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# Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts

Katharine B. Silbaugh\*

## INTRODUCTION

The Family and Medical Leave Act (FMLA) provides relief to workers, helping them in their struggle to meet the sometimes competing demands of work and family. There have been numerous attempts to expand legislation to cover more occasions where work and family obligations are in tension. This Article will address one way that the *courts* may be expanding the Act's application. It will investigate whether this modest interpretive expansion can be explained partially by society's deeper understanding of the challenges of work-family balance over the ten years since the FMLA's passage. Have we changed our general understanding of conflicts between employment and family work from occasional and extraordinary events to frequent and ordinary ones? Consequently, is the paradigmatic work-family conflict pathological or normal under the FMLA?

There are many critics of the FMLA. The business community complains that the FMLA affords too much coverage—arguing that the notice requirements placed on employees are insufficient, that the FMLA's interaction with company sick-leave policies is unsatisfactory, that leave is taken in too small of increments, and that courts are too permissive in deciding what illnesses qualify under the Act. Advocates of employees complain that the FMLA's scope and coverage are too *limited*. They argue that the Act applies to too few employees because of both the one year employment requirement and

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the exemption for employers with fewer than fifty workers.<sup>1</sup> Some say the leave provided is not long enough in the case of birth or adoption, comparing the FMLA's twelve week provision with the full year (or more) of parental leave provided in many developed countries. Others complain that, in practice, men do not take the provided leave to care for newborn children; still others say the definition of "family" is unfairly narrow in excluding many close-knit relationships, such as those between same-sex partners. The most prominent complaint, however, is that there is no wage replacement in the law. Employee advocates have worked since the passage of the FMLA to establish paid leave, with increasing success towards the end of the Clinton administration.<sup>2</sup>

This Article addresses a different criticism of the FMLA's utility to parents, who originally were conceived as its prime beneficiaries.<sup>3</sup> Raising children is an enterprise that extends beyond the first twelve weeks of life, and a worker's identity as a parent continues long after the twelve weeks expire and the parent returns to his or her job. The eighteen year dependency of a child has employment implications for parents. As a statute dealing with the short-term medical implications of family illnesses or childbirth, the FMLA has some value.<sup>4</sup> However, as a work-family policy statute—one premised on the

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1. Senator Dodd (D-CT) has several times introduced legislation to extend the number of people covered by the Act. *E.g.*, Family and Medical Leave Expansion Act, S. 304, 108th Cong. (2003); Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. (1999).

2. The use of unemployment insurance trust funds made possible by an executive order under President Clinton has caused both great praise and great criticism, and has remained the focal point of much of the discussion of the FMLA for the past several years, ending with the George W. Bush administration rescinding the executive order. Regulations for Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2002) (rescinded Oct. 9, 2003). *See also* Letter from Jeffrey C. McGuinness, President, Labor Policy Ass'n, to President William J. Clinton, at [http://www.hrpolity.org/memoranda/1999/99-130\\_Letter\\_to\\_President\\_Clinton\\_Re-FMLA-UI.pdf](http://www.hrpolity.org/memoranda/1999/99-130_Letter_to_President_Clinton_Re-FMLA-UI.pdf). Note that the Labor Policy Association is now known as the HR Policy Association.

3. This has changed in practice, as workers' own illnesses dominate FMLA use in the case law. COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 94 fig. 5.2 (1996) (showing that 60% of FMLA-covered leave is taken because of a worker's own health problems). In addition, as it evolved over the years, elder care became an increasing focus of the Act. STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 125 (2001).

4. I say "some" because it is limited in all the other ways previously mentioned: no wage replacement, limited application to employers, etc.

promise that workers will “never again have to choose between the job they need and the family they love”<sup>5</sup>—the FMLA captures only a small slice of the difficulties.<sup>6</sup> This limitation stems from the fact that the FMLA’s protection rests on specific triggering events. Other than the birth of a child, these events are premised on there being a serious crisis or emergency—on something extraordinary befalling a family. On the other hand, the challenges surrounding the work-family balance are, as we now know, distinctly ordinary.

The challenges associated with balancing our routine family obligations and our identities as workers have received tremendous attention of late from the business community, women’s groups, academics, and in society generally. Many policy proposals attempt to address these challenges, including a reinvigorated hours cap under the Fair Labor Standards Act,<sup>7</sup> reforms in part-time work and in the use of flex-time,<sup>8</sup> and childcare support, just to name a few of the many examples.

But as work in path-dependence teaches us, when a statute has already passed, it changes the course of policy discussion on a topic. The FMLA, as currently conceived, might seem to have limited potential for achieving a better work-family policy over the course of one’s working life, rather than just during crises. Yet the legislation does have the distinct advantage of already being enacted. Thus, it is worth investigating the FMLA as a *platform* for further work-family accommodations. The value of building upon what is already there is

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5. U.S. National Archives and Records Administration, Clinton Presidential Materials Project, Statement by the President on the Fifth Anniversary of the Family and Medical Leave Act, available at <http://clinton6.nara.gov/1998/08/1998-08-05-statement-by-the-president-on-5th-year-anniversary-of-fmla.html> (Aug. 5, 1998).

6. E.g., TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 146 (2002); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 44–56 (2000); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 142–43 (1998); Ellen Goodman, *Missing the Point—Again—on Parental Leave*, BOSTON GLOBE, Nov. 14, 1999, at D7.

7. E.g., Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1 (2001); Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157 (1995); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

8. E.g., Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 393, 405–08 (1992); WILLIAMS, *supra* note 6, at 112.

reflected in several bills that have been introduced to expand the FMLA's coverage. President Clinton proposed the Family Friendly Workplace Act of 1996 to require employers to provide up to three additional days per year of leave for a child's educational needs, or for routine family medical purposes, including attending to an older relative's health needs.<sup>9</sup> In the House of Representatives, the Family and Medical Leave Improvements Act would have given an additional twenty-four hours per year to volunteer at a child's school or to attend a parent-teacher conference or school performance related to the child's advancement.<sup>10</sup> These efforts reflect the idea that the FMLA could be the platform for legislation making the balancing of family and work roles easier generally, and not just in the event of medical crises. These FMLA amendment proposals aim to transform the Act into one that addresses more ordinary work-family conflicts. This expanded vision for the FMLA—as a broader work-family balancing regime rather than as a bridge over medical emergencies—would constitute a considerable evolution in the mainstreaming of work-family issues.

Significantly, however, the expansions envisioned in these amendments have not been passed in Congress. The provocative question addressed here is *whether the “expansions” were already made law by the FMLA in 1993.*

Against the backdrop of the legislative amendment debate, this Article evaluates what *federal courts*, independent of Congress, have done to contribute to the evolution of the FMLA beyond medical crises and towards a balanced work-life regime. The Article will evaluate a strand of cases interpreting key language in the FMLA: “serious health condition.”<sup>11</sup>

Before a person can qualify for FMLA leave, either the worker herself, or else a qualifying family member, must have a serious health condition.<sup>12</sup> Imagine two possible interpretations of that term. The first views a serious health condition as an emergency, such as

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9. Family Friendly Workplace Act, S. 4, 105th Cong. (1997).

10. Family and Medical Leave Improvements Act of 1997, H.R. 109, 105th Cong. § 4(a)(3)(A)(I) (1997).

11. 29 U.S.C. § 2611(11) (2000).

12. The Department of Labor has issued regulations interpreting the term. 29 C.F.R. § 825.114 (2003).

an aneurism, a fractured hip from a car accident, or a pancreatic cancer diagnosis. If these calamities befell a worker's child or spouse, they would turn the worker's life upside down, and likely would prevent her from going to work for a period of time. That version of "serious health condition" would offer someone in a hard-luck situation the support of job security.

Now imagine a different interpretation of the term "serious health condition." Imagine that it includes the flu, migraine headaches, childhood ear infections, conjunctivitis, bronchial infections, or strep throat. As with the more dire situations, if one of these conditions befell a worker's child, it would likely prevent the worker from going to work for a period of time, albeit a shorter one, while she stayed home to care for her sick child. It would not turn her life upside down, however, and though these events create childcare emergencies, they are not commonly considered *grave* emergencies. Instead, they are *ordinary* occurrences. From a worker's perspective, what makes such ordinary work disruption a crisis is the prospect of job loss due to absenteeism while managing the relatively minor health and caregiving problem.

The first interpretation of the term "serious health condition" envisions a federal policy of job security for medical emergencies. The second interpretation might envision a federal policy of job security even in the event of a routine work-family balancing challenge—in other words, federally mandated sick days and personal days.<sup>13</sup>

Early cases seemed to be grounded securely in the former, the "dire medical emergencies" camp, in interpreting serious health conditions under the Act. A few more recent cases, however, have leaned more towards the latter interpretation, granting FMLA leave to a parent for her child's ear infection or to a worker for his own flu.<sup>14</sup>

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13. Twelve weeks of leave is not medically necessary to recover from childbirth, but rather it represents an entitlement to healthy family integration time. Such an understanding of family needs is positive, but it is strange to cap the time at twelve weeks and apply it to new children only.

14. For a discussion of the cases, see *infra* Part II of this Article. The case outcomes are still quite mixed. But Senator Judd Gregg (R-NH) has introduced legislation, entitled "The Family and Medical Leave Clarification Act," to roll back the decisions allowing FMLA coverage for more minor illnesses. S. 320, 108th Cong. (2003). The Senator likely was

Why would a federal bench widely believed to prefer the most restrictive available interpretation of civil rights or employee benefits statutes choose an expansive interpretation here? This is puzzling, particularly because a less expansive interpretation is not only available, but may even be more plausible as a matter of discernable legislative intent. I speculate that this nascent development may reflect the deepened understanding we have gained into the nature of the work-family balancing problem since the FMLA's passage ten years ago. I further posit that the problems of balancing work and family have been *domesticated*; they have moved beyond the realm of a solely equality-based, feminist concern to that of a more universal worker and family concern.<sup>15</sup>

Part I of this Article maps out the road the FMLA took to become a law without any apparent focus on the routine balancing problems that face working parents over the life cycle of dependent care. Part II examines the evolving case law on the key term, "serious health condition." Part III offers a possible explanation for the trend towards the changed views of work and family balance. Part IV compares the judicial sympathy here to that shown in sexual harassment cases, looking for similarities in the mainstreaming of the issues by framing them not only as equality issues, but also as decency issues. Part V concludes that the trend is modest, that further legislation to expand the FMLA is still needed, and that the sexual harassment law analogy may indicate an area of concern.

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responding to business community complaints on the same subject. See *Family and Medical Leave Act of 1993: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Educ. and the Workforce*, 105th Cong. (1997) [hereinafter *Hearings*]; 149 CONG. REC. S2005 (daily ed. Feb. 5, 2003) (statement of Sen. Judd Gregg introducing the Family and Medical Leave Clarification Act); Letter from R. Bruce Josten, Executive Vice President of Government Affairs, U.S. Chamber of Commerce, to U.S. Representative Judy Biggert, at <http://www.uschamber.com/government/letters/030121hr35.htm> (Jan. 21, 2003); Watson Wyatt Insider, *FMLA Concerns Prompt New Legislation*, at <http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=9151>.

15. I made a similar point in Katharine B. Silbaugh, *Foreword: The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001).

## I. THE PATH TO THE NARROW CONCEPTION OF A FAMILY-FRIENDLY WORKPLACE REFORM ACT

The understanding of work and family has changed tremendously in the fifteen years since the FMLA was first put on the table. We now see the effect that care of dependents, especially child dependents, have on women's status as workers in a different light. I will grossly oversimplify this change in light of space constraints.<sup>16</sup>

During the 1980s, many women's organizations argued that if women could receive a small accommodation for the temporary physical disability associated with childbirth, then women would have what they needed to be the true equals of male workers.<sup>17</sup> Concerns that women not be distinguished from men by long-term ties to dependents motivated much of the legal product coming from the women's organizations. This strategy was necessitated by the political and cultural circumstances of the time, which included widespread and strong skepticism in the business community as to women's capabilities as workers at the most basic level. In the process of responding to the blatant discrimination against women on the basis of their parenthood, the longer-term needs of female or male workers with significant responsibilities to dependents failed to receive the planning and commitment that the FMLA afforded the narrower issue of the weeks following childbirth.<sup>18</sup>

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16. Varied understandings were of course available at the time, but they were realistically sacrificed in the face of the political conditions of the time. *E.g.*, Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1051 (1987).

17. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33 (1984) (describing the litigation strategy of leading women's rights advocate Ruth Bader Ginsburg of the ACLU); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

18. To be clear, I do not mean to criticize that stance under the conditions of its time; I shared this view at that time. Moreover, the feminist visionaries of the 1970s did argue in favor of the expansive availability of high quality daycare as a key foundation for women's workplace advancement, a critical battle that still has not been won thirty years later. See Nat'l Council of Jewish Women, *Programs and Projects: Child Care Milestones*, at <http://www.ncjw.org/programs/childcare-milestones.htm> (describing the history of efforts to achieve universal childcare).



Today, the challenges a worker faces managing his identity as a worker and his role as a caregiver are not only understood to extend well beyond the first twelve weeks of an infant's life, but also are understood to raise ongoing and formally gender-neutral policy questions. We have now seen extensive study and debate over the consequences of the "second shift" for women in the paid labor force,<sup>19</sup> the inflexible structures in the workplace that are as much a product of tradition as necessity,<sup>20</sup> and a serious evaluation by both policymakers and business consultants of the kind of support that could substantially benefit parents in the workplace.<sup>21</sup> We must consider the extent to which the FMLA was premised on the infant-only understanding of work and family, and the extent to which it incorporated hints of the explosion of work-family research and programming by industry,<sup>22</sup> government, and academia that was to come in the decade following the FMLA's passage.

#### A. *The Road to the Content of the Act.*

The story of the FMLA's passage is a familiar one. It took eight years for the bill to get through Congress and the Oval Office—including President George H.W. Bush's veto and a failed congressional override vote—before being signed into law by President Clinton.<sup>23</sup> Through that process, many compromises were

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19. The term is a reference to Arlie Hochschild's treatise, *The Second Shift* (1989), but the subsequent literature is far too extensive for citation. See, e.g., Katharine B. Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

20. See WILLIAMS, *supra* note 6, at 84–113, for a discussion of some unnecessary workplace constraints on parents.

21. See Mary B. Young, *The Evolving World of Work and Family: New Stakeholders, New Voices, Diverse Families*, 562 ANNALS 32 (1999); Carol Kleiman, *Worklife Improvements Get Serious Attention, Even at a Time of Economic and Political Turmoil*, CHI. TRIB., Feb. 5, 2003. The business trend in favor of work-life programs is the subject of Arlie Russell Hochschild's book, *The Time Bind* (1997).

22. See, e.g., Fisher Vista, *Industry Overview*, at <http://www.fishervista.com/industry.htm>.

23. The first bill was The Parental and Disability Leave Act of 1985, providing for eighteen weeks of unpaid leave to a parent for the birth or adoption of a newborn or the care of a seriously ill child, plus twenty-six weeks disability leave. ANYA BERNSTEIN, *THE MODERATION DILEMMA: LEGISLATIVE COALITIONS AND THE POLITICS OF FAMILY AND MEDICAL LEAVE* 94–95 (2001). It was championed by Rep. Patricia Schroeder. *Id.* In 1990, the Family and Medical Leave Act passed the House. In 1991, the Bill passed both the House and the Senate, but was vetoed by President George H.W. Bush, and the House could not produce

made to the bill.<sup>24</sup> Proponents of family leave statutes were dealing with the extraordinary fact that the United States was one of very few industrial nations *without* a family leave policy; even so, the fight was fierce to win any federal movement on the issue.

Against that backdrop, the ambitions were limited from the outset. For example, even the early versions of the bill did not include wage replacement.<sup>25</sup> To make things worse, through the many versions and years of legislative activity on the subject, compromises were made by proponents in order to pick up more votes. Some hoped for a four month leave in the event of childbirth,<sup>26</sup> and more particularly for the application of the law to more employers. Those hopes were abandoned, however, in negotiations for congressional votes.<sup>27</sup>

The FMLA was originally conceived as a “parental” leave statute, intended to deal with the unusual failure of the American legal system to deal with the consequences of childbirth or adoption by parent-workers. But the coverage was expanded to include a worker’s own illness, as well as the care of sick family members.<sup>28</sup> This expansion reflected a careful strategy to broaden the bill’s support base to include unions and senior citizens,<sup>29</sup> and to draw attention away from gender-based implications of parental leave, instead suggesting the more general principle that pro-family policy meant that workers’ medical emergencies should not cost them their jobs.<sup>30</sup>

Although the expansion of triggering events aimed to broaden the coalition for passage,<sup>31</sup> the heart of the bill from a *gender perspective*—a bill which had the women’s groups as its original and

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enough votes to override the veto. *Id.* at 103.

24. BERNSTEIN, *supra* note 23, at 98–101.

25. The Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (1986); BERNSTEIN, *supra* note 23, at 96.

26. These standards were all watered down during negotiations. *See* BERNSTEIN, *supra* note 23, at 101.

27. *Id.*

28. *See id.* at 98–99.

29. Gaining support from unions and the AARP was a key reason to expand the coverage. *See id.* at 99.

30. *See id.* at 99–100.

31. I support those expansions because the care of adult children or aging parents is demanding work that society depends upon; I simply point out the strategy behind changing a parent-friendly bill into a more universal one.

most sustaining supporters<sup>32</sup>—was the notion that women’s status as workers is affected by the birth or adoption of a child. Earlier years had seen litigation over the provision of disability benefits to mothers of newborns<sup>33</sup> and the passage of the Pregnancy Discrimination Act to amend Title VII, as well as ample law review commentary on the relationship between maternity and women’s roles as workers.<sup>34</sup> The many sides to this debate were most clearly played out in *California Federal Savings & Loan Ass’n. v. Guerra*.<sup>35</sup> Under the combined circumstances of business groups’ opposition to any parental leave and women’s groups’ concerns regarding the stereotyping of parent-workers, the FMLA coverage became what it is today.

### *B. The Effects of the Compromises in the FMLA.*

As the use of the FMLA has unfolded, it is the application of the Act to an employee’s own illnesses, rather than to her caretaking responsibilities, that has caused the most criticism by employers. Industry groups,<sup>36</sup> congressional critics,<sup>37</sup> and some commentators<sup>38</sup> commonly complain that the FMLA’s largest impact is as a sick-leave statute for the worker herself; in other words, they argue that the “Medical” in “Family and Medical Leave Act” has, in practice, swamped the leave taken by new parents. Research on the use of the FMLA corroborates these observations.<sup>39</sup> Industry groups decry what they view as the expansion of FMLA usage beyond that purpose

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32. BERNSTEIN, *supra* note 23, at 95. In fact, just this year, Chief Justice Rehnquist, writing for the Court, said the “family care” provisions of the FMLA clearly qualify as anti-discrimination measures, leaving open the question of the medical leave so heavily utilized in the law. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

33. *Cal. Fed. Sav. & Loan Ass’n. v. Guerra*, 479 U.S. 272 (1987); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

34. *See supra* note 17.

35. 479 U.S. 272 (1987). *See* BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 101–04 (2d ed. 2001) (summarizing the *Guerra* debate).

36. *See* Josten, *supra* note 14; *Hearings, supra* note 14; *Insider, supra* note 14.

37. 149 CONG. REC. S2005 (daily ed. Feb. 5, 2003) (statement of Sen. Judd Gregg introducing the Family Medical Leave Clarification Act).

38. Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 407–09 (1999).

39. *See* COMM’N ON LEAVE, *supra* note 3, at 94 fig.5.2.

which sold the American public on the idea: family leave for a baby's arrival.<sup>40</sup>

From a work-family balance standpoint, we must determine how to view the industry complaints over the expansive uses of the FMLA. There are two components to the criticisms that we need to distinguish: concern about employees using leave for their *own* illnesses instead of for *family* care, and concern about the *type of illness* that either a family member or the employee herself may use to trigger the leave.

Proponents of the FMLA must ensure that the distinct components are not merged. Industry may be upset because the employee uses the FMLA for her own illnesses rather than to care for family members, in place of company sick leave policies. The leave was sold to the nation as a family-oriented benefit, and the overwhelming use of the Act to benefit the self may be surprising to industry. On the other hand, industry could be upset because of the *ordinary* nature of the medical events that lead to worker leave, whether the event affects the worker herself or her dependents. If it is the former, the complaints are that the FMLA has superseded industry sick leave policies; if the latter, then complaints are that the FMLA has turned the family care provisions into protections intended to catch the occasional "dropped ball" in the ordinary work-family juggling act. Industry may not be making this distinction when it attacks the relaxed standards for defining a serious health condition, because ordinarily the worker is invoking the FMLA to cover her own flu-level illness, and not the illnesses of her dependents.

A look at the text, regulations, and cases interpreting the term "serious health conditions" illuminates the debate over the proper scope of the term.

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40. *NBC Nightly News: The High Cost of Good Intentions* (NBC television broadcast, May 3, 1997) (transcript on file with author).

## II. SERIOUS HEALTH CONDITIONS WITHIN THE STATUTE AND THE CASE LAW

### A. Recent Permissive Interpretations

In the past few years, a few courts have interpreted the term “serious health condition” to include what can be thought of as ordinary short-term illnesses, seemingly expanding the scope of events covered under the FMLA. For example, in *Miller v. AT&T*,<sup>41</sup> the Fourth Circuit decided that the common flu can be an illness requiring employer accommodation under the FMLA, assuming that it meets certain criteria.<sup>42</sup> This is particularly surprising because in the relevant Department of Labor regulations, the flu is listed as an example of an illness *not* covered by the FMLA.<sup>43</sup> In *Caldwell v. Holland of Texas*, the Eighth Circuit held that a parent is permitted to take FMLA leave to stay home with her son during what appeared at the time of the leave to be an ordinary childhood ear infection.<sup>44</sup>

I hasten to add that courts’ treatment of the term is mixed,<sup>45</sup> and that the cases applying the FMLA to minor illnesses are comparatively recent and few. For those who like this development, the glass can be either half full or half empty. But this expansive strain of decisions is noteworthy enough to have elicited an alarmed reaction from opponents of an expanded FMLA. The business community is unhappy with the recent development of this liberal strand of interpretation of “serious health condition.” It has prodded

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41. 250 F.3d 820 (4th Cir. 2001).

42. *Id.* at 830.

43. Compare *Miller v. AT&T*, 250 F.3d 820, 830 (4th Cir. 2001) (including flu within the FMLA’s scope), with 29 C.F.R. § 825.114(c) (expressly excluding flu).

44. 208 F.3d 671, 676 (8th Cir. 2000). The ear infection later required surgery, indicating that it was a more serious, but hardly uncommon, version of an ordinary childhood ear infection. *Id.* at 675–76. See also *Brannon v. OshKosh B’Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995) (holding that the employee’s daughter’s upper respiratory infection was a serious health condition under the FMLA because she visited a health care provider, was given a course of medication, and was advised by a doctor to stay home from daycare until her fever broke).

45. *E.g.*, *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 246 (E.D. Pa. 1994) (holding that the ear infection of employee’s child did not constitute a serious health condition, in contrast to *Caldwell*); *Mell v. Weyburn-Bartel, Inc.*, 1997 WL 626093, at \*4 (W.D. Mich. July 28, 1997) (holding that the flu does not constitute a serious health condition under the FMLA, in apparent contrast with *Miller*).

Congress to consider what is called the “Family and Medical Leave Clarification Act,” introduced in February 2003 by Senator Judd Gregg of New Hampshire.<sup>46</sup> The proposed Act would contract the meaning of “serious health condition” in light of these recent decisions. Thus, the trend is certainly expansive enough to be noticed by the business community.

### *B. Linking These Interpretations to Work-Family Balance*

How do the more permissive interpretations of “serious health condition” connect to the concern that the FMLA—which focuses its ordinary parenting provisions on newborns—is not responsive to the larger problem of work-family policy? As passed, the FMLA arguably applied to only one “ordinary” event: the birth or adoption of a child. The other events, medical crises of a parent or child, are represented as extraordinary hard-luck events (in other words, as events that are exceptional and disruptive, not ordinary).<sup>47</sup>

Holding that the flu constitutes a serious health condition might imply that a parent is entitled to take unpaid leave from work to attend to a child who is sick enough to be home in bed for three days and to need a trip to the doctor. This kind of illness, however, can occur with some frequency in both young children and the elderly. The work dilemma of a parent whose child is bedridden with an ordinary childhood ailment is evident. A similar phenomenon applies when adult children must stay home to care for an aging parent with the flu.

*Miller* pertained to the employee’s own illness, as most FMLA cases do.<sup>48</sup> However, the Eighth Circuit faced a parenting case in *Caldwell*.<sup>49</sup> There the court held that a mother was covered by the FMLA such that she could not be fired for staying home with her three-year-old son who had an ear infection. The court played up the severity of the ear infection in its recitation of the facts: the child was

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46. Family and Medical Leave Clarification Act, S. 320, 108th Cong. § 3 (2003).

47. I am aware that the health crises of aging parents are in fact ordinary, but the form they take and their impact on workers varies widely, and are unpredictable to the worker.

48. Cf. COMM’N ON LEAVE, *supra* note 3, at 94 fig.5.2.

49. 208 F.3d 671.

kept in bed “as much as possible”;<sup>50</sup> he underwent two ten-day courses of antibiotics; and eventually, he had surgery to remove his tonsils and adenoids.<sup>51</sup> The court does not rest the holding on the surgery, which occurred after the mother’s work absence.<sup>52</sup> Rather, it seems that the two courses of antibiotics and the corresponding trips to the emergency room, along with the child’s incapacity in bed, were adequate to qualify the illness as a serious health condition. As sick as a child under these circumstances feels, ear infections and this kind of treatment are a very common childhood occurrence. Accommodating them exemplifies the routine aggravations of a parent’s working life.<sup>53</sup>

Some Republicans in Congress are outraged because in their view, the FMLA was meant to apply only to catastrophic illnesses.<sup>54</sup> The interpretation being given by these courts, however, suggests that the *ordinary* may also be eligible for coverage, being wrapped up as it is in a parent-worker’s conflicting role obligations. The debate over the meaning of “serious health conditions” could transform or better define whether the FMLA could be a broader family accommodation statute.

### *C. President Clinton’s Implementing Regulations*

The cases’ interpretations are partially driven by a progressive president’s administrative regulations. The Clinton administration’s Department of Labor first issued temporary implementing regulations soon after the FMLA’s passage.<sup>55</sup> It issued permanent regulations in 1996,<sup>56</sup> which provided, in part, that a condition could be deemed “serious” if it led to at least three days of “incapacitation” and involved “continuing treatment by a health care provider.” This could

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50. *Id.* at 675 (finding fulfillment of the “incapacity” requirement under the regulations).

51. *Id.* at 673. This surgery, however, which took place after the work absences in question, was not critical to the finding of a serious health condition.

52. *Id.*

53. Peggy Auinger et al., *Trends in Otitis Media Among Children in the United States*, 112 PEDIATRICS 514, 514–20 (2003).

54. 149 CONG. REC. S2005-07 (daily ed. Feb. 5, 2003) (statement of Sen. Judd Gregg regarding the Family and Medical Leave Clarification Act).

55. 29 C.F.R. § 825 (1993).

56. 29 C.F.R. § 825 (1995), as amended by 60 Fed. Reg. 2180 (Feb. 6, 1995).

entail as little as one trip to a health care provider along with a course of treatment that could be described as “under the supervision” of that provider, whether or not an additional visit is paid.<sup>57</sup>

“Incapacity” need not be as comprehensive as under the ADA;<sup>58</sup> rather, it generally indicates the inability to go to work or school.<sup>59</sup> When applied to the illness of the worker herself, the logic of being unable to go to work is clear. When applied to a dependent of the worker who is an adult, such as a parent, the test is whether the dependent has the capacity for self-care.<sup>60</sup> But when the dependant is a child, the capacity for self-care is unclear. Children, by definition, lack the full capacity for self-care; the practical measure, therefore, could be described as whether their care can continue to be delegated to their ordinary daycare, school, after-school, or other care program. Therefore, despite judicial rulings that childcare problems do not receive protection under the FMLA in the absence of illness,<sup>61</sup> under some circumstances, childcare problems will in fact be the measure of whether protection is available. Consider an example of how incapacity is interpreted.

In *Caldwell*, incapacity of a three-year-old was interpreted as being unable to go to daycare—what the dissenting opinion in the case calls “sniffle standards.”<sup>62</sup> “Under the continuing care of a medical provider” is interpreted as taking antibiotics prescribed by a physician. The sniffle standard may reflect a daycare center’s attendance rule for children taking antibiotics, where a child’s need specifically for *parental* care is considered paramount.

The regulations are potentially permissive. The courts, on several important occasions, have exercised such potential in favor of

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57. 29 C.F.R. § 825.114(a)(2)(i)(B).

58. *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858, 861 (8th Cir. 2000) (citing 29 C.F.R. § 825.702(b)) (“[T]he applicable regulations emphasize that the ‘ADA’s ‘disability’ and [the] FMLA’s ‘serious health condition’ are different concepts, and must be analyzed separately.”).

59. The text of the regulation says incapacity, for example, may be seen as the “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” 29 C.F.R. § 825.114(a)(2)(i).

60. *Sakellariou v. Judge & Dolph, Ltd.*, 893 F. Supp. 800 (N.D. Ill. 1995) (citing 29 U.S.C. § 2611(12)(B)).

61. *Evans v. Henderson*, 2001 U.S. Dist. LEXIS 962 (N.D. Ill. Feb. 5, 2001).

62. *Caldwell*, 208 F.3d at 260 (Hansen, J., dissenting).



employees,<sup>63</sup> though other court interpretations of the regulations have demonstrated that the permissive course is not the only one available.<sup>64</sup>

#### *D. A Conservative Judiciary?*

The regulations notwithstanding, it is curious that generally conservative courts would find an expansive definition of a regulatory statute placing a mandate on the employer. Does this interpretation reflect evolving norms about the accommodation of the relationship between employment and family obligations? Clearly, those norms have evolved—the public discourse, business discourse, and legal discourse have all expanded and evolved since the adoption of the FMLA ten years ago. Perhaps the judiciary, too, has shared in the transformation of norms of work-family balance.

### III. PERMISSIVE INTERPRETATIONS AS A WORK-FAMILY POLICY NORM

If this is, in fact, a development,<sup>65</sup> we must endeavor to explain it. In a recent *New York Times Week in Review*, Linda Greenhouse speculated that Chief Justice Rehnquist's surprisingly sympathetic opinion in *Nevada Department of Human Resources v. Hibbs* might spring from a new appreciation for the strains of the working parent.<sup>66</sup> Apparently, Chief Justice Rehnquist has needed to leave work several times to pick his grandchildren up from school when his own daughter has had difficulty with her childcare arrangement. Perhaps this is just a coincidence, with no causal connection to *Hibbs*—one can only speculate. But perhaps we can strengthen the

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63. *Miller v. AT&T*, 250 F.3d 820 (4th Cir. 2001); *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671, 677 (8th Cir. 2000); *Brannon v. Oshkosh B'Gosh*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

64. *Henderson v. Cent. Progressive Bank*, 2002 WL 31086086 (E.D. La. Sept. 17, 2002); *Mell v. Wayburn-Bartel, Inc.*, 1997 WL 626093 (W.D. Mich. July 28, 1997); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994).

65. Even beyond the cases, the best evidence that the trend is noticeable is that conservative lawmakers are seeking to reverse it through the Family and Medical Leave Clarification Act.

66. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3.

suggestion of a link between changes in the cultural, political, and commercial attitude toward work-family balancing issues and case outcomes with an examination of the distance we have traveled in the past ten years. Below is a brief look at the changes in industry practices, culture, political discourse, and academic thought regarding work-family balance.

### *A. Changes in Industry Practice*

Human resources departments of large employers now offer programs and expertise in work-family balancing issues that were unheard of when the FMLA was first introduced in the mid-1980s.<sup>67</sup> One human resources industry group lists the following benefits that employers now offer, most of which are family-oriented: Work life counseling and referral Employee Assistance Programs (EAP); Life event portals; Elder care; Concierge; Wellness; Voluntary benefits; On-site childcare; Legal assistance; Lactation services; Flexible work consulting; Financial education; Discounted shopping; and Emergency back-up childcare.<sup>68</sup> Fisher Vista, a public relations firm for the human resources industry, claims the first employer-provided childcare referral service arose sometime during the 1980s. However, the additional forms of assistance listed above, which are now frequently provided by employers, did not arise until the 1990s.<sup>69</sup> The explosion in voluntary benefit programs by large employers places work-family issues on a different playing field than existed during the battle to pass the FMLA.

A 1998 survey by Ellen Galinsky of the Families and Work Institute and James T. Bond reported that, out of all employers with 100 or more employees, over half provide some form of flexible schedule for workers, as well as a program to allow the tax-free payment of some childcare expenses through dependent care assistance accounts.<sup>70</sup> Over one-third of employers allowed *more* than

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67. For an overview of some of the programs offered by employers, see Lotte Bailyn et al., *Integrating Work and Family Life: A Holistic Approach* (Executive Summary), at <http://lsir.la.psu.edu/workfam/WorkFamily-sum.pdf>.

68. Fisher Vista, Industry Overview, at <http://www.fishervista.com/industry.htm>.

69. *Id.*

70. Ellen Galinsky & James T. Bond, *Supporting Families as Primary Caregivers: The*

twelve weeks of maternity leave.<sup>71</sup> By responding to the needs of workers, employers have helped to raise the bar for work-family accommodation, and perhaps the sense of entitlement, in the culture at large.

### *B. Changes in Cultural Awareness of Work-Family Conflict*

Coverage of work-family balancing issues in the news has become ubiquitous. Major papers and magazines have columns devoted entirely to issues of work and family.<sup>72</sup> Recent books are too countless to name.<sup>73</sup> News reports about studies touching on the work-family issue seem to come out faster than we can read them.<sup>74</sup> It is almost impossible to be a consumer of news during the past ten years and to have avoided the debates and analyses of the issue. On some level, the issues have become common knowledge.

### *C. Changes in Political Discourse*

In addition to congressional attempts to expand the FMLA to cover parent-teacher conferences and children's doctor appointments, as discussed above,<sup>75</sup> the political landscape has been packed in the past ten years with work-family initiatives. As examples, consider Democratic Presidential candidate Al Gore's stump speech, which contained a plea for universal preschool.<sup>76</sup> President Clinton's 2001 budget called for "Universal After-School Opportunities for Children

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*Role of the Workplace*, in INFANTS AND TODDLERS IN OUT OF HOME CARE 309, 318 (Debby Cryer & Thelma Harms eds., 2001).

71. *Id.* at 318.

72. See, for example, the Work and Family column of the *Wall Street Journal*, and the Work and Family column in *Business Week*.

73. See, e.g., IT'S ABOUT TIME: COUPLES AND CAREERS (Phyllis Moen ed., 2003); WORKING FAMILIES: THE TRANSFORMATION OF THE AMERICAN HOME (Rosanna Hertz & Nancy L. Marshall eds., 2001); ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER OFF (1996).

74. See generally WORK-FAMILY RESEARCH: AN ANNOTATED BIBLIOGRAPHY (compiled by Terri Ann Lilly et al., 1997); *Facing the Grail: Confronting the Cost of Work-Family Imbalance*, BBA TASK FORCE REPORTS (Task Force on Professional Challenges and Family Needs) (1999), available at <http://www.bostonbar.org/grail/workfamilychallenges.htm>.

75. See discussion of these reform proposals, *supra* Introduction.

76. E.g., THE CENTURY FOUNDATION, *New Ideas for a New Century: Universal Preschool* (2000), at [http://www.ideas2000.org/Issues/Education/Universal\\_Preschool.pdf](http://www.ideas2000.org/Issues/Education/Universal_Preschool.pdf).

and Teenagers Most in Need.”<sup>77</sup> Countless legislative efforts to improve the availability, affordability, and quality of childcare have been proposed.<sup>78</sup> Federal initiatives in recent years have attempted to address the difficulties facing working-family caregivers of an aged or disabled relative.<sup>79</sup>

In the past ten years, unions have developed and disseminated detailed tools for negotiating over work and family issues, ranging from before- and after-school care to flexible schedules to voluntary reduced time.<sup>80</sup> In the past several years, the AFL-CIO began supporting family-friendly policies as an official position.<sup>81</sup> Union interest reflects the desire among the workforce for better work-family accommodation.

For several years, there has been a battle to pass a bill called the Working Families Flexibility Act, which would allow workers to choose compensatory time instead of pay under the Fair Labor Standards Act.<sup>82</sup> Democrats have opposed the bill due to their belief that it would give employers too much ability to persuade or prevent workers from taking the overtime pay on which they currently rely. Republicans have marketed the bill as an answer to the inflexibility of the workplace for working parents. Whether out of sincere concern for families or as a strategic play in an ongoing struggle between employers and labor, addressing work-family balancing issues is considered so appealing that the framing of an act as family-friendly legislation has come to carry political leverage.

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77. *A Blueprint for the Future: The Clinton Administration's FY2001 Budget and Legislative Proposals for Teenagers and Their Families*, at <http://clinton3.nara.gov/WH/New/html/teenconf2.html>.

78. *E.g.*, National Women's Law Center, Focus on Committed and Underpaid Staff for Children's Sake Act: The "Focus" Act (2001), at <http://www.nwlc.org/pdf/FOCUSFactSheet.pdf> (supporting S.814 and H.R.1650, which provide for federal assistance to recruit and retain qualified childcare providers).

79. *See* Wendy Fox-Grage et al., *Federal and State Policy in Family Caregiving: Recent Victories but Uncertain Future*, Policy Brief No. 2, Family Caregiver Alliance (Oct. 2001), at [http://www.caregiver.org/caregiver/jsp/content/pdfs/op\\_2001\\_10\\_policybrief\\_2.pdf](http://www.caregiver.org/caregiver/jsp/content/pdfs/op_2001_10_policybrief_2.pdf).

80. *See, e.g.*, Labor Project for Working Families, *Work and Family Contract Language*, at <http://www.laborproject.org/bargaining/language.html>.

81. AFL-CIO, Convention 2001, at [http://www.workfam.com/convention01/updates\\_1205\\_4.htm](http://www.workfam.com/convention01/updates_1205_4.htm).

82. H.R. REP. NO. 105-21, § 2 (1997).

#### *D. Changes in Academic Discipline*

There is always a question of the extent to which academic disciplines influence federal judges. Influence notwithstanding, the literature certainly can help us to interpret the trend. In particular, the past decade has seen a great deal of criticism of three tendencies: (1) not to account for the work of dependent care, instead assuming this gets done naturally within families; (2) to consider such care a private issue in the sense that it does not engage public policy; and (3) in the case of children, to hold parents responsible for their care without public responsibility or support. The emergency model of the FMLA may reflect the understanding that there are crisis instances when the private becomes public and employers must respond, but this reallocation is limited to extraordinary events, not ordinary ones.

But suppose that there has been evolution on this point in light of the increased numbers of middle-class working mothers, as well as the industrial, cultural, and academic attention to work-family issues. If, in fact, the consensus understanding is evolving, then perhaps the care of children is being understood to raise serious public policy questions and to necessitate public-private partnerships, at least in some situations. Perhaps the trend in the FMLA cases providing job security to affected workers reflects an increased willingness to spread the responsibility for the care of children occasionally beyond the private family.

Consider the work of Martha Fineman in the mid-1990s, which argued that dependency is inevitable and a part of human nature for all people, rather than a pathology of the undeserving.<sup>83</sup> Fineman argued that because every person is a child at some point, there is no such thing as independence, and therefore claims for support are both inevitable and normal. She argued that we have historically avoided the implications of that dependency by privatizing it; that is, we have made dependency a family matter rather than one that engages public resources or policy.

Nancy Folbre has argued that economics has assumed that care is naturally provided by “the invisible heart,” just as efficiency is

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83. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 161–64 (1995).

naturally produced by the “invisible hand” of private markets. Says Folbre, people have “generally assumed that God, nature, the family, and ‘SuperMom’—or some combination thereof—would automatically provide whatever care was needed.”<sup>84</sup> Under that understanding, regular accommodations for the *ordinary* situation need not be required of employers. In contrast, if courts choose to interpret the FMLA’s job security provision to cover absenteeism due to the care of a sick child, then they are allocating some care, and its challenges, to the market sector through employers.

Joan Williams has argued that we have built workplaces around an “ideal worker norm”;<sup>85</sup> that is, employers have been free to assume that a worker is not responsible for the care of dependents, that such responsibilities are attended to by others, and that the worker is thus free to devote all her energies to her workplace. The cramped interpretation of the FMLA can be viewed as keeping with that ideal worker view: the FMLA is a statute to deal with the physical disability associated with childbirth as the prototypical (if not typical) use; employer obligations to assist with work-family tension ends promptly at twelve weeks post-partum.

The more expansive definition of serious health conditions embraced in *Caldwell*, however, suggests potential for an ongoing requirement of forbearance in cases where an employee is trapped between a need to go to work and the necessity of dealing with an illness-related childcare problem. This view suggests a federal statute that could accommodate a worker’s status as caregiver to dependents in those instances when that status creates ordinary difficulties.

It is a different world than it was in 1985, or even in 1993, on all measures of the awareness and expectations around work and family balancing. The speculation here is that the judges in *Miller*, as well as in *Caldwell*, have been as influenced by the change in consciousness, as has the culture at large, and that they may see the fulfillment of the promise of the FMLA as permitting a richer protection than defendant-employers argued in those cases.

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84. NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* 1 (2001).

85. WILLIAMS, *supra* note 6, at 64–113.

#### IV. THE SEXUAL HARASSMENT LAW ANALOGY: EQUALITY OR DECENCY?

If the foregoing changes in cultural-political, corporate, and academic thought on work-family balance have had a widespread impact, their internalization by a conservative judiciary would not be unprecedented. Scholars and journalists have puzzled for a decade or more over the apparently enthusiastic embrace by the current judiciary of defendant liability for sexual harassment—particularly hostile work environment claims—under federal anti-discrimination statutes such as Title VII and Title IX.

Some recent literature on the subject has argued that the sexual harassment cases have gradually internalized a civility code for the workplace that is at times distinct from the intended anti-discrimination purposes of sexual harassment causes of action.<sup>86</sup> As sexual harassment came to be defined by courts as discriminatory, Vicki Schultz observes that “feminist tradition may have resonated with more conservative political tendencies to create a climate that enabled judges to perceive that women, more than men, are routinely subjected to sexual advances and assaults that may endanger and harm them.”<sup>87</sup>

As the legal culture kept pace and reflected the culture at large, sexual harassment law came to be associated with what the *New York Times Magazine* recently called “a clumsy substitute for manners.”<sup>88</sup> The notion that extreme sexual harassment is as much offensive as it is discriminatory made it easier for judges to condemn. As sexual harassment law succeeded at removing sexual content of various sorts from many workplaces, conservative judges found it more intuitive to respond to the changed norm, and as a great surprise to many, they became champions of the cause. The evolving prohibition

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86. Some see this as a positive development. See, e.g., Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999). For others, it is a cause for serious concern. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003). Catharine MacKinnon similarly rued the collapse of a distinction between indecency and discrimination that she saw embodied in obscenity law. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 150 (1987).

87. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1748 (1998).

88. Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 12, 2003, (Magazine) at 52.

against sexual expression in the workplace may coincide nicely with some versions of sexual conventionality. Thus, sexual harassment law is *domesticated*; it has evolved from a strictly equality-based action to one that also incorporates judicial notions of decency.

Perhaps the judges in these FMLA decisions value not only the equality issues associated with workplace accommodation,<sup>89</sup> but also a newfound decency standard favoring alleviation of the Hobson's choices that can arise when work and family conflict. That mixed standard is affirmatively supported by the statute, which unlike Titles VII and IX has as its purposes both an equality component and a family welfare component. Whether that decency standard has dangers, as the decency standard implicitly incorporated into sexual harassment law does, must be evaluated on independent grounds.

#### V. LIMITATIONS

I will mention three important limitations to the potential benefits of the new cases discussed here. First, in the sexual harassment analogy comes a caution. To the extent that conservative courts understand sexuality as uncivil, they reinforce a Victorian notion of women, about which many have complained. To the extent that conservative judges are attracted to a family-friendly interpretation of the FMLA, they may be expressing their maternalistic instincts, to which we could expect many to object.<sup>90</sup> While a decency-based norm of family time need not be as problematic as a decency based norm against sexual expression,<sup>91</sup> if it is accompanied by sex-based expectations, it could bring to life the scenario so feared by women's groups of the 1980s: the equation of women-workers with limited potential. To the extent that this is the case, it is incumbent upon advocates of work-family accommodations to maintain clarity on equality principles. Yet, this is not a reason to criticize a possible trend toward a more family-accommodating workplace, if such a trend has the independent value so many people now believe it does.

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89. That value is made explicit in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

90. E.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

91. For a contra argument, see *id.*



Second, to the extent the development is positive, which I believe it is, the case law is mixed. The development of positive case law on this subject could be cut off if the current Congress passes the Family and Medical Leave Clarification Act into law, as the new bill is aimed at reversing the cases discussed above.

Finally, the range of ordinary work-family challenges covered even by this expansive understanding of serious health conditions is still a small subset of the ordinary challenges facing working parents. Worse, the differences between the covered and uncovered events is random.

Suppose a hypothetical daycare center, which ordinarily accommodates ten children, is shut down for a week because of an outbreak of head lice. If your child has the head lice, you might visit her doctor for prescription shampoo and be instructed on removing lice and nits over the course of several days. Ordinary school requirements that she be “nit-free” for a period of a week or more would give you three days of incapacity. The child would likely have a “serious health condition” in the eyes of the *Caldwell* court. Your absence from work would be protected under the FMLA. But, if your child is one of the more fortunate children amongst the ten and has *not* been affected by the outbreak, then she has no serious health condition. Unfortunately for both of you, the daycare center is closed. Now, your parenting responsibilities have interfered with your ability to go to work, but you are not covered by the FMLA.<sup>92</sup>

If we want to consider accommodations for family-related work interruptions, tying them to children’s illnesses will not capture the range of *ordinary* disruptions that can strain a parent worker. Thus, even if the trend in the FMLA cases reflects a greater understanding of the kind of public-private partnership necessary for a healthier work-family climate, more legislation is necessary to deal with work interruptions that sometimes arise out of a worker’s care giving role. President Clinton’s attempt to gain coverage for attending parent-teacher conferences, going to doctor appointments, or volunteering in a child’s school represents a necessary step in the trend. Some legislated employer accommodation of childcare emergencies would

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92. See, e.g., *Evans v. Henderson*, 2001 U.S. Dist. LEXIS 962 (N.D. Ill. Feb. 5, 2001) (finding babysitting problems inadequate to sustain a cause of action under the FMLA).

go a long way in improving work and family balance, and warrants investigation.