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Looking to the United Kingdom to Overhaul New York State's Paid Family Leave Law and Close the Global Gender Gap

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LOOKING TO THE UNITED KINGDOM TO OVERHAUL NEW YORK STATE'S PAID FAMILY LEAVE LAW AND CLOSE THE GLOBAL GENDER GAP

INTRODUCTION

Since 2006, the World Economic Forum (WEF¹) has published the Global Gender Gap Report in an effort to quantify the magnitude of gender-based disparities across the globe and track their progress over time.² Through its Global Gender Gap Index, the WEF has measured the relative gap between men and women in the area of economic participation.³ This gap is wide; the WEF estimates that “54% of working-age women take part in the formal economy, on average, compared to 81% of men.”⁴ Moreover, “women make up a larger proportion of discouraged job seekers and of those outside the labour force; and, on average, women’s unemployment rate is nearly 2% higher globally.”⁵ The WEF estimates that the indices of labor force participation and wage equality for similar work exacerbate the gender gap in this area.⁶ This disparity is significant because women are one-half of the world’s population and deserving of equal access to economic participation and its attendant opportunities.⁷

Mitigating these disparities through some semblance of gender parity will be a key strategy in the continual growth of world and regional economies.⁸ To quantify this growth, the WEF estimated in 2016 that North America’s economy would

1. The World Economic Forum is an independent and impartial international non-governmental organization based in Geneva, Switzerland. Our Mission: The World Economic Forum, <https://www.weforum.org/about/world-economic-forum> (last visited Oct. 10th, 2018). The organization’s purpose is “to engage the foremost political, business and other leaders of society to shape global, regional and industry agendas.” *Id.*

2. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2016 v (2016), http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf [hereinafter 2016 Global Gender Gap Report].

3. *Id.*

4. *Id.* at 30.

5. *Id.*

6. *Id.* at 45–46.

7. *Id.* at 25.

8. *Id.* at 26.

gain an additional \$3.1 trillion in gross domestic product (GDP) by 2020 if it closed its gender gap.⁹ Thus, there is both a moral and economic incentive that should motivate governments to mitigate the gender gap in the area of economic participation.

Though the gender gap is a global problem, the nature of the international system of sovereign states requires the solutions to be piecemeal. Each state must set priorities to achieve gender parity within its own specific economic, political, and cultural contexts.¹⁰ The United States (US) is not exceptional in this regard and, by virtue of being the largest economy in the world by nominal GDP, undoubtedly has one of the largest roles to play in mitigating this global problem.¹¹ In the US, there are considerable disparities in the economic participation of women compared to men.¹² It is estimated that “less than two-thirds of working-age women are employed compared to almost three-quarters of working age men.”¹³ Moreover, women hold only nineteen percent of seats on the boards of directors for companies on the S&P 500 index,¹⁴ despite being half of the population.¹⁵

These facts indicate that women’s economic participation in the US economy is more limited than many may think. Much like other states experiencing this phenomenon, the US must inevitably confront the underlying problems that exacerbate the gender gap in economic participation and determine solutions that work toward the goal of gender parity. The US economy has much to gain in doing so, making such an effort

9. *Id.* at 26; see also MCKINSEY GLOBAL INSTITUTE, *The Power of Parity: How Advancing Women’s Equality Can Add \$12 Trillion to Global Growth*, 4 (2015),

https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Full%20report_September%202015.ashx.

10. 2016 Global Gender Gap Report, *supra* note 2.

11. *Id.*

12. *Id.* at 45–46.

13. Willem Adema et al., *Paid Parental Leave and Other Child Supports for Parents with Young Children: The United States in International Comparison*, 69 INT. SOC. SEC. REV. 29, 31 (2016).

14. This is a stock market index that tracks the 500 largest public corporations in the US. See Kimberly Amadeo, *The S & P 500 and How It Works*, BALANCE (June 25, 2019), <https://www.thebalance.com/what-is-the-sandp-500-3305888>.

15. Adema et al., *supra* note 13, at 32.

worthwhile. The WEF estimates that economic gender parity could add an additional \$1.201 billion to the GDP of the US.¹⁶

One small step toward achieving gender parity in the US is to look to other countries with similar legal, economic, and cultural systems, such as the United Kingdom (UK). The UK surpasses the US in the aforementioned indices that factor into economic participation rates, such as labor force participation and wage equality.¹⁷ One policy decision that accounts for this difference between the two countries is the lack of a statewide and a nationwide mandatory paid parental leave laws in the US.¹⁸ Paid parental leave “refers to remunerated or compensated leave from employment that is given to an individual after the birth or adoption of a child.”¹⁹ In other countries, these policies have generally been shown to increase labor force participation rates among women.²⁰ Mandatory paid parental leave policies have also been shown to increase wage equality.²¹ Though the US has mandatory *unpaid* parental leave for those eligible for it under the Family and Medical Leave Act of 1993 (FMLA),²² only a handful of states have implemented mandatory *paid* parental leave.²³

16. 2016 Global Gender Gap Report, *supra* note 2, at 356.

17. 2016 Global Gender Gap Report, *supra* note 2, at 45–46.

18. *See generally* Adema et al., *supra* note 13.

19. Anthea Williams, *Public Law Models for the Implementation of Paid Parental Leave*, 16 N.Z.U.L. REV. 377, 378 (2001).

20. Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q. J. OF ECON. 285, 287 (1998).

21. *Id.* at 287.

22. Kerry Anne Hoffman, Note, *The Work/Family Balance: New York’s Struggle to Harmonize Domestic and Employment Spheres*, 16 CARDOZO J. L. & GENDER 93, 93 (2009); surprising, too, is the limited scope of coverage of the FMLA. *Id.* It is estimated that only sixty percent of workers in the United States are eligible for unpaid parental leave under the FMLA. Adema et al., *supra* note 13, at 30.

23. Samantha Jean Quan Forsyth, Note, *Bringing Up Baby Under FMLA: How the Federal Unpaid Maternity Leave System in the United States Will Not Carry to Term*, 24 WM. & MARY J. OF WOMEN & L. 379, 386 (2018). The states with paid parental leave are: California, New Jersey, Rhode Island, and New York. *Id.* Washington D.C. and Washington State have also passed mandatory paid family leave legislation, but have not implemented it as of the writing of this Note. *See* Julie Kashen, *New York State’s Paid Family Leave Law Is the Strongest One Yet*, CENTURY FOUNDATION (Feb. 5, 2018), <https://tcf.org/content/commentary/new-york-states-new-paid-family-leave-law-strongest-one-yet/>.

To fulfill this need, New York State (NYS) became the fourth state in the US to implement mandatory paid parental leave by passing the most comprehensive law in the country by any measure in 2018.²⁴ The NYS Paid Family Leave Policy fills the gaps left by the FMLA by guaranteeing lower hurdles for eligibility, longer duration of leave, and, when fully implemented in 2021, the highest amount of leave remuneration of any state in the country.²⁵ Nonetheless, the current NYS policy has room for substantial improvement in light of other legal models.²⁶

This Note will argue that NYS could more effectively reduce the gender gap in the areas of labor force participation and wage equality by adopting a more effective paid parental leave model that mirrors the UK. By adopting an employer levy model²⁷ similar to that which the UK has used successfully for decades, the NYS program would have better funding, a broader scope of eligibility, a greater amount of leave entitlement, and a longer duration of coverage. Alternatively, NYS could look to sources of international law, such as the International Labor Organization (ILO) Conventions, to improve upon the current law.²⁸ By drawing inspiration from these sources, NYS

24. Kashen, *supra* note 23; Forsyth, *supra* note 23, at 388.

25. Forsyth, *supra* note 23, at 389; Leave remuneration refers to the amount of compensation that is paid to participants in the policy. *Id.*

26. Williams, *supra* note 19, at 383–85.

27. The employer levy model functions by building a central fund from employer contributions. See generally Williams, *supra* note 19, at 383–85. Employers pay a payroll levy for all employees and pay for their employees' leave out their own pocket. *Id.* They are then reimbursed via a consolidated fund in whole or in part, depending upon the size of the business. *Id.*

28. ILO Convention (No. 3) Convention Concerning the Employment of Women before and after Childbirth, art. 3, Nov. 29, 1919, 38 U.N.T.S. 53 (entered into force June 13, 1921) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P1210_0_ILO_CODE:C003;

ILO Convention (No. 103) Convention Concerning Maternity Protection, art. 3, June 28, 1952, 214 U.N.T.S. 2907 (entered into force Sep. 7, 1955) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P1210_0_ILO_CODE:C103;

ILO Convention (No. 183) Convention Concerning the Revision of the Maternity Protection Convention (Revised), art. 14, 2181 U.N.T.S. 38441 (entered into force May 10, 2002) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P1210_0_ILO_CODE:C183.

could hold itself to the higher international standard for paid parental leave, similar to the way member states of the US Climate Alliance currently do with regard to emissions standards.²⁹

If NYS implements the policy proposals outlined in this Note, it would further diminish the economic gender gap within the state, and that impact would have national and international implications. On the local level, NYS could achieve greater gender parity and the attendant economic benefits that come with it. Beyond these economic implications, reducing the gender gap would also improve the quality of life for NYS residents, serve as a model for other states to follow suit, and provide a guideline for the federal government to one day implement legislation on a national scale.

Part I of this Note will examine parental leave policies in the US and the UK. It will also review the relationship that each country's policies have to their ranking on the Global Gender Gap Index. Part II will argue that NYS could close its economic gender gap by improving its current paid parental leave law by emulating the UK, or alternatively, by agreeing to meet standards outlined by various sources of international law. In doing so, NYS would substantially improve its law by altering its method of funding, amount of leave remuneration, and duration of coverage. Part III will address counterarguments to this proposition, including notions that such a policy will reduce economic efficiency,³⁰ lead to greater discrimination in the hiring of women,³¹ or prove too fiscally burdensome to state budgets.³² This Note will conclude that NYS legislators can effectu-

Each of the above sources outline minimum standards and goals for each country to meet with regard to domestic parental leave law. *Id.*

29. Allyson Browne, *U.S. States Lead the Charge on National Climate Progress*, 8 RENEWABLE ENERGY L. & POLY REV. 7, 9 (2018). For a discussion of how federalism plays out in climate change policy see William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037 (2017).

30. Ruhm, *supra* note 20, at 285; see also Nita Ghei, *The Argument Against Paid Family Leave*, NEWSWEEK (Aug. 4, 2009, 8:00 PM), <https://www.newsweek.com/argument-against-paid-family-leave-78741>.

31. See Williams, *supra* note 19, at 392–93; Vanessa Brown Calder, *How Paid Family Leave Hurts Women (Opinion)*, CNN (May 30, 2017, 2:31 PM), <https://www.cnn.com/2017/05/30/opinions/trump-budget-paid-leave-calder-opinion/index.html>.

32. Trey Kovacs, *Paid Parental Leave Proposal Increases Cost of Employment and Burdens States*, COMPETITIVE ENTERPRISE INSTITUTE: BLOG (May 26,

ate the economic and social benefits of greater gender parity by looking to the UK model or sources of International Law to improve the current paid family leave policy.

I. PAID PARENTAL LEAVE POLICIES IN THE US AND THE UK

This section will provide an overview of the current paid parental leave policies in the US, including NYS's policy regarding paid parental leave. In addition, this section outlines the current policy in the UK. It will show that their disparate approaches to parental leave policies accounts for differences in the indices of labor force participation and wage equality between the two countries.

A. *United States of America*

US governments on both the federal and state levels have generally resisted the idea of government mandated paid parental leave policies. On the federal level, mandatory paid parental leave for any amount of time is not an entitlement under the FMLA.³³ The FMLA entitles eligible individuals to twelve weeks of *unpaid* leave over a twelve month period.³⁴ Eligibility criteria is limited to employees who have been employed for at least twelve months, have completed at least 1,250 hours of service with an employer, are non-federal employees, and work for an employer at a worksite where the employer's total number of employees is fifty or more within a seventy mile radius of the worksite.³⁵ Due to this strict criteria, it is estimated that only fifty-nine percent of employees are eligible to benefit from the FMLA, leaving almost half of the national workforce uncovered by the protections afforded therein.³⁶

The US can be characterized, with the exception of a handful of states like NYS and California, as having generally adopted

2017), <https://cei.org/blog/paid-parental-leave-proposal-increases-cost-employment-and-burdens-states>.

33. Forsyth, *supra* note 23, at 380; The FMLA was passed with bipartisan support in 1993 after being repeatedly introduced to Congress annually since 1984. *Id.* at 383.

34. Forsyth, *supra* note 23, at 384 (emphasis added).

35. 29 U.S.C. § 2611 (2009).

36. Forsyth, *supra* note 23, at 383; Adema et al., *supra* note 13, at 30; DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 21 (Apr. 18, 2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/FMLA-2012-Technical-Report.pdf>.

a voluntary employer provision model of paid parental leave.³⁷ This model leaves paid parental leave terms to be negotiated by employers and employees privately, with the rationale that this model does not interfere with the free operation of the labor market.³⁸ According to the free market approach, if the benefits of paid leave outweigh the costs, employers and employees will voluntarily consent to paid parental leave regimes.³⁹ However, this model has led to estimates that a mere fourteen percent of US private sector workers have access to paid parental leave through their employers.⁴⁰

Moreover, the efficacy of the voluntary employer provision model has been challenged by the WEF⁴¹ and leading legal scholars with knowledge of this area.⁴² For example, legal scholar Anthea Williams explained the shortcomings of the voluntary employer provision best when she stated, “[f]ar from allowing individuals the freedom to negotiate appropriate leave entitlements, leave is under provided . . . [w]hen provision is left to the market, employers, acting in their (perceived) economic self-interest, will generally offer paid leave to less replaceable, more highly skilled employees; a limited, elite group of people.”⁴³ This reality of the voluntary employer provision model is supported empirically by a recent summary of a Congressional Research Service report, which similarly found that a mere sixteen percent of private sector workers have access to paid family leave, and that the availability of PFL “was more prevalent among managerial and professional occupations; information, financial, and professional and technical service industries; high-paying occupations; full-time workers; and workers in large companies (as measured by number of employees).”⁴⁴ The voluntary employer provision is thus failing to

37. Williams, *supra* note 19, at 384.

38. *Id.*

39. *Id.*

40. See Maya Rossin-Slater, *Easing the Burden: Why Paid Family Leave Policies Are Gaining Steam*, STAN. INST. FOR ECON. POL'Y RES. 1,1 (Feb. 2018), <https://siepr.stanford.edu/sites/default/files/publications/PolicyBrief-Feb2018.pdf>.

41. See 2016 Global Gender Gap Report, *supra* note 2, at 26.

42. Williams, *supra* note 19, at 386–88.

43. *Id.* at 386–87.

44. SARAH A. DONOVAN, CONG. RESEARCH SERV., R44835, PAID FAMILY LEAVE IN THE UNITED STATES 2 (2019), <https://fas.org/sgp/crs/misc/R44835.pdf>.

provide paid parental leave to large segments of the US population.

To make up for shortcomings on the federal level, several states have passed paid parental leave legislation. California has the distinction of being the first state to pass mandatory paid parental leave, which it promulgated in 2002 under a disability insurance model.⁴⁵ Under this model, the employer is required to purchase insurance—similar to that of workers compensation insurance—that recompenses the worker for a percentage of their wages throughout the duration of parental leave.⁴⁶ Some states, including New Jersey and Rhode Island, followed suit by implementing a similar type of system in the years afterward.⁴⁷ In 2016, NYS enacted the most comprehensive paid parental leave law in the country,⁴⁸ following California's example by using the disability insurance model.⁴⁹

The NYS law, when fully implemented in 2021, will entitle those eligible for it to twelve weeks of leave with sixty-seven percent of their average weekly wage, not to exceed sixty-seven percent of the state average weekly wage (currently \$652.50 per week, though this is likely to increase as minimum wage increases).⁵⁰ The law's eligibility requirements for employees is less strict than the FMLA, covering employees who regularly worked either twenty or more hours per week for twenty-six consecutive weeks, or less than twenty hours per week for 175

45. Forsyth, *supra* note 23, at 386.

46. Williams, *supra* note 19, at 384.

47. Forsyth, *supra* note 23, at 388.

48. Forsyth, *supra* note 23 at 388–89; New York State's law is referred to as "Paid Family Leave" in its legislative history and by the sources that refer to it, though other similar programs in other countries are called "Paid Parental Leave." NEW YORK STATE PAID FAMILY LEAVE: EMPLOYEE FACTS, https://www.ny.gov/sites/ny.gov/files/atoms/files/PFL_Employee_Fact_Sheet.pdf (last visited Oct. 6, 2019). The former term likely reflects the fact that NYS's law includes eligibility not only for new parents, but also to care for family members with a serious health condition or to assist loved ones when a family member is deployed on active military duty. *See id.* For the purposes of this note, both terms are interchangeable.

49. Forsyth, *supra* note 23, at 388–89.

50. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *Resource Guide: What Employers Need to Know About New York's Impending Paid Family Leave Benefits Law and Final Regulations* 1, 2 (2017), https://www.ebglaw.com/content/uploads/2017/09/Resource-Guide_New-York-PFLBL-and-Final-Regulations.pdf.

days in a fifty-two week consecutive period.⁵¹ Unlike the FMLA's strict eligibility requirements for employers, the NYS law applies to all private employers that employ one or more individuals for at least thirty days of the calendar year.⁵² It also bears mentioning that the NYS law is gender-neutral in its eligibility requirements, much like the FMLA.⁵³ The statutory language uses the language of "employee" without regard to the gender of the employee.⁵⁴ Thus, the NYS law has adopted some of the positive aspects of the FMLA, such as gender inclusivity, in its efforts to overcome some of the drawbacks of the FMLA, though there is still substantial room for improvement in light of other legal models that are available.⁵⁵

B. United Kingdom

In contrast to the US, the UK has been more open to the notion of government mandated paid parental leave, as well as involvement in maternal issues more generally. Government involvement in maternal issues dates back to 1911 when Parliament passed the National Insurance Act,⁵⁶ which included a universal entitlement to a one-time payment of thirty shillings to pregnant women.⁵⁷ This brought maternal issues onto the political stage for the first time and opened the door to more expansive policies, such as the landmark Employment Protection Act of 1975.⁵⁸ This act, which was expanded by further legislation in 1980,⁵⁹ instituted for the first time a period of mandatory paid maternity leave for women.⁶⁰ Eligibility criteria

51. See N.Y. COMP. CODES R. & REGS. tit. 12, § 380-2.5 (a) (2019).

52. N.Y. WORK. COMP. LAW § 202 (Consol. 2019).

53. See generally N.Y. WORK. COMP. LAW § 202 (Consol. 2019); EPSTEIN BECKER GREEN, *supra* note 50.

54. See generally N.Y. WORK. COMP. LAW § 202 (Consol. 2019).

55. Such improvements could be made in the method of funding, amount of leave remuneration, and duration of leave, as will be expounded later in this Note. See *infra* Parts II.A–II.C.

56. STRIKING WOMEN: RIGHTS AND RESPONSIBILITIES, *Maternity (and Paternity) Leave and Pay*, <http://www.striking-women.org/module/workplace-issues-past-and-present/maternity-and-paternity-leave-and-pay> (last visited Oct. 4, 2018).

57. *Id.* This is equivalent to approximately £119 GBP or \$155 USD today. *Id.*

58. *Id.*

59. *Id.*

60. PAUL GREGG ET AL., CENTRE FOR ECON. PERFORMANCE, *THE EMPLOYMENT OF MARRIED MOTHERS IN GREAT BRITAIN: 1974 – 2000* 2 (2003),

was initially limited either to women who had worked sixteen or more hours per week of continuous employment with the same employer for the two years prior to the eleventh week of the expected week of confinement, or to those who had worked eight to sixteen hours per week of continuous employment for the same employer for five years prior to the eleventh week before the expected week of confinement.⁶¹ This unfortunately meant that for the first fifteen years of the policy only about half of working women were eligible due to the long qualifying periods of employment.⁶² Nonetheless, in terms of the remuneration amount, this legislation generously included for the first time a statutory maternity pay (SMP) for new mothers, which included: six weeks of paid leave at ninety percent of one's former wages, as well as eighteen weeks of weekly flat-rate payments at a set amount.⁶³ Furthermore, it included an additional five weeks of unpaid leave, during which time new mothers were still entitled to job protection if they returned to work within that time.⁶⁴

The UK's nationwide paid family leave law is even more comprehensive in its contemporary form. The Social Security Contributions and Benefits Act of 1992 loosened its predecessor's strict eligibility requirements; it now only mandates that the employee be on the employer's payroll in the "qualifying week" (the fifteenth week before the expected childbirth),⁶⁵ give proper notice and proof of pregnancy,⁶⁶ be employed by the em-

http://eprints.lse.ac.uk/20014/1/The_Employment_of_Married_Mothers_in_Great_Britain_1974-2000.pdf.

61. *Id.* at 21. Here "week of confinement" refers to the expected date that the baby was due to be born and the pregnant mother was expected to be hospitalized. *Id.*

62. STRIKING WOMEN, *supra* note 56.

63. GREGG ET AL., *supra* note 60, at 21.

64. *Id.* at 21; Job protection here means that the employer could not terminate the individual during the time of leave, and the individual could return to their same employment role after leave was taken. *Id.* This is also known as the "Right of Reinstatement." *Id.*

65. Social Security Contributions and Benefits Act 1992, c. 4, § 164 (UK); see also Statutory Maternity Pay and Leave: Employer Guide, <https://www.gov.uk/employers-maternity-pay-leave/print> (last visited Aug. 28, 2018).

66. Social Security Contributions and Benefits Act 1992, c. 4, § 164 (UK); see also Statutory Maternity Pay and Leave, *supra* note 65. Proof of pregnancy consists of doctor's note authenticating a diagnosis that a person is in fact physiologically pregnant. *Id.*

ployer for at least twenty-six weeks prior to any day in the qualifying week,⁶⁷ and earn at least £116 (\$152 USD) in an eight-week period.⁶⁸ Despite seemingly more conditions, in practice the current requirements are less strict than the previous qualifying criteria.

In terms of funding and the mechanics of how the law functions, the Act has continued to use the employer levy model, just like the previous iteration.⁶⁹ This model functions by having employers pay the leave amount to employees and then receive a set amount of reimbursement from the government.⁷⁰ Larger employers under this system reclaim up to ninety-two percent of the amount they pay in SMP, and smaller businesses eligible for small business relief funds can reclaim up to 104.5 percent of these costs.⁷¹ The amount of cash benefit has also increased since the 1970s. There is still a guarantee of six paid weeks at a rate of ninety percent of wages, though on top of that there is now an entitlement to thirty-three weeks at ninety percent of wages or a weekly cash grant of £145.18 (\$189.75 USD), whichever amount is lower.⁷² This makes for a total of thirty-nine paid weeks of leave time under UK law. In addition to these thirty-nine weeks, there is an entitlement to thirteen unpaid weeks of parental leave with employment protection.⁷³ In sum, women are entitled to fifty-two weeks of maternity leave, of which thirty-nine are paid according to the rates above.⁷⁴

There are also two key features of the UK system that bear mentioning. First, it still allows for a voluntary employer provisions in the form of what is called Contractual Maternity Pay (CMP).⁷⁵ Many employers attach return-to-work conditions to the receipt of CMP as an inducement for new mothers to come

67. Social Security Contributions and Benefits Act 1992, c. 4, § 164 (UK); see also Statutory Maternity Pay and Leave, *supra* note 65.

68. Statutory Maternity Pay and Leave, *supra* note 65.

69. Williams, *supra* note 19, at 383–85.

70. *Id.* at 383.

71. Social Security Contributions and Benefits Act 1992, c. 4, § 167 (UK); Katherine Forbes, *Paid Parental Leave Under (New) Labour*, 34 SOC. POL'Y J. OF N.Z. 12, 16 (2008).

72. Social Security Contributions and Benefits Act 1992 c. 4, § 166 (UK); Forbes, *supra* note 71.

73. Forbes, *supra* note 71.

74. *Id.*

75. GREGG ET AL., *supra* note 60, at 3.

back to work and stay connected to their jobs.⁷⁶ In this way, the UK system is like the US in that it allows for voluntary provisions of paid parental leave if an employer places greater value on their human capital or believes that it is in their long-term economic interest. The UK system can be thought of as merely providing a baseline of benefits that parties cannot contract below in the private negotiation process.

Second, the UK law is explicitly gendered in that it includes a separate paid paternity leave provision for men. New fathers are eligible for statutory paternity pay (SPP) at the same flat rate as SMP if they have worked for their employer for twenty-six weeks at the qualifying week and have a partner who is having a child.⁷⁷ The leave duration, however, is substantially shorter than that provided to new mothers; the law provides for only two weeks of SPP for new fathers.⁷⁸ The UK law therefore differs in its gendered approach to paid paternity leave from the NYS law, which reflects a more gender neutral approach in its eligibility and application. This is one area in which the NYS law is more inclusive of gender identities and responsive to different and novel family structures, such as those with same-sex parents or the father acting as primary caretaker of the newborn child.

C. Different Policies, Different Rankings, Different Progress Mitigating the Gender Gap

The contrasting approaches to paid parental leave in the US and the UK has resulted in stark differences in the rankings of each country on the Global Gender Gap Index. These differences are attributable in part to each country's different paid parental leave policies. The UK is ranked forty-eighth in the world for labor force participation of women, whereas the US falls behind this number with a ranking of fifty-six.⁷⁹ One phenomenon that explains this difference is the rise in the UK of employment rates for married mothers with children under

76. *Id.*

77. Forbes, *supra* note 71.

78. *Id.*

79. 2016 Global Gender Gap Report, *supra* note 2, at 45; see also generally International Labour Organization [ILO], *Key Indicators of the Labour Market* (9th ed. 2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_498929.pdf.

five-years-old that occurred from 1974 to 2000.⁸⁰ In addition to purely demographic changes, economists also attribute this increase in employment to the changes in paid parental leave policies implemented in the 1970s.⁸¹ Furthermore, paid parental leave policies in many other countries have been shown to generally increase labor force participation rates for women.⁸² Therefore, the larger disparity in labor force participation among men and women in the US is in large part attributable to the absence of policies regarding paid parental leave.

The same is true regarding wage equality for similar work between men and women. The UK comes in at fifty-second in the world for wage equality, while the US follows behind with a ranking of sixty-six.⁸³ This difference in the rankings between the two countries can be attributed to paid parental leave policies that affect the wages of new mothers. One study on paid parental leave policies in Europe found that “a law establishing rights to three months of paid leave raises the effective wage for holding a job in the year prior to childbirth by 25 percent.”⁸⁴ This in effect reduces long-term wage inequality by adding value and continuity to women’s wages that would be non-existent without paid parental leave. Furthermore, structural barriers like lack of paid family leave impede the progress of mothers to

80. GREGG ET AL., *supra* note 60.

81. *Id.*

82. Rossin-Slater, *supra* note 40. Professor Maya Rossin-Slater identifies studies that have found positive effects on employment of mothers (i.e. labor force participation rates) as a result of paid family leave policies in European countries and in the state of California. *Id.* See also generally Ruhm, *supra* note 20, at 287; Michael Baker & Kevin Milligan, *How Does Job-Protected Maternity Leave Affect Mothers’ Employment?*, 26 J. OF LAB. ECON. 655, 687 (2008); Jochen Kluge & Marcus Tamm, *Parental Leave Regulations, Mothers’ Labor Force Attachment and Fathers’ Childcare Involvement: Evidence From a Natural Experiment*, 26 J. POPULATION ECON. 984, 1003 (2013); *contra generally* Gordon B. Dahl et al., *What is the Case for Paid Maternity Leave?* (IZA Inst. of Lab. Econ., Working Paper No. 7707, 2013), <https://www.econstor.eu/handle/10419/90025>; Claudia Olivetti & Barbara Petrongolo, *The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High Income Countries*, 31 J. OF ECON. PERSP. 205, 228 (2017); *but see also generally* Maya Rossin-Slater, *Maternity and Family Leave Policy* (IZA Inst. of Lab. Econ., Working Paper No. 10500, 2017).

83. 2016 Global Gender Gap Report, *supra* note 2, at 46.

84. Ruhm, *supra* note 20, at 312.

advance in the labor market,⁸⁵ which in turn widens wage inequality. Therefore, it can be concluded that the US ranks lower in wage equality in part because of its lack of paid parental leave policies.

II. A SMALL SOLUTION WITH A POTENTIALLY LARGE FUTURE IMPACT: CHANGING THE LAW IN THE STATE OF NEW YORK

One solution that would improve labor force participation and wage equality is for states to change their paid parental leave policies on an individual basis.⁸⁶ NYS is one of the states best suited to do this because it already has a pre-existing mandatory paid parental leave policy and is one of the most progressive states in the nation, with legislators more willing to enact new social policies.⁸⁷ Moreover, the UK is one of the closest models and analogs for the NYS state to follow by virtue of sharing a similar legal and economic system. If NYS emulated the UK's law, or in the alternative agreed to meet standards outlined by sources of International Law, three key features of the NYS paid parental leave policy could be improved. These are the (1) method of funding, (2) amount of leave remuneration, and (3) duration of employee coverage. Enhancements in these three areas would improve labor force participation and wage equality, which would in turn bring the US and the wider world economy closer to the goal of gender parity.

85. Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make the Difference?*, 16 J. OF LAB. ECON. 505, 507 (1998).

86. Though a more comprehensive solution would be for the federal government to pass legislation, no such bill has been passed as of the writing of this Note. Interestingly, however, nationwide paid parental leave became part of the platform of both major parties in the run-up to the 2016 election and is still part of each party's platform. See Megan A. Scholer, *Donald Trump and Hillary Clinton both support paid family leave. That's a breakthrough.*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough/?noredirect=on&utm_term=.78e1531d13e5.

87. This is best illustrated by NYS's latest passing of its mandatory paid parental leave law. See Kashen, *supra* note 23; Forsyth, *supra* note 23, at 388.

A. Method of Funding

If NYS adopted an employer levy model of paid parental leave in lieu of its pre-existing model based on disability insurance, the law would avoid several issues related to funding methods. NYS's current program is funded entirely by employees through a payroll tax deduction that is remitted to the employer for the purposes of purchasing private insurance from a third party.⁸⁸ This approach to funding has several drawbacks. First, employees inequitably bear the entire cost of funding paid parental leave despite being only one of many groups, including employers, that benefit from the program.⁸⁹ This inequity, in which employers are effectively "off the hook" for any obligation to fund parental leave, is even more striking in comparison to the ethos of the UK, which considers employers obliged to pay for such leave as part of the social contract of their society.⁹⁰

The second drawback with this method of funding is that it equates paid parental leave taken as a result of pregnancy with illness, disability, or unemployment.⁹¹ It reflects the "same treatment" approach that fails to account for biological differences between the sexes.⁹² Since pregnancy is uniquely experi-

88. See EPSTEIN BECKER GREEN, *supra* note 50, at 3–4.

89. Employers can benefit from paid parental leave as a result of cost savings. See Rossin-Slater, *supra* note 40. Through paid family leave they do not have to incur indirect transactional costs of hiring and training new employees. *Id.* They also benefit by reducing turnover rates that negatively affect their businesses reputation. *See id.*

90. Williams, *supra* note 19, at 383.

91. *Id.*

92. *Id.* at 385. The "equal treatment," as opposed to "special treatment," approach to pregnancy has been the topic of much debate in feminist legal scholarship regarding paid family leave. See Wendy W. Williams, *Equality's Riddle: Pregnancy and Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1984). The former approach argues that any special protective legislation will serve to reduce women's opportunities in the workplace, depriving them of access to better jobs and economic opportunities. *Id.* It supposes that pregnancy is best analogized to disabilities suffered by both men and women and should be treated accordingly. *Id.* The latter approach, and the one advocated for in this paper, is the "special treatment" approach to paid parental leave. This approach argues that pregnancy is unique to women and legislation should accommodate these differences in order to give women full equality in the workplace. See Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 435–36 (1980); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 2 (1985). The prevailing view in American jurisprudence is

enced predominantly by women,⁹³ is a primordial process necessary to assure the continued existence humankind, and is generally celebrated with positive connotations within family structures, the statutes should reflect all of these important differences. Instead of being grouped together *de jure* with unrelated categories that carry with them negative connotations, the statutes governing mandatory paid parental leave should be separate from provisions related to illness, disability, or unemployment, which would avoid the creation of a legal fiction that pregnancy is the same or similar to such other categories.

A third drawback of the NYS model is that it proves more costly than other options because it functions through funding private, third-party insurers that need to make a profit and recoup marketing costs.⁹⁴ A fourth flaw is that this system increases wage inequality between men and women because it is funded entirely by employees. Since larger proportions of women are employees rather than in employer positions, this system is indirectly contributing to the gender wage gap.

In contrast to NYS, the UK model has a better funding method that remedies the drawbacks outlined above. As stated earlier, the UK has an employer levy model.⁹⁵ This model of paid parental leave is funded initially by the employer at the time of disbursement, who can then claim back ninety-two percent (or if they are a small business, up to 104.5 percent) of their costs from a consolidated fund created by the national government.⁹⁶ By having employers cover the entire initial cost of their employee's paid leave, this approach solves the problem of inequitably forcing employees to exclusively bear the up-front cost.⁹⁷ This is more equitable because employers directly benefit from

the "same treatment" approach, which has been an unfortunate product of equal protection jurisprudence and congressional responses to it (the Pregnancy Discrimination Act of 1983). *See also* *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974); *General Electric v. Gilbert*, 429 U.S. 125, 145–46 (1976); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983).

93. The reality that transgender men and people with varying gender identities may be able to become pregnant further demonstrates the value of adopting an approach that both recognizes that pregnancy is not universal, while including language that is inclusive to all who can become pregnant.

94. Williams, *supra* note 19, at 385.

95. *Id.*

96. Social Security Contributions and Benefits Act 1992, c. 4, § 167 (UK); Forbes, *supra* note 71.

97. Forbes, *supra* note 71.

the labor of their employees, indirectly benefit from paid parental leave policies,⁹⁸ and often have greater access to more capital than employees, making it a comparatively easier burden for them to bear. Employees are also less burdened by costs on the backend⁹⁹ when employers are reimbursed by the government because governments have the capacity to raise capital from a broader range of sources (e.g., corporate entities and value added tax,¹⁰⁰ among others), which distributes the cost across multiple economic actors.

In addition, the employer levy model would not inequitably burden employers because large employers would ultimately only pay eight percent of employees' parental leave costs. If some form of small business relief was implemented similar to the UK law, then smaller employers may actually receive more than they pay out to their employees. This would actually create an economic incentive for small employers to comply with the paid parental leave policies because it would reduce their overall business expenses. Moreover, this is a very small price to pay for employers considering they benefit from a greater amount of leave remuneration under the employer levy model.¹⁰¹ It also solves the problem of *de jure* equating pregnancy with disability, illness, or unemployment because it would be a separate statutory entitlement that is not lumped in with pre-existing statutes.¹⁰²

This model would also eliminate the problem of increased cost due to the involvement of third parties because it keeps the disbursement of funds for parental leave exclusively between the employee and employer, cutting out the middleman in the process.¹⁰³ It also reduces wage inequality because the

98. Rossin-Slater, *supra* note 40.

99. In the form of taxes.

100. Value added tax (VAT) "is the world's most common form of consumption tax in place in more than 160 countries, including every economically advanced nation except the United States." See WHAT IS A VAT?, <https://www.taxpolicycenter.org/briefing-book/what-vat> (last visited Oct. 11, 2019). VAT is popular because "it raises significant revenue, is relatively easy to administer, and, unlike an income tax, does not impinge on household saving and business investment choices." *Id.*

101. Ninety percent of regular wages as compared to fifty-five percent.

102. Social Security Contributions and Benefits Act 1992, c. 4 (UK).

103. Social Security Contributions and Benefits Act 1992, c. 4, § 164 (UK). Compare this to N.Y. WORK. COMP. LAW § 211 (Consol. 2019), which allows for private third parties (insurance companies) to provide the family leave bene-

funds are taken from a broader tax base.¹⁰⁴ This diminishes economic inequality between men and women by sharing the costs of the program across more segments of society than just the employees who are funding it through a payroll tax—who are proportionally more often women than men. If NYS adopted this model, it would remedy funding issues pervasive in the disability insurance model while in the process working toward the goal of gender parity through these improvements.

B. Amount of Leave Remuneration

If NYS adopted the UK model, the law would also avoid drawbacks regarding the amount of leave remuneration. The NYS law currently only provides fifty percent of employees average weekly wage before taxes, though this amount is expected to increase to sixty-seven percent by 2021 when the law is fully implemented.¹⁰⁵ The NYS law also contains a statutory provision that allows the Superintendent of Financial Services of NYS to delay this increase upon consideration of any of the following factors:

- (1) the current cost to employees of the family leave benefit and any expected change in the cost after the benefit increase;
- (2) the current number of insurers issuing insurance policies with a family leave benefit and any expected change in the number of insurers issuing such policies after the benefit increase;
- (3) the impact of the benefit increase on employers' business and the overall stability of the program to the extent that information is readily available;
- (4) the impact of the benefit increase on the financial stability of the disability and family leave insurance market and carriers; and
- (5) any additional factors that the superintendent of financial services deems relevant.¹⁰⁶

As such, this provision essentially allows the Superintendent of Financial Services to delay the increase in remuneration for any reason. This is alarming because it is effectively a provision through which the entire law can be severely undermined.

fit. By having disbursement be exclusively between employers and employees, the UK law makes the transaction smoother for both parties and more cost efficient.

104. Social Security Contributions and Benefits Act 1992, c. 4, § 167 (UK).

105. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *supra* note 50.

106. N.Y. WORK. COMP. LAW § 204 (Consol. 2019).

Moreover, the amount of leave remuneration, though it certainly leaves individuals more financially stable than unpaid leave, does not do enough to tackle wage inequality because it is one of the lowest percentages of leave remuneration in the world.¹⁰⁷ Such a small amount of remuneration disincentivizes individuals from taking paid parental leave for fear of financial hardship.

Adopting the UK model would substantially remedy the drawbacks outlined above. The UK law does not contain any provisions that would allow for the law's administrator to limit the amount of leave remuneration. Neither the statutes themselves, nor the statutory instrument interpreting them, contain a provision that allows for this to occur.¹⁰⁸ This provision should therefore also be absent from the New York law so that there can be no impediment to the successful implementation of the program. Furthermore, the UK law has substantially more remuneration than the NYS law.¹⁰⁹ This amount of remuneration creates a greater incentive for people to use the program without fear of experiencing financial hardship in the process.

The idea that the NYS program disincentivizes people from using it for fear of financial hardship can be explained by a brief example comparing the two laws in practice. Imagine if Mother A, living in Brooklyn and working forty hours each week for the city's minimum wage of \$15.00, decides to take full advantage of the current paid parental leave policy. She would be entitled to \$402 each week for twelve weeks for a to-

107. A brief survey of percentages of leave remuneration in industrialized countries proves this to be true. See Dorethea Alewell & Kerstin Pull, *An International Comparison and Assessment of Maternity Leave Legislation*, 22 COMP. LAB. L. & POL'Y J. 297, 325–26 (2001). Though legal models vary, Germany, the Netherlands, and Denmark each provide one hundred percent of daily wages, capped at a certain amount. *Id.* Even the UK, as stated above, does more by providing ninety percent of one's wages. See Social Security Contributions and Benefits Act 1992 c. 4, § 166 (UK); Forbes, *supra* note 71.

108. Social Security Contributions and Benefits Act 1992, c. 4 (UK); Statutory Maternity Pay (General) Regulations, 1986 SI 1986/1960, (UK).

109. Social Security Contributions and Benefits Act 1992, c. 4, § 166 (UK); Forbes, *supra* note 71. The UK law remunerates ninety percent of average weekly wages for six weeks and also provides flat-rate payments for thirty-three weeks afterward, which is substantially more than NYS's twelve weeks at sixty-seven percent of wages. *Id.*

tal of \$4,824 before taxes.¹¹⁰ Now, imagine Mother B lives in London and works the same hours for the London Living Wage of £10.20 (\$13.33 USD) per hour. She would be entitled to £367.20 (\$480.00 USD) per week for six weeks, and then £145.18 (\$189.78 USD) for thirty-three weeks thereafter. In total, Mother B would be entitled to £6,994.14 (\$9,142.73 USD).¹¹¹

As this example demonstrates, the amount of leave remuneration in the UK is twice as high as that of NYS, even though the minimum wage in the UK is lower. There is thus a greater incentive to take paid leave in the UK because the cash benefits are over twice that of the NYS program. Therefore, if NYS is going to incentivize its citizens to use the program and work toward the goal of gender parity, it should do so by increasing the amount of leave remuneration by emulating the UK's model.

C. Duration of Leave

The NYS law would also avoid several drawbacks concerning the duration of leave if it were to mirror the UK model. Currently, the NYS law allows for eight weeks of paid leave, which is set to be increased to twelve weeks in 2021.¹¹² Even following that increase, such a short duration of leave creates several problems. First, it does not allow for the benefits of paid leave

110. This is calculated by taking the weekly wage (the minimum wage per hour [\$15.00] multiplied by the hours worked [40], which totals \$600) and multiplying that number by 0.67. This produces a weekly entitlement amount of \$402. That number is then multiplied by the total weeks of entitlement (in this case, twelve) to yield \$4,824. Note that this number is before taxes, so the amount of entitlement is likely lower after income and other related taxes. Also, note that the percentage of leave remuneration used here is the percentage when the law is fully implemented in 2021.

111. This is calculated by taking the weekly wage (the minimum wage per hour [£10.20] multiplied by the hours worked [40], which totals £408) and multiplying that number by 0.90. This produces a weekly entitlement amount of £367.20. That number is then multiplied by the number of weeks of entitlement (in this case six), to yield £2,203.20. This is then added to the amount of total flat-rate entitlement (thirty-three weeks times £145.18, totaling £4,790.94), to total £6,994.14. Note that this number is also before taxes, so the amount of entitlement is likely lower after income and other related taxes. Also, note that conversion rates are current as of October 20, 2018.

112. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *supra* note 50.

to be fully realized.¹¹³ A recent study of the effects of parental leave on the mother's health demonstrated "that taking *more than 12 weeks* of maternity leave from work . . . is associated with declines in depressive symptoms, a reduction in the likelihood of severe depression, and when paid leave is considered, an improvement in overall maternal health."¹¹⁴ Moreover, the benefits to infant development and health are even more plentiful when longer durations of paid parental leave are implemented.¹¹⁵ For example, the cognitive health of children has been shown to increase when parents have longer terms of paid leave.¹¹⁶ Increased lengths of paid leave also lead to reduced mortality rates among young children.¹¹⁷ In order for these health benefits to materialize for employees and their families, a longer duration of leave is needed.¹¹⁸

This duration of leave is also out of step with international norms regarding paid parental leave.¹¹⁹ As will be further elucidated in the next section, the ILO has set the international bright line of fourteen weeks for the duration of paid parental leave.¹²⁰ In order to be more in step with international norms, NYS should increase its duration of leave.

By switching to the employer levy model like that adopted by the UK, both of the above issues would be addressed. The UK's program entitles individuals to fifty-two weeks of parental

113. Pinka Chatterji & Sara Merkwitz, *Family Leave After Childbirth and the Mental Health of New Mothers*, 15 J. OF MENTAL HEALTH POL'Y & ECON. 61, 73 (2012).

114. *Id.* at 73 (emphasis added).

115. Charles L. Baum, *Does Early Maternal Employment Harm Child Development? An Analysis of the Potential Benefits of Leave Taking*, 21 J. OF LAB. ECON. 409, 440-41 (2003).

116. *Id.* at 440; see also generally Jeanne Brooks-Gunn et al., *Maternal Employment and Child Cognitive Outcomes in the First Three Years of Life: The NICHD Study of Early Child Care*, 73 CHILD DEV. 1052 (2002). Studies have also shown that employment of mothers within the first year of child development has detrimental effects on the cognitive and behavioral development of children. See Nazli Baydar & Jeanne Brooks-Gunn, *Effects of Maternal Employment and Childcare Arrangements on Preschoolers' Cognitive and Behavioral Outcomes: Evidence from the Children of the National Longitudinal Survey of Youth*, 27 DEV. PSYCHOL. 932 (1991). Longer durations of leave could potentially reduce or negate these detrimental effects.

117. Christopher J. Ruhm, *Parental Leave and Child Health*, 3 (Nat'l Bureau of Econ. Research, Working Paper No. 6554, 1998).

118. See Brooks-Gunn et al., *supra* note 116; Ruhm, *supra* note 117.

119. Adema, *supra* note 13, at 30.

120. ILO Convention (No. 183), *supra* note 28, art. 14.

leave, thirty-nine of which are paid.¹²¹ If NYS adopted this amount of leave, it would allow enough time for the full health benefits of paid family leave to be realized for both parents and their children.¹²² It would also meet, and even exceed, international legal standards regarding the duration of leave.¹²³ If NYS adopted the UK model, it would remedy the drawbacks related to a short duration of leave that are presently manifesting with the current paid family leave law.

D. An Alternative Solution: Incorporate Sources of International Law

If the above arguments are unconvincing, an alternate method of remedying gender-based disparities would involve looking to sources of international law as a guide to reforming the NYS legislation. Treaty law is a particularly helpful source of international law in this regard because treaties have the advantage of specificity (*lex specialis*).¹²⁴ Treaties are also a particularly good starting point because paid parental leave has not been heavily addressed through other sources of international law, such as general principles or custom.¹²⁵ Furthermore, treaties are more easily referenced than other sources of law because they are codified and their texts can be readily found through treaty repositories maintained by international organizations, such as the United Nations (UN).¹²⁶ Treaties are

121. Forbes, *supra* note 71.

122. See Brooks-Gunn et al., *supra* note 116; Baydar & Brooks-Gunn, *supra* note 116; Ruhm, *supra* note 117.

123. Such a law would surpass the ILO's minimum standard. See ILO Convention (No. 183), *supra* note 28, art. 14.

124. *Lex specialis* is defined as "law unique to a particular regime or applicable in specific scenarios, such as international trade law disciplines or international humanitarian law, as opposed to law generally applicable in a variety of international relations, such as general rules of treaty interpretation or state liability for wrongful acts." See AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2011); For a discussion on how *lex specialis* operates in the field of international law more generally, see Anastasios Gourgourinis, *Lex Specialis in WTO and Investment Protection Law*, 53 GERMAN Y.B. INT. L. 579 (2010).

125. As of the writing of this Note, paid family leave has not been heavily addressed by other sources of international law. This is likely because natural persons are only limited actors in the field of international law.

126. See *Certified True Copies*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/CTCs.aspx?clang=en> (last visited Jan. 8th, 2019).

therefore the most useful and convenient guides in international law for domestic legislatures to use in crafting their own legislation.

In particular, the ILO drafted conventions that have been ratified by many countries throughout the world and used as a guide to determine the baseline levels of benefits for domestic paid parental leave programs.¹²⁷ The ILO's involvement in maternity issues dates back to its founding after the First World War, when it held its first General Conference in October 1919 in Washington, D.C.¹²⁸ During this initial conference, the ILO passed the first international convention related to paid parental leave. It included both maternity leave for a mandated duration and paid benefits for new mothers, which were to be "sufficient for the full and healthy maintenance of herself and her child."¹²⁹ In that convention, the maternity leave duration was limited to only six weeks and primarily focused on the time following the mother's confinement.¹³⁰

Following the Second World War, the ILO (at that time a sub-organ of the Economic and Social Council of the UN) adopted Maternity Protection Convention 103 ("Convention 103") in June 1952 in Geneva,¹³¹ improving upon its predecessor in a number of ways. To begin with, it mandated that "the period of maternity leave shall be at least twelve weeks."¹³² It also added language establishing a higher amount of leave remuneration¹³³ and stated that the rate of benefit for new parents must be "sufficient for the full and healthy maintenance of herself and her child *in accordance with a suitable standard of living*."¹³⁴

Convention 103 also had much stronger language that established benefits as a right, rather than merely a gratuity or privilege, stating that "cash . . . benefits shall be . . . provided as a matter of right to all women who comply with the prescribed

127. The ILO's mission is to set labor standards, develop policies, and devise programs promoting decent work for all women and men. *See About the ILO*, INT'L LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Sept. 27, 2019).

128. ILO Convention (No. 3), *supra* note 28, art. 3.

129. *Id.*

130. *Id.*

131. ILO Convention (No. 103), *supra* note 28, art. 3.

132. *Id.*

133. *Id.*

134. *Id.* (emphasis added).

conditions.”¹³⁵ More recently, the ILO adopted the most recent revision to its maternity protection convention on June 15, 2000, known as Maternity Protection Convention 183 (“Convention 183”).¹³⁶ This latest iteration established the baseline duration of leave to be “not less than 14 weeks” in total, with many ratifying countries exceeding this number.¹³⁷ It also stated that cash benefits of paid parental leave must be “at a level which ensures that the woman can maintain herself and her child *in proper conditions of health* and with a suitable standard of living.”¹³⁸ Convention 183 also specified that, when cash benefits are based on figures of previous earnings, the amount of benefit may not be less than two-thirds of the parent’s income received while working.¹³⁹ This represents the most expansive effort in public international law to set standards for paid parental leave.

The NYS legislature should look to Convention 183 as a guide to improve the duration of paid leave in its own law.¹⁴⁰ The current paid family leave law of NYS only guarantees eight weeks of paid leave, and when fully implemented in 2021, will only mandate twelve weeks of leave.¹⁴¹ While this would have satisfied the standards of the ILO over half a century ago in 1952, it is now increasingly anachronistic and falls far below the minimum standard that has been established for close to two dec-

135. *Id.*; Both Maternity Protection Conventions 3 and 103 strikingly demonstrate the long history of paid parental leave in legal jurisprudence. *See id.* These conventions show that the need for, and utility of, paid parental leave has been recognized for close to one hundred years. *See id.* Contrary to popular thinking, it is therefore not a novel idea for state actors or domestic lawmaking bodies to undertake implementation of these programs. *Id.*

136. ILO Convention (No. 183), *supra* note 28, art. 14.

137. *Id.*

138. *Id.* (emphasis added).

139. *Id.*

140. For a comprehensive list of countries that have ratified this convention, *see* Ratifications of C183 – Maternity Protection Convention, 2000 (No. 183),

https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INS TRUMENT_ID:312328. The US and the UK have not ratified this or any other of the ILO conventions mentioned here. The US has ratified a surprisingly few ILO conventions in comparison to the UK, and it has not ratified one for almost two decades. *See* Ratifications for United States, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_CO UNTRY_ID:102871.

141. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *supra* note 50.

ades by Convention 183.¹⁴² At a minimum, NYS should expand the duration of leave to fourteen weeks in accordance with Convention 183. By undertaking this change, NYS would realize some of the health and quality of life benefits outlined above, albeit in a more limited way.¹⁴³ Moreover, this would eliminate some wage inequality and increase labor force participation, which would further the goal of gender parity.¹⁴⁴ This measure would also be easier for policymakers to implement because it is a more modest proposal compared to the thirty-nine weeks of paid leave that would result from emulating the UK's plan.

NYS should also look to Convention 183 to improve its levels of leave remuneration. The current fifty-five percent rate¹⁴⁵ falls below the threshold of the required two-thirds of previous earnings established by Convention 183. Though the earnings rate is expected to increase to sixty-seven percent by 2021,¹⁴⁶ that will just barely rise above the threshold. It also remains an open question as to whether the benefit amount, once the NYS law is fully implemented, will be “at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.”¹⁴⁷ This question can likely be answered in the negative, as demonstrated by the example of Mother A and Mother B above. The practicalities of living on \$402 each week in a city like New York is very difficult for one person, let alone a mother supporting her child. The increasingly high costs of childcare, housing, food, and other expenses make having a child very costly, even with the current paid parental leave benefit amount.¹⁴⁸ Therefore, in order to remedy this and comply with Convention 183, the NYS legislature should raise the benefit to a monthly

142. ILO Convention (No. 183), *supra* note 28, art. 14.

143. *See* Brooks-Gunn et al., *supra* note 116; Baydar & Brooks-Gunn, *supra* note 116; Ruhm, *supra* note 117.

144. 2016 Global Gender Gap Report, *supra* note 2, at 45.

145. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *supra* note 50.

146. N.Y. WORK. COMP. LAW § 204 (Consol. 2019); *see also* EPSTEIN BECKER GREEN, *supra* note 50.

147. ILO Convention (No. 183), *supra* note 28, art. 14.

148. EPI'S FAMILY BUDGET CALCULATOR: KINGS COUNTY, NY, <https://www.epi.org/resources/budget/> (last visited on Dec. 26th, 2018).

amount that the Economic Policy Institute recommends is necessary to maintain an adequate standard of living.¹⁴⁹

The amount of benefit should meet the standard or enabling a mother and a child to live “in proper conditions of health and with a suitable standard of living.”¹⁵⁰ Though this may seem vague since it is not a bright-line rule, a standard such as this would give an administrative agency flexibility to determine and change the requirements on a yearly basis. This test could also be further refined through jurisprudence if individuals have a private right of action to file a lawsuit when their entitlements fail to meet the standard. Overall, along with increasing the leave duration, this measure would decrease wage inequality¹⁵¹ and labor force participation disparities¹⁵² while furthering the goal of gender parity in the process.

There are numerous critiques of this approach to reforming the law, one of which is constitutional. It may be argued that, if NYS were to model its laws after Convention 183, it would be violating Article II of the Constitution by abiding by a treaty that is not recognized by the federal government.¹⁵³ This argument, however, would be moot for a number of reasons. First, the policy proposal above is not advocating for NYS to formally become a party to Convention 183, but rather to hold itself to that standard informally through mirroring its provisions. This would *prima facie* obviate any constitutional infirmity. There is also precedent for doing so, as it would be akin to what a number of states have done with regard to the Paris Climate Accords.¹⁵⁴ These states have taken it upon themselves, in the ab-

149. *Id.* This amount would vary by geographic location within NYS. For example, the amount in King’s County, NY that the Economic Policy Institute (“EPI”) recommends is \$6,389 per month. *Id.* However, the amount for Clinton County, NY that EPI recommends is \$4,661. *Id.* This would account for important geographic differences between areas of the state and also meet the minimum standards of Convention 183.

150. ILO Convention (No. 183), *supra* note 28, art. 14.

151. Ruhm, *supra* note 20, at 312.

152. Rossin-Slater, *supra* note 40; *see also generally* Ruhm, *supra* note 20, at 287; Baker & Milligan, *supra* note 82; Kluve & Tamm, *supra* note 82; *contra* Dahl et al., *supra* note 82; Olivetti & Petrongolo, *supra* note 82; *but see also* Rossin-Slater, *supra* note 82.

153. “[The President] shall have Power, by and with the Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur” U.S. Const. Art. II § 2, cl. 2.

154. Browne, *supra* note 29. These states include New York, California, Washington, Connecticut, Colorado, Delaware, Hawaii, Maryland, Massachu-

sence of federal action, to abide by international emissions reduction standards.¹⁵⁵ NYS could similarly hold itself to a higher standard of paid parental leave, and perhaps create an alliance of states to implement Convention 183, without formally becoming a party to the treaty.¹⁵⁶ In this way, principles of federalism would be maintained while still progressing toward the goal of gender parity.

III. COUNTERARGUMENTS: CRITIQUES OF CHANGING NEW YORK STATE'S LAW

This section will respond to existing and anticipated arguments in opposition to changing the NYS law on a number of different grounds. One of the most common arguments against expanding paid parental leave is that it will reduce economic efficiency and prove to be harmful to employers.¹⁵⁷ A second argument is that expanding entitlements to paid parental leave will lead to greater discrimination against women in the hiring practices of employers.¹⁵⁸ Finally, there is a concern among some policy analysts that expanding paid family leave will prove too costly for taxpayers.¹⁵⁹ All of these arguments will be addressed and shown to rest on either mistaken assumptions or found to be negligible in light of more salient countervailing interests.

A. Concerns Regarding Economic Efficiency

Some critics of mandatory paid family leave policies, such as law and economics scholar Nita Ghei, have made the argument that mandating paid family leave—and by extension expanding it, as this Note has argued—would be detrimental to employers and the larger economy.¹⁶⁰ She argues that “mandated paid family leave will make it more expensive to hire workers, par-

setts, Minnesota, New Jersey, North Carolina, Oregon, Rhode Island, Vermont Virginia, and the U.S. Territory of Puerto Rico. *Id.*

155. *Id.*

156. *Id.*

157. Ruhm, *supra* note 20, at 285; *see also* Ghei, *supra* note 30.

158. Williams, *supra* note 19, at 392–93; *see also* Calder, *supra* note 31.

159. Kovacs, *supra* note 32. The argument is that such a policy would incur higher taxes in order to budget for such a program and effectively cover such a large amount of people. *Id.*

160. Ghei, *supra* note 30.

ticularly women.”¹⁶¹ This increased cost would then lessen demand for workers because it is a law of economics that “people will buy less of something when its price increases.”¹⁶² Essentially, as the price of hiring workers increases, then presumably businesses will hire less of them, in turn leading to increased unemployment and hampered economic growth.

This argument rests on an assumption that paid family leave programs will make it more expensive to hire employees. This assumption is incorrect for one important reason. Under the proposed law advocated for here, in which employers pay the upfront cost and are later reimbursed,¹⁶³ very minimal, and in some cases non-existent, costs to employers are incurred in the long-term. Employers would only end up paying at most eight percent of employees’ wages in total throughout the duration of the leave after reimbursement, a cost that would likely be offset by the economic benefits to employers—such as reduced transaction costs of hiring and training new employees and a significant reduction in employee turnover rates.¹⁶⁴ Therefore, Ghei’s assertion that mandatory paid parental leave will reduce economic efficiency by making it more expensive to hire employees is largely based on a mistaken assumption, rendering her argument unconvincing.

B. Concerns Regarding Increased Discrimination in the Hiring of Women

Another critic of mandatory paid family leave policies, policy analyst Vanessa Brown Calder with the Cato Institute, has argued that mandatory paid family leave programs harm women by leading to greater discrimination in hiring.¹⁶⁵ She posits that parental leave policies are associated with “an increase in leave-taking and childbearing.”¹⁶⁶ From this, “employers may assume women will cost more to employ before the policy, and company decisions to hire . . . reflect that, at women’s expense.”¹⁶⁷ A similar concern has been echoed by legal scholar

161. *Id.*

162. *Id.*

163. Social Security Contributions and Benefits Act 1992 c. 4, § 167 (UK); Forbes, *supra* note 71.

164. See Rossin-Slater, *supra* note 40, at 3.

165. Calder, *supra* note 31.

166. *Id.*

167. *Id.*

Anthea Williams, who argues that the threat of covert discrimination in the job market becomes a reality to contend with if paid leave programs make women more expensive to hire.¹⁶⁸

In fact, paid parental leave policies do not make women more expensive to hire because such programs actually save businesses money in the form of reduced transaction costs and employee turnover rates. Even if these policies initially cost business more, the cost is very minimal, as elucidated above. Furthermore, under the pre-existing system of voluntary provisions for paid parental leave, discrimination is not only pervasive, but actually the result of factors that the market fails to account for.¹⁶⁹ As Anthea Williams put it best, “[e]ven where retaining female labour or promoting women with childcare responsibilities can be shown to bring benefits, some employers will not implement paid leave because the ‘perfect information’ [of the market] their decisions rest on consists of irrational stereotypes and value judgements.”¹⁷⁰

Expanding leave is actually the antidote to pervasive discrimination against women in hiring—which is already occurring—because it puts men and women on equal footing with employers making hiring decisions. The policies proposed in this Note would issue a levy on employers for all employees, meaning that the costs of hiring men and women in relation to paid leave would be the same.¹⁷¹ Therefore, the idea that greater discrimination would result in the decreased hiring of women on account of greater costs is simply untrue. On the contrary, expanding entitlements to paid parental leave would give men and women equal status in a job market that is already discriminatory against women.

C. Concerns Regarding the Cost of the Program

A third critique of mandatory paid family leave programs and their expansion argues that they are fiscally irresponsible and place too great a burden on already cash-strapped state budgets.¹⁷² Trey Kovacs, from the Competitive Enterprise Institute, has argued that relying on the expansion of unemployment insurance programs to fund paid family leave is “a recipe for dis-

168. Williams, *supra* note 19, at 392–93.

169. *Id.* at 392.

170. *Id.*

171. *Id.*

172. Kovacs, *supra* note 32.

aster” because states already owe large amounts of debt to the federal government to fund those same programs.¹⁷³ He uses the example of California, which as of 2016 still owed approximately \$6 billion in debt to the federal government on account of borrowing funds during the Great Recession to fund its unemployment insurance program.¹⁷⁴ Essentially, when another recession hits the economy, states will not have the funds to maintain unemployment insurance programs, let alone additional paid family leave programs.¹⁷⁵ In his words, “[i]t doesn’t make sense to place greater financial burdens on state unemployment funds when they are not adequately funded for their primary purpose.”¹⁷⁶

This argument also rests on some erroneous assumptions, and it should be dismissed on account of the more important countervailing interests that a paid parental leave policy would serve. At first glance, his example of California’s debt to the federal government seems like an incredibly high amount that would place a great burden on generations of taxpaying citizens. California, however, has an economy larger than that of most countries in the world.¹⁷⁷ A six-billion-dollar debt is not something to be alarmed about in a state with a nominal GDP of over two-and-a-half trillion.¹⁷⁸ Therefore, the great risk of a potential fiscal crisis is largely an exaggeration.

Kovacs’ argument also rests on the mistaken presumption that paid family leave policies will only take the form of expanding disability insurance, rather than the employer levy model as advocated for in this Note. As detailed earlier, an employer levy mode would operate separately from unemployment

173. *Id.*

174. *Id.* See also Ben Kasselmann, *The Unemployment System Isn’t Ready for The Next Recession*, FIVETHIRTYEIGHT (Feb. 3, 2016), <https://fivethirtyeight.com/features/the-unemployment-system-isnt-ready-for-the-next-recession/>.

175. Kovacs, *supra* note 32.

176. *Id.*

177. Lisa Marie Segarra, *California’s Economy is Now Bigger Than All of the U.K.*, FORTUNE (May 5, 2018), <http://fortune.com/2018/05/05/california-fifth-biggest-economy-passes-united-kingdom/>. See also *California is now the world’s fifth-largest economy, surpassing the United Kingdom*, L.A. TIMES (May 4, 2018), <https://www.latimes.com/business/la-fi-california-economy-gdp-20180504-story.html>.

178. STATE OF CALIFORNIA DEP’T OF FIN., *Gross State Product*, http://www.dof.ca.gov/Forecasting/Economics/Indicators/Gross_State_Product/ (last visited Dec. 26th, 2018).

insurance and would obviate any further fiscal burden due to its different method of funding. Hence, his argument only withstands scrutiny if one assumes that disability insurance is the only method through which governments can implement paid family leave, which is certainly not the case.¹⁷⁹

Even if one concedes that paid parental leave is expensive, the countervailing interests in favor of paid family leave are well worth the additional expense. As argued above, paid parental leave policies increase labor force participation rates,¹⁸⁰ wage equality among women,¹⁸¹ and improve the overall economy.¹⁸² Such policies also have the potential to realize substantial positive health effects.¹⁸³ These interests show that the benefits of expanded paid parental leave outweigh the costs.

CONCLUSION

Unless steps are taken to mitigate the problem, gender-based disparities in labor force participation and wage equality will likely continue to hinder the economic participation of women in the global economy of the twenty-first century.¹⁸⁴ The US has one of the largest roles to play in mitigating this global problem by virtue of being the largest economy in the world by nominal GDP.¹⁸⁵ Mandatory paid parental leave is one of the single most effective policy measures state governments across the US can prioritize to take steps toward gender parity.¹⁸⁶

In the US, states have often played, and will continue to play, a vital role in bringing about positive changes in the quality of life of all people. In the words of the late Supreme Court Justice Louis Brandeis, “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁸⁷ In recent years, states have also taken on the mantle of

179. Williams, *supra* note 19, at 382–85.

180. Rossin-Slater, *supra* note 40, at 2–3; *see also* Ruhm, *supra* note 19, at 287; Baker & Milligan, *supra* note 82; Kluve & Tamm, *supra* note 82; *contra* Dahl et al., *supra* note 82; Olivetti & Petrongolo, *supra* note 82; *but see also* Rossin-Slater, *supra* note 82.

181. Ruhm, *supra* note 20, at 312.

182. 2016 Global Gender Gap Report, *supra* note 2, at 26.

183. Baum, *supra* note 115, at 440; Chatterji & Merkowitiz, *supra* note 113.

184. 2016 Global Gender Gap Report, *supra* note 2, at 28.

185. 2016 Global Gender Gap Report, *supra* note 2, at 356.

186. Ruhm, *supra* note 20, at 312.

187. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

tackling global issues such as climate change through informal political bodies like the US Climate Alliance.¹⁸⁸ This Note advocates for NYS to be the laboratory that tackles the global issue of gender disparity in economic participation by improving its mandatory paid parental leave policy.

By adopting an employer levy model like that which has been successfully used by the UK for decades,¹⁸⁹ the NYS program would be better funded, have a broader scope of eligibility, a greater amount of leave entitlement, and a longer duration of coverage. Alternatively, NYS could look to sources of international law, such as the ILO's Convention 183, to improve its program in all of the aforementioned areas.¹⁹⁰ If NYS implemented either one of these policies, it would further diminish the gap in economic participation between men and women within NYS, the broader US, and ultimately have global implications. Additionally, it would give NYS residents increased quality of life and could serve as a model for the federal government to perhaps one day implement similar legislation on a national scale.

The US political climate as of the writing of this Note demonstrates that there is growing support for paid family leave policies.¹⁹¹ Unfortunately, many of the programs that politicians on both sides of the political spectrum are currently advocating for do not meet the standards of the UK law or the international conventions discussed here. Recently, the Trump administration released its annual budget appropriating federal funds for states to implement their own paid family leave policies.¹⁹² The plan calls for states to establish programs through pre-existing

188. Browne, *supra* note 29.

189. Williams, *supra* note 19, at 383.

190. ILO Convention (No. 183), *supra* note 28, art. 14.

191. Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RESEARCH CENTER (Mar. 23, 2017), <http://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>. Research shows that a majority of Americans across the political spectrum support paid family leave in some form, and most supporters say pay should come from employers rather than from state or federal governments. *Id.*

192. Lorie Konish, *Trump's budget calls for six weeks paid family leave. What it will cost you*. CNBC PERSONAL FINANCE (Feb. 12, 2018), <https://www.cnbc.com/2018/02/12/trumps-budget-calls-for-six-weeks-paid-family-leave.html>.

unemployment insurance programs and recommends a six-week duration of paid leave.¹⁹³ To date, no new states have done so. These policy developments raise new questions about the future of paid parental leave in the United States. It certainly seems that the political winds of change are blowing in the direction of federally mandated paid family leave, but only time will tell whether the solutions advocated for here will gain traction among policymakers in order to realize the economic and social benefits of greater gender parity.

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193. *Id.*

* B.A., Saint Joseph's University (2016); J.D., Brooklyn Law School (2020); Executive Articles Editor, *Brooklyn Journal of International Law* (2019-2020); President, Labor & Employment Law Association (2019-2020). This Note is dedicated to all of the parents in the United States who have not had the financial means or agency to take time off from work to spend time with their children as they grow up. I would like to thank the staff of the *Brooklyn Journal of International Law*, especially Hannah Sarokin and Abigail Erickson, for all of their expertise in the development of this Note. Thank you to my mother, father, and sister, who have extended endless love and support to me throughout my law school career. Without your encouragement and motivation throughout my endeavors, I would not be where I am today. I would also like to thank my best friend, Frank Saverino, for countless conversations that helped keep my sanity throughout law school. I would also like to thank Dr. Randall Miller and the entire history department at Saint Joseph's University for inspiring my love of history and the law. All errors or omissions are my own.