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Washington University Journal of Law & Policy

The Family and Medical Leave Act of 1993: Ten Years of Experience

Introduction

Pauline T. Kim^{*}

On February 5, 1993, in a Rose Garden ceremony, President Bill Clinton signed the Family and Medical Leave Act (FMLA) into law, declaring that workers “will no longer need to choose between the job they need and the family they love.”¹ The signing ceremony was significant for a number of reasons. It marked an early legislative victory for a new administration, signaling its commitment to ending gridlock in Washington. It also symbolized changing priorities: earlier versions of the legislation had twice been enacted by Congress and then vetoed by President George H.W. Bush. With its focus on the needs of ordinary workers and families, the FMLA meshed with the Clinton administration’s message that it intended to “give this government back to the American people.”²

The passage of the FMLA was significant for other reasons as well. It was the first law to articulate work-family policy at the federal level. Prior to its passage, the United States stood out among western industrialized nations in its lack of provision for family

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1. Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22.

2. Carl P. Leubsdorf, *Clinton Signs Bill for Family Leave in Jubilant Ceremony*, DALLAS MORNING NEWS, Feb. 6, 1993, at 3A.

leave. The bill represented an acknowledgment that the growing proportion of dual earner families often faced intractable conflicts between the demands of work and the care needs of family members. Advocates hailed its passage as a victory for working families. According to Judith Lichtman, who lobbied for the bill: “This is a glorious, triumphant day for American families and a major step forward for the nation.”³ Similarly, Representative William L. Clay of Missouri, one of the bill’s co-sponsors, described it as “landmark legislation, in the same category as legislation against child labor, on minimum wage, and on occupational safety and health.”⁴

Even then, however, the limitations of the bill were clear. The original leave proposal protections had been scaled back through the process of legislative negotiation and compromise. In the version finally enacted, the FMLA only applied to large employers (those employing fifty or more employees) and only to eligible employees (those who had worked more than 1250 hours in the previous year), leaving nearly forty percent of workers uncovered.⁵ The guaranteed period of leave had been reduced from eighteen weeks to twelve weeks, and an exception was carved out for highly compensated “key” employees in an organization.⁶ And although employers were required to maintain the health benefits of workers while on leave, the FMLA only provided for unpaid leave for workers eligible for its protections.

Now, ten years after its passage, employers, employees, and the courts have had enough experience applying, using, and interpreting the FMLA to assess whether the law has lived up to its promise. In this volume, we have gathered the work of nine scholars from a variety of disciplines and a practicing attorney with extensive experience advising business, to consider that question. Their

3. Greg Hassell & Jane Baird, *Family-Leave Law Praised, Scorned*, HOUSTON CHRON., Feb. 6, 1992, at 1.

4. Robert L. Koenig, *Clinton Signs Family Leave, Praises Clay; President Proclaims End to Washington Gridlock*, ST. LOUIS POST-DISPATCH, Feb. 6, 1993, at A1.

5. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 760–61 (2000).

6. Joanna Grossman, *The Family and Medical Leave Act of 1993: “Men Don’t Take Paternity Leave” and Other Obstacles to Gender Equality for Working Mothers*, 15 WASH. U. J.L. & POL’Y 17 (2004).

contributions offer multiple, and for the most part complementary, ways of viewing the impact of the FMLA in its first ten years.

In order to measure the success of a statute, one first has to have in mind the purposes for which it was passed. One of the difficulties in assessing the FMLA is that it incorporates a fundamental ambiguity as to its central purpose. Family leave legislation was initially promoted by some feminists as a way to insure actual, not merely formal, equality of opportunity for women in the workplace. By the time of its enactment, the rhetoric surrounding the law emphasized helping families cope with the competing demands of work and family care. And ten years out, it appears that the primary beneficiaries of the statute are workers temporarily unable to work due to their own medical condition.

Thus, one could identify at least three purposes of the FMLA: promoting sex equality in the workplace; accommodating work/family conflicts; and providing basic minimum standards of job security. All three goals are articulated in the statute itself, which lists among its “Purposes” “to promote the goal of equal employment opportunity for women and men,” “to balance the demands of the workplace with the needs of families,” and “to promote the stability and economic security of families.”⁷

By most accounts, the leave protections in the case of a worker’s own illness were included primarily for political reasons, to broaden the potential base of support for the bill, and not because they advanced either of the other policy goals, which were primary. These other two articulated goals of the FMLA, however, stand somewhat in tension with one another. Because women have traditionally taken primary responsibility for care work, mandated leave will most likely benefit individual women who need accommodation of their family responsibilities. Given these cultural norms, however, an emphasis on family care will also tend to entrench gendered patterns of leave-taking. These patterns, in turn, may reinforce stereotyped notions of women’s lack of commitment to the labor market, undermining progress toward gender equality in the workplace.

7. 29 U.S.C. §§ 2601(b)(1), (5) (2000).

Thus, *which* of the FMLA's articulated purposes one views as central will critically affect one's assessment of the statute. The contributions to this Symposium differ from one another not only in the methodologies they employ to assess the impact of the FMLA, but also in their assumptions about the primary goal of the FMLA. From these varying perspectives, they offer differing responses to such questions as: Has the law met expectations? In what ways has it fallen short and why? And what further needs to be done to meet the goals the FMLA was intended to advance?

Law professors Joanna Grossman and Michael Selmi each evaluate the FMLA in terms of its contribution—or lack thereof—to gender equality in the workplace.⁸ From this perspective, the law appears mostly a symbolic gesture, one short on substance and of little practical utility in promoting actual equality in the workplace. Prior to passage of the FMLA, a patchwork of state laws and voluntary employer initiatives determined the availability and terms of leave for the individual worker. In this world, women typically took leave when they had a child; men rarely did so. Although the FMLA formally includes men its leave protections, the basic pattern of leave-taking for family care has hardly changed in ten years. To the extent, then, that the FMLA was intended to combat gender stereotypes and reduce discrimination against women, it has not accomplished these goals.

Grossman's Article explores the vast gap between the rhetoric of gender equality and the reality of the FMLA's practical effects. She begins with the Supreme Court's sweeping language in *Nevada Department of Human Resources v. Hibbs*.⁹ In ruling that the FMLA validly abrogated the states' Eleventh Amendment sovereign immunity, the Court held that the FMLA's purpose is "to protect the right to be free from gender-based discrimination in the workplace."¹⁰ Finding state sponsorship of the "pervasive sex-role stereotype that caring for family members is women's work,"¹¹ the Court approved

8. Grossman, *supra* note 6; Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65 (2004).

9. 538 U.S. 721, 123 S. Ct. 1972 (2003).

10. 123 S. Ct. at 1978.

11. *Id.* at 1979.

the provision of family leave on gender neutral terms as an appropriate legislative response that targets “the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest.”¹² Despite this inspiring rhetoric, Grossman argues that specific provisions of the Act—such as its failure to provide paid leave and its exemption for highly compensated “key” employees—discourage men from taking family leave, thereby undermining its effectiveness as a tool for combating gender discrimination. She suggests that this gap between rhetoric and reality resulted from the implicit assumption of both proponents and opponents of the FMLA that its purpose was “to accommodate motherhood rather than to induce equal parenthood.”¹³

According to Grossman, the FMLA offers a sharp reminder that “constitutional sex equality and real equality are not the same thing.”¹⁴ By employing formally gender neutral terms, the law was protected from constitutional challenge, but did nothing to alter the cultural norms or patterns of behavior underlying the stereotype of care work as women’s work.¹⁵ An anti-subordination approach to equality, says Grossman, suggests that the FMLA must be restructured to *both* accommodate maternal leave taking *and* eliminate employer incentives to discriminate against women. The difficulty, of course, lies in formulating concrete policies to achieve both these goals simultaneously. Grossman’s proposals here are not new: paid leave to make paternal leave more affordable (although it remains unclear whether it would in fact make it more frequent) and incentives for employers to encourage men to take parental leave as suggested by Selmi in an earlier work.¹⁶ Grossman’s contribution here lies in reminding us that without conscious attention to an anti-subordination strategy, the FMLA is simply a “bill to accommodate the gendered status quo, rather than bring about change.”¹⁷

While Selmi would agree that the FMLA has done little to combat stereotypes and discrimination against women, his concern here is to

12. *Id.* at 1975.

13. Grossman, *supra* note 6, at 34.

14. *Id.* at 61.

15. *Id.* at 59.

16. Selmi, *supra* note 5, at 712.

17. Grossman, *supra* note 6, at 41–42.

understand how such a flawed statute came to be accepted, and even applauded, by the advocates of family leave. He reports two principal rationales articulated by supporters at the time of passage: (1) that “something was better than nothing” and (2) that the FMLA was a first step, a “foot in the door,” that would eventually lead to stronger leave protections.¹⁸ After ten years of experience under the FMLA neither of these expectations have been met. The “something” turned out to be not much better than “nothing,” Selmi argues, given that large numbers of employees were already entitled to family leave either under state law or voluntary employer policies.¹⁹ And although it effectively created a form of unpaid sick leave for some workers, those protections did nothing to advance the equality goals behind the statute. Similarly, the “foot in the door” appears not to have worked as an entering wedge.²⁰ Ten years later, the statute has yet to be amended, and the prospect of paid leave remains controversial and remote as ever.²¹

Apart from the stated rationales, Selmi suggests that the interest groups that promoted the FMLA had other incentives for supporting the legislation, even in a seriously weakened form. He points out the independent benefits that accrue to advocacy groups from legislative successes, benefits such as increased funding and enhanced influence and status among legislators,²² as well as the political and psychological forces that press these groups toward compromise. Although he does not wish to blame the advocacy groups for the limited utility of the FMLA, Selmi asks important questions about the costs of compromise. He raises the possibility that the FMLA may have stalled the development of stronger protections at the state level, reduced employers’ incentives to create more generous leave

18. Selmi, *supra* note 8, at 4.

19. *Id.* at 18.

20. The fact that employers understood that the FMLA was intended as a “foot in the door,” see Peter A. Sussler, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL’Y 169 (2004), explains both the business community’s continuing opposition to the bill, and, perhaps, the strategy’s lack of success.

21. The notable exception is California, which passed a paid leave bill in 2002. See 2002 Cal. Legis. Serv. ch. 901 (West).

22. Selmi, *supra* note 8, at 23. Of course, pursuing these benefits may make these advocacy groups more effective in advancing the interests of their constituencies in the long run.

packages,²³ and passage of the FMLA may have made federal legislators reluctant to revisit the issue in the near term. Selmi does not purport to answer the question of whether the FMLA was worth the costs. Nevertheless, his analysis emphasizes the need for advocates to seriously consider the costs of enacting weak legislation, rather than assuming that something is always better than nothing.

For economists, the challenge is to measure the effect of legal rules on actual behavior. Measuring these effects directly is difficult, because one can never be certain that observable changes in behavior (e.g., increased workforce participation by mothers of young children) were caused by the changes in the law, rather than by broader social and economic forces that would have operated even in the absence of those changes. The two papers by economists in this volume²⁴ attempt to get leverage on this problem by looking at variations in state laws prior to the passage of the FMLA. The provisions of these state laws differed somewhat in the details, but a substantial minority of states mandated job-protected family leave similar to the provisions of the FMLA prior to 1993. Although not offering a direct test of the FMLA's impact, comparisons between those states with and those without family leave mandates prior to passage of the federal law offer some evidence of the effects of these types of laws.

Professor Charles Baum asks whether mandated family leave has any effect on whether new mothers take leave after giving birth, or on the duration of maternity leave taken.²⁵ Using data from the National Longitudinal Survey of Youth (NLSY), he examines the leave-taking experience of women in this cohort²⁶ who gave birth from 1988 to 1993, comparing the experiences of those in states with, and those in

23. *Id.* at 17–18.

24. Charles L. Baum, *Has Family Leave Legislation Increased Leave Taking?*, 15 WASH. U. J.L. & POL'Y. 93 (2004); Jean Kimmel & Catalina Amuedo-Dorantes, *The Effects of Family Leave on Wages, Employment, and the Family Wage Gap: Distributorial Implications*, 15 WASH. U. J. L. & POL'Y 115 (2004).

25. Baum, *supra* note 24, at 2.

26. The NLSY, begun in 1979, collects information at regular intervals from individuals who were between the ages of fourteen and twenty-one in that year. By using this dataset, Baum's sample of mothers who gave birth between 1988 and 1993 only includes those who were between the ages of twenty-three and thirty in 1988. *Id.* at 8. It excludes the experiences of older and younger women who might have been affected by the legislation. *Id.*

states without, family leave mandates. The results of his multivariate regression analyses suggest that family leave laws have no effect on the incidence of maternal leave taking.²⁷ And although such laws may increase the number of weeks of leave among those mothers who take leave, those effects are quite modest—on the order of a couple of additional weeks.²⁸

What can Baum's study tell us about the effectiveness of the FMLA?²⁹ If the FMLA is primarily about balancing work and family, his study suggests that mandated family leave benefits—at least when unpaid—have produced little change in the experience of working mothers. By focusing on maternal leave taking, however, Baum not only assumes that family leave laws are primarily about work-family balance, but also that *mothers* are the intended beneficiaries. If, by contrast, the FMLA is understood primarily as gender equality legislation, then a study of *maternal* leave taking alone cannot help us to assess its effectiveness. The incidence of leave taking among men and the response of employers to mandated leave laws are also crucial factors determining whether these laws promote or undermine greater gender equality in the workplace.

Using the same data set as Baum, Professors Jean Kimmel and Catalina Amuedo-Dorantes ask different questions, questions that are directed at assessing the FMLA's impact on gender equality. Specifically, they ask what effect mandated leave laws have on women's employment levels and on the gender wage gap. They note that *a priori* it is unclear whether mandating family leave will affect women's wages and employment levels positively or negatively.³⁰

27. *Id.* at 13.

28. *Id.* at 15.

29. As with all empirical work, Baum's results must be qualified by the limitations of his data, which include here a limited age cohort, relatively modest sample size, and potential inaccuracies due to subjects' recall errors. *See id.* at 8, 17. Nonetheless, his findings are consistent with other studies finding little effect of such legislation on maternal leave taking. *See, e.g.,* Charles L. Baum II, *The Effect of State Maternity Leave Legislation and the 1993 Family and Medical Leave Act on Employment and Wages*, 315 LAB. ECON. 1 (2003); Charles L. Baum II, *The Effects of Maternity Leave Legislation on Mothers' Labor Supply After Childbirth*, 69 S. ECON. J. 772 (2003); Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE (Francine D. Blau & Ronald G. Ehrenberg eds., 1997); Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281 (1999).

30. Kimmel & Amuedo-Dorantes, *supra* note 24, at 16–17.

Wages might fall if employers adjust to the costs of the new mandated benefits by lowering cash wages. Alternatively, women's wages may rise if the job protection provisions in these laws allow women who take leave to retain their jobs, thereby building firm-specific human capital and promoting long-term wage growth. Similarly, women's employment levels might fall if employers perceive them as more costly to employ as a result of the mandated benefits, or rise if those laws improve female job retention and/or encourage more women to enter the workforce.

In order to explore empirically the *actual* effects of mandatory leave laws, Kimmel and Amuedo-Dorantes use NLSY data from 1992, the year before the FMLA was passed. Comparing states with and without mandatory leave laws, they find a negative impact on women's employment, but that eligibility for family leave positively impacts earnings.³¹ Moreover, they find that eligibility for leave nearly closes the motherhood wage gap,³² offering support for the theory that the motherhood wage gap is due in part to inadequate leave policies.³³ Their results differ somewhat from prior studies finding little or no impact of leave laws on either women's wages or employment levels,³⁴ suggesting the need for further research to understand better for whom and under what conditions the effects they observe will obtain. In any case, their research reminds us that the economic effects of leave laws cannot be determined *a priori*. Because job protected leaves may encourage job retention and long term wage growth, mandatory leave laws might help promote greater gender equality over the long run, even if they cannot immediately change gendered patterns of leave-taking.

Like Baum, Professors Rafael Gely and Timothy Chandler take as their starting point the assumption that the FMLA was enacted primarily to protect women confronting conflicts between work and family obligations. They focus on cases litigated under the statute as one way of evaluating how well the FMLA does in alleviating those

31. *Id.* at 35.

32. *Id.*

33. See Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?*, 16 J. LAB. ECON. 505 (1998); Jane Waldfogel, *Understanding the "Family Gap" in Pay*, 12 J. ECON. PERSP. 137 (1998).

34. See *supra* note 29.

conflicts. Because they see the needs of caring for a new child as the paradigmatic case of work-family conflict, they examine electronically available court decisions involving leaves surrounding birth or adoption of a child.³⁵ In many ways, their findings are unsurprising. Within their sample (decisions in cases involving birth/adoption leave), the overwhelming majority of plaintiffs—eighty-six percent—are women.³⁶ Most of the cases involved serious economic consequences for the plaintiffs, such as loss of a job, rather than denials of leave, or other more technical violations of the statute.³⁷ Similar to the experience under other employment statutes, reported litigation outcomes tend to favor defendants, especially at the summary judgment stage.³⁸ On the other hand, Gely and Chandler suggest that popular concerns over technical notice requirements in the statute are overblown, noting that in their sample employer defenses like inadequate notice or failure of the employee to provide proper certification of a medical condition are not particularly significant obstacles to enforcement of the statute's substantive protections.³⁹

While Gely and Chandler's Article offers an important close study of litigation experience under the FMLA, their research design choices limit the extent to which their findings can be generalized.⁴⁰ In particular, Gely and Chandler's choice to focus only on cases involving leave for childbirth or adoption results in the exclusion of a sizeable number—indeed, likely the majority—of cases litigated under the FMLA. Selmi reports that of all electronically available appellate FMLA cases in 2000 and 2001, less than twelve percent

35. Rafael Gely & Timothy Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143 (2004).

36. *Id.* at 27.

37. *Id.* at 29–30.

38. *Id.* at 39–40.

39. *Id.* at 37–38.

40. As has been noted before, publicly available opinions are only a subset of litigated cases. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990). Studying only publicly available opinions may introduce various biases if the characteristics of those cases differs from all litigated cases in some systematic way.

involved taking leave to care for a new child in the family.⁴¹ Gely and Chandler justify their focus on childbirth/adoption cases on the grounds that those cases offer the best assessment of the FMLA's central purpose: to alleviate the conflicts between work and family for working women. Especially if that characterization of the FMLA's intent is correct, however, the very fact that such cases constitute only fraction of those actually litigated under the statute is itself remarkable—and certainly worth noting.

Moreover, focusing on such a narrow slice of FMLA cases is likely to give a distorted picture of the litigation experience under the statute as a whole. For example, limiting the sample to childbirth/adoption cases undoubtedly skews the gender composition of their sample compared with all FMLA litigants. Surveys conducted by the Department of Labor in 1995 and 2000 found that approximately forty-two percent of leave-takers for any covered reason are men.⁴² Unless women are much more litigious than men, the proportion of female litigants across all types of FMLA cases is likely considerably lower than the eighty-six percent reported by Gely and Chandler in the childbirth/adoption cases. Moreover, in cases involving childbirth or adoption, the need for leave is typically foreseeable and the reason for requesting it easily verified. Disputes over proper notification and the validity of medical certifications are unlikely to arise frequently in those contexts. By focusing solely on childbirth/adoption decisions, Gely and Chandler have eliminated the types of cases—those involving illness of the employee or family member—most likely to raise these issues. Thus, their conclusion that the statute's notice and certification requirements are relatively unimportant may not apply to the full range of cases litigated under the FMLA.

Turning from a study of what has occurred under the FMLA to what it might achieve in the future, one encounters recurrent calls for expanding its protections. The most often mentioned reform, both in this Symposium and elsewhere, would mandate some form of income

41. Selmi, *supra* note 8, at 12.

42. U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS 3-7 (2000); COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 92 (1996).

maintenance during periods of leave.⁴³ Paid leave would make it economically feasible for workers to take leave when necessary for family care reasons, easing the burden of work-family conflicts. In addition, it is argued that paid leave would reduce the disincentives for fathers, who are often paid more than mothers, to take leave to care for a new child, thereby destabilizing traditionally gendered care patterns and promoting greater gender equality in the workplace.⁴⁴

Whether or not moving to paid leave would produce significant gender shifts in leave-taking behavior, or merely ease the burden of women's care-work, future debates over work-family policy will likely center on the issue of paid leave. Peter Susser's contribution to this Symposium describes the debate's contours and recent developments on this front.⁴⁵ He reports that the business community's original opposition to the FMLA was motivated in part by fears that its unpaid leave provisions were only "the foot in the door" leading to more costly paid leave.⁴⁶ He further describes the opposition to the Clinton administration's "Baby UI" regulations that permitted states to use unemployment fund moneys for those on leave following birth or adoption of a child. By the time the regulations were adopted in mid-2000, the economic and political climate was changing, and no state adopted implementing legislation to use the unemployment funds in this way before the regulations were rescinded by the Bush administration in the fall of 2003. The only state to act on its own, California, passed a paid leave program in 2002 that expands the state's existing disability insurance program to cover family care leaves. According to Susser, the employer community's position throughout all these developments has been

43. See, e.g., Selmi, *supra* note 5; Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219 (2004); Grossman, *supra* note 6, at 67; Kimmel & Amuedo-Dorantes, *supra* note 24, at 38; Heather A. Peterson, *The Daddy Track: Locating the Male Employee within the Family and Medical Leave Act*, 15 WASH. U. J.L. & POL'Y 253 (2004); Gillian Lester, *Spreading the Costs of Paid Family Leave* (draft manuscript, on file with author).

44. See, e.g., Dowd, *supra* note 43, at 38, 51; Grossman, *supra* note 6, at 63–64; Peterson, *supra* note 43, at 38.

45. Susser, *supra* note 21.

46. *Id.* at 2–3.

consistent: paid leave mandates are unduly costly, administratively burdensome and disruptive of independent employer initiatives.⁴⁷

The ongoing debate over paid leave, however, distracts attention from other ways in which the FMLA's protections for working parents are limited. The student contributor to this Symposium, Heather A. Peterson, argues that the very structure of the FMLA's protections discourage fathers from taking parental leave. In addition to the lack of paid leave, she points to the FMLA's exception for highly compensated employees and its prohibition on intermittent or reduced leave as discouraging paternal leave upon birth or adoption, thereby perpetuating a male norm of uninterrupted commitment to work.⁴⁸ Modifying these provisions might remove some disincentives for fathers to take leave, but whether such changes would be sufficient to *induce* paternal leave-taking remains uncertain.

In her contribution to this Symposium, Professor Katherine Silbaugh highlights another of the FMLA's limitations—its failure to address the ordinary, day-to-day challenges of balancing work and family.⁴⁹ As Silbaugh points out, responsibility for raising a child extends far beyond the first twelve weeks of life. However, by linking its protections to a triggering event such as birth, adoption, or serious illness, the FMLA envisions work-family conflicts as short-term crises. The reality, she argues, is that work-family conflict for working parents is an everyday, unexceptional situation. Although the FMLA is primarily structured on a crisis model, Silbaugh points to a couple of recent federal court decisions that hint at a broader understanding of the nature of work-family conflicts. One case, in particular, held that staying home with a child with an ear infection is a FMLA protected leave.⁵⁰ By reading the term “serious health condition” to include such an ordinary, short-term illness, this decision suggests that the FMLA could be read more broadly to accommodate routine work-family conflicts.

47. *Id.* at 53.

48. Peterson, *supra* note 43, at 19–21.

49. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193 (2004).

50. *See* *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671 (8th Cir. 2000).

Although heartened that at least some courts appear to recognize the pervasive, ordinary nature of work-family conflicts, Silbaugh is careful to note the limitations of relying on the FMLA to alleviate these sorts of day-to-day challenges for working parents.⁵¹ As a practical matter, it is unclear whether courts are likely to adopt this approach to interpreting the FMLA as the dominant one. But Silbaugh acknowledges broader policy concerns as well. If an expansive reading of “serious medical condition” is accompanied by the expectation that *mothers* will fulfill those routine family care needs, then the broader, family-accommodating interpretation of the FMLA may ultimately come at the expense of women’s potential *as workers*.⁵² And as Silbaugh recognizes, even from a “family care” perspective, the most expansive reading of the FMLA is too limited, as many routine conflicts do not involve any illness, serious or otherwise. This point was dramatically illustrated by the recent case of Kim Brathwaite whose two children, left alone at home when her babysitter did not show up, died in a fire.⁵³ Brathwaite, who had recently been promoted to assistant manager at McDonald’s, feared losing her job if she failed to appear for work on time. Only the happenstance of the tragic consequence of her choice brought into focus the very ordinary conflicts between job and family obligations that are faced by working parents every day.

The dilemma faced by Brathwaite—whether to leave her children home alone or to risk her job and her means of supporting them economically—lies far beyond the purview of the specific leave protections of the FMLA. As Professor Nancy Dowd argues, however, leave policies should be seen as merely one aspect of a broader work/family policy, having as its central goal promoting the well-being of all children. In her contribution, Dowd emphasizes that not only gender, but also class and race hierarchies, limit the utility of the protections offered by the FMLA.⁵⁴ If asked about Brathwaite, Dowd would likely point out that she was not only a working mother,

51. Silbaugh, *supra* note 49, at 16–17.

52. *Id.* at 16.

53. Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES, Oct. 19, 2003, at A1.

54. *See generally* Dowd, *supra* note 43.

but also a single mother, a woman of color, and that she held a job that likely placed her in the category of the “working poor.” These concrete social conditions powerfully constrained her ability to manage the interface between paid work in the labor market and her family care responsibilities. Although she suggests some specific reforms for the FMLA—such as making family leave universal and paid—Dowd argues that much broader reforms are needed to develop a work/family policy that truly supports families and insures the well-being of children.⁵⁵

Despite differences in perspective and methodology, the articles gathered in this Symposium generally agree that the impact of the FMLA has been quite modest. Although it has offered some measure of job protection for some workers who need leave, it has not caused significant change in patterns of leave-taking for family care reasons, and its overall effects on gender inequality in the workplace are quite uncertain. Clearly, achieving its principal purposes—alleviating work/family conflicts and promoting gender equality in the workplace—will require something more than what the FMLA currently provides. However, what that “something more” should be is not entirely obvious. Given the deeply entrenched cultural norms and structural inequalities that have hampered the FMLA’s effectiveness, simple linear extension of its provisions (e.g. cover more employees, add more days of protected leave, etc.) are unlikely to have a transformative effect on care-taking and workplace practices. While not providing any clear answers, this Symposium offers a close, often critical, assessment of the FMLA in order to illuminate the work that remains to be done.

55. *Id.* at 55–57.