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The Slow Crawl of Paid Family Leave Laws

Brendan Williams

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THE SLOW CRAWL OF PAID FAMILY LEAVE LAWS

BRENDAN WILLIAMS*

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INTRODUCTION

When my son, Blake, was born in 2002, his mother had the option of taking unpaid leave from her job. Under the Family and Medical Leave Act of 1993 (“FMLA”),¹ eligible employees are allowed up to twelve weeks of unpaid leave during any twelve-month period for prescribed circumstances, including the birth of an employee’s child; the placement of a child with an employee for foster care or adoption; the care of an employee’s spouse, child, or parent in the event of a serious health condition; or the occurrence of a serious health condition

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1. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

that “makes the employee unable to perform the functions of the position of such employee.”²

It’s easy to forget what a landmark law this was then. Prior to its enactment, there was no federally protected job security if the employee took a leave of absence for childbirth or a family member’s sickness.³ Employment would commonly be terminated in such situations.⁴

Yet, for many, the option of going without income is a Hobson’s choice. Moreover, maternity breaks can interfere with a woman’s ability to build, and retain, employability skills, furthering gender inequality in the workplace.⁵ Once detached from the workforce, it’s harder for women to resume working.⁶ This was certainly true for Blake’s mother, who had nearly died in childbirth, as it is for so many women.

Today, as one advocate notes, “we are the only industrialized country without a national paid family and medical leave program despite the fact that women are now roughly half of the paid labor force.”⁷ She argues that “[t]he lack of a national paid family and medical leave program hurts our businesses, families, health and economy—and is a contributing factor to the gender wage gap, particularly for moms and women of color.”⁸

Even in its earliest days, there was an inherent economic-class bias to the FMLA. One criticism points out that the FMLA, although intended to provide economic stability to America’s working families, inevitably excludes women, minorities, and the indigent.⁹ Congress

2. 29 U.S.C. § 2612(a)(1) (Westlaw through Pub. L. No. 116-5).

3. Ashleigh Garvey & Claire Mitchell, *Who’s Your Daddy? A Proposal for Paid Family Leave to Promote the Growth of Families*, 27 HOFSTRA LAB. & EMP. L.J. 199, 201 (2009).

4. *Id.*

5. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 294 (2007).

6. *Id.* at 294–95.

7. Kristin Rowe-Finkbeiner, *Why America Needs a Paid Family Leave Act for All*, TIME (Feb. 26, 2018), <http://time.com/5172814/paid-family-leave-policy/>.

8. *Id.*

9. Christina Potter-Bayern, *The Changing Needs of the Workplace: Looking to State Statutory Expansions for Guidance on FMLA Reform*, 7 AM. U. LAB. & EMP. L.F. 1, 6 (2017).

failed to examine the interplay of family leave and other laws – as one scholar notes, “[t]he possibility that traditional welfare would end was not considered during the FMLA debate.”¹⁰ Policymakers and advocates erroneously assumed women excluded from the FMLA would rely on welfare if their employers did not accommodate their pregnancy and caregiving needs.¹¹ Accordingly, President Bill Clinton’s “welfare reform” of 1996, probably the most significant overhaul of federal welfare laws since 1935, passed without acknowledging that poor women rely on both welfare, and employer policies, for protection against pregnancy discrimination and to ensure work-life balance.¹²

These shortcomings, however, could still be addressed by states. The FMLA provides that “[n]othing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”¹³ Clearly, the FMLA operates as a floor, not a ceiling.

To the extent this language is an implied invitation to states to do markedly better than the FMLA, few states have responded to that invitation in the past quarter-century. As of 2018, the only state-paid-leave programs were in California, New Jersey, New York, and Rhode Island, although other states were soon to be implementing their own programs.¹⁴ Although these states have successfully enacted a program, the process of implementing paid family leave faces several challenges, even in progressive jurisdictions like the state of Washington and the District of Columbia.

10. Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 4 (2007).

11. *Id.*

12. *Id.* at 53. The author notes the following:

As a political matter, advocates for poor women and children found that they were fighting the most punitive welfare reform since the inception of Aid to Dependent Children in 1935. In Congress, there was little dialogue or room for discussion about the best way to encourage work for low-income parents while accommodating caregiving.

Id. at 54.

13. 29 U.S.C. § 2651 (Westlaw through Pub. L. No. 116-5).

14. See Ron Lieber & Tara Siegel Bernard, *Washington Gridlock? Maybe Not on These Personal Finance Issues*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/your-money/credit-finance-congress.html>.

This article first examines the odyssey states have undertaken to implement paid family leave laws since the FMLA's enactment. It then looks at the future of paid family leave in both the state and federal landscape and concludes that the best hope for paid family leave availability rests with the states.

I. PAID FAMILY LEAVE IN THE STATES

A. *California*

In 2002, California became the nation's first state to implement paid family leave.¹⁵ Business criticism was fierce even though employers were exempted from paying into the benefit fund.¹⁶ It was reported that Governor Gray Davis, a Democrat, supported the legislation only after provisions requiring paid leave for twelve weeks and employer contributions were removed.¹⁷ Instead, the law allowed workers up to six weeks of paid leave at fifty-five percent of their weekly salary, "to care for sick children, spouses, parents or domestic partners, as well as for parents of newborn or newly adopted children."¹⁸ The maximum benefit is capped at \$728 a week and is tax-free.¹⁹ No more than \$70 annually would be deducted from an employee's pay to fund the program.²⁰ Organized labor lobbied hard for the new law and rewarded Governor Davis's signature with accolades six weeks before the gubernatorial election.²¹

15. See Lisa Girion & Megan Garvey, *Davis OKs Paid Family Leave Bill*, L.A. TIMES (Sept. 24, 2002), <http://articles.latimes.com/2002/sep/24/local/me-leave24>.

16. See *id.*

17. See *id.*

18. *Id.*

19. See *id.*

20. See *id.*

21. See Lynda Gledhill, *Davis OKs Paid Leave to Care for Family / Workers to Get About Half of Salary for 6 Weeks*, SFGATE (Sept. 24, 2002, 4:00 AM), <https://www.sfgate.com/news/article/Davis-OKs-paid-leave-to-care-for-family-Workers-2767437.php>. Davis would be recalled, however, by voters in 2003 after winning his 2002 re-election. Carla Marinucci & Joe Garofoli, *Legacy of Gov. Gray Davis' Recall Endures*, SFGATE (Apr. 13, 2013, 9:26 PM), <https://www.sfgate.com/politics/article/Legacy-of-Gov-Gray-Davis-recall-endures-4432913.php> ("The seeds of California voters' discontent were planted in 2002, when Davis emerged battered

However, more than a decade after California's historic foray into providing paid family leave benefits, the law's partial compensation scheme provides minimal benefits for the employees dealing with "the chaotic, stressful, and often sleepless" routine that arises in caring for a child or an ailing family member.²² The law does not cover independent contractors and, given its partial benefits, not even half of families caring for newborns use the state's paid family leave program.²³ Indeed, workers with lower incomes are least likely to take paid family leave, even though their needs are greater and their access to additional support is more limited.²⁴

This inherent economic class bias has manifested itself elsewhere, including in the District of Columbia. Accordingly, in California, "some companies have rightly taken to offering stronger paid leave to attract and retain employees. Salaried employees at Netflix, for example, are given a full year of paid parental leave."²⁵

B. Washington State

In 2007, following a year-long legislative push,²⁶ Washington became the second state to adopt a paid family leave law.²⁷ Much fanfare accompanied the new law's passage, which was supposed to

from an exhausting, expensive battle with GOP opponent Bill Simon. Only 36 percent of California voters bothered to cast ballots in the November election.").

22. Salvador Guillermo, *To Address California's Affordability, Fix Paid Family Leave*, L.A. DAILY NEWS (Oct. 30, 2018, 2:23 PM), <https://www.dailynews.com/2018/10/30/to-address-californias-affordability-fix-paid-family-leave/>.

23. *See id.*

24. *See id.*

25. *Id.*

26. Marc Mory & Lia Pistilli, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689, 705 (2001) ("Washington State legislators are considering proposals to provide \$250 a week, with a cap at five weeks for individuals taking FMLA leave. The funding would be provided by a two-cent per hour payroll tax shared by employers and employees.").

27. *See* Rachel La Corte, *State Lawmakers Pass Family Leave Bill for New Parents*, SEATTLE TIMES (Apr. 22, 2007, 12:00 AM), <https://www.seattletimes.com/seattle-news/state-lawmakers-pass-family-leave-bill-for-new-parents/>.

begin providing benefits in 2009. One advocacy group proclaimed it “a giant step forward” for the state’s families.²⁸

There was a small catch, though—the law wasn’t funded. As *The Olympian* editorialized: “All sizzle, no steak—it’s a pretty lousy way to legislate.”²⁹ The results would, perhaps predictably, prove to be a tragicomedy.

The law passed the Senate on a bipartisan 32-17 margin with a small payroll tax, a tax that remained intact through a House policy committee, before being gutted in the House.³⁰ To avoid a potentially damaging legislative vote, the House speaker and the governor, both Democrats, even “suggested putting the issue up for a statewide vote.”³¹ The Democrats, at that time, held large majorities in the Senate (32-17) and the House (62-36).³² Outraged by the unfunded bill that emerged

28. Brendan Williams, *Commentary: Is Any State Fund Safe During a Budget Year?*, HERALDNET (Sept. 3, 2017, 1:30 AM), <https://www.heraldnet.com/opinion/commentary-is-any-state-fund-safe-during-a-budget-year/>.

29. *Editorial Views from Across the State*, SEATTLE TIMES (May 4, 2007, 12:00 AM), <https://www.seattletimes.com/opinion/editorial-views-from-across-the-state-78/>.

30. See Ralph Thomas, *Reduced Paid-Family-Learn Bill Surfaces in House*, SEATTLE TIMES (Apr. 13, 2007, 12:00 AM), <https://www.seattletimes.com/seattle-news/reduced-paid-family-learn-bill-surfaces-in-house/>.

31. *Id.* That was an approach that supporters resisted: “Despite strong backing from labor unions, family-learn supporters say they would be outgunned by big business in a referendum campaign.” Ralph Thomas, *Paid-family-Learn Bill in Doubt*, SEATTLE TIMES (Apr. 1, 2007, 12:00 AM), <https://www.seattletimes.com/seattle-news/paid-family-learn-bill-in-doubt/>. The union-backed paid family learn bill had also been killed in the Democratic House in 2005, drawing fulsome praise for the House speaker from a conservative business leader, Tom McCabe of the Building Industry Association of Washington: “Frank Chopp is wise enough to realize you can’t meet the expectations of those groups without jeopardizing the Democratic Party’s majority status in the Legislature,” McCabe said.” Ralph Thomas, *Labor, Environmentalists Eye Big Legislative Wins*, SEATTLE TIMES (Mar. 20, 2005, 12:00 AM), <https://www.seattletimes.com/seattle-news/labor-environmentalists-eye-big-legislative-wins/>. Chopp’s supporter, McCabe, would go on to win the Ronald Reagan Award from the Conservative Political Action Committee. See Brad Shannon, *Tom McCabe wins national Ronald Reagan award*, THE OLYMPIAN (Feb. 14, 2011, 9:27 PM), <https://www.theolympian.com/news/politics-government/article/25284622.html>.

32. Andrew Garber & Ralph Thomas, *Democrats Spent Big but Showed Restraint*, SEATTLE TIMES (Apr. 22, 2007, 12:00 AM), <https://www.seattletimes.com/seattle-news/democrats-spent-big-but-showed-restraint/>.

from the House, many Senate Democrats and one Republican, who previously supported the bill, ended up changing their votes at the last minute.³³ The eviscerated bill left hard feelings:

One Republican who voted for the measure when it passed the Senate, angrily derided Democrats for capitulating to the House version.

“Where is the Senate’s backbone on this issue?” asked Sen. Don Benton, R-Vancouver.³⁴

The Association of Washington Business praised Democrats, especially House Speaker Frank Chopp, for not “overreaching.”³⁵ But the bill’s critics derided the absence of a funding mechanism, which a task force chartered by the law would determine.³⁶

As the 2008 legislative session opened, the Senate majority leader professed the Democrats’ support for “the 1-cent-per-hour, employee-paid payroll tax that Senate Democrats have twice approved.”³⁷ The Republican House minority leader responded by accusing the Senate majority leader of being a socialist.³⁸

33. See La Corte, *supra* note 27. Benton now runs the Selective Service Administration under President Trump. See Erik Lacity, *After Tension at EPA, Ex-State Sen. Don Benton to Lead Selective Service*, SEATTLE TIMES (Apr. 11, 2017, 7:35 AM), <https://www.seattletimes.com/nation-world/nation-politics/after-tension-at-epa-ex-state-sen-don-benton-to-lead-selective-service/>.

34. LaCorte, *supra* note 27.

35. See Garber & Thomas, *supra* note 32.

36. See *Editorial Views from Across the State*, *supra* note 29 (“Republicans rightfully scoffed at the bill’s creation of a task force to figure out how to pay for the benefit. ‘It’s like telling the waiter, ‘I’m hungry. Surprise me,’ joked Rep. Daniel Newhouse, R-Sunnyside”). This criticism led to its eventual demise. See Rachel La Corte, *Washington Tries to Fix Paid Leave Law Dormant Since 2007*, AP (Jan. 18, 2017, 4:10 PM), <https://apnews.com/ce523de16e6b4c42a5f6efb7147b1082> (“But the law quickly turned into an empty promise because state lawmakers never came up with a way to pay for it, resulting in an indefinite delay of its implementation”).

37. David Postman, *More Talk Coming on Family Leave*, SEATTLE TIMES (Jan. 9, 2008, 12:00 AM), <https://www.seattletimes.com/seattle-news/politics/more-talk-coming-on-family-leave/>.

38. See *id.* (noting that “[w]hen Brown said that most industrialized nations have paid family leave, House Minority Leader Richard DeBolt, R-Chehalis, said that at least some of those countries are socialist”).

Despite the Senate majority leader's support, no progress occurred that session, leaving it until the next session to decide how the approved paid-family-leave program was to be funded.³⁹

By the 2009 legislative session, legislators had given up.⁴⁰ They passed a new law to delay the start date for the paid family leave law until 2012.⁴¹ In 2011, a law was passed delaying implementation until 2015.⁴² Then, in 2013, legislators passed a law changing the 2015 implementation deadline until "[w]hen the legislature has specifically appropriated funding and enacted an implementation date for benefits,"⁴³ which seemed to signal the law's death knell.

But voters were ahead of the politicians. Initiative 1433 passed in 2016, entitling employees to paid sick leave by 2018⁴⁴ and helping to force legislative action. In a show of bipartisanship, Senator Joe Fain, R-Auburn, sponsored Senate Bill 5149, providing eight weeks of paid family leave for childbirth, adoption, or a family member's serious illness and ensuring an increase to twelve weeks as of 2023.⁴⁵ The bill passed in 2017, and the family and medical leave law was finally

39. Andrew Garber & Ralph Thomas, *Low-Key Session Ends with Tribute to Longtime Lawmaker Sommers*, SEATTLE TIMES (Mar. 14, 2008, 12:00 AM), <https://www.seattletimes.com/seattle-news/politics/low-key-session-ends-with-tribute-to-longtime-lawmaker-sommers/>.

40. See Matthew Halverson, "Fine. Call Me A Dictator.", SEATTLE MET (Jan. 7, 2009, 4:00 AM), <https://www.seattlemet.com/articles/2009/1/7/frankchopp0109>. Amazingly, that same year Chopp had bragged, in the face of progressive criticism, about having passed the law he gutted: "Chopp brushes off the criticism and points to that list of Democratic accomplishments since he became speaker: . . . passing America's second paid family leave act[.]" *Id.*

41. See 2009 Wash. Sess. Laws 544.

42. See 2011 Wash. Sess. Laws 469.

43. 2013 Wash. Sess. Laws 2875.

44. See Initiative 1433, WASH. ST. LEGISLATURE, <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Initiatives/Initiatives/INITIATIVE%201433.sl.pdf> (last visited May 1, 2019).

45. *Id.* The bill that ultimately passed into law was introduced by Fain. See Substitute Senate Bill 5975, WASH. ST. LEGISLATURE, <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5975-S.SL.pdf> (last visited May 1, 2019). Fain – "seen as a rising star in the GOP" – would go on to lose his 2018 re-election bid to a Democrat. Joseph O'Sullivan, *Washington State Sen. Joe Fain Concedes to Democratic Challenger Mona Das*, SEATTLE TIMES (Nov. 9, 2018, 7:52 PM), <https://www.seattletimes.com/seattle-news/politics/washington-state-sen-joe-fain-concedes-to-democratic-challenger-mona-das/>.

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funded.⁴⁶ Participation from the business community proved helpful to passage of the law.⁴⁷ Having gutted the 2007 law, Chopp, still House speaker, was on hand to take credit for its 2017 resurrection: “This is the largest expansion in social security in Washington state. Hallelujah!”⁴⁸

No one will be able to obtain benefits under the law until January 1, 2020.⁴⁹ The maximum weekly benefit will begin at \$1,000, and then be adjusted upward annually for inflation.⁵⁰ The minimum weekly benefit is \$100.⁵¹ Moreover, the Washington law is regressive. Employers deduct the full amount of the family leave premiums from an employee’s wages and are only responsible for fifty-five percent of the medical leave portion of the premium.⁵² Again, the inherent economic-class-bias issue inherent in these types of laws is evident. How could anyone take care of an ill family member or raise a newborn on \$100 a week? As two authors note in a law review analysis: “One of the main reasons people do not take advantage of leave programs is that they cannot afford to do so. To these individuals, the provisions of the FMLA are meaningless.”⁵³

46. Rachel La Corte, *Washington Becomes 5th State to Guarantee Paid Family Leave*, HERALDNET (July 6, 2017, 5:57 AM), <https://www.heraldnet.com/news/washington-becomes-5th-state-to-guarantee-paid-family-leave/>.

47. *Id.*

48. John Stang, *Washington Will Give Parents Paid Family Leave*, CROSSCUT (July 5, 2017), <https://crosscut.com/2017/07/washington-is-5th-state-to-pass-paid-family-leave/>.

49. See 2017 Wash. Sess. Laws 2044, 2052; *Leave Benefits*, EMP. SECURITY DEP’T: WASH. ST., <https://esd.wa.gov/paid-family-medical-leave/benefits> (last visited May 1, 2019).

50. *WA’s Paid Family and Medical Leave Program Begins January 1, 2019*, WSVMA, <https://wsvma.org/2018/11/30/was-paid-family-and-medical-leave-program-begins-january-1-2019/> (last visited May 1, 2019).

51. *Id.*

52. *Frequently Asked Questions*, EMP. SECURITY DEP’T: WASH. ST., <https://esd.wa.gov/paid-family-medical-leave/FAQ> (last visited May 1, 2019).

53. Mory & Pistilli, *supra* note 26, at 698–99.

C. New Jersey

In 2008, New Jersey, on paper at least, became the third state to pass a paid family leave bill.⁵⁴ It was enacted with a grand statement of legislative intent, including perhaps one of the longest sentences in statutory history:

In order to maintain consumer purchasing power, relieve the serious menace to health, morals and welfare of the people caused by insecurity and the loss of earnings, to reduce the necessity for public relief of needy persons, to increase workplace productivity and alleviate the enormous and growing stress on working families of balancing the demands of work and family needs, and in the interest of the health, welfare and security of the people of this State, such a system, enacted under the police power, is hereby established, requiring the payment of reasonable cash benefits to eligible individuals who are subject to accident or illness which is not compensable under the worker's compensation law or who need to care for family members incapable of self-care.⁵⁵

The sponsor of the original law pushed for it to become much more expansive in 2018, even though business interests, including the New Jersey Business and Industry Association, were opposed to the proposed changes.⁵⁶ The former Republican Governor, Chris Christie, had vetoed a similar expansion to the current law.⁵⁷ In February 2019 the new approach finally passed the Legislature and went to the

54. See 2008 N.J. Laws ch. 17, https://www.njleg.state.nj.us/2008/Bills/PL/08/17_.PDF.

55. *Id.* Thus, of the total premiums, “businesses foot about 37 percent of the bill and employees pay 63 percent.” Rachel Lerman & Benjamin Romano, *Workers Start Paying for Washington State's New Paid-Leave Law in 2019. Here's How it Works.*, SEATTLE TIMES (Dec. 12, 2018, 7:32 PM), <https://www.seattletimes.com/business/employers-would-be-parents-get-set-for-new-washington-state-medical-and-family-leave/>.

56. Colleen O’Dea, *Paid Family-Leave Bill Would Mean More Time, More Money for Workers*, NJSPOTLIGHT (May 11, 2018), <https://www.njspotlight.com/stories/18/05/10/paid-family-leave-bill-would-mean-more-time-more-money-for-workers/>.

57. See Christian Hetrick, *Christie Vetoes Bill to Expand Paid Family Leave and More*, OBSERVER (July 21, 2017, 4:13 PM), <https://observer.com/2017/07/christie-vetoes-bill-to-expand-paid-family-leave-and-more/>.

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Democratic governor, Phil Murphy – it would “increase the eligibility period from six to 12 weeks and raise the cap on the reimbursement an applicant can receive to 85 percent of their wages — up to \$859.”⁵⁸

D. Rhode Island

Rhode Island, in 2014, became the fourth state to enact a paid family leave law, or the third if you considered Washington’s 2007 law meaningless. The program entitles eligible employees to collect about 60 percent of their salary for up to four weeks and is funded by a 1.2 percent payroll tax on most Rhode Island employees.⁵⁹ The maximum benefit paid out is about \$800 a week.⁶⁰

E. District of Columbia

In 2016, the District of Columbia City Council, in a 9-4 vote, passed the Universal Paid Leave Amendment Act of 2016, which the *Washington Post* editorial board urged Mayor Miriam Bowser to veto on grounds that the benefits would not be going to D.C. employees, but to D.C. employees residing in Maryland and Virginia.⁶¹ She did not

58. Samantha Marcus, *N.J.’s Paid Family Leave Program is About to Pay Out Much More*, NJ: TRUE JERSEY (Feb. 3, 2019), <https://www.nj.com/politics/2019/02/njs-paid-family-leave-program-is-about-to-pay-out-much-more.html>. This may improve utilization: “According to NJ Time to Care, a coalition of unions and advocacy organizations that support expanding the program, only 14 percent of New Jersey families who gave birth or adopted a child made use of the program in 2014. The overall participation rate among eligible workers in 2015, the group said, was less than 1 percent.” Nicholas Pugliese, *New Jersey Workers Could Get Twice as Much Time Off with Expanded Family Leave*, NORTHJERSEY (Feb. 6, 2019, 5:44 AM), <https://www.northjersey.com/story/news/new-jersey/2019/02/06/family-leave-act-nj-double-time-bigger-benefits-way/2769795002/>.

59. *Can Rhode Island’s Paid Family Leave Be a National Model?*, PBS (Apr. 16, 2017, 4:17 PM), <https://www.pbs.org/newshour/show/can-rhode-islands-paid-family-leave-national-model>.

60. *Id.*

61. Editorial Board, *Bowser Should Take a Stand Against D.C.’s Costly Family Leave Bill*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/opinions/bowser-should-take-a-stand-against-dcs-costly-family-leave-bill/2017/02/09/28e4b6e8-eefe-11e6-9973-c5efb7ccfb0d_story.html?noredirect=on&utm_term=.29dee8e44a4d. Obviously, this is a dynamic that would not exist in most, if any, states. But one’s residency would seem to be immaterial to workplace rights, as it is with respect

follow that advice, despite offering “[p]retty convincing arguments to veto the bill—but instead Ms. Bowser took the easy way out, at least for her, and decided to let the bill become law without her signature.”⁶²

However, in 2018, the mayor, pushing for an opponent of the law to unseat an incumbent councilmember, Elissa Silverman, attacked the family-leave law, noting that some of the benefits would be received by Maryland and Virginia residents.⁶³ The challenger, Dionne Reeder, promised to offer an alternative method, but failed, telling voters to wait until after the election.⁶⁴

After the incumbent won, one longtime observer of D.C. politics, Colbert King, poignantly noted that many D.C. residents felt they were sidelined on a medical leave debate that, clearly, was not about them.⁶⁵

to other labor laws that apply to the situs of one’s workplace (e.g., a Virginia resident working in D.C. still can earn no less than the minimum wage in D.C.).

62. Editorial Board, *Mayor Bowser’s Feckless Decision to Let D.C.’s Paid-Leave Proposal Become Law*, WASH. POST (Feb. 20, 2017), https://www.washingtonpost.com/opinions/bowsers-feckless-decision-to-let-dcs-paid-leave-proposal-become-law/2017/02/20/d90f69d8-f53d-11e6-8d72-263470bf0401_story.html?utm_term=.ef0b22984422.

63. Fenit Nirappil, *D.C. Mayor Rallies for Reeder in Effort to Oust Silverman*, WASH. POST (Oct. 14, 2018), https://www.washingtonpost.com/local/dc-politics/bowser-rallies-for-dionne-reeder-latest-in-her-push-to-oust-elissa-silverman/2018/10/14/836342d2-ce4b-11e8-a3e6-44daa3d35ede_story.html?noredirect=on&utm_term=.9c1336040ec4.

64. See Fenit Nirappil, *D.C. Candidate Promised a Plan for Paid Family Leave. Now She Says to Wait Until After Election Day.*, WASH. POST (Oct. 25, 2018), <https://www.washingtonpost.com/local/dc-politics/dc-candidate-promised-a-plan-for-paid-family-leave-now-she-says-wait-until-after-election-day/2018/10/25/c80c63e6-d878-11e8-aeb7-ddcad4a0a54estory.html?utmterm=.8a74260994a5> (“Reeder testified at a council hearing convened by Silverman that she wanted the paid-leave program to succeed without hurting businesses, but she offered few specifics. In subsequent forums and interviews, Reeder said she didn’t want to ‘speak out of turn’ by proposing an alternative”). The *Washington Post* had endorsed her anyway. See Editorial Board, *The Post’s Endorsements for D.C. Council*, WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/opinions/the-posts-endorsements-for-dc-council/2018/10/19/25b8afa2-d303-11e8-8c22-fa2ef74bd6d6_story.html?utm_term=.c33cc98de660 (“we have profound policy disagreements with Ms. Silverman (notably her championing of unwieldy paid family leave legislation that punishes businesses that already provide the benefit) . . .”).

65. See Colbert I. King, *Lust for Power Has Split D.C. into Two Cities*, WASH. POST (Nov. 9, 2018), https://www.washingtonpost.com/opinions/lust-for-power-has-split-dc-into-two-cities/2018/11/09/c71228a6-e389-11e8-b759-3d88a5ce9e19_story.html?noredirect=on&utm_term=.65eb3756c8d0. King aptly observed:

Again, there is an unacknowledged economic-class bias to paid family leave programs. The D.C. ordinance, however, is unique in that it only assesses employers, who will contribute 0.62% of its covered-employee wages to the Universal Paid Leave Implementation Fund.⁶⁶ Prior to October 1, 2021, the maximum weekly benefit amount is \$1,000,⁶⁷ which will be adjusted by inflation thereafter.⁶⁸ An employee may take off up to 8 weeks in a 52-week period.⁶⁹ Benefits will become available July 1, 2020,⁷⁰ with deductions for the funding beginning July 1, 2019.⁷¹

F. New York

The New York paid family leave bill unveiled by Democratic Governor Andrew Cuomo in 2016 drew criticism from business interests, who thought it went too far, and advocates like the New York Civil Liberties Union, who didn't think it went far enough.⁷² The New York Civil Liberties Union's executive director said the benefit should be closer to seventy-five percent of the employee's salary, as opposed

The paid family medical leave debate unfolded against the backdrop of two cities stubbornly divided between those employed full time, and those either underemployed or jobless, and who are also separated by income, race and where people live.

Most residents of both cities, I believe, would not begrudge beneficiaries of the family leave act. It is their good fortune to have jobs with benefits. If anything, they are to be envied, not resented.

Id.

66. D.C. CODE ANN. § 32-541.03 (West 2017).

67. *Id.* § 32-541.04.

68. *Id.* § 32-541.04(g)(6)(A).

69. *See id.* § 32-541.04(f).

70. *See id.* § 32-541.04(j) ("By July 1, 2020, the Mayor shall commence the payment of paid-leave benefits provided for in this act").

71. *See id.* § 32-541.03(d) ("By July 1, 2019, the Mayor shall begin to collect contributions to the Universal Paid Leave Implementation Fund from covered employers").

72. *See* Glenn Blain & Kenneth Lovett, *Andrew Cuomo's Paid Family Leave Plan Only Covers 35% of Person's Salary in First Year*, N.Y. DAILY NEWS (Jan. 14, 2016, 7:13 PM), <https://www.nydailynews.com/news/politics/cuomo-paid-family-leave-proposal-starts-pay-article-1.2497544>.

to the proposed thirty-five to fifty percent.⁷³ The final bill provided for eight weeks of paid leave with a maximum benefit of \$652 per week.⁷⁴ Employees will be entitled to twelve weeks by 2021, at two-thirds of their average weekly wage.⁷⁵ However workers, not their employers, pay into the fund “through a payroll deduction of up to \$1.65 a week.

With Rhode Island offering four weeks of partial pay, and New Jersey and California offering six, New York became leader of the pack with its 2016 bill, although the state still trails most other countries in the world when it comes to maternity leave.⁷⁶

G. Massachusetts

In June 2018, Massachusetts Governor, Charlie Baker, a Republican, signed off on what was characterized as a “grand bargain” to keep three ballot questions off the November 2018 ballot that would have proposed a raise on the minimum wage, instituted paid leave, and lowered state sales taxes.⁷⁷ The new paid leave program provides eligible employees with paid leave for a maximum of twelve weeks a year to care for a family member or bond with a new child, twenty weeks a year to deal with a personal medical issue, and up to twenty-six weeks to deal with deployment of a family member for military service.⁷⁸ Weekly benefit amounts will be calculated as a percentage of the employee’s average weekly wage, with a maximum weekly

73. *Id.*

74. *See New York Joining States Requiring Paid Family Leave*, CBS: NEW YORK (Dec. 24, 2017, 3:08 PM), <https://newyork.cbslocal.com/2017/12/24/new-york-paid-family-leave/>.

75. *See id.*

76. *See Christina Cauterucci, New York Just Established the Best Paid Family Leave Policy in the Country*, SLATE (Apr. 1, 2016, 12:29 PM), <https://slate.com/human-interest/2016/04/new-york-established-the-best-paid-family-leave-policy-in-the-country.html>.

77. Shira Schoenberg, *Gov. Charlie Baker Signs \$15 Minimum Wage, Paid Family Leave into Law*, MASSLIVE (June 28, 2018), https://www.masslive.com/politics/2018/06/gov_charlie_baker_signs_15_min.html.

78. Press Release, Office of Gov. Charlie Baker & Lt. Gov. Karyn Polito, *Governor Baker Signs Grand Bargain Legislation* (June 28, 2018), <https://www.mass.gov/news/governor-baker-signs-grand-bargain-legislation>.

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benefit of \$850.⁷⁹ Self-employed persons may also opt into the program.⁸⁰

In short, with six states, plus the District of Columbia, having enacted paid family leave laws, other states looking to do so have templates to choose from. Moreover, Congress can rely upon actual data, not mere anecdotes, in considering whether to augment the FMLA.

II. THE FUTURE OF PAID FAMILY LEAVE

In light of what has occurred to date, what's next for paid family leave? The prospects of using federal action to improve the FMLA appears dim given political polarization. However, the FMLA's benefits and its popularity may continue to drive individual states to experiment with new legislation and implement their own versions of paid family leave in the future. The need seems clear, as a September 2018 survey showed that more than half of those surveyed "said an unpaid leave for family or medical reasons would mean serious financial hardship[.]"⁸¹

The benefits of paid family leave are undeniable. Even the conservative Heritage Foundation has acknowledged that most parents want to be at home with their newborns and adopted children and that allowing employees that time can be good for businesses as well.⁸²

79. *Id.*

80. *See id.* Business leaders issued a very tepid response to the bill's passage. One article noted a sentiment shared by James E. Rooney, president and chief executive of the Greater Boston Chamber of Commerce: "[a]lthough imperfect, this legislation reflects compromise from all sides, and we accept it." Nik DeCosta-Klipa, *What You Need to Know About the 'Grand Bargain' that Charlie Baker Just Signed into Law*, B: NEWS (June 28, 2018), <https://www.boston.com/news/politics/2018/06/28/massachusetts-minimum-wage-paid-leave-sales-tax-law>.

81. Jill Cornfield, *Five Myths About the Burden of Family Leave on Business*, CNBC (Sept. 27, 2018, 10:06 AM), <https://www.cnbc.com/2018/09/27/paid-family-leave-can-be-a-win-win-for-workers-and-employers.html>.

82. Rachel Greszler, *Paid Family Leave: Avoiding a New National Entitlement*, HERITAGE FOUND. (July 20, 2017), <https://www.heritage.org/jobs-and-labor/report/paid-family-leave-avoiding-new-national-entitlement>.

One 2018 study discovered that in California and New Jersey, breastfeeding increased after paid family leave laws were passed.⁸³ The notion of paid family leave has even garnered major support across the political spectrum: A 2018 column in *The Hill* reported that “[a] recent poll shows 84 percent of Americans support a comprehensive national paid leave policy. . . . we have 94 percent of Democrats, 83 percent of Independents, and 74 percent of Republicans in favor of paid leave.”⁸⁴ Even President Trump called for paid family leave in his 2018 State of the Union Address, although it remains unclear as to whether he supports a government policy or encouraging private companies to offer paid leave through tax incentives.⁸⁵

III. THE INHERENT STRUGGLES THAT STATES ARE FACING

Despite the trend in employer-supplied paid family leave, “only 13 percent of all workers in the U.S. have access to paid parental or family medical leave through their employers.”⁸⁶ Efforts by enlightened employers still exclude significant parts of the working class because “[h]ourly workers, who make up more than half of the US workforce and are disproportionately African-American and Latino, rarely see such benefits: Only 5 percent are estimated to have access to paid

83. Andrew Scheeler, *More Mothers Breastfeeding After California Passed Paid Leave Law, Study Finds*, SACRAMENTO BEE (Oct. 26, 2018, 1:37 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article220680020.html>.

84. Aparna Mathur & Isabel Sawhill, *A Path Forward on Paid Family Leave*, THE HILL (Sept. 7, 2018, 1:00 PM), <https://thehill.com/opinion/finance/405568-a-path-forward-on-paid-family-leave>.

85. Claire Cain Miller, *Lowe's Joins Other Big Employers in Offering Paid Parental Leave*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/upshot/lowes-joins-other-big-employers-in-offering-paid-parental-leave.html> (President Trump stated, “Let us support working families by supporting paid family leave.” However, he “did not say whether he supported a government policy or, as some Republicans have suggested, tax incentives or other encouragement for more private companies to offer it.”). However, one is reluctant to lend credence to any of the president’s pronouncements. See, e.g., Glenn Kessler et al., *President Trump Has Made 6,420 False or Misleading Claims Over 649 Days*, WASH. POST (Nov. 2, 2018), https://www.washingtonpost.com/politics/2018/11/02/president-trump-has-made-false-or-misleading-claims-over-days/?noredirect=on&utm_term=.f2e23b2208a8.

86. Steven Findlay, *Are You Eligible for Paid Family Leave Without Knowing It?*, CONSUMER REP. (Feb. 21, 2018).

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family leave.”⁸⁷ For instance, “McDonald’s offers paid leave to corporate employees, but the vast majority of its 375,000 workers are hourly and not covered.”⁸⁸

While some companies have taken the initiative to support its employees through paid family leave, lawmakers are still experimenting with new legislation to improve the FMLA. Republican Senator Marco Rubio of Florida has introduced the Economic Security for New Parents Act. This legislation would “offer new parents the option of collecting Social Security benefits for at least two months in return for deferring their retirement age for the period of time necessary to offset the cost.”⁸⁹

This proposal has been heavily criticized for its disregard for bigger families because “couples with more children would face working further into old age before receiving retirement benefits.”⁹⁰ Another critic notes that “Mr. Rubio’s bill would make parents cash in their retirement to take care of their children today.”⁹¹

Additionally, the economic class bias is also present here. This bill “neglects the most pressing reason people need paid leave: to recover from a serious illness or to take care of a sick or disabled family member. About three-quarters of those who take unpaid family leave do it for these reasons, not because they have a new infant.”⁹² Senator

87. Simon Montlake, *Paid Family Leave: While US Lags Behind, More States Set Policies*, CHRISTIAN SCI. MONITOR (July 12, 2018), <https://www.csmonitor.com/Business/2018/0712/Paid-family-leave-While-US-lags-behind-more-states-set-policies>.

88. *Id.*

89. Kristin A. Shapiro, *A Paid Family Leave Plan That Congress Might Actually Pass*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/opinion/rubio-paid-family-leave.html> (“[b]ecause the Social Security proposal doesn’t require a new tax, it is much more likely to gain enough support in Congress to actually be passed into law”).

90. Elizabeth Bruenig, *Trump’s Paid Family Leave Plan Would Punish Those Who Choose to Have Kids*, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/opinions/trumps-paid-family-leave-plan-would-punish-those-who-choose-to-have-kids/2018/02/07/dc612c0c-0b85-11e8-95a5-c396801049ef_story.html?utm_term=.18712b37a603.

91. Bryce Covert, *The Wrong Way to Do Paid Family Leave*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/opinion/paid-family-leave-marco-rubio.html>.

92. *Id.*

Rubio's bill does not consider that "lower-wage workers would end up putting off retirement longer than wealthier workers with ample company benefits, . . . given that America's poor suffer significantly reduced life expectancies compared with the country's rich."⁹³

Altruism alone need not motivate employers in the near term given that the Tax Cuts and Jobs Act of 2017⁹⁴ provides that companies may receive a tax credit if they provide paid family and medical leave for their lower-wage employees.⁹⁵ The credit, limited to two years, is available to companies offering employees earning less than \$72,000 a year at least two weeks of paid family or medical leave covering at least fifty percent of the employee's wages.⁹⁶ If those conditions are met, "and the company contributes at the half-wage level, it will receive a tax credit equal to 12.5 percent of the amount it pays to the employee. . . . It could go up to a maximum credit of 25 percent of the amount the employer paid for up to 12 weeks of leave."⁹⁷

Experts find it unlikely this will be enough to incentivize employers.⁹⁸ However, beyond enlightened workplaces, paid family leave is only available in a handful of progressive jurisdictions, and the challenges associated with enacting such laws, including business community concerns, suggest paid family leave laws will continue to only inch forward.

In Colorado, the paid family leave bill House Democrats sent to the Senate in 2018 reportedly marked "the fourth such iteration of an effort since 2014 to take money from each worker's paycheck — an amount estimated at 0.33 percent of the total payment — and put it into a pool that can be used by any worker to give them partial pay if they need to

93. Bruenig, *supra* note 90.

94. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2054.

95. Michelle Andrews, *Tax Credit Aims To Boost Availability Of Paid Family Leave, But Will It Work?*, NPR (Jan. 23, 2018, 5:00 AM), <https://www.npr.org/sections/health-shots/2018/01/23/579753000/tax-credit-aims-to-boost-availability-of-paid-family-leave-but-will-it-work>.

96. *Id.*

97. *Id.*

98. *See id.*; *see also* Findlay, *supra* note 86 ("Paid-leave advocates say the federal measure is inadequate and will induce few companies that don't already offer paid leave to do so").

take extended leave to care for themselves or for a family member.”⁹⁹ Although the 2018 bill was killed again in the Senate, the Senate shifted to Democratic control in the 2018 election.¹⁰⁰ Poignantly, among the victors: “Rep. Faith Winter, the Westminster Democrat who has sponsored the paid-family-leave bill the past two sessions, ousted Sen. Beth Martinez, R-Thornton, by a margin of 52 percent to 41 percent to capture a hotly contested seat in Adams County.”¹⁰¹ The new Democratic governor, Jared Polis, campaigned in support of paid family leave.¹⁰² His first budget proposal would provide paid family leave to state workers.¹⁰³

Even in progressive Vermont, the Republican governor, Phil Scott, vetoed a paid family leave bill in 2018 that would have been funded by a 0.141% payroll tax upon employees.¹⁰⁴ However, although Scott won re-election in 2018, Democrats obtained veto-proof legislative majorities.¹⁰⁵ Along with the Republican governor of neighboring New Hampshire, Chris Sununu, Scott suggested a private insurance model

99. Ed Sealover, *Colorado House Passes Bill to Launch Paid-Family-Leave Program*, DENVER BUS. J. (Apr. 16, 2018, 1:50 PM), <https://www.bizjournals.com/denver/news/2018/04/16/colorado-house-passes-bill-to-launch-paid-family.html>.

100. See Ed Sealover, *Democrats Recapture Colorado Senate, Now Hold Complete Power at Capitol*, DENVER BUS. J. (Nov. 6, 2018), <https://www.bizjournals.com/denver/news/2018/11/06/colorado-senate-democrat-control.html>.

101. *Id.*

102. See Ernest Luning, *Polis Pitches ‘Economy that Works for Everyone’ in Labor Day Ad*, COLORADOPOLITICS (Sept. 3, 2018), https://www.coloradopolitics.com/hot-sheet/polis-pitches-economy-that-works-for-everyone-in-labor-day/article_bcac2772-85e7-5d19-a229-2a0af03b27e1.html.

103. See Blair Miller, *In First State of the State Speech, Colorado Gov. Jared Polis Outlines Ambitious Policy Agenda*, DENVER CHANNEL (Jan. 10, 2019, 12:48 PM), <https://www.thedenverchannel.com/news/politics/in-first-state-of-the-state-speech-colorado-gov-jared-polis-outlines-ambitious-policy-agenda>.

104. See Elizabeth Hewitt, *Paid Family Leave Bill Among Scott’s Vetoes*, VALLEY NEWS (May 23, 2018), <https://www.vnews.com/Vt-s-Gov-Vetoes-paid-family-leave-min-wage-17694554>.

105. See April McCullum, *Phil Scott Without a Backstop: Vermont Governor Loses Veto Power in Second Term*, BURLINGTON FREE PRESS (Nov. 12, 2018, 6:51 AM), <https://www.burlingtonfreepress.com/story/news/politics/government/2018/11/12/phil-scott-without-backstop-vermont-governor-loses-veto-power-second-term/1929916002/>.

for family leave, with a voluntary opt-in.¹⁰⁶ In 2019, though, Sununu was “the first Republican governor of New Hampshire in modern history to face a Democratic Legislature”—and Democrats made it clear that paid family leave is a priority.¹⁰⁷

New Hampshire’s Democratic legislature tested Sununu’s resolve by passing, in March 2019, a paid family leave bill to set “up an insurance program that would provide 60 percent of wages for up to 12 weeks of qualified leave annually, funded by 0.05 percent universal withholding from paychecks.”¹⁰⁸ While Republicans derided the Democrats’ bill as an “income tax,” the private insurers Sununu would rely upon reportedly “suggested that an insurance program based on voluntary participation would be more costly to participants.”¹⁰⁹

CONCLUSION

There is no doubt paid family leave is popular with voters.¹¹⁰ But in states where paid family leave laws are enacted, policymakers must address the economic class inequities inherent in family leave laws.¹¹¹

106. See Wilson Ring, *N.H., Vermont Governors Detail Paid Family Leave Proposal*, CONCORD MONITOR (Jan. 16, 2019, 6:34 PM), <https://www.concordmonitor.com/Govs-of-New-Hampshire-and-Vermont-outline-family-leave-plan-228-20200>. It is not clear how that approach would be actuarially-sound or serve to address the economic class bias issues associated with family leave laws.

107. Holly Ramer, *Sununu, Democrats to Share Power in NH*, FOSTERS (Nov. 7, 2018, 3:09 PM), <https://www.fosters.com/news/20181107/sununu-democrats-to-share-power-in-nh>.

108. Dave Solomon, *Family leave bill clears legislature; Sununu veto anticipated*, UNION LEADER (Mar. 20, 2019), https://www.unionleader.com/news/politics/state/family-leave-bill-clears-legislature-sununu-veto-anticipated/article_a3415922-8405-55ab-968c-c0a276aed485.html.

109. *Id.*

110. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *VOTERS’ VIEWS ON PAID FAMILY + MEDICAL LEAVE: FINDINGS FROM A NATIONAL SURVEY 7* (2018), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf> (noting that 70% of voters, and even 58% of Republicans, were more likely to vote for a 2018 Congressional candidate who publicly supported a national paid family and medical leave policy).

111. The conservative Heritage Foundation notes that “[l]ow-income and minority workers are least likely to have access to paid leave. According to the BLS data, only 6 percent of workers in the lowest quartile of wages have access to paid

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For example, consider the nation's direct care workers—4.3 million in number according to the Paraprofessional Health Institute.¹¹² Of the 2.1 million home care workers in 2016, 87% were women, and workers were making a median wage of \$11.03 an hour.¹¹³ If such a worker gave birth, could she *really* afford to stay at home for as little as, say, \$100 a week in lieu of pay? What if she is a single mom and the sole source of income for her family?

In such circumstances, paid family leave is an illusory choice—or perhaps even worse, a program she will never use that she may be subsidizing for the more affluent. To destroy that illusion states must consider adding a progressive element allowing the more affluent to subsidize more livable and reasonable benefits for the poor, instead of making benefits proportional to income.¹¹⁴ Otherwise, Colbert King's observations in D.C. about the irrelevance of paid family leave to the indigent will ring true elsewhere.¹¹⁵

leave, compared to 24 percent of workers in the highest quartile." Greszler, *supra* note 82.

112. See PARAPROFESSIONAL HEALTH INST., THE DIRECT CARE WORKFORCE: YEAR IN REVIEW 2 (2018), <https://phinational.org/resource/the-direct-care-workforce-year-in-review-2018/>.

113. *Id.* at 3.

114. See, e.g., NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, VOTERS' VIEWS ON PAID FAMILY + MEDICAL LEAVE, PAID FAMILY AND MEDICAL LEAVE: A RACIAL JUSTICE ISSUE—AND OPPORTUNITY 7 (2018) ("To make paid leave accessible to workers of color, the wage replacement rate should be as close to 100 percent as possible and it should be progressive by providing greater replacement to people with lower incomes."). As one author notes, paid family leave can also perpetuate a gender inequity dynamic in a two-parent household: "Because men on average enjoy higher salaries than women, a straight percentage cut for a family across each wage earner's income will still usually provide an economic bias toward *maternity leave*." Ayanna, *supra* note 5, at 302 (emphasis added). She argues that "[i]f men become as likely as women to take parental leave, it will result in a greater equalization of bargaining power in the job market, as well as an equalization of the disadvantages parents face in building their careers." *Id.* at 295.

115. See King, *supra* note 65.