1999 (UK Regulations).[171] Employers are required to provide up to fifty-two weeks of leave, with the first six weeks paid at 90 percent, a flat rate paid for weeks seven through thirty-nine, and no pay for weeks forty through fifty-two.[172] Employers make these payments, with public funds providing the employer with 92 percent reimbursement.[173] In accordance with Regulation 8, new mothers are required to take at least two weeks of compulsory leave.[174] These two weeks begin on the day the child is born.[175] Moreover, Regulation 14 allows all male employees up to thirteen weeks of paid parental leave if he "has, or expects to have,

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168. *See* Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 79 (2012) (explaining that "[t]he purpose [of compulsory maternity leave] is to remove the minimum standard from employer-employee negotiation in recognition of the . . . pressures faced by employees to agree to terms and conditions that fall below the minimum standard" such as returning to work early or not taking maternity leave).

169. *See* FMLA, *supra* note 123, § 102(a)(1) (providing that, under certain circumstances, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period"); Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1532 (2001-2002) (explaining that women often feel pressured "to choose between staying home with their children and advancing their careers" and, therefore, return to work before the end of the twelve-week parental leave period that is permitted under the FMLA).

170. *See* Sharon Lerner, *Is 40 Weeks the Ideal Maternity Leave Length?*, SLATE (Dec. 22, 2011), http://www.slate.com/articles/double_x/doublex/2011/12/maternity_leave_how_much_time_off_is_healthiest_for_babies_and_mothers_.html (last visited Aug. 31, 2014) [http://perma.cc/DFE3-XFSN] (archived Aug. 31, 2014) (citing Ruhm, *Parental Leave and Child Health*, *supra* note 27) (reporting that "more than a quarter [of mothers who worked during pregnancy] are at work within two months of giving birth and one in 10 . . . go back to their jobs in four weeks or less").

171. UK Regulations, *supra* note 121, at Regulations 4–7 (outlining entitlements to ordinary and additional maternity leave).

172. Hurt, Killian & Straley, *supra* note 111.

173. *See id.* (indicating that employer liability provides for maternity leave compensation and that 92 percent of these payments are "refunded by public funds").

174. UK Regulations, *supra* note 121, at Regulation 8.

175. *Id.*

responsibility for a child."[176] Regulation 18 additionally provides a "right to return."[177] For employees who take leave of four weeks or less, this is the right to return to their same job in the same position as they left.[178] For those who take more than four weeks, employees are entitled to return to the same position as prior to their leave, "or, if it is not reasonably practicable for the employer, to another job which is both suitable . . . and appropriate . . . in the circumstances."[179] This includes a right to "her seniority, pension rights and similar rights as they would have been" and "otherwise on terms and conditions not less favourable than those which would have been applicable to her had she not been absent from work."[180] Regulation 19 contains specific protection for adverse actions by employers due to the fact that an employee is pregnant, has given birth, or has sought to take maternity leave, parental leave, or time off to care for a child.[181] Regulation 20 also offers specific protection for unfair dismissal on the basis of pregnancy, leave, and childbirth, including added requirements that employers must make specific showings to support claims of redundancy.[182]

Despite these protections, according to figures reported from the House of Commons library, on average, nearly "14 percent of the 340,000 women who take maternity leave . . . find their [jobs] under threat when they try to return."[183] Nearly half of the women reported that their job assignments and expectations had changed since returning from maternity leave, and one in twenty women reported she had taken on a different role within her company.[184] The report also showed that, "[i]n 2005, an estimated 30,000 women . . . lost their jobs as a result of pregnancy discrimination," a staggering "8 [percent] of all pregnant women in the workforce."[185] In addition, the United Kingdom, like the United States, has a demonstrable "motherhood penalty," or pay gap between mothers and non-mothers. According to numbers from the UK Office for National Statistics, in 2009, single women surprisingly earned slightly more than single men, with a pay gap of -1.1 percent.[186] Women who were married or

176. *Id.* at Regulations 13–14.
177. *Id.* at Regulation 18.
178. *Id.* at Regulation 18(1).
179. *Id.* at Regulation 18(2).
180. *Id.* at Regulation 18(5)(b).
181. *Id.* at Regulation 19.
182. *Id.* at Regulation 20.
183. Wright, *supra* note 23.
184. *Id.*
185. BUSINESS, INNOVATION AND SKILLS COMMITTEE, *supra* note 24, ¶¶ 1.1, 4.2.
186. Mark Wadsworth, *The 'Mothers Versus Everybody Else Pay Gap'*, YPP (June 13, 2009), http://markwadsworth.blogspot.com/2009/06/mothers-versus-everybody-else-pay-gap.html (last visited [http://perma.cc/H5ZJ-QRBD] (archived Aug. 31, 2014); *see* Tim Worstall, *The Mother's Pay Gap*, GUARDIAN (U.K.) (June 17, 2009, 6:31 AM), http://www.theguardian.com/commentisfree/2009/jun/17/pay-gap-mothers-children-inequality

cohabiting, on the other hand, suffered from a 14.5 percent pay gap with men in comparable positions.[187] When the numbers were broken out per child, the gap widened by approximately 5 to 7 percent per child, beginning with an 8 percent pay gap for women with no children and ending with a huge 35.5 percent pay gap for women with four children.[188] Thus, despite the UK Regulations' assurances that women will return from maternity leave "on terms . . . not less favourable,"[189] women are seeing their pay slip with each child.[190]

These discriminatory practices continue because the UK Regulations offer absolute job protection only to women who take four weeks or less of maternity leave;[191] they offer no absolute protection to co-parents who take parental leave or women who take more than four weeks. [192] Additionally, Regulation 20's unfair dismissal protections do not apply to employers with five or fewer employees if it is "not reasonably practicable" for the employer to allow the employee to return.[193] Given that absolute protection is severely limited to only four weeks when new mothers are entitled to fifty-two, these loopholes are large enough to allow for significant abuse.[194] In addition to these enforcement issues, the UK Regulations, like the U.S. statutes, offer no provision for childcare.[195]

Perhaps in recognition of these shortcomings, during the pendency of this Note, Parliament enacted the Children and Families Act of 2014. In addition to reforming aspects of the family justice system, adoption process, and special needs education, the Act also included reforms to the parental leave system.[196] Most significantly, Part 7 of the Act creates a new right to shared paid parental leave for

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[http://perma.cc/H6F8-WC2Q] (archived Aug. 31, 2014) ("[I]t is marriage and more especially the having of children that leads to what everyone refers to as the gender pay gap and what should therefore more properly be referred to as the mothers' pay gap.").

187. Wadsworth, *supra* note 186.

188. For a table, see *id.*

189. UK Regulations, *supra* note 121, at Regulation 18(5)(a).

190. *See* Wadsworth, *supra* note 186 (explaining that the wage "gap widens by 5% - 7% for each child").

191. UK Regulations, *supra* note 121, at Regulation 18.

192. *Id.* at Regulations 18.

193. *Id.* at Regulation 20(6).

194. *See* Hurt, Killian & Straley, *supra* note 111 (indicating that employers offer employees 52 weeks of maternity leave); UK Regulations, *supra* note 121 at Regulation 18 (guaranteeing a right to return to the same job for employee's who return from maternity leave within 4 weeks).

195. *See* Waldfogel, *supra* note 163, at 148 (noting that "Britain . . . has very little in the way of family policy" and "lags behind the rest of Europe in child care provision"); *see generally* UK Regulations, *supra* note 121 (providing parental leave for parents but failing to provide for parental care).

196. For a summary of the changes in law under the Act, see Press Release, Dep't for Educ., Landmark Children and Families Act 2014 Gains Royal Assent (Mar. 13, 2014) [hereinafter Press Release], *available at* https://www.gov.uk/government/news/landmark-children-and-families-act-2014-gains-royal-assent (last visited Oct. 11, 2014) [http://perma.cc/A7TF-PF72] (archived Oct. 23, 2014).

all eligible parents beginning in April 2015.[197] Under the new Act, mothers continue to be eligible for leave as before.[198] However, if mothers decide not to take their entire fifty-two week allowance, fathers and co-parents have a right to share in the remaining leave for up to fifty weeks of leave and thirty-seven weeks of pay.[199] This is a potential increase over the UK Regulations' provision of up to thirteen weeks for new fathers.[200] The Act also provides a new right for fathers and co-parents (including same-sex partners) and intended parents (in the case of surrogacy) to take unpaid time off work to attend prenatal appointments with pregnant women beginning in October 2014.[201] Finally, the Act closes some of the loopholes that allowed employers to continue discriminatory policies by expanding the right to a flexible work schedule to all caregivers and providing that employers have a duty to "deal with the application in a reasonable manner."[202]

The passage of the Children and Families Act demonstrates that the time is ripe for new parental leave protections.[203] It also enacted many of the reforms advocated in the proposed Global Maternity Protection Act, detailed in Part IV, including the equal provision of leave benefits to mothers and co-parents and decreased employer

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197. Children and Families Act, 2014, c. 6, pt. 7 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2014/6/part/7/enacted (2014) (last visited Oct. 11, 2014) [http://perma.cc/8P23-SVP8] (archived Oct. 23, 2014).

198. *See* Press Release, *supra* note 196 ("All employed women continue to be eligible for maternity leave and statutory maternity pay or allowance in the same way as previously.").

199. *See* Children and Families Act, *supra* note 197, § 75F(2)(a)(i) ("[T]he amount of leave to which an employee is entitled in respect of a child does not exceed . . . in a case where the child's mother became entitled to maternity leave, the relevant amount of time reduced by . . . the amount of maternity leave taken by the child's mother[.]"); Press Release, *supra* note 196 ("[I]f [mothers] choose to bring their leave and pay or allowance to an early end, eligible working parents can share the balance of the remaining leave and pay as shared parental leave and pay up to a total of 50 weeks of leave and 37 weeks of pay.").

200. *See* UK Regulations, *supra* note 121, at Regulations 13–14 (providing for up to thirteen weeks of parental leave for co-parents); Regulation 18 (offering no protection for co-parents who take parental leave).

201. *See* Children and Families Act, *supra* note 197, pt. 8, § 57ZE(1) ("An employee who has a qualifying relationship with a pregnant woman or her expected child is entitled to be permitted by his or her employer to take time off during the employee's working hours in order that he or she may accompany the woman when she attends by appointment at any place for the purpose of receiving ante-natal care.").

202. *See* Press Release, *supra* note 196 ("Part 9 provides for the expansion of the right to request flexible working from employees who are parents or carers to all employees, and the removal of the statutory process that employers must currently follow when considering requests for flexible working."); Children and Families Act, *supra* note 197, pt. 9, § 132(2).

203. *See* Press Release, *supra* note 196 (quoting Employment Relations Minister Jenny Willott as saying, "Current workplace arrangements have not kept up with the times. The Children and Families Act will bring the way new parents balance their working and home lives into the 21st century.").

discretion in making decisions related to leave benefits. Thus, while the Children and Families Act does not solve all of the issues with the UK's maternity protection regime, it is a step forward.

3. Sweden

Sweden has perhaps the world's most progressive maternity leave system.[204] The Parental Leave Act of 1995 (Act) is unique in that it provides for five different types of paid parental leave.[205] Under the second type of leave, parents are entitled to up to 480 full days of paid parental leave.[206] Of those 480 days, sixty days are reserved for the co-parent.[207] Parents are compensated at a rate of 80 percent of their original salary for the first 390 days of leave, and then compensated at a flat fee for the remaining ninety days.[208] All expenses are paid by social security.[209] Additionally, parents can choose to take full leave for a shorter period of time,[210] reduce their normal working hours in order to extend their leave benefits until the child is up to eight years old,[211] or take temporary leave with temporary benefits for short periods of time.[212] The Act mandates two weeks of compulsory leave[213] and entitles every woman to a minimum of seven weeks of leave pre-delivery and seven weeks post-delivery.[214] These benefits are extended beyond married mothers and fathers to

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204. *See* Hurt, Killian & Straley, *supra* note 111 ("Sweden and Norway have among the best parental leave in the world.").

205. *See* Parental Leave Act, *supra* note 122, § 3 (listing the five types of parental leave provided by the Act).

206. *See id.* § 3, ¶ 2 (providing that a parent may take "[f]ull leave . . . until the child has reached 18 months"); *Gender and Equality in Sweden*, *supra* note 122 (explaining that "parents are entitled to 480 days of parental leave" and describing the parental allowance); Hurt, Killian & Straley, *supra* note 111 (indicating the availability of parental leave in Sweden).

207. *See* Hurt, Killian & Straley, *supra* note 111 (noting that "[t]wo months are reserved for the father").

208. *Id.*

209. *See id.* (indicating that compensation during maternity leave is paid by social security).

210. *See* Parental Leave Act, *supra* note 122, §§ 4, 10–11, 15 (stipulating that "[m]aternity leave need not be taken in conjunction with the payment of parental benefit," describing how periods of leave can be distributed, and recognizing an employee's "right to resume work" prior to the end of his or her intended parental leave).

211. *See id.* §§ 6–7 (stating the policies for partial leave with and without parental benefit).

212. *See id.* § 8 (identifying the circumstances under which an employee is entitled to temporary leave to care for his or her child).

213. *See id.* § 4 ("[T]wo weeks of this maternity leave shall be obligatory during the period prior to or after delivery.").

214. *See id.* § 4 ("A female employee is entitled to a full leave in connection with her child's birth during a continuous period of at least seven weeks prior to the estimated time for delivery and seven weeks after the delivery.").

legal custodians and those who have "taken a child for permanent care and fosterage."[215]

Sections 16 and 17, under the heading "Prohibition of Disfavourable Treatment," offer discrimination protections for employees who take parental leave under the Act.[216] Section 16 provides that "employers may not disfavor a job applicant or an employee for reasons related to parental leave" when deciding an employment issue, considering promotions, implementing vocational training or counseling, determining pay or terms of employment, managing and distributing work, or deciding terminations.[217] However, Section 16 contains a potentially wide exception: "[T]his prohibition does not apply if the different terms and conditions or different treatment are a necessary consequence of the leave."[218] Section 17, on the other hand, gives a broad and absolute protection from termination: "If an employee is given notice of termination or is summarily dismissed solely for reasons related to parental leave under this Act, the notice of termination or summarily dismissal shall be declared invalid, if the employee so requests."[219]

The Act has been widely successful in addressing maternity issues in Sweden. Women's labor force participation rates in Sweden are much higher than either the United States or United Kingdom: in 2005, Sweden female workforce participation rate was the highest of any OECD country at 84.6 percent of women age twenty-five to forty-four (those most likely to have young children), compared to approximately 75 percent and 74 percent, respectively, for the United States and UK over the same period.[220] The overall gender pay gap in Sweden for full-time employees (not adjusted for familial status) is lower than either the United States or UK, at approximately 15 percent versus approximately 22 percent for the United States and 20 percent for the UK.[221] Some commentators have stated that, unlike

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215. *Id.* § 1.

216. *See id.* §§ 16–17 (prohibiting employers from disfavoring job applicants and employees for a series of reasons and declaring a termination or dismissal for any of the prohibited reasons invalid at the employees request).

217. *See id.* § 16 (listing seven reasons employers may not use as grounds for disfavoring job applicants or employees).

218. *Id.*

219. *Id.* § 17.

220. *See* Joanna Abhayaratna & Ralph Lattimore, *Workforce Participation Rates – How Does Australia Compare?* 69 tbl.A.9 (Australian Gov't Productivity Comm'n, Staff Working Paper, 2006), *available at* http://www.pc.gov.au/__data/assets/pdf_file/0008/60479/workforceparticipation.pdf [http://perma.cc/3RRM-UTCD] (archived Aug. 29, 2014) (listing the "[a]djusted female workforce participation rates by age groups" for 2005 in OECD nations).

221. *See* DEREK BLADES, ORG. FOR ECON. CO-OPERATION & DEV., WOMEN AND MEN IN OECD COUNTRIES 15 (2006), *available at* http://www.oecd.org/std/37962502.pdf [http://perma.cc/78JX-JHAU] (archived Sept. 12, 2014) (charting the gender wage gaps of OECD nations in 2004 or, alternatively, the most recently available year).

the United States and UK, Sweden has no motherhood penalty.[222] However, 2011 OECD numbers show that the gender pay gap for *single* women in Sweden is higher than in either the United States or UK, at 14 percent, with an additional 7 percent motherhood penalty for women with at least one child.[223] According to the OECD, women in Sweden are also less represented in senior management than women in either the United States or UK.[224]

Commentators generally agree that Sweden's program has been successful in maintaining women's labor market participation rate, something other countries have been unable to do.[225] This is generally attributed to Sweden's childcare provisions, including both parental leave and state-sponsored preschool and after-school programs.[226] However, the conflicting numbers about gender pay gaps and the motherhood penalty are troubling. Commentators, including the OECD itself, have suggested that Sweden's long parental leave periods are actually causing this gap rather than helping it.[227] There are variety of potential theories for this paradox, including that women are allowed more parental leave than men,

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222. *See* Waldfogel, *supra* note 163, at 143, 148 (explaining that women with children in both the United States and UK incur a pay penalty compared to their child-free counterparts while working mothers in Sweden experience no such pay penalty).

223. The disparity in these numbers is likely due to changes in metrics: The OECD figure measures general employment numbers, including women working in all fields and both full-time and part-time workers, while the earlier cited figures include only full-time workers. Additionally, the numbers are likely impacted by the difference in market sectors for men and women: the majority of women in Sweden work in the public or service sectors, where wages are generally lower than in the private sector and where there is less room for advancement. *See Closing the Gender Gap*, *supra* note 108 (describing the differences in male and female employment and pay in Sweden).

224. *See id.* (charting the percentage of women in OECD nations holding positions as part of the labor force and as senior managers).

225. *See, e.g.*, Abhayaratna & Lattimore, *supra* note 220, at 29 fig.3.5 (showing Sweden maintains the highest female workforce participation rate relative to the other documented nations).

226. *See Closing the Gender Gap*, *supra* note 108 ("Sweden has invested in a continuum of work-family supports for families throughout early and middle childhood (including parental leave, pre-school and out-of-school hours care).").

227. *See id.* (highlighting the disparities between Swedish men and women's pay and positions of relative power in the workforce); Kay Hymowitz, *Longer Maternity Leave Not So Great for Women After All*, TIME (Sept. 30, 2013), http://ideas.time.com/2013/09/30/longer-maternity-leave-not-so-great-for-women-after-all/ [http://perma.cc/B2PS-6VYA] (archived Aug. 29, 2014) ("Rather than offering a route to equality between the sexes, the data shows, extended maternity leave actually throws up roadblocks in a woman's career – the very roadblocks that such policies are meant to prevent."); Lerner, *supra* note 170 (noting generally that "certain amounts of leave may give the biggest bang, while longer periods of leave may yield diminishing returns, at best"); Thévenon, *supra* note 30, ¶¶ 68–70 (explaining that "the effect on female employment and the gender gap of lengthening the period of paid leave turns from positive to negative for durations of leave exceeding two years"); *We Did It!*, *supra* note 108 (noting that needing to provide lengthy periods of maternity leave deters private firms from hiring women, explaining why most Swedish women occupy lower paying government positions).

thus taking women out of the workforce for longer,[228] that the prospect of having to provide long parental leave discourages hiring women,[229] and that women who are out of work for so long inevitably fall behind.[230]

B. *International Efforts*

As mentioned in Part II.A, above, gender equality has long been a focus of the international community. As part of that effort, the United Nations and its bodies have enacted a number of conventions aimed at promoting gender equality, including protecting women's employment.[231] Part III.B examines three conventions that deal specifically with maternity discrimination: The Convention on the Elimination of All Forms of Discrimination of 1979 (CEDAW) and the 1999 CEDAW Optional Protocol, the Workers with Family Responsibilities Convention of 1981 (WFRC), and the Maternity Protection Convention of 2000 (MPC). Because of the weak enforcement capabilities of the WFRC, this Note focuses on CEDAW and the MPC.

1. The Convention on the Elimination of all Forms of Discrimination of 1979

The UN General Assembly adopted CEDAW in 1979.[232] Colloquially referred to as the Women's Bill of Rights, CEDAW has 188 parties and ninety-nine signatories.[233] Article 11(2) addresses "discrimination against women on the grounds of marriage or maternity and [ensuring] their effective right to work."[234] Section (a)

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228. *See Closing the Gender Gap*, *supra* note 108 (noting that only "13% of available parental leave (8.5 weeks) is reserved to fathers" in Sweden).

229. *See We Did It!*, *supra* note 108 ("Lengthy periods of maternity leave can put firms off hiring women, which helps explain why most Swedish women work in the public sector and Sweden has a lower proportion of women in management than America does.").

230. *See* Thévenon, *supra* note 30, ¶¶ 68–69 (articulating that, beyond a certain point, prolonged leave increases the gender employment gap and negatively affects women's employment).

231. *See, e.g.*, CEDAW, *supra* note 35; International Labour Organization, Convention No. 156 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities Convention, June 23, 1981, 1331 U.N.T.S. 22346 [hereinafter WFRC]; International Labour Organization, Convention No. 183 Concerning the Revision of the Maternity Protection Convention (revised), June 15, 2000, 2181 U.N.T.S. 38441 [hereinafter MPC].

232. CEDAW, *supra* note 35, at 1.

233. Convention on the Elimination of All Forms of Discrimination Against Women: Ratifications, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en [http://perma.cc/33TN-TSRB?type=source] (archived Aug. 30, 2014) [hereinafter CEDAW Ratifications].

234. CEDAW, *supra* note 35, art. 11(2).

prohibits "dismissal on the grounds of pregnancy or of maternity leave." [235] Section (b) requires member states "[t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."[236] Many of the reservations to the CEDAW concern Article 11(2).[237] For example, prior to the implementation of their current paid maternity leave system,[238] Australia advised that: "[I]t is not at present in a position to take the measures required by [A]rticle 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia." [239] Austria, Ireland, Malaysia, Malta, Micronesia, Netherlands, United Kingdom, Singapore, and Germany also made some type of reservation regarding Article 11(2).[240] While many of these reservations have since been withdrawn (and all the states mentioned have in fact enacted paid maternity leave policies), the discord on this issue highlights that important role it played in CEDAW.

Article 29 of CEDAW permits one state to enforce the convention against another through arbitration and, if arbitration is not possible, through appeal to the International Court of Justice.[241] However, this enforcement mechanism is subject to a number of reservations and has never been utilized.[242] In response to a call for an enforcement mechanism with more teeth, the CEDAW Committee proposed the Optional Protocol.[243] The Optional Protocol to CEDAW was adopted by the UN General Assembly in October 1999 and has 105 parties.[244] This is noticeably less than the 188 parties to CEDAW itself.[245]

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235. *Id.* art. 11(2)(a).

236. *Id.* art. 11(2)(b).

237. *See* CEDAW Ratifications, *supra* note 233, at 3–49 (listing signatory and party nations' reservations and objections to CEDAW).

238. *See* Hurt, Killian & Straley, *supra* note 111 (discussing Australia's duration, compensation rate, and source of compensation for Australia's parental leave policy in 2011).

239. CEDAW Ratifications, *supra* note 233, at 1, 49 n.3.

240. *See id.* 4–9, 11 (articulating each nation's reservations to various provisions of CEDAW, including those related to Article 11(2)).

241. *See* CEDAW, *supra* note 35, art. 29 (providing that a dispute between two or more nations regarding the interpretation or application of the Convention not settled by negotiation may be submitted to arbitration by request, and, if not settled within six months of the request, "any one of those parties may refer the dispute to the International Court of Justice").

242. *See Convention on the Elimination of All Forms of Discrimination against Women: Why an Optional Protocol?*, UN WOMEN, http://www.un.org/womenwatch/daw/cedaw/protocol/why.htm (last visited Aug. 29, 2014) [http://perma.cc/6S7K-FMEQ] (archived Aug. 29, 2014) [hereinafter *Why an Optional Protocol?*] (indicating that no state party has ever referred an interpretation or implementation dispute under article 29 of CEDAW and that the "procedure is subject to a large number of reservations").

243. *See* G.A. Res. 54/4, at 1–2, U.N. Doc. A/RES/54/4 (Oct. 15, 1999) [hereinafter Optional Protocol] (identifying the actions prompting the Resolution).

244. *See id.* at 1 (providing the date of ratification via the General Assembly Resolution); Convention on the Elimination of All Forms of Discrimination Against

Article 2 of the Protocol allows any individual or group within the jurisdiction of a member state who claims to be a victim of a violation of any of the rights set out in CEDAW to submit a complaint, called a "communication," to the Committee on the Elimination of Discrimination Against Women.[246] The Committee operates essentially as a court. It recognizes precedent in reviewing communications and will not admit communications when the issue presented has already been settled or is already under review.[247] In the event of a decision against a State Party, the Committee makes recommendations for correction.[248] The Committee is moreover authorized under Article 8 to investigate any alleged "grave or systematic violations" of CEDAW by member states.[249] The Protocol concludes by requiring member states to "undertake[] to make widely known and to give publicity to the Convention and the present Protocol" in order to encourage communications.[250]

Unlike CEDAW Article 29, the Protocol has been successful in addressing at least a few complaints. The Committee completed its first and only Article 8 inquiry to date in July 2004.[251] "The Committee [also] adopted its first decision on a[] communication submitted under article 2 . . . in July 2004."[252] Since then, it has adopted ten other decisions.[253] The third decision by the Committee

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Women: Optional Protocol Ratification, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter CEDAW Optional Protocol Ratifications], *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8-b.en.pdf [http://perma.cc/3FP2-8CZU] (archived Aug. 30, 2014) (noting that there are 105 parties to the CEDAW Optional Protocol and that the protocol was ratified on October 6, 1999).

245. *See* CEDAW Ratifications, *supra* note 233 (indicating that there are 188 parties to CEDAW).

246. *See* Optional Protocol, *supra* note 243, art. 2 ("Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party.").

247. *See id.* art. 4(2)(a) (stating that the Committee will not consider a communication when "[t]he same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement").

248. *Id.* art. 7(3)–(5) (explaining the State Party is required to respond to a recommendation within six months and may be asked to give reports about "any measures the State Party has taken in response to [the Committee's] views or recommendations" in the State Party's subsequent annual reports to the Committee).

249. *See id.* art. 8(1)–(2) (noting that the Committee, in response to receipt of "reliable information indicating grave or systematic violations of the Convention," may request information from the accused state or "designate one or more of its members to conduct an inquiry and to report . . . to the Committee").

250. *Id.* art. 13.

251. *See Convention on the Elimination of All Forms of Discrimination against Women: Decisions/Views*, UN WOMEN, http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm [http://perma.cc/MB3P-QV9R] (archived Aug. 30, 2014) [hereinafter CEDAW Decisions/Views] (listing only one inquiry conducted under Article 8 of the Optional Protocol and noting that the inquiry was completed in July 2004).

252. *Id.*

253. *See id.* (listing ten decisions on inquiries made under Article 2).

concerned Article 11(2) of CEDAW.[254] A Dutch woman claimed the Netherlands' compensation scheme for self-employed women, which did not provide full compensation of her previous salary, was a violation of Article 11(2)(b)'s requirement that national legislation must provide women "with pay or with comparable social benefits without loss of former employment, seniority or social allowances."[255] The Committee rejected her claim, holding that Article 11(2)(b) left a "margin of discretion" for member states to fulfill the convention's requirements through national legislation and that the Netherlands' scheme was within that margin of discretion.[256]

CEDAW Article 11(2) is an important international instrument for fighting maternity discrimination. CEDAW is one of the most ratified treaties in history, with only six less parties than the Convention on the Rights of the Child. [257] Thus, Article 11(2)'s requirements have the potential to be far-reaching in their protection of women. Importantly, CEDAW's Article 11 employment requirements are supported by the remainder of CEDAW's gender discrimination provisions, providing the extra protections that are necessary to the support of a maternity protection regime. [258] However, CEDAW is subject to many reservations, depends on self-reporting even for those states that are supposedly bound by it, and lacks significant penalties even for members that are found to be in violation.[259] That not a single action has ever been submitted to the Committee through Article 29 is proof positive of its failure in

254. *See id.* (listing *Dung Thi Thuy Nguyen vs. Netherlands* as the Committee's third decision); CEDAW, Dung Thi Thuy Nguyen v. Netherlands, Comm. No. 3/2004, ¶ 1.1, CEDAW/C/36/D/3/2004 (Aug. 26, 2006) [hereinafter Netherlands Case], *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%203-2004%20-%20English.pdf [http://perma.cc/BG53-ZZV3] (archived Aug. 29, 2014) (raising a claim based on Article 11, paragraph 2(b)).

255. CEDAW, *supra* note 35, art. 11(2)(b); *see also* Netherlands Case, *supra* note 254, ¶¶ 3.1–3.5 (outlining Nguyen's claim that the Netherlands violated Article 11, paragraph 2(b) of CEDAW).

256. Netherlands Case, *supra* note 254, ¶¶ 10.2–10.3.

257. *See* Convention on the Rights of the Child Ratifications, Nov. 20, 1989, 1577 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en [http://perma.cc/42K7-WZYU] (archived Aug. 29, 2014) (indicating that, as of August 29, 2014, the Convention on the Rights of the Child has 194 parties).

258. *See generally* CEDAW, *supra* note 35 (establishing numerous provisions designed to eliminate gender discrimination and better protect women's rights in all spheres).

259. *See* Felipe Gómez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human* Rights, 20 ARIZ. J. INT'L & COMP. L. 291, 302–05 (2003) (discussing a variety of weaknesses that make the CEDAW an ineffective mechanism for protecting women's rights).

enforcement.[260] Given this dismal record, the Optional Protocol is an encouraging addition to CEDAW. Through the Netherlands case, the Protocol has already proven its potential utility in addressing maternity discrimination.[261] However, the Protocol has only 105 parties and eighty signatories, much less than CEDAW.[262] Like CEDAW itself, the Protocol is also limited to actions submitted against member states,[263] limiting its power. Even under the Protocol, Committee decisions are enforced only through "recommendations" to state parties.[264] Thus, even decisions reached through the Committee correspondence mechanism of the Protocol have little value for actually enforcing the substantive rights of CEDAW, not to mention the "margin of discretion" the Committee found Article 11(2) leaves to parties.[265]

In sum, CEDAW, through the use of the Optional Protocol, has the potential to be an effective tool for international maternity protection. However, the limitations on the Committee's sanction power and the number of states subject to the Protocol cripple its effectiveness on a global scale.

2. Workers with Family Responsibilities Convention of 1981

Another international instrument that addresses maternity and employment is the Workers with Family Responsibilities Convention of 1981.[266] This Convention has forty-three ratifications.[267] The preamble recognizes "the need to create effective equality of opportunity and treatment as between men and women workers with family responsibilities and between such workers and other

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260. *See Why an Optional Protocol?*, *supra* note 242 (noting that no state party has ever referred an interpretation or implementation dispute under Article 29 of CEDAW).

261. *See* Netherlands Case, *supra* note 254, ¶¶ 10.2–10.3 (showing that, while the specifics of this case did not merit action, the Optional Protocol does provide a functional framework for furthering the goals of CEDAW).

262. *Compare* CEDAW Optional Protocol Ratifications, *supra* note 244 (indicating that the Optional Protocol has 105 signatories and 80 parties), *with* CEDAW Ratifications, *supra* note 233 (noting that CEDAW has 188 parties and 99 signatories).

263. *See* Optional Protocol, *supra* note 243, art. 2 (stating that "[c]ommunications may be submitted by or on behalf of individuals or groups of individuals").

264. *Id.* art. 7–8.

265. *See* Netherlands Case, *supra* note 254, ¶ 10.2 (explaining that, under CEDAW, States have a "margin of discretion to devise a system of maternity leave benefits to fulfill Convention requirements").

266. *See generally* WFRC, *supra* note 231.

267. *Ratifications of C156 - Workers with Family Responsibilities Convention, 1981 (No. 156)*, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312301 (last visited Aug. 31, 2014) [http://perma.cc/LZS9-429E] (archived Aug. 31, 2014).

workers."[268] Article 3 requires member states to "make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities." [269] The conditional, deferential, tone of these provisions stands in contrast to the commanding tone of CEDAW's requirements. The WFRC's most striking provision, Article 8, provides simply, "[f]amily responsibilities shall not, as such, constitute a valid reason for termination of employment."[270]

The WFRC has the benefit of being adopted by a meaningful number of countries.[271] However, it provides no real enforcement mechanism.[272] Instead, by the ILO's own description, the WFRC's main purpose is simply "to promote equality."[273] Ratifications are seen as a "message in support of the special needs and problems that workers with family responsibilities face" rather than a commitment to any new or additional legal responsibilities for member states.[274] Moreover, the WRFC speaks directly to maternity very little.[275] These structural problems make the WFRC a poor mechanism for international maternity protection.

3. Maternity Protection Convention of 2000

The most progressive international instrument that addresses maternity is the International Labour Organization's Maternity Protection Convention of 2000.[276] This 2000 convention revised the

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268. WFRC, *supra* note 231, pmbl.

269. *Id.* § 3.

270. *Id.* § 8.

271. *See Ratifications of C156*, *supra* note 267 (listing the 43 countries that have ratified the WFRC).

272. *See* WFRC, *supra* note 231, art. 9 (failing to specify an enforcement mechanism and providing that enforcement can be achieved through the "laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practice which may be appropriate").

273. *Ecuador Ratifies the Workers with Family Responsibilities Convention*, ILO (Feb. 12, 2013), http://www.ilo.org/global/standards/WCMS_204817/lang--en/index.htm (last visited Aug. 31, 2014) [http://perma.cc/A8YC-7X6E] (archived Aug. 31, 2014) ("The Convention aims to promote equality of opportunity and treatment in employment of men and women workers with family responsibilities, as well as between workers with family responsibilities and those without such responsibilities.").

274. *Id.*

275. *See* WFRC, *supra* note 231 (referring to "family responsibilities" but never maternity issues explicitly).

276. MPC, *supra* note 231; *see also International Labour Standards on Maternity Protection*, ILO, http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/maternity-protection/lang--en/index.htm (last visited Oct. 11, 2014) [http://perma.cc/R27H-9RUC] (archived Oct. 23, 2014) (defining the convention as "the most up-to-date international labour standard on maternity protection").

less forceful Maternity Protection Convention of 1952.[277] The convention has twenty-nine ratifications.[278] The Preamble states that the MPC's purpose is to create an international convention specifically providing for the protection of female workers in the circumstance of pregnancy.[279] Thus, it is the only international conventions whose sole aim is to protect maternity and employment.[280] Article 4 is entitled "Maternity Leave" and provides (1) that women in member states will "be entitled to a period of maternity leave of not less than fourteen weeks" and (2) that member states will require "six weeks' compulsory leave after childbirth."[281] Article 4(2) requires that each member state accompany their ratification with a separate declaration specifying the period of maternity leave they will offer, not less than fourteen weeks, as specified in Article 4(1).[282] The section of the convention titled "Benefits" is the largest of the entire instrument and contains Articles 6 and 7.[283] Article 7 provides specifically for underdeveloped

277. *See* MPC, *supra* note 231, pmbl. The Maternity Protection Conventions of 1952 and 1919 are still in force for some states, including some that are not parties to the 2000 Convention. *See Ratifications of C003 - Maternity Protection Convention, 1919 (No. 3)*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312148 (last visited Oct. 23, 2014) [http://perma.cc/J548-M8WR] (archived Oct. 23, 2014) (listing twenty-six states for whom the convention is still in force); *Ratifications of C103 - Maternity Protection Convention (Revised), 1952 (No. 103)*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312248 (last visited Oct. 23, 2014) [http://perma.cc/RH6R-RRY8] (archived Oct. 23, 2014) (listing twenty-four states for whom the convention is still in force). The 1919 Convention specifies that a woman "shall not be permitted to work during the six weeks following her confinement" and shall "be paid benefits sufficient for full and healthy maintenance of herself and her child . . . and . . . shall be entitled to free attendance by a doctor or certified midwife" but allows for women to be dismissed if she remains absent for longer than six weeks or develops an illness related to pregnancy "rendering her unfit for work." *See* 1919 MPC, *supra* note 92, arts. 3(a), 3(c), 4. Similarly, the 1952 Convention provides for a period of maternity of at least twelve weeks, with at least six weeks of mandatory leave and "cash and medical benefits" but allows for women on maternity leave to be dismissed during her absence. *See* 1952 MPC *supra* note 93, arts. 3(2)–(3), 4(1), 6.

278. *Ratifications of C183 - Maternity Protection Convention, 2000 (No. 183)*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312328 (last visited Aug. 31, 2014) [http://perma.cc/3K8N-SEDU] (archived Aug. 31, 2014).

279. *See* MPC, *supra* note 231, pmbl. (indicating that the Convention is meant to "promote equality of all women in the workforce").

280. *See List of Instruments By Subject and Status*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO:::#Maternity_protection (last visited Oct. 11, 2014) [http://perma.cc/LP9H-4ZQE] (archived Oct. 23, 2014) (listing the MPC as the only up-to-date instrument on maternity protection).

281. MPC, *supra* note 231, art. 4.

282. *See id.* ("The length of the period of leave referred to [in Article 4(1)] shall be specified by each Member in a declaration accompanying its ratification of this Convention."). Declarations accompanying the ratifications can be seen at MPC Ratifications, *supra* note 278.

283. *See* MPC, *supra* note 231, arts. 6, 7 (discussing the benefits provided under the MPC).

countries, allowing a lower bar for compliance than required in Article 6.[284] Article 6 is the heart of the maternity leave protections in the convention. It provides for three main benefits: (1) cash benefits for women with traditional employment following childbirth or complications from childbirth, (2) cash benefits for women who do not get traditional earnings following childbirth, and (3) medical benefits for women and children.[285]

The MPC's major benefit is that it is focused solely on protecting women during pregnancy and after child birth. Another benefit is its guaranteed enforcement mechanism: by requiring that members provide proof of their compliance with the convention at the time of accession, MPC secures its own enforcement without any of the problems faced by the CEDAW Committee.[286] However, the MPC has only twenty-nine signatories, making its reach limited.[287] Moreover, many countries already provide many of the protections in the MPC, such as compulsory and discretionary leave periods, benefits, and medical care, through domestic law.[288] Not only does this make the adoption of MPC less vital for these states, but also, as discussed in Part A, these domestic efforts have not been successful at achieving full workplace equality and maternity protection, thus limiting the MPC's potential as a fix-all solution.

IV. SOLUTION

Maternity discrimination in employment is an international problem that has be dealt with in a variety of ways. From this survey,

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284. *Compare* MPC, *supra* note 231, art. 6(2) (requiring that "[c]ash benefits . . . be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living"), *with id.* art. 7(1) (requiring "[a] Member whose economy and social security system are insufficiently developed . . . be deemed to be in compliance . . . if cash benefits are provided at a rate no lower than a rate payable for sickness or temporary disability in accordance with national laws and regulations").

285. See MPC, *supra* note 231, art. 6(1)–(2), (6)–(7) (indicating that "[c]ash benefits shall be provided to women who are absent from work on leave" and to women who "do[] not meet the conditions to qualify for cash benefits under national laws" and that "[m]edical benefits shall be provided for the woman and her child").

286. *See id.* art. 2(3) (requiring each member to include a "list [of] the categories of workers . . . excluded and the reasons for their exclusion" and a description of "measures taken with a few to progressively extending the provision of the Convention" in the member's report required "under article 22 of the Constitution of the International Labour Oranization"); *see also* ILO Constitution, art. 22, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A22 (last visited Sept. 19, 2014) [http://perma.cc/3TRZ-K3T7] (archived Sept. 19, 2014) (requiring members "to make an annual report . . . on the measures which it has taken to give effect to the provisions of Conventions to which it is a party").

287. MPC Ratifications, *supra* note 278.

288. *See MPA Ratifications*, *supra* note 278; WORLD POLICY ANALYSIS, *supra* note 26 (showing maternity leave policies around the world).

a few things should have become clear. First, none of the solutions currently in force presents a holistic solution to the problems of maternity discrimination; none address gender discrimination, health, and economic issues at once. Second, paid maternity leave, the keystone of the majority of solutions both domestic and international, is not a stand-alone solution. This is in part because paid maternity leave—the original maternity protection—was not devised to solve problems with gender or economic inequality but rather was based in a paternalistic desire to protect the health of children of working mothers. Third, international conventions, while addressing the issues and showing some benefit for member states, do not have the reach or authority to adequately solve the problems of maternity discrimination. Finally, piecemeal domestic solutions have had the most success in addressing individual problems caused by maternity discrimination.

Inspired by the passage of maternity protection legislation in the United States through the federal system, this Note proposes a global solution through domestic efforts. The Global Maternity Protection Act is an international model law for maternity protection that can be adopted on a state-by-state basis.

A. *Note on the Difficulty of International Solutions*

Given the survey of international instruments above, particularly CEDAW and the MPC, adoption of international instruments is certainly a worthy goal. As the ILO has recognized, the significance of adoption of these conventions is often as simple and profound as a public, global commitment to gender equality and nondiscrimination. [289] Therefore, adoption should certainly be encouraged wherever possible. However, there are two reasons these instruments cannot, in and of themselves, fully address the problem of global maternity discrimination.

First, some states may be reluctant to ratify international instruments. The experience of the United States is a prime example of this mindset.[290] This reluctance often depends on the place treaties hold under domestic law. In the United States, for example, under

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289. *Ecuador Ratifies the Workers with Family Responsibilities Convention*, *supra* note 273 ("Ecuador's ratification of [CEDAW] sends a renewed message in support of the special needs and problems that workers with family responsibilities face.").

290. *See* Blanchfield, *supra* note 134, at 1, 8 (explaining that U.S. ratification of CEDAW has been delayed because of the "concern[] that . . . ratification would undermine national sovereignty and require the federal government or, worse, the United Nations to interfere in the private conduct of citizens"); Harold H. Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 273 (2012) (summarizing the arguments against ratification, including, "most pervasively, . . . that U.S. ratification would diminish our national sovereignty and states' rights by superseding or overriding our national, state or local laws.").

Article 6 of the United States Constitution, treaties are "the supreme Law of the Land," entitled to the same legal weight as federal statute or the Constitution itself.[291] A treaty thus displaces all domestic law contrary to its terms just as a finding on unconstitutionality or preemption would.[292] The U.S. Senate has historically been loath to give an international instrument that has not been tested by the U.S. political process such heavy weight.[293] In recent years, the Senate has been willing to adopt treaties dealing with international issues such as global economics and criminal extradition but remains ambivalent to human rights treaties such as CEDAW.[294] The United States signed CEDAW in July 1980 but never allowed the treaty to come into force in the United States.[295] Similarly, the United States signed the Declaration on the Rights of the Child in February 1995, only to become one of only three countries in the world not to ratify.[296] In countries that are hesitant to ratify treaties or that take many

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291. U.S. CONST. art. VI.

292. *See* CONG. RESEARCH SERV., S. PRT. 106–7, TREATIES AND OTHER INTERNATIONAL INSTRUMENTS: THE ROLE OF THE UNITED STATES SENATE 4 (2001), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf [http://perma.cc/52YH-6CSX] (archived Aug. 31, 2014) (describing the relationship between international treaties and U.S. federal law).

293. *See* Blanchfield, *supra* note 134, at 8 (explaining that some senators view ratification of international treaties as "favoring international law over U.S. constitutional law and self-government, thereby undermining U.S. sovereignty"); CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL INSTRUMENTS, *supra* note 292, at 6– 14 (describing the lengthy process required for a treaty to incorporated into U.S. federal law).

294. *See* CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL INSTRUMENTS, *supra* note 292, at 15, 285 (noting that "[i]ncreased [Senate] recognition has been given to the importance of economic treaties, including consular, investment, and tax agreements," but cautioning that "legally binding human rights treaties ha[ve] been controversial" because members of the U.S. government fear "that internationally determined human rights could have an impact on rights of American citizens under the U.S. Constitution"); *see also* Jackie Kucinich, *She The People's Guide to the International Women's Rights Treaty You Have Never Heard Of*, WASH. POST (June 25, 2014), http://www.washingtonpost.com/blogs/she-the-people/wp/2014/06/25/she-the-peoples-guide-to-the-international-womens-rights-treaty-you-have-never-heard-of/ (last visited Sept. 12, 2014) [http://perma.cc/T57T-9JHR] (archived Sept. 12, 2014) [hereinafter *She the People*] ("In 1980, President Jimmy Carter sent the Senate Foreign Relations Committee a treaty for ratification outlining basic human rights for women around the world. Over 30 years later, the Senate Foreign Relations Committee is where it remains.").

295. *See* CEDAW Ratifications, *supra* note 233, at 3 (indicating that the United States has signed, but never ratified, CEDAW); *see also She the People*, *supra* note 294.

296. *See* Convention on the Rights of the Child, *supra* note 257 (indicating that the United States signed the Convention in 1995, but has failed to ratify it); *UN Issues Call on Member States to Ratify Convention on Rights of the Child*, *supra* note 257 (reporting that "Somalia, South Sudan and the United States are the only Member States that have not ratified [the Convention]").

reservations, encouraging the adoption of these international instruments is thus an incomplete solution.[297]

Second, as discussed in Part III.B, none of the international instruments providing maternity protection offer sufficient means of enforcement even for countries that are signatories. Even under the CEDAW Optional Protocol, the most coercive of enforcement measure in any of the discussed conventions,[298] the Committee decision's only remedy is a recommendation to the state party.[299] There is no means of ensuring that the recommendation is followed.[300] The WFRC has no enforcement mechanism whatsoever.[301] The MPC, which offers the most maternity protections, also has no enforcement mechanism but rather requires signatories to provide a signing statement attesting to their compliance.[302] Thus, the MPC is only signed by states that are already following its recommendations; it has no authority to compel that the recommendations be followed. Moreover, even if these conventions were strongly enforceable, countries are free to take reservations against the conventions, including the enforcement provision.[303] Given these weaknesses in enforcement, none of the international instruments is particularly effective in addressing maternity discrimination in countries not already willing to do so.

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297. For the view that CEDAW and the MPC are sufficiently flexible to allow adoption without displacing domestic law, see Blanchfield, *supra* note 134, at 14 (suggesting that, because CEDAW "leav[es] it up to States Parties to determine what actions are appropriate based on their domestic laws and policies," CEDAW "could be ratified by countries with a wide range of domestic laws and policies"); EVE C. LANDAU & YVES BEIGBEDER, FROM ILO STANDARDS TO EU LAW: THE CASE OF EQUALITY BETWEEN MEN AND WOMEN AT WORK 136 (2008) (explaining that, when the ILO was revising the MPC, "increased flexibility was a stated goal of the ILO Employers group, the ILO Secretariat and some industrialized countries, who considered that it would facilitate ratification of the new Convention by a greater number of Member States").

298. *See supra* Part III.B (surveying the enforcement mechanisms of CEDAW, the Optional Protocol, WFRC, and MPC).

299. *See* Optional Protocol, *supra* note 243, arts. 7(3)–(5), 8–9 (indicating that once the Committee makes a decision, it can make recommendations to and invite reports from a State Party accused of violating the Convention); Blanchfield, *supra* note 134, at 2–3 (discussing the function of the CEDAW Committee); Felipe Gómez Isa, *supra* 259, at 303–05, 313–16 (explaining that once the Committee reaches a decision and makes any recommendations, the state is required to report its efforts "to implement the [Committee's] recommendations" and noting that the Committee may continue to monitor the state by requesting additional reports).

300. *See* Optional Protocol, *supra* note 243, art. 10(1) (explaining that "[e]ach State Party may . . . declare that it does not recognize the competence of the Committee provided for in articles 8 and 9," the articles outlining the Committee's powers of enforcement).

301. *See* WFRC, *supra* note 231.

302. *See* MPC, *supra* note 231.

303. *See, e.g.*, Optional Protocol, *supra* note 243, art. 10(1) (permitting parties to refuse recognition of the articles outlining the Committee's enforcement powers); *supra* notes 242–45 and accompanying text (discussing the many reservations taken against CEDAW's enforcement mechanism).

It is also worth noting that CEDAW is one of the most highly ratified UN conventions, and yet the problem of maternity discrimination persists.[304] This raises questions about the basic effectiveness of CEDAW as an instrument, most probably due to the problem of enforcement. Thus, these instruments, while proving that maternity discrimination is a problem that can and should be dealt with on an international scale, illustrate that an international convention alone is not the solution at this time. However, the success of international human rights instruments like the Geneva Convention and Universal Declaration on Human Rights illustrate the potential good that can come from such an instrument, both in providing actual standards and in creating global pressure to conform to international norms.[305] Thus, this Note's ultimate solution works toward an international solution by first focusing on implementing effective domestic regimes.

B. *The Model Law Approach*

When the international community is viewed by analogy to the United States federal system, the reluctance of some countries to adopt international conventions becomes more understandable. Like the United Nations, the United States is a conglomerate of sovereign states, each with their own unique cultures and interests. When representatives of these sovereigns consider legislation on the national level, they do so with the knowledge that it is possible that whatever policy they enact will displace the laws already passed by a state's sovereigns. Thus, the federal government is historically unwilling to take up far-reaching policy questions that may be contrary to state law unless there is a compelling reason to do so. It is often only after a substantial number of states have already taken similar actions that the federal government follows to nationalize the policy. A case in point is the FMLA, which was adopted by the federal government only after twenty-three states adopted similar measures.[306] The FMLA is an example of how the adoption of a similar law by many sovereigns can inspire a boarder authority to take action. A model law approach has four benefits over traditional international law making. First, it would appeal to states that, like

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304. *See* CEDAW Ratifications, *supra* note 233 (indicating that there are 99 signatories and 188 parties to CEDAW).

305. *See generally* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that international conventions are able to change state behavior through three forms of pressure: coercion, persuasion, and acculturation).

306. *See Expecting Better*, *supra* note 135, at 12 (citing Waldfogel, *Family Leave Coverage*, *supra* note 137) (noting that "23 states had passed FMLA laws prior to the 1993 enactment of the federal FMLA"); *supra* Part III.A(i) (discussing the impact of federalism on U.S. national legislation and the passage of FMLA).

the United States, are traditionally reluctant to adopt international standards because of the displacement of domestic law. That the United States is a signatory to CEDAW arguably demonstrates agreement with its requirements; however, because of the reluctance of the Senate to approve instruments like CEDAW, its protections are denied to American women. The United States would be far more likely to adopt a purely domestic model law than to accede to an international convention containing the exact same provisions because of the supremacy issues involved. [307] Moreover, the accessibility of a model law opens up the possibility of adoption by political units within a country. In the United States, for example, states could adopt the law regardless of the federal government's position, perhaps eventually prompting the federal government to follow though the sort of action that inspired the law in the first place.[308]

Second, countries could modify the model to fit their specific needs. This would also be a benefit for countries that may be facing unique challenges not addressed by a general convention as well as for states that, like the United States, are concerned about the impact of national legislation on existing law. In either of these situations, the state could modify the model law to fit their specific needs rather than having to abide by both domestic and international laws that may or may not conflict.

Third, the model law would provide the universal standard of gender equality envisioned in the CEDAW. This Note discussed only three national regimes, yet the differences among them were striking. While these regimes were chosen to be representative, they failed to cover the vast array of protections provided to women in different countries. The widespread adoption of a substantially similar domestic maternity protection scheme would provide the same rights to women regardless of their citizenship, thus furthering the goals of conventions like CEDAW and the Universal Declaration of Human Rights to provide all citizens of the world with equal rights.[309]

Finally, just as the state adoptions of FMLA-like statutes led to the national FMLA law in the United States, the widespread domestic adoption of a comprehensive maternity protection plan would make the adoption of a truly effective international convention

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307. *Cf.* Koh, *supra* note 290.

308. *See supra* note 140 and accompanying text (explaining that the U.S. federal government often follows individual states in adopting laws and providing the example of the FMLA laws, which were adopted by 23 states before being adopted by the federal government).

309. *See* CEDAW, *supra* note 35, art. 2 (stating the parties' commitment to "condemn discrimination against women in all its forms"); Universal Declaration of Human Rights, *supra* note 39, art. 2 (recognizing that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction any kind").

on maternity protection more likely.[310] At the time CEDAW was adopted, the protections embodied in Article 11(2) were foreign to many of the signatories, sparking the large number of reservations.[311] The adoption of a model law would make the eventual adoption of an international instrument more likely because the ratification of such an instrument would be in line with existing domestic regimes. Also, the wide ratification of an instrument is more likely to encourage even non-signatories to comply through the weight of global pressure to conform.[312]

C. *The Global Maternity Protection Act*

The model act's title—The Global Maternity Protection Act—reflects both the global nature of the law and the goal of a comprehensive solution to maternity discrimination rather than one focused only on the provision of leave or benefits. Based on the recommendations of commentators and the successes and failures of existing domestic and international solutions, the Act has five major parts: (1) the provision of paid maternity leave, including a period of compulsory leave; (2) the extension of benefits to co-parents that are equal or near-equal those offered to mothers; (3) the provision of state-sponsored child care; (4) the provision of medical care to mothers and children; and (5) employment protections for women who take leave and all mothers, including an enforcement mechanism.

The Global Maternity Protection Act has three levels of enforcement: mandates, recommendations, and discretionary decisions. Each of the five provisions below contains a mandate, such as a minimum pay level or range of acceptable leave allowances, which must be met by an adopting state. Each provision also contains either a recommendation or a policy within the mandated range that would offer the optimal protection. However, states would have no obligation to follow this recommendation. All of the provisions additionally leave a margin of discretion to the state in implementation, both in determining the optimal policy for it within the mandated range and in determining funding, implementation, enforcement, and a number of other issues surrounding adoption. Nonetheless, the model law is exactly that: a model. Any entity,

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310. *See Expecting Better*, *supra* note 135 (suggesting that federal laws, such as the federal FMLA regulations, have often been adopted following widespread adoption of such laws by individual states).

311. *See generally* CEDAW Ratifications, *supra* note 233 (listing the declarations and reservations of countries who have ratified, acceded to, or succeeded from CEDAW).

312. *See* Goodman & Jinks, *supra* note 305 (arguing that international conventions are able to change state behavior through coercion, persuasion, and acculturation).

whether a country, province, or city, can adopted the act to fit its unique needs.

Any successful maternity protection scheme must include paid maternity leave. Though it has not been able to completely eradicate problems of maternity discrimination, paid maternity leave has been a useful tool in combatting many facets of the three major problems.[313] Commentators have argued that maternity leave is most effective when it is at least six weeks long but begins to counteract employment equality goals after two years.[314] Thus, the Act would mandate a minimum leave period in that wide range, and the state will decide the exact length within the effective range. At least one commentator has argued that forty weeks is the ideal length for maternity leave.[315] According to Ruhm, children's health benefits from parental leave peak at that point.[316] Thus, the Act would recommend a leave period of forty weeks.[317]

The Act would also include a compulsory leave period before and after the birth of the child. Despite the suspicion that sometimes surrounds compulsory leave, it can be effective in relieving the pressure on new mothers to return to work as quickly as possible and warding off any resentment by her employer for her failure to do so. The compulsory leave period must be long enough to allow the mother time to, at a minimum, prepare for and recover from childbirth. Generally, postpartum doctor's visits are scheduled six weeks after birth, when substantial recovery is expected.[318] Based on this medical marker, the Act would recommend a minimum compulsory leave of six weeks. However, acknowledging the varied needs of mothers and businesses, it would allow a compulsory leave period between two and eight weeks.

As for pay, the Act would recommend full compensation equal to a woman's prior salary or, if the woman was formerly unemployed, to the national minimum wage. Influenced by the MPC's standard, the Act would allow a minimum compensation of two-thirds the woman's previous income, with a lower boundary of national minimum

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313. *See supra* Part II.B (discussing the development of paid maternity leave).

314. *See, e.g.*, Ruhm, *Parental Leave and Child Health*, *supra* note 27, at 16–23.

315. *Id.*

316. *Id.*

317. To be clear, the minimum leave period is the minimum amount of time an employer must allow a woman to take in connection with the birth of a child. The woman is permitted to return sooner (subject to the conditions of the compulsory leave period) and employers may offer their employees as much additional time as the employer chooses.

318. *See Recovering from Birth*, U.S. DEP'T HEALTH & HUM. SERVS. (Sept. 27, 2010), http://www.womenshealth.gov/pregnancy/childbirth-beyond/recovering-from-birth.html (last visited Aug. 31, 2014) [http://perma.cc/88UW-ZYES] (archived Aug. 31, 2014) (indicating that postpartum doctors visits are scheduled about six weeks after birth).

wage.[319] The Act would recommend that benefits be paid by social security but allow for payment by social security, employers, or a combination.

Following the UK's lead, the Act would mandate extension of benefits that are equal or near-equal those offered to mothers to co-parents. The Act would define co-parent broadly to include spouses, non-spousal partners, same-sex partners, or any other relationship where the person would have responsibility for the child's upbringing equal to or second only to the mother's. The mandate for equal time is in recognition of the OECD's concern about the Swedish system's negative effect on gender pay equality.[320] The OECD theorized that one of the reasons for Sweden's large pay gap was that women took significant parental leave while men took relatively little.[321] Thus, the provision of substantially equal parental leave to both mothers and fathers would be perhaps the most important part of the Act in furthering the goals of gender equality and closing the pay gap.

The Act would mandate that men be given substantially equal access to parental leave. The Act would require a compulsory leave period for co-parents equivalent to the compulsory leave period for mothers, whatever the state determines that may be. Additionally, the Act would mandate a minimum leave period within the same range as for mothers (between six weeks and two years), again to be equivalent to that adopted for mothers. As with mothers, fathers could elect to return to work sooner than this minimum period. However, employers could not take adverse action against fathers who elected to take their full amount of parental leave.

The Act would require the provision of state-sponsored child care. Funding for this care would be within the discretion of the state. State funding would be a given for states like Sweden, where such care is already available. But even for countries like the United States that are more resistant to state-sponsored social programs, there is a precedent. For the United States, compliance with this provision could be as simple as expanding access to the federally

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319. *See* MPC, supra note 231, art. 6(2)–(3) (mandating that "cash benefits . . . be at a level which ensures that the woman can maintain herself and her child" and requiring that "cash benefits paid with respect to leave . . . based on previous earnings, . . . shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits").

320. *See Closing the Gender Gap*, *supra* note 108 (reporting that "[i]n 2011, Swedish women earned 14% less than men" and that "[t]he pay gap is even larger (21%) among parents").

321. *See* OECD, OECD ECONOMIC SURVEYS: SWEDEN 86 (Dec. 17, 2012), *available at* http://www.oecd.org/eco/surveys/Sweden%202012%20Overview.pdf (last visited Sept. 19, 2014) [http://perma.cc/G48T-CSZU] (archived Sept. 19, 2014) (indicating that Sweden offers parental leaves to both genders, but that "women tak[e] most of them" and that women who take a 16-month parental leave "have been less likely to see a progress in their careers once back on the job").

subsidized Head Start preschool program, offering tax refunds to parents for the cost of child care, or even expanding the public school system.[322] States would be required to provide access to such care for each child from the end of the state's maternity leave requirement to the time when mandatory schooling begins. Under the Act's recommendations, then, states would be required to provide child care from forty weeks after birth (the recommended minimum leave period) until the age of five (the average age when formal schooling begins).

The Act would mandate the provision of medical care to mothers and children, and funding for this requirement would be left to the discretion of the states. Again, there is precedent both in countries that already provide universal state-sponsored healthcare and in countries like the United States that do not. In the United States, the Women, Infants, and Children Program (WIC) provides health care and food subsidies to women who qualify.[323] To meet the Act's requirement, the United States would only have to expand WIC to cover all new mothers and their children. It would be within the state's discretion to determine how to fund this expansion, including by requiring covered families to pay premiums based on income. However, the Act would recommend that health care, including food subsidies when needed, be covered by the state.

Finally, and perhaps most importantly, the Act would mandate employment protections for all mothers who take leave, and it would include an enforcement mechanism. As has been discussed throughout this Note, the lack of adequate discrimination protections is where other maternity protection regimes, both domestic and international, have failed. Thus, this requirement would leave less discretion to states. The Act would flatly forbid termination of employment, in whole or in part, due to pregnancy, familial status, or use of parental leave for either men or women. Additionally, the Act would forbid negative employment action such as demotion, passing over, reassignment, transfer, lack of advancement due to pregnancy, familial status, or use of leave. Employers would be forbidden from inquiring about the familial status of job applicants or employees being evaluated for promotion and would be forbidden from considering such information in decision making, including in determining pay, once it was disclosed. The Act would allow none of

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322. *See Head Start Services*, OFFICE OF HEAD START, http://www.acf.hhs.gov/programs/ohs/about/head-start (last visited Sept. 23, 2014) [http://perma.cc/9S-JNBM] (archived Sept. 23, 2014) (describing the services and goals of the Head Start Program).

323. *See Women, Infants, and Children (WIC)*, USDA FOOD & NUTRITION SERV., http://www.fns.usda.gov/wic/women-infants-and-children-wic (last visited Sept. 6, 2014) [http://perma.cc/K695-D5PB] (archived Sept. 6, 2014) (explaining that, through WIC, the federal government "provides . . . grants to States for supplemental foods, health care referrals, and nutrition education" for qualifying women and "infants and children up to age five").

the exceptions found in the UK's Regulations or Sweden's Parental Leave Act for failure to comply when compliance is deemed impracticable without a significant showing of hardship on the part of the employer, which cannot be based solely or even largely on the employee's familial status or use of leave.[324] As the UK's continuingly dismal pregnancy discrimination figures illustrate, such loopholes allow too much room for abuse.[325]

States would have discretion in how they wished to enforce these requirements. For example, it would be more consistent with U.S. policy and concerns to make the Act enforceable through private litigation, as is the case with other civil rights actions, while countries with more robust regulatory schemes, like Sweden, might be more comfortable enforcing through government action. Subject to the above mandates, states would be free to erect their own legal standards for compliance.

The Global Maternity Protection Act outlined here differs from most maternity protection regimes in only two respects: the length of parental leave available to co-parents and the strict antidiscrimination standards. [326] These changes are crucial for combatting the ongoing global problem of discrimination and pay inequality despite the widespread adoption of the remainder of the provisions. As for the remaining provisions, the usefulness of paid maternity leave has been the focus of a great deal of this Note, especially Part II. Sweden's record-setting female workforce participation rate proves the efficacy of child care, and state-sponsored health care has been widely adopted by the majority of the world's countries, save the United States. Together, these five provisions, along with the benefits of the model law itself, as previously outlined, would be a significant step forward in the fight against maternity discrimination.

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324. *See, e.g.*, Regulations, *supra* note 121, at Regulation 18, 20 (providing exceptions to the UK Regulations' requirements where it is not reasonably practicable for the employer to comply); Parental Leave Act, *supra* note 122, at §§ 14, 20 (noting exceptions to the Act when compliance is not practicable or would result in a "substantial disturbance to the employer's activity").

325. *See supra* Part III.A(ii) (discussing the challenges facing paid maternity leave reform in the United Kingdom).

326. *Compare supra* Part IV.C (proposing a Global Maternity Protection Act with flat prohibitions and minimum paid leave lasting between 6 and 40 weeks), *with supra* Part III.A (discussing current antidiscrimination standards and parental leave in the United States, United Kingdom, and Sweden), *and supra* Part III.B (analyzing international antidiscrimination and parental leave standards in CEDAW, the WFRC, and the MPC).

V. CONCLUSION

Women's roles in the workplace have been growing steadily for the past half-century. Yet, in everything from pay to advancement, workplace gender discrimination persists. Much of this discrimination is based on women's unique role in society as child bearers. Numerous domestic and international efforts to address this discrimination have been made over the past 150 years, especially throughout the twentieth century, but none have been completely successful. Drawing from the history of maternity leave legislation, the original and most popular maternity protection, as well as the example of domestic and international regimes, the Global Maternity Protection Act provides global protection for a global problem and aims to make all women equal by providing them with the same benefits and protections, regardless of nationality. The Global Maternity Protection Act has benefits over current international protections and over purely domestic solutions of providing universal equality because the Global Maternity Protection Act is easily adopted and enforced by states.

The world's women have been stuck on the mommy track for long enough. It is time to get off.

Caraline Rickard[*]

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* J.D. Candidate, Vanderbilt Law School, 2015; B.S. History & Political Science, Union University, 2012. Thank you to the Executive Board and staff of the *Vanderbilt Journal of Transnational Law* for the opportunity to publish and their help in publishing this Note. A special thanks to Cody Goodman of the Tennessee Department of Labor and Workforce Development for his help in ensuring the accuracy of the statistical evidence herein. Most importantly, thank you to my parents, Charles and Ronda Rickard, for their unending support, encouragement, and love, and for showing me what it means to truly "have it all."

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