

CHRISTEN LINKE YOUNG

Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms

ABSTRACT. In a fiercely competitive labor market, large American law firms universally offer some paid leave to attorneys after the birth of the child. This Note offers an empirical investigation of those policies, finding that all firms offer paid leave to new mothers, and many firms offer at least some leave to fathers as well. In most cases, however, men receive much less leave than women. The most grossly gender-disproportionate policies harm attorneys of both genders—perpetuating stereotypes about women, stigmatizing fathers who spend time with their children, and entrenching the “ideal worker” norm that scholars have protested. Based on this analysis, the Note illustrates how some policies are vulnerable to a Title VII challenge by male employees. In particular, law firms that offer maternity leave of three to four months, without offering male attorneys a parallel benefit, violate Title VII’s prohibition on sex discrimination. Furthermore, some firms offering facially neutral policies may also manifest impermissible gender bias in the application of parental leave.

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NOTE CONTENTS

INTRODUCTION	1184
I. LEAVE POLICIES AT U.S. LAW FIRMS	1185
A. Methodology	1187
B. Availability of Leave for Men and Women	1189
C. Types of Leave	1190
D. Patterns in the Provision of Leave	1193
E. Law Firm Prestige and Leave Available	1195
II. LEAVE POLICIES AND GENDER DISCRIMINATION	1197
A. Gender Discrimination in Law Firms	1197
B. Leave Policies and Assumptions About Women	1204
C. Leave Policies and Assumptions About Family Dynamics	1206
III. TITLE VII CHALLENGES TO LEAVE POLICIES	1210
A. Development of Federal Law	1211
B. Challenging Extended Disability Leave	1216
C. As-Applied Challenges to Primary Caregiver Leave	1221
D. Explaining the Persistence of Vulnerable Policies	1224
CONCLUSION	1228

INTRODUCTION

America's most prestigious law firms fiercely compete for talented lawyers and law school graduates, enticing them with lavish recruiting trips, expensive gourmet meals, and glossy informational brochures. Some estimate that recruiting and training a new associate to replace a second- or third-year associate can cost as much as \$500,000.¹ Given this spare-no-expense attitude toward recruitment, it is no surprise that firms have become concerned as the popular media and legal press have focused the spotlight on "family friendly" workplaces in the legal profession.² As a result, many law firms have positioned themselves to highlight the benefits they provide to attorneys with family commitments.³

Maternity and parental leave programs, which offer attorneys paid time off after the birth of a child, are a centerpiece of law firm rhetoric regarding lawyers with families. For example, one firm explains that it is devoted to "address[ing] the work-family needs" of its attorneys by providing the "greatest possible amount of support in the critical months following the arrival of a new child."⁴ Indeed, America's largest law firms universally offer some paid leave to new mothers, and a majority also offer some form of paid leave to attorney fathers.⁵ Nevertheless, the policies differ greatly in both program structure and overall generosity. Of particular interest is the remarkable variety in the paid leave that law firms provide to fathers.

This Note provides an empirical investigation of paid maternity and paternity leave policies at America's one hundred "most prestigious"⁶ law

1. *E.g.*, Danielle M. Evans, Note, *Non-Equity Partnership: A Flawed Solution to the Disproportionate Advancement of Women in Private Law Firms*, 28 *WOMEN'S RTS. L. REP.* 93, 98 (2007).
2. *See, e.g.*, Suzanne Riss, Teresa Palagano & Angela Ebron, *2007 Best Law Firms for Women*, *WORKING MOTHER*, <http://www.workingmother.com/?service=vpag/797> (last visited Feb. 6, 2009); *see also* Yale Law Women, *2008 Top Ten Family Firms*, <http://www.law.yale.edu/stuorgs/top10.htm> (last visited Feb. 6, 2009).
3. *See* Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 *STAN L. REV.* 967, 971 (2001) ("Firms are speaking about the [work-life] dilemma because the best and brightest associates come in with the attitude that they have a life, a profession and a family" (quoting psychologist Everett Moitza)).
4. Simpson Thacher & Bartlett LLP, *Work-Life Balance*, <http://www.stblaw.com/sitecontent.cfm?contentID=24&itemID=266> (last visited Feb. 6, 2009).
5. *See infra* Section I.B.
6. *VAULT GUIDE TO THE TOP 100 LAW FIRMS* (Brian Dalton ed., 2008) [hereinafter *VAULT GUIDE*]. Vault measures "prestige" by asking attorneys at previously ranked firms to provide their assessment of all firms under consideration for ranking. No other metrics are used.

firms. Part I describes the methodology and results of the investigation, highlighting important patterns in law firm provision of parental leave. The data collected here reveals that some firms provide generous leave to men and women, but other firms provide mothers with extremely extended maternity leave—well in excess of their pregnancy-related disability—while offering fathers little or no paid time off when their children are born. These grossly disproportionate leave policies fail to distinguish between childbearing and childrearing in problematic ways.

Part II discusses how disproportionate leave policies create hurdles for male and female attorneys. Women are stigmatized by inferences about their abilities and their commitment to their careers, while men are burdened by assumptions about fatherhood that prevent them from engaging fully in their children's lives. This account of family responsibility discrimination is rooted in feminist theory's conception of the "ideal worker" norm,⁷ which intersects with parental leave policies in important ways.

Part III furthers this inquiry by illustrating how some of these law firm policies are so inconsistent with federal legal requirements as to be seriously vulnerable to a Title VII challenge. Employers violate Title VII's prohibition on sex discrimination when they fail to distinguish between leave available to women as a result of pregnancy-related disability and leave available to parents to bond with a new baby. As discussed below, this is true even in light of Supreme Court precedent that allows employers to treat pregnancy disability more favorably than other conditions.

I. LEAVE POLICIES AT U.S. LAW FIRMS

Although attorneys may choose from a wide variety of practice settings,⁸ large firms represent the most visible and highest paying employers in the profession and warrant investigation. Researching parental leave policies at America's largest firms offers an opportunity to understand how an influential group of employers provides family leave benefits.

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7. See, e.g., JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 70 (2000) [hereinafter WILLIAMS, *UNBENDING*]; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 80 (2003) [hereinafter Williams & Segal, *Relief*].
 8. AM. BAR ASS'N, *LAWYER DEMOGRAPHICS* (2006), http://www.abanet.org/marketresearch/lawyer_demographics_2006.pdf (indicating that 74% of attorneys surveyed in 2000 are in private practice, and 14% of those are in firms with 101 or more attorneys).

Law firms are also an excellent target for empirical study. New attorney recruitment occurs on a fixed track and is regulated by a powerful trade association.⁹ Large firms offer relatively comparable work,¹⁰ and draw employees from a single, competitive labor pool. The analysis here is particularly important because it focuses on benefits provided to high-status employees in a market where employers are competing on that basis. In the workplace as a whole, lower-paid employees generally are offered leave benefits consistent with the minimum requirements of federal law or collective bargaining agreements.¹¹ In many contexts, higher-paid employees are excluded expressly from official parental leave policies, and generous benefits are not part of the employment culture.¹² Law firms, by contrast, are facing a crisis in “work/life satisfaction” and are experimenting with creative ways to accommodate women attorneys.¹³ If, even in this context, employers persist in offering discriminatory leave policies, then one can infer profound disparities in the workforce as a whole.

Moreover, large law firms have a unique and tumultuous history of rejecting, then cautiously welcoming, and now struggling to accommodate women and parents. Forty years ago, large firms were largely off-limits to female lawyers; it was not until law students threatened suit in 1969 that they began hiring an appreciable number of women.¹⁴ Today, women make up 49% of new associates.¹⁵ Yet women still face challenges.¹⁶ They constitute only 16%

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9. See National Association for Law Placement, Mission, <http://www.nalp.org/mission> (last visited Feb. 6, 2009).
 10. See Bruce E. Aronson, *Elite Law Firm Mergers and Reputational Competition: Is Bigger Really Better?*, 40 VAND. J. TRANSNAT'L L. 763, 763 (2007) (discussing “presumed client demand for ‘one-stop shopping’ [in law firms]”).
 11. See Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 11 (2007) (explaining the ways in which the development of federal law has left low-income women with limited benefits).
 12. Cf. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000) (excluding high paid employees).
 13. Deborah Epstein Henry, *Facing the FACTS: Work/Life Choices for All Firm Lawyers Within the Billable Hour Model*, DIVERSITY & BAR, Nov./Dec. 2007, at 17.
 14. See KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 210-13 (1986); Amy E. Decker, *Women in Corporate Law: Rewriting the Rules*, 4 AM. U. J. GENDER & L. 511, 514-16 (1996).
 15. See NAT’L ASS’N WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2007), http://www.abanet.org/nawl/docs/FINAL_survey_report_11-14-07.pdf [hereinafter NAWL SURVEY].
 16. See generally Decker, *supra* note 14, at 515-16; Alison A. Reuter, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1405-16 (2006).

of the equity partners at large law firms¹⁷ and endure discrimination from colleagues, clients, and supervisors.¹⁸ In addition, competitive pressures are forcing firms to reevaluate their attorneys' work-life balance, and are rethinking their conception of parenthood for attorneys of both genders.¹⁹ Understanding how law firms offer maternity and paternity leave can offer insight into the changing role of women and parents in America.

Before turning to the empirical investigation of law firms, it is useful to provide a brief overview of parental leave policies in the workforce as a whole. Federal law requires most employers to provide most employees with twelve weeks of unpaid leave.²⁰ A 2005 study revealed that employers provided an average of 16.7 weeks of (possibly unpaid) job-guaranteed leave to women, and 14.5 weeks of leave to men.²¹ With respect to paid leave policies, which are the subject of this Note, 54% of employers offer at least some paid leave to women, while 12% offer paid leave to men.²² No data is available on the average amount of paid leave available, but evidence suggests that it is reasonably common to offer women paid leave during a six-week period of pregnancy-related disability, and substantially less common to offer other kinds of paid leave.²³ As described below, law firm policies differ from this general structure in several important ways.

A. Methodology

This analysis examines parental leave policies at one hundred firms—namely, the firms listed in the 2008 edition of the *Vault Guide to the Top 100 Law Firms*.²⁴ For each firm, the following information was collected: total

17. See NAWL SURVEY, *supra* note 15, at 4.

18. See Decker, *supra* note 14, at 517-25; see also HOLLY ENGLISH, GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKFORCE 5-8 (2003).

19. A number of nonprofit organizations have made attorneys' work-life balance their sole mission. See, e.g., Center for WorkLife Law, <http://www.uchastings.edu/centers/worklife-law.html> (last visited Feb. 6, 2009); Project for Attorney Retention, <http://www.pardc.org/> (last visited Feb. 6, 2009).

20. See 29 U.S.C. §§ 2601-2654 (2000).

21. JAMES T. BOND ET AL., FAMILIES & WORK INST., 2005 NATIONAL STUDY OF EMPLOYERS 11 tbl.6 (2005), <http://www.familiesandwork.org/eproducts/2005nse.pdf>.

22. See *id.* at 13 tbl.8.

23. *Id.*

24. VAULT GUIDE, *supra* note 6. For access to free online content regarding Vault Rankings, see Vault, Law Firm Rankings, available at http://www.vault.com/nr/lawrankings.jsp?law2008=2&top100=1&ch_Id=242 (last visited Feb. 6, 2009).

weeks of leave available to women, total weeks of leave available to men, leave provided as disability leave, leave provided as “parental” leave, leave provided to “primary caregivers,” and leave provided as a nondisability maternity leave or paternity leave. This Note considers only paid parental leave policies; the analysis does not look at unpaid leave or leave available for other kinds of family commitments, such as caring for an aging parent or sick spouse.

The Notes relies on information drawn from two sources: law firms’ own websites describing attorney benefits, and the “workplace questionnaire” data collected by the National Association of Legal Professionals (NALP) and made available on its website in January 2008.²⁵ The relevant questions from the NALP workplace questionnaire are not detailed (for example, “How many weeks of paid parental leave do [f]emale attorneys receive?”²⁶), but in all cases the firms provided enough description in the questionnaire to explain sufficiently how their leave policies work. Information was not available from any source for fourteen of the one hundred firms surveyed; results for the remaining eighty-six firms are presented below.

Important limitations to this approach deserve some discussion. To begin, this analysis looks only at firms’ leave policies, not at actual attorney usage of available parental leave. A number of researchers are investigating the extent to which male and female attorneys actually take time off,²⁷ and many observers have called attention to the fact that fathers often do not take leave even when it is available to them.²⁸ Nonetheless, the policies themselves are still important, both because they are prerequisite for attorney usage of leave, and because they perform a valuable signaling function to new parents. Another important limitation is the constantly changing nature of law firm leave policies. Recent research, for example, indicates that a number of law firms’ policies have changed since they last updated their NALP records, and other firms show inconsistencies between the paper and online versions of the NALP survey, which were completed at different times.²⁹ The data is also limited by

25. See National Association of Legal Professionals, Directory of Legal Employers, <http://www.nalpdirectory.com> (last visited Feb. 6, 2009) [hereinafter NALP Directory]. To access workplace questionnaire data, follow the link to “Advanced Search,” search for a firm by name, and click on the “Workplace Questionnaire” icon.

26. *Id.*

27. See Center for WorkLife Law, <http://www.uchastings.edu/centers/worklife-law.html> (last visited Feb. 6, 2009); Project for Attorney Retention, <http://www.pardc.org/> (last visited Feb. 6, 2009).

28. See, e.g., Cunningham, *supra* note 3, at 993-94; *infra* notes 75-82 and accompanying text.

29. See, e.g., Above the Law, Featured Survey Results: Maternity Leave, http://www.abovethelaw.com/2008/02/featured_survey_results_matern_1.php (last visited

its relatively narrow scope, as it considers only one hundred prestigious firms. While these firms are not a representative random sample of legal practice, they do represent industry leaders and employ a significant percentage of law school graduates.³⁰ Moreover, the intense competition among these employers is important, as it underlies the assumption that employers are adopting these policies out of need to entice and retain employees. Thus, the data described here paints an interesting, if incomplete, picture of leave policies.

General descriptive statistics are presented in Section I.B. Sections I.C and I.D classify firm leave policies into several categories based on the types of leave they provide, the differences in treatment of men and women, and the overall generosity of the parental leave program. The relationship between firm ranking and available leave is examined in Section I.E. This analysis reveals that firms often fail to distinguish between childbearing and childrearing in the design of their parental leave policies, offering women benefits that far exceed their pregnancy-related disability without providing a comparable benefit to men.

B. Availability of Leave for Men and Women

Of the firms for which information was available, all provide paid maternity leave to female attorneys, ranging from four to eighteen weeks and averaging 11.9 weeks. The standard deviation³¹ is 2.82 weeks, and the median and mode are both 12 weeks. Eighty-seven percent of the firms analyzed also offer paid leave to male attorneys, ranging from one to twelve weeks. The average leave available to men is 3.9 weeks,³² with a standard deviation of 3.18 weeks, and the median and mode both equal four weeks.

Feb. 6, 2009); Above the Law, Featured Survey Results: Paternity Leave, http://www.abovethelaw.com/2008/03/featured_survey_results_patern.php (last visited Feb. 6, 2009).

30. See *supra* note 8 and accompanying text.

31. It bears emphasizing that the data represents a complete population—Vault’s “most prestigious” firms—not a sample, so standard deviation is the appropriate metric.

32. This average includes firms that do not have paid paternity leave; that is, they offer zero weeks of leave.

Table 1.

DESCRIPTIVE STATISTICS. ALL VALUES INDICATE WEEKS OF LEAVE.

	WOMEN	MEN
Range	4 to 18	0 to 12
Mean	11.9	3.9
St. Dev.	2.82	3.18
Median	12	4
Mode	12	4

These descriptive statistics reveal two striking facts. First, for both men and women, the distribution seems remarkably symmetrical: the mean, median, and mode are nearly identical. This indicates that while it might be typical for firms to provide twelve weeks of leave to women and four weeks of leave to men (indeed, a plurality of firms offer precisely this policy), these values operate as neither a floor nor a ceiling on the amount of leave employers choose to offer. In fact, 21% of firms offer women more than twelve weeks of leave, while 20% offer less.³³

The second observation focuses on the standard deviations of the two distributions. For men, the standard deviation is large in proportion to the mean, indicating that the distribution is not only symmetrical, but also fairly flat. That is, there is substantial variation in the amount of leave available to men at large law firms. Leave available to women, on the other hand, is much more tightly clustered around the twelve-week mean. This suggests that law firms may be more aware of each others' maternity leave policies, and competitive pressures are more influential in driving women's leave policies toward a twelve-week standard.

C. Types of Leave

Although numerical analysis provides an interesting summary of family leave, a much sharper image emerges from a more qualitative analysis. The

33. For men, 22% of firms offer more than four weeks, and 35% offer fewer. Interestingly, when firms deviate from the "twelve-and-four" standard, they tend to alter the available leave in the same direction—only 6% of firms offer *women more* than twelve weeks while offering *men fewer* than four weeks, and only 5% offer *women fewer* than twelve while offering *men more* than four.

above discussion focused on the total leave available to female and male attorneys—broadly termed maternity leave and paternity leave. In fact, leave policies generally are not structured in this way. Instead, firms offer complicated policies with different kinds of leave—some available only to one gender, some available to all new parents. In general, firms rely on three types of leave: disability leave for women, parental leave for all attorneys, and nondisability leave, which is offered differently depending on the attorney’s gender.

Disability leave offers women paid time off to recover from the physical disability associated with childbirth. Some firms compensate women for the actual “period of pregnancy disability,” defining the length of the pregnancy disability leave in the same way that disability leave for heart attacks or skiing accidents are defined—the actual period during which the attorney is unable to work.³⁴ For normal pregnancy and childbirth, postpartum disability lasts approximately six weeks, though some women in certain occupations can return to work much sooner, and some complicated pregnancies or deliveries create much longer periods of disability.³⁵ Most firms, however, do not base disability leave on the circumstances of the individual woman’s pregnancy. Instead, they offer a “fixed” disability period. Fixed disability leave ranges from four to sixteen weeks, and a female attorney who gives birth automatically receives the entire fixed-leave period, regardless of her level of actual disability.³⁶ Disability leave, therefore, can be either actual or fixed, and fixed leave is either normal (four to eight weeks) or extended (ten to sixteen weeks).

Many firms also rely on parental leave periods. As one firm explains, these periods “relate to the time necessary to adjust to the demands of a new child in the home and, therefore, are offered to both male and female associates in the [f]irm.”³⁷ Despite the implication of parental parity, parental leave is not always available on an equal basis. Some firms offer different parental leave periods to “primary” and “nonprimary” caregivers. For example, one firm

34. See, e.g., NALP Directory, *supra* note 25 (workplace questionnaire for Baker & McKenzie LLP’s San Francisco office).

35. See Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 ANNALS FAM. MED. 159, 159 (2006); see also *Nev. Dep’t Human Res. v. Hibbs*, 538 U.S. 721, 731 n.4 (2003) (citing legislative history of the Pregnancy Discrimination Act that describes a disability period of four to eight weeks).

36. See, e.g., Wachtell, Lipton, Rosen & Katz, Compensation, <http://www.wlrk.com/Page.cfm/Thread/Recruiting/SubThread/Compensation> (last visited Feb. 6, 2009) (providing women a four month maternity disability leave). In addition, most firms’ temporary disability insurance programs provide additional medical leaves for particularly complicated pregnancies; this type of leave is not considered in the analysis.

37. NALP Directory, *supra* note 25 (workplace questionnaire for Willkie Farr & Gallagher LLP).

offers twelve weeks of paid leave “for the lawyer with primary childcare responsibility or up to three weeks [of paid leave] for the lawyer with secondary childcare responsibility.”³⁸ Although these programs appear gender neutral, their application often relies on gendered assumptions. For example, one firm offers a lengthy leave to “a birthmother who is the primary caregiver,” and then offers a much shorter leave to all “male attorneys,” ignoring the possibility that male attorneys may be primary caregivers.³⁹ Thus, parental leave can be categorized as short (one to two weeks), moderate (four to six weeks), generous (eight to twelve weeks), or primary/non-primary.⁴⁰

The final type of leave offered is a catch-all category that includes family-oriented leave periods, other than disability leave, which makes a distinction based on gender. At one firm, a “paternity leave” is available to “male associates and income partners,”⁴¹ while another firm explains that “[m]ale attorneys receive four or six weeks, depending on the circumstances.”⁴² In most cases, these policies offer men some paid time off at firms where women receive an extended fixed disability leave.

38. *Id.* (workplace questionnaire for Wilmer Cutler Pickering Hale and Dorr LLP).

39. NALP Directory, *supra* note 25 (workplace questionnaire for Fried, Frank, Harris, Shriver & Jacobson LLP). For a general description of men’s difficulties with primary caregiver leaves, see Cunningham, *supra* note 3, at 976-78.

40. Primary/nonprimary policies generally offer the primary caregiver a “generous” leave and the nonprimary caregiver a “short” leave, though other combinations do exist.

41. McDermott Will & Emery, Careers at McDermott, http://careers.mwe.com/index.cfm/fa/page.view/page_id/7640b739-9681-4c59-be8a-03dd338bcoae/Benefits.cfm (last visited Feb. 6, 2009).

42. NALP Directory, *supra* note 25 (workplace questionnaire for Fried, Frank, Harris, Shriver & Jacobson LLP).

Table 3.
SUMMARY OF THE TYPES OF LEAVE POLICIES.

DISABILITY LEAVE	Actual	Leave offered to women during the period in which they are incapacitated from childbirth.
	Fixed Normal	Leave offered to women for a fixed period of 4 to 8 weeks after childbirth.
	Fixed Extended	Leave offered to women for a fixed period of 10 to 16 weeks after childbirth.
PARENTAL LEAVE	Short	1 to 2 weeks of leave offered to both parents.
	Moderate	4 to 6 weeks of leave offered to both parents.
	Generous	8 to 12 weeks of leave offered to both parents.
	Primary/NonPrimary	Leave of any length offered differently depending on whether the parent is the “primary” caregiver.
NONDISABILITY LEAVE		Leave of any length that is not disability leave and is offered to attorneys of one gender.

D. Patterns in the Provision of Leave

The firms analyzed here use some combination of the three general leave types described above to create an overall policy. For example, combining a moderate parental leave with a normal fixed disability leave results in “four weeks paid leave for all new parents . . . plus eight weeks additional paid leave for biological mothers because of short-term disability.”⁴³ Although the leave policies are diverse, a number of patterns emerge.

First, fully half of the employers in the analysis mimic the example above, and combine a disability leave for women with a parental leave that is equally available to attorneys of both genders. Only seven of these firms, however, rely on a woman’s actual period of pregnancy disability; the rest use a fixed disability leave ranging from four to sixteen weeks. Remarkably, for those using fixed disability leave, only 52% of firms rely on a normal fixed disability leave of four to eight weeks. The remaining firms offer extended fixed disability leave of ten weeks or longer. Moreover, one quarter of fixed disability

43. *Id.* (workplace questionnaire for Foley & Lardner LLP).

leaves are twelve weeks or longer, and two firms offer an astonishing sixteen weeks of “disability” leave to new mothers. This pattern is particularly remarkable because these firms have chosen explicitly to offer a parental leave alongside their disability leave, which makes it all the more inexplicable that so many offer extended disability periods. With respect to the parental leave portion of the package, 17% of the firms in this group offer a generous parental leave while 35% offer a brief parental leave of one or two weeks.

Excluding those firms that rely on the dominant model described above, the remaining leave policies divide into a number of widely diverse categories. Ten percent of employers in the sample, for example, provide no leave to men at all and only offer a fixed disability leave to women. At the other extreme, 15% of firms offer identical leave to all attorneys—only a parental leave ranging from four to twelve weeks. Thus, while many firms have decided to offer identical benefits regardless of gender, nearly as many make no accommodations for male attorneys. An additional 12% of firms offer a permutation on the disability leave/parental leave combination by using an explicitly gendered leave policy. These firms either offer different “maternity” and “paternity” parental leave, or they offer an extended fixed disability leave for women and a short parental leave available only to men. Finally, 13% of firms use policies that distinguish between primary and nonprimary caregivers, occasionally combining this with a disability leave, but generally casting the entire policy in terms of caregiver status. Although this appears facially gender neutral, Section III.C highlights the biased application of primary caregiver leave.

These policies begin to illustrate the ways in which law firms conflate childbearing (pregnancy-related disability leave) and childrearing (leave for the purpose of raising children). Extended disability leave is the starkest example: it confers a “disability” benefit that is in no way congruent with the effects of normal pregnancy, thereby offering new mothers, but not new fathers, extra time to bond with the baby. Some firms, recognizing the need to provide some parental leave to men, react to this conflation by explicitly gendering their leave policies, while other firms simply fail to provide meaningful leave to fathers. Still other firms use primary and nonprimary caregiver distinctions in a failed attempt to paper over the conflation of childbearing and childrearing leave. Regardless of which policy employers utilize, male and female attorneys suffer when firms design their leave policies in this way.⁴⁴

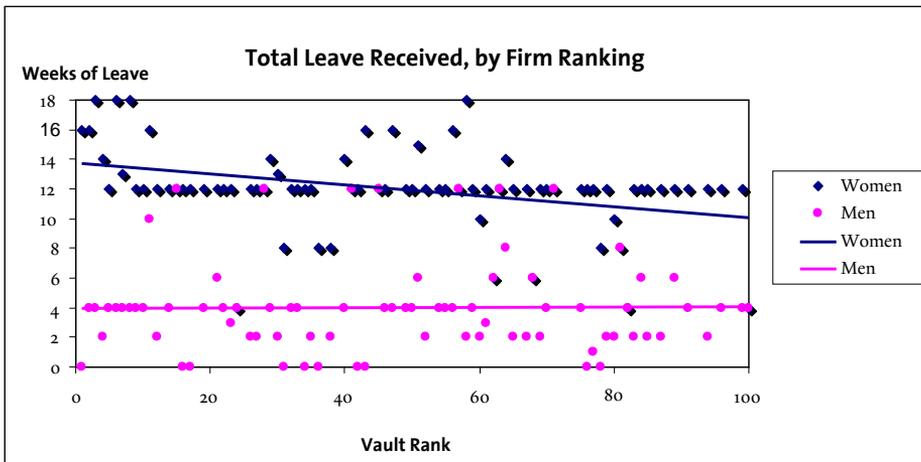
44. See *infra* Part II.

E. Law Firm Prestige and Leave Available

When all the components of the leave policies are combined, women receive four to eighteen weeks of paid leave, while men receive zero to twelve weeks of paid time off.⁴⁵ Figure 1 illustrates these differences, plotting leave available to men and women against law firm prestige as estimated by the firm's rank in the Vault survey.⁴⁶ Each firm is represented by two points in the graph—one for the leave it provides to women, and another for the leave it provides to men. In addition, two trendlines, one for each gender, illustrate the overall relationship between leave and prestige.

Figure 1.

LEAVE RECEIVED BY MEN AND WOMEN, BY FIRM RANK.



Focusing on leave available to women, it appears that more prestigious firms tend to offer longer leave. Indeed, the length of maternity leave is weakly but statistically significantly correlated with firm prestige (correlation coefficient = -0.36 ; $R^2 = 0.13$, $p = 0.003$), and the upper trendline in Figure 1 reflects this pattern. This correlation appears to be driven, at least in part, by the fact that many of the fifteen most prestigious firms offer incredibly

45. See *supra* Section I.B.

46. There is a theoretical, though unlikely, potential for endogeneity in this analysis: if attorneys rating firms in the Vault survey evaluated parental leave as an indicator of prestige, then the reasoning would be circular. For a discussion of Vault's measurement of prestige, see *supra* note 6.

generous maternity leave, lasting as long as eighteen weeks.⁴⁷ Interestingly, there is no correlation between firm prestige and the length of paternity leaves ($R^2 = 0.00$), and none of the fifteen top firms offer particularly generous leave periods to male attorneys.

Indeed, the pattern with respect to prestige illustrates an assumption underlying firms' failure to distinguish between childbearing and childrearing leave. In the face of stiff competition for associates, prestigious firms feel compelled to offer generous benefits to mothers, but have paid little attention to the needs of attorney-fathers. As discussed below, however, male and female attorneys are equally concerned about work-family conflicts,⁴⁸ and firms' assumption that only women value parental leave may reflect inaccurate stereotyping. In addition, the pattern illustrates that firms place a premium on offering generous benefits to mothers.⁴⁹ Therefore, if the Title VII litigation discussed below successfully encourages firms to provide longer paternity

47. Note, also, that two less prestigious firms offer incredibly short maternity leaves, which also drives the correlation.
48. See, e.g., CATALYST, *WOMEN IN LAW: MAKING THE CASE*, 18-19 (2001) (showing that equal numbers of men and women cite work-life balance as a professional concern).
49. In addition to prestige-based differences, there is interesting regional variation in the provision of leave, based on the state in which the firm is based. With some exceptions, the firms offer the same leave policy at all of their offices. *But see, e.g.*, NALP Directory, *supra* note 25 (workplace questionnaire for Mayer, Brown, Rowe & Maw LLP) (offering different policies at the Chicago and Washington, D.C. offices). Nonetheless, there are observable and statistically significant differences ($p = 0.002$) between firms based in different states. Statistical analysis was based on a single variable Chi-squared test, indicating significance at the level of the entire distribution. That is, some regions differ from other regions on some variables. Table 3 illustrates these differences, presenting data for states with five or more firms in the Vault rankings:

Table 3.

REGIONAL DIFFERENCES IN THE PROVISION OF LEAVE.

	WOMEN	MEN	RATIO	N
NATIONAL	11.9	3.9	34.9%	86
CALIFORNIA	11.4	2.7	30.4%	13
DISTRICT OF COLUMBIA	11.1	4.3	42.6%	13
ILLINOIS	12.9	4.5	33.6%	8
MASSACHUSETTS	13.4	4.4	32.8%	5
NEW YORK	12.8	3.0	26.2%	24

benefits, reformers can be confident that firms will continue to offer meaningful maternity leave.⁵⁰

Overall, this analysis indicates that differences in the total amount of maternity and paternity leave can be attributed to firms' combinations of policy types: disability leave for women (actual, normal fixed, or extended fixed), parental leave for both genders (brief, moderate, generous, or primary/nonprimary), and explicitly gendered non-disability leave. The most robust pattern that emerges from this classification is that firms repeatedly fail to distinguish between leave provided to women for childbearing and leave provided to both parents for childrearing. Extended disability leave and primary caregiver policies conflate these concepts, and, as described in the next Part, this conflation is problematic for attorneys of both genders.

II. LEAVE POLICIES AND GENDER DISCRIMINATION

Parental leave policies have, for over thirty years, exposed deep divisions among feminist scholars and activists, illustrating tensions between the rhetoric of equality and the goal of widely opening workplaces to women.⁵¹ The sheer variety of leave policies at prestigious and highly competitive law firms illustrates that we are far from consensus on the best type of paid parental leave policy or even on the criteria by which best should be measured. This Part discusses how some of the leave policies described above, particularly those that effectively offer generous childrearing benefits to women and little or no analogous leave to men, reinforce stereotypes and ultimately place unnecessary hurdles in front of male and female parent-attorneys. Section II.A provides an overview of gender discrimination in law firms. Sections II.B and II.C trace this discrimination to two outmoded but common assumptions in law firm leave policies—women are caregivers, and only one parent will be responsible for children.

A. Gender Discrimination in Law Firms

Women and parents are important constituencies within America's large law firms. Women constitute 49% of new law firm associates. This fact alone

50. Of course, creating generous policies on paper is only part of the battle, and attorneys must still be supported in the use of these policies.

51. See, e.g., KRISTINE M. BABER & KATHERINE R. ALLEN, *WOMEN AND FAMILIES: FEMINIST RECONSTRUCTIONS 190-95* (1992); MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES 215-16* (1994).

suggests that firms must pay some attention to the needs of female attorneys, and, indeed, 93% of law firms have made some specific public commitment to recruiting and retaining women.⁵² Census data reveals that most women, like most men, work outside the home when their children are young.⁵³ In the law firm context, one survey found that 63% of female attorneys and an astonishing 80% of male attorneys have children.⁵⁴ Women in law firms—like men in law firms, or women in the workforce as whole—have both a family and a career. But discrimination based on gender or family responsibilities remains evident in many ways, from differences in compensation and achievement to powerful accounts of subtle but systematic gender stereotyping.

An annual survey by the National Association of Women Lawyers (NAWL) provides a numerical portrait of women in country's 200 largest law firms.⁵⁵ While women constitute nearly half of young associates and more than 40% of senior associates, they make up only 26% of income partners and 16% of equity partners.⁵⁶ Commentators have often attributed these differences to the pipeline effect—the fact that many partners started practicing law before women were admitted to firms in appreciable numbers.⁵⁷ The NAWL data challenges this explanation, however, demonstrating that women who graduated from law school between 1980 and 1995 made up nearly half of new associates after their graduation, but constitute only 20% of the partners in their cohort today—a result replicated in other studies.⁵⁸ Undoubtedly, gender

52. NAWL SURVEY, *supra* note 15, at 4.

53. See Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families in 2007 (May 30, 2008), <http://www.bls.gov/news.release/pdf/famee.pdf> (noting that 71% of all mothers and 55% of mothers with children less than one year old are in the labor force).

54. See María Pabón López, *The Future of Women in the Legal Profession*, 19 HASTINGS WOMEN'S L.J. 53, 93 n.340 (2008).

55. NAWL SURVEY, *supra* note 15. NAWL's study considers the "American Lawyer Top-200." Virtually all of the Vault Top-100 are contained in this sample. *Id.* at 19 n.5.

56. *Id.* at 4.

57. See, e.g., Timothy L. O'Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of Big Law Firms*, N.Y. TIMES, Mar. 19, 2006 (Magazine), at 1 (explaining that many assumed "once law school graduation rates substantially equalized between men and women, that pipeline would fuel firm diversity and cause partnerships to equalize as well"); see also Marc Galanter, "Old and in the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081.

58. See MORELLO, *supra* note 14 195-96 (1986) (quoting media accounts from the mid-eighties that indicated no "entry level" discrimination against women); NAWL SURVEY, *supra* note 15, at 5; see also BARBARA A. CURRAN, AM. BAR ASS'N, COMM'N ON WOMEN IN THE

differences in partnership attainment must be attributed to a variety of factors, only some of which might be formally termed discrimination.⁵⁹ A study by the Women's Bar Association of the District of Columbia is only the most recent in a chorus of voices insisting that discrimination interacts with and profoundly influences women's choices in the profession.⁶⁰

Similarly, women in large law firms are not paid as well as men. While compensation for associates is generally governed by a system that leaves little room for discretion (or discrimination), women partners and women in "of counsel"⁶¹ positions are paid substantially less than men. Male counsels earn 11% more, male income partners earn 12% more, and male equity partners earn 16% more than their female peers.⁶² Rigorous statistical analysis reveals that income differences are related to a number of factors, including hours worked and educational background, but these factors cannot account for the entire gap.⁶³ Thus, the gender wage gap persists in the legal profession.

Perhaps most disturbingly, recent data indicates that, even today, only 53% of female lawyers believe that they have the same career opportunities as male colleagues.⁶⁴ That is, nearly half of the women practicing law today believe that their employers treat them differently than they treat men, at least as far as advancement is concerned. Moreover, the number of women who perceive this disparity has actually increased since 1983, suggesting that women are profoundly disillusioned with their prospects for success.⁶⁵

PROFESSION, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 49 (1995) (identifying the low partnership rates of women who entered law firms after 1981).

59. See BERNARD F. LENTZ & DAVID N. LABAND, *SEX DISCRIMINATION IN THE PROFESSION* 32-48 (1995).
60. WOMEN'S BAR ASS'N D.C., *CREATING PATHWAYS TO SUCCESS FOR ALL: ADVANCING AND RETAINING WOMEN IN TODAY'S LAW FIRMS* 8 (2006) ("Men and women, partners and associates, report similar levels and sources of work/life conflict, with all groups reporting difficulties due to that conflict in the 70% range."); see also WILLIAMS, *UNBENDING*, *supra* note 7, at 19-37.
61. "Of Counsel" or "Counsel" positions refer to senior attorneys who are not partners. The term encompasses a variety of work arrangements, from senior attorneys who recently joined the firm, to partially retired attorneys who still take on some projects.
62. See *NAWL SURVEY*, *supra* note 15, at 8.
63. See, e.g., LENTZ & LABAND, *supra* note 59, at 29 (describing a number of statistical models in which women earn less than men).
64. See Jennifer Gill, *Q&A with American Bar Assn. President Martha Barnett*, BUSINESSWEEK.COM, Oct. 3, 2000, http://yahoo.businessweek.com/careers/content/oct2000/ca2000103_488.htm.
65. See *id.*

While these numbers are striking, one of the most commonly mentioned attributes of discrimination in law firms is that it is subtle and difficult to characterize or describe.⁶⁶ Women are not stigmatized by overt beliefs that they should not be partners, or that they do not deserve the same salaries. Instead, their difficulties are anchored in assumptions about what it means to be a woman lawyer. Furthermore, focusing on numbers alone obscures the gender-based stereotyping that men experience in law firms. The literature on sex discrimination in legal employment has illuminated a variety of stereotypes about gender roles, family responsibilities, and employer beliefs, creating a perception that lawyers with family responsibilities are not suited to large law firms. These stereotypes impact attorney-parents of both genders in their attempts to seek career and family satisfaction.⁶⁷

Some employers' assumptions about motherhood and lawyering grow from the idea that a woman is not a "good mother" to her children if she maintains a demanding career. Employers have been sued successfully for actions based on these sorts of views,⁶⁸ but they persist in the workplace.⁶⁹ As one writer observes, "[h]igh-powered female lawyers with kids are viewed as suspect parents."⁷⁰ These sentiments are not exclusively by men; one female managing partner, interviewed in Holly English's survey of women in law firms, claims that "part time is the only way that you can give women a life of quality in the child rearing years."⁷¹ Employers consistently rely on these "good mother" assumptions to the detriment of their female employees.⁷² English illustrates that many women in law firms have internalized these stereotypes,⁷³ while John Hagan and Fiona Kay point to the tension between work and family as a primary driver of unhappiness among some female attorneys.⁷⁴

66. See *infra* notes 111-112 and accompanying text; see also JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE 161-62 (1995) (describing the subtlety of gender discrimination in law firms).

67. Gender discrimination theorists have also investigated the stereotype that women have trouble with the ethos of cutthroat competition that permeates the practice of law. See, e.g., HAGAN & KAY, *supra* note 66, at 70.

68. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

69. See, e.g., Reuter, *supra* note 16, at 1401 (describing employers' belief that "in order to be a good mother, a woman must devote all of her time, energy, and attention to her child").

70. ENGLISH, *supra* note 18, at 230.

71. *Id.* at 199.

72. See Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/LIT 333, 354 (2007).

73. See ENGLISH, *supra* note 18, 230-33.

74. HAGAN & KAY, *supra* note 66, at 158.

Employers also harbor “providership” or “breadwinner” stereotypes about fatherhood, and men who deviate from this norm face consequences at work.⁷⁵ Indeed, one scholar has gone so far as to call “breadwinning . . . the great unifying element in father’s lives.”⁷⁶ As one law firm partner insisted, when “associates get married and become family men . . . [i]t means they work harder”—presumably because having a family means providing a salary for a wife and children.⁷⁷ Fathers are not expected to have conflicts between work and family, because their relationship with their children is supposed to be defined primarily by the income raised to support them.⁷⁸ Moreover, “[b]ecause of the extraordinary time and dedication required of lawyers, male attorneys, more so than most working men, must forsake the role of ‘good father’ in order to assume the role of ‘good provider.’”⁷⁹ When fathers deviate from these assumptions and try to take on a more fulfilling role in childrearing, they face “resistance,”⁸⁰ “hostility,”⁸¹ and workplace “consequences.”⁸²

Recent scholarship has documented just how persistent these so-called “domesticity” assumptions can be. Despite the changed structure of the American economy and contemporary ideas about women’s capabilities and the importance of fatherhood, Joan Williams argues that we continue to rely on traditional gender roles in organizing our family and professional lives.⁸³ Social structures are organized around two types of individuals—an “ideal worker” who is the family breadwinner and is willing to make any sacrifice for a career,

75. See Cunningham, *supra* note 3, at 997.

76. ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 2 (1993).

77. ENGLISH, *supra* note 18, at 239.

78. See Cunningham, *supra* note 3, at 996 (describing the way in which the phrase “working mother” but not “working father” embodies some sort of tension).

79. 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, 275 (2004).

80. E.g., Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL’Y J. 329, 345-46 (2003).

81. E.g., Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 318 (2004); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077-79 (1994); Peterson, *supra* note 79, at 271-72.

82. ENGLISH, *supra* note 18, at 210.

83. See WILLIAMS, *UNBENDING*, *supra* note 7, at 1-4. Today, only 24% of children are raised in homes with only a father in the workforce. See JASON FIELDS, U.S. CENSUS BUREAU, *CHILDREN’S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002*, at 9 (2003) available at <http://www.census.gov/prod/2003pubs/p20-547.pdf> (showing that 20% of all children live in two parent homes with only a father in the workforce, and an additional 4% of children live in one parent homes with only a father in the workforce).

and a caregiver who is economically marginalized.⁸⁴ Although few families can afford, or even desire, this archetypal arrangement, the feminist movement has not altered its underlying structure.⁸⁵ Modern female lawyers are perceived as “ideal workers” until they have children, at which point they revert to caregivers and experience stigma within the firm. Men, as perpetual ideal workers, are assumed to have no caregiving responsibility and are thus unable to participate fully in the raising of their children.

The same themes manifest themselves in employer assumptions about attorneys’ commitment to the firm and to their family. Many employers view mothers as less committed to their work because they are presumed to be focused on their children. Researchers have famously demonstrated that when a female professional is late to work, her colleagues assume child care difficulties, and when a male professional is late, colleagues assume a breakfast meeting or a delayed train.⁸⁶ The women attorneys in English’s survey report that they did not perceive gender as an issue in their careers until they became mothers. One woman pessimistically concluded that at her law firm, people “were okay with having women as colleagues, [but they] were not okay with having a mother as a colleague.”⁸⁷ This is consistent with larger patterns in the American economy—while the wage gap between men and women is shrinking, the gap between “mothers and others” is widening.⁸⁸ Thus, women are hampered by their employers’ beliefs that they cannot be committed lawyers after they have children. One prominent scholar remarked that “[e]very single woman I have spoken to” experienced discrimination after returning from maternity leave.⁸⁹

84. See WILLIAMS, UNBENDING, *supra* note 7, at 1-4.

85. See *id.* at 8 (describing the “white picket fence in our heads” that is ever-present in discussion about gender and families).

86. Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 389 (2004) (“[W]hen a mother is absent or late for work she is assumed to be caring for her children; a similarly-situated father is assumed to be handling a work-related issue.”).

87. ENGLISH, *supra* note 18, at 228.

88. WILLIAMS, UNBENDING, *supra* note 7, at 59. See, e.g., Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001); Jane Waldfogel, *The Effect of Children on Women’s Wages*, 62 AM. SOC. REV. 209, 216 (1997); see also Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3, 3 (2006).

89. WILLIAMS, UNBENDING, *supra* note 7, at 69.

Meanwhile, fathers are unable to make or articulate family commitments and fear reprisals from their employers if they do.⁹⁰ “The role of father is even more rigidly defined than that of mother,” writes one author,⁹¹ and this rigidity underlies “male attorney[s]’ fear of being perceived as less committed to the firm” if they do ask for time to care for children.⁹² Men who need time away from the office to address their own health problems are hardly noticed, but men who need time for family-related reasons experience reputational sanctions.⁹³ One senior attorney in English’s study paints with a characteristically broad brush, remarking that

the guys don’t need to leave to get the kid out of day care, or stay home when the kid is sick, or take the kid to the doctor, or any of those things that take time away from the clients. But of course the lady lawyer has to do those things.⁹⁴

While it is a particularly unlikely proposition that the fathers in this firm are never responsible for child care, the sentiment is by no means unusual. Moreover, this statement perfectly encapsulates the relationship between commitment, domesticity, and stereotypes. The partner focuses on female attorneys’ family commitments, and every time a woman leaves to “get the kid out of day care” the assumption is affirmed. Moreover, this statement bluntly assumes that “guys don’t need to leave” for family reasons, making it difficult for male attorneys’ to assert their own caregiving responsibilities. In one stroke, the partner has questioned women’s commitment to their career and undermined fathers’ flexibility to participate in their children’s lives.

Ultimately, sex discrimination in law firms is rooted in a complex set of assumptions about gender roles, family dynamics, and attorney capabilities. With this overview, one can explore the ways in which parental leave interacts with and helps perpetuate these stereotypes. The following discussion focuses on the most grossly disproportionate leave policies—those which provide maternity leave benefits well in excess of pregnancy-related disability but offer no comparable benefit to fathers—as described in Part I. Section II.B first addresses how disproportionate leave reinforces assumptions about women,

90. See, e.g., ENGLISH, *supra* note 18, at 210 (describing men’s fear of “abuse” because of family commitments); see also sources cited *supra* notes 80-81.

91. ENGLISH, *supra* note 18, at 238.

92. Peterson, *supra* note 79, at 275.

93. See Cunningham, *supra* note 3, at 994.

94. ENGLISH, *supra* note 18, at 229-30.

illustrating how these policies caricature female attorneys. Section II.C then considers more complicated relationships, exploring how leave policies embody and enforce assumptions about family dynamics.

B. Leave Policies and Assumptions About Women

Although firms may design their maternity and parental leave policies around their assumptions about families, these same policies also can reinforce employer stereotypes that women and mothers are not meant for or committed to law firm work. The classic sociological account of stereotypes focuses on evidence processing—when individuals observe evidence consistent with their background assumptions, they focus on it and remember it, but inconsistent evidence is largely ignored.⁹⁵ When a law firm provides a sixteen-week maternity leave without offering male attorneys a single day off, each birth in an attorney's family becomes a stereotype-reinforcing event. Supervisors are given four months to reflect on a woman's absence from the firm and how her motherhood will change her legal career. They are also given the opportunity to slap a male colleague on the back and admire the baby pictures after only a few days, reinforcing breadwinner assumptions about fatherhood. In the less frequent case where a male attorney uses accumulated vacation to stay home with a newborn, or a female attorney quickly returns to work, the employer ignores the evidence or sees these two individuals as outliers.⁹⁶ In contrast, when female attorneys take sixteen-week leaves, and male attorneys are offered and regularly take advantage of ten or twelve week leaves, supervisors and colleagues are provided with overwhelming evidence that can dissolve or soften their assumptions about parenting and lawyering.⁹⁷

95. See, e.g., Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory*, 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); Marilyn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 ANN. REV. PSYCHOL. 219 (1985); Patricia G. Devine, *Stereotypes and Prejudices: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). For an excellent overview of this literature in the context of employer perceptions of men and women taking family leave under the FMLA, see Malin, *supra* note 80, at 337-49.

96. See Brewer & Kramer, *supra* note 95, at 222 (discussing stereotype subtyping). The problem is compounded by evidence that even when leave is available, male attorneys are unlikely to avail themselves of whatever limited leave is provided. See generally Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293 (2007) (stressing the importance of equal leave-taking and proposing compensation schemes to accomplish it).

97. See Ayanna, *supra* note 96.

Primary caregiver leave can operate in a similar way. These policies can be facially gender-neutral, but often are applied in gendered ways.⁹⁸ For instance, women are automatically considered the primary caregiver and entitled to long leaves, while men must often specially petition their employers if they wish to take an extended parental leave.⁹⁹ These policies provide the same opportunities to reinforce assumptions about motherhood, but may be even more pernicious for two reasons. First, they attach labels—primary caregiver and nonprimary caregiver—to individuals taking parental leave. To the extent anyone within the firm notices or uses these distinctions, they offer further evidence that fathers should not have childcare responsibilities and mothers have little room for a legal career.¹⁰⁰ Second, as discussed in more detail below, they reinforce employer conceptions of the way families run—with one career and one caregiving parent—even if they provide nominal flexibility for the caregiver to be the father.

Finally, disproportionate leave policies can reinforce stereotypes for another group of lawyers: those interviewing for positions with the firm. Despite the fact that it is plainly illegal to ask about marriage, family, or childcare commitments in job interviews, female attorneys still believe that those topics are being probed.¹⁰¹ Moreover, recruiting tactics that encourage employers to focus on the family-friendly qualities at their law firms only reinforce the biases that the ban on family-status questions is supposed to eliminate. When no parental leave is available to men, employers have no reason to discuss it with potential male hires, but they are encouraged to tell women about the generous maternity leave policies. This only reminds the hiring attorneys of women's potential family commitment and emphasizes the "gender-based *assumption* that a particular female worker will assume caretaking responsibilities."¹⁰²

98. See *infra* Section III.C.

99. Cunningham, *supra* note 3, at 972.

100. See Bodenhausen, *supra* note 95, at 727 (discussing the effects of labeling when a mixed set of evidence is presented).

101. See LENTZ & LABAND, *supra* note 59, at 87-88.

102. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 11 (2007) (emphasis added), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>; see also *id.* at 12 (emphasizing that it is illegal to "assume that childcare responsibilities will make female employees less dependable than male employees").

C. Leave Policies and Assumptions About Family Dynamics

It is fairly straightforward and uncontroversial to argue that women who do not take on primary responsibility for raising children, or whose caregiving responsibilities are no greater than their male colleagues, should not face stereotypes that do not apply to them. But the situation for parent-attorneys is substantially more complicated, and employer stereotypes are rooted in the reality of many working families' lives. Countless studies demonstrate that women, even in families with two high-status professionals, take on the majority of the caregiving responsibility.¹⁰³ Women are responsible for 80% of the childcare duties in American households, and even the Equal Employment Opportunity Commission (EEOC) acknowledges that "women actually do assume the bulk of caretaking responsibilities in most families."¹⁰⁴ Law firms might reasonably protest that they offer long maternity leaves and short paternity leaves because that is what the attorneys want, and that they have to offer short leaves to men to be able to afford long leaves for women. But this Section demonstrates how parental leave policies can actually contribute to the continued dominance of these patterns. It begins by describing feminist objections to the ideal worker norm, then rebuts the rhetoric of women's and men's choices, and finally applies these concepts to law firm leave policies.

As described above, feminist theorists have argued that workplaces are built around the norm of an ideal worker—a person who has access to an unlimited "flow" of childcare assistance from a spouse and has no pressing responsibilities beyond commitment to their career.¹⁰⁵ The concept has been developed in great detail in the feminist literature,¹⁰⁶ and the core objection is that the norm is centered on an inherently gendered view of the family. Activists, in this view, should focus on more than simply guarding against overt discrimination. If success continues to require ideal worker status as an essential component, then few women will be successful—because women rarely have access to the flow of domestic services that ideal workers require.¹⁰⁷

103. See, e.g., WILLIAMS, UNBENDING, *supra* note 7, at 2.

104. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 102, at 11.

105. WILLIAMS, UNBENDING, *supra* note 7, at 5.

106. See, e.g., TERRI APTER, WORKING WOMEN DON'T HAVE WIVES: PROFESSIONAL SUCCESS IN THE 1990S (1993); MARY BLAIR-LOY, COMPETING DEVOTIONS 1-2 (2003) (discussing competing work and family "schema"); LESLIE F. STEBBINS, WORK AND FAMILY IN AMERICA (2001); UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES (Jody Heymann & Christopher Beem eds., 2005); WILLIAMS, UNBENDING, *supra* note 7, at 1-39.

107. See, e.g., APTER, *supra* note 106, at 1-10; WILLIAMS, UNBENDING, *supra* note 7, at 5.

Instead, the focus should be on changing workplaces so individuals who are not ideal workers for certain periods of their careers can still achieve. Central to this is the goal of “enabling workers to take more time for caregiving” without penalizing them in the workplace.¹⁰⁸ Though less clearly articulated in the literature, eliminating the ideal worker norm also requires deconstructing the assumption that one parent will provide a flow of childcare responsibility on which the other can rely. Moreover, there is ample evidence in the social sciences literature that populating workplaces with “non-ideal” workers will increase productivity and is a feasible reform goal.¹⁰⁹

It is within this framework that many observers have objected to assertions that women with children make a choice to exit the workforce, reduce their participation, or minimize their professional commitments. Joan Williams insists that “mothers’ marginalization reflects not mere choice; it also reflects discrimination.”¹¹⁰ In this view, women’s choices are constrained by the fact that it is impossible for them to become ideal workers. As one author observes, “[F]emale lawyers often feel pushed into that choice [to exit or minimize their career] and would prefer to maintain their careers and a family if a structure existed that allowed them to do so.”¹¹¹ Indeed, women are “caught in a double bind between the competing models of the ideal worker and ideal parent,” making meaningful choice difficult.¹¹² Certainly no one disputes that many women make these sorts of choices and that they are satisfied with their decisions. But it is also inaccurate to assume that all women can be characterized in such a manner.

Nor can we say that men freely choose their more limited family commitments. Men repeatedly explain that they are concerned about or have personally experienced supervisor and coworker intolerance of their

108. Anita Garey, *Far From Ideal*, WOMEN’S REV. BOOKS, Dec. 1999, at 17, 18.

109. See, e.g., Jennifer L. Glass & Sarah Beth Estes, *The Family Responsive Workplace*, 23 ANN. REV. SOC. 289, 296-97 (1997) (discussing how work-life conflict decreases productivity); Alison M. Konrad & Robert Mangel, *The Impact of Work-Life Programs on Firm Productivity*, 21 STRATEGIC MGMT. J. 1225, 1231-36 (2000) (discussing how “work-life programs” improve productivity); Susan J. Lambert, *Added Benefits: The Link Between Work-Life Benefits and Organizational Citizenship Behavior*, 43 ACAD. MGMT. J. 801, 801 (2000) (offering a model of how work-life benefits can improve “organizational citizenship” and “job performance”); Amy L. Wax, *Family-Friendly Workplace Reform: Prospects for Change*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 2004, at 36.

110. WILLIAMS, UNBENDING, *supra* note 7, at 37.

111. O’Brien, *supra* note 57, at 1.

112. Pamela Stone & Meg Lovejoy, *Fast Track Women and the “Choice” To Stay Home*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 2004, at 62.

childrearing commitments.¹¹³ Growing from a “societal stereotype . . . that men are less attached to their children,” more than 60% of fathers worry their supervisors will not approve if they take more than four weeks of paternity leave.¹¹⁴ One man poignantly insisted that when fathers take time for their children, they do so “as quietly as possible because we fear for our jobs if word gets out.”¹¹⁵ Keith Cunningham-Parmeter paints a stark picture of men at American law firms, explaining a male partner’s assessment that child care “is not a macho thing to do.”¹¹⁶ Another observer explains that when a man insists on time away from work because of family commitments, he “may face the assumption not only that he is a less competent worker, but that he is, overall, somehow lacking as a person.”¹¹⁷ An oft-quoted, though now dated, study revealed that fully 63% of large employers believed that it was “unreasonable” for men to take even a single day of paternity leave after a child was born.¹¹⁸ A less rigorous but somewhat more recent investigation found that “almost two-thirds of chief executive officers and human resources directors believed that ‘none’ was a reasonable paternity leave following the arrival of child,” suggesting that, at the very least, progress in this field is slow.¹¹⁹ Men’s choices are profoundly influenced by this workplace hostility. A recent study revealed that male and female law school graduates are equally concerned about “work-life balance.”¹²⁰ Thus, just as discrimination rooted in the ideal worker norm hinders mothers’ professional accomplishment, so, too, does it restrain fathers’ family commitments.

The role of disproportionate parental leave policies within this wider narrative is clear. A sixteen-week leave for women, without offering a single day off for men, represents a classic manifestation of the ideal worker

113. See generally ENGLISH, *supra* note 18, at 238-42 (describing the predicament of “[d]ads in a [b]ox”); STEBBINS, *supra* note 106, at 31-32 (highlighting men’s work-family conflicts); Cunningham, *supra* note 3, at 976-78 (discussing difficulties men have in taking primary caregiver leave); Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 410-11 (2007).

114. Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 262 (2003); Janet Shibley Hyde et al., *Parental Leave: Policy and Research*, 52 J. SOC. ISSUES 91, 105 (1996).

115. Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 42 (1998).

116. Cunningham, *supra* note 3, at 977.

117. Williams & Segal, *Relief*, *supra* note 7, at 102.

118. CATALYST, REPORT ON A NATIONAL STUDY OF PARENTAL LEAVES 65 (1986). The study considered large employers generally, not law firms.

119. Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1957 (2008) (describing a 1999 study).

120. CATALYST, *supra* note 48, at 18-19.

assumption that men should not need time off for newborns because they, as ideal workers, have unlimited childcare assistance. At the same time, new mothers are no longer ideal workers and will be marginalized in the firm. Similarly, policies that define certain parents as the primary caregiver only reinforce the law firms' beliefs that households will be organized so that one parent provides the other with a flow of domestic support. It is no wonder, then, that couples with two high-status professionals feel as if their lives are unsustainable,¹²¹ since neither parent has the unlimited support employers seem to expect. More subtly, leave policies can also suggest to new parents what the proper, or perhaps simply prudent, organization of their family should be. With one parent entitled to weeks of time off, and the other entitled to little or no leave, it is easy to establish the patterns that lead to women providing the vast majority of the child care. One observer calls these sorts of policies a "self-fulfilling prophecy" because the mother, able to take an extended leave, becomes the "expert caregiver" and then maintains that role in years to come.¹²² Certainly, law firms are not responsible for outside social pressures that shape their employees' decisions. Nonetheless, grossly uneven leave policies assume the correctness of those pressures, and inappropriately make conforming decisions all but inevitable.

The objections described above follow logically from a school of feminist thought that emphasizes and combats the stereotypes of domesticity.¹²³ But, without rehashing the sameness/difference debates of previous decades,¹²⁴ it is important to recognize that the very existence of maternity leave is an enduring accomplishment of earlier waves of the feminist movement.¹²⁵ Indeed, to the activists who so aggressively fought for the passage of the Pregnancy Discrimination Act (PDA), the central battle was securing employers' minimum tolerance for mothers in the workplace.¹²⁶ Following this legacy, it is

121. Cf. Rosalind C. Barnett & Nancy L. Marshall, *Gender and the Relationship Between Job Experiences and Psychological Distress: A Study of Dual-Earner Couples*, 64 J. PERSONALITY & SOC. PSYCHOL. 794 (1993) (describing how men and women in dual-earner couples react to professional stress).

122. Cunningham, *supra* note 3, at 978.

123. WILLIAMS, UNBENDING, *supra* note 7, at 1-6.

124. See, e.g., Rosemary C. Salomone, *Myths and Realities in the Sameness/Difference Debate*, 11 CARDOZO WOMEN'S L.J. 583 (2005).

125. See LISE VOGEL, *MOTHERS ON THE JOB* 9-43 (1993) (describing the evolution of maternity benefits).

126. By way of illustration, the plaintiff in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the first major pregnancy discrimination case, was fired simply for leaving work long enough to deliver her child.

easy to see how one might welcome longer maternity benefits as a signal of greater employer recognition of women, and might argue that a sixteen-week maternity leave suggests that an employer is fully committed to keeping new mothers on its staff. Certainly, the law firms who have these policies will be quick to offer this justification. Nonetheless, by offering generous benefits to new mothers but not new fathers, these employers are taking an unmistakable position on what motherhood and fatherhood should mean to their employees. Just as earlier feminists worked to ensure that women had a choice to have a baby and a career if they so chose, those working to increase equity in leave policies seek to ensure that parents of both genders have meaningful choices in the way they structure their work and family lives.

In sum, disproportionate parental leave reinforces problematic stereotypes. The policies allow employers to assume that motherhood undermines a legal career without regard to the particular mother or the particular career. But they do more than simply assume women into roles they may not take on. Grossly uneven leave policies also reinforce a family dynamic that is ultimately unsatisfying to both parties—the (female) marginalized caregiver who cannot embrace a career, and the (male) ideal worker who cannot participate in a family. Until employers abandon these assumptions, attorneys of both genders will continue to express profound dissatisfaction with the “work-life” conflict in their lives and firms will unnecessarily lose talented employees. The workforce need not wait patiently for employers to realize their mistake; as Part III illustrates, disproportionate leave policies are extremely vulnerable to a Title VII challenge for discrimination on the basis of sex.

III. TITLE VII CHALLENGES TO LEAVE POLICIES

Given the potential harm that these notably uneven leave policies can cause, this Part investigates the viability of Title VII challenges alleging sex-based discrimination in the provision of parental leave. In particular, policies that offer incredibly generous benefits to women and no leave to men may be vulnerable on straightforward claims of facial discrimination on the basis of sex. In addition, certain facially neutral leave policies that distinguish between primary and nonprimary caregivers may also be susceptible to a “sex-plus” disparate treatment challenge by male attorneys who consider themselves primary caregivers but find they are unable to use their firm’s more generous leave provisions. Although these suits would almost certainly be brought by men, the discussion in Part II suggests that more paid leave for men and less inequality in the provision of leave can lessen stereotypes for attorneys of both genders.

Despite their position in the legal hierarchy, law firms are not immune from suit. In 1984, the Supreme Court established that law firms were colorable Title VII defendants.¹²⁷ One recent study uncovered thirty-three recent cases where legal employers, including many large law firms, have been sued under Title VII for discriminating on the basis of gender and caregiving responsibility.¹²⁸ While the study was unable to find any suits brought by male attorneys,¹²⁹ the discussion below suggests that grossly disproportionate leave policies may provide an excellent target. To understand the framework in which a Title VII challenge should be situated, Section III.A provides an overview of federal law on a pregnancy and parental leave. Section III.B argues that leave policies that provide as much as twelve or sixteen weeks of disability leave to women and offer little or no leave to men are facially discriminatory under existing law. Section III.C describes how primary/nonprimary caregiver policies may also be challenged based on the way in which they are applied to male attorneys. Finally, Section III.D explores factors that may explain firms' persistence in offering these policies and attorneys' failure to instigate legal action to date.

A. *Development of Federal Law*

Supreme Court jurisprudence on the relationship between Title VII and parental leave has followed a circuitous route. While many of the key principles are found in Title VII decisions, a number of important concepts can also be drawn from equal protection jurisprudence and other federal law. As described below, the Court's initial conclusion that pregnancy did not create a leave entitlement was overruled by the PDA.¹³⁰ Interpretation of that statute has

127. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

128. See *Williams et al.*, *supra* note 113, at 395, 404-10; see also *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 123 F. App'x 558 (4th Cir. 2005) (finding for the attorney on a claim of gender discrimination); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716 (7th Cir. 1998) (allowing a claim to go to trial when a female attorney's boss allegedly told her she should stay home with her children); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995) (finding for the attorney on a claim of pregnancy discrimination); *Capruso v. Hartford Fin. Servs. Group, Inc.*, 2003 WL 1872653 (S.D.N.Y. Apr. 10, 2003); *Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrimination*, 729 N.E.2d 1068 (Mass. 2000); Kimberly Blanton, *Lawyer Accuses Firm of Pregnancy Bias: Says Goodwin Procter Denied Her Partnership*, BOSTON GLOBE, Mar. 13, 2003, at E1 (describing a pregnancy discrimination case).

129. See *Williams et al.*, *supra* note 113, at 410.

130. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

shaped the boundaries of parental leave, as has the passage of the Family and Medical Leave Act of 1993 (FMLA).¹³¹ Taken together, the developments require maternity leave for many employed women, while also affirming a baseline commitment to gender equality in the provision of leave.

In *Phillips v. Martin Marietta Corp.*, an early Title VII case, the Court established that discrimination against women because they are mothers can constitute “discrimination on the basis of sex.”¹³² In that 1971 per curiam opinion, the Court easily concluded that a hiring policy which excluded mothers, but not fathers, of young children could violate Title VII.¹³³ This holding formed the basis for sex-plus theories of discrimination, which prohibit policies where “an employer classifies employees on the basis of sex plus another characteristic, such as parenthood, race, marital status or child-bearing ability.”¹³⁴

The Court first attempted to address issues specifically related to parental leave in *Geduldig v. Aiello*.¹³⁵ In that 1974 case, pregnant women challenged a California program that provided paid disability benefits to most disabled private employees, but specifically excluded any disability “arising in connection with pregnancy.”¹³⁶ Justice Stewart held that California’s decision not to cover pregnancy-related disabilities is not “invidious discrimination under the Equal Protection Clause.”¹³⁷ Similarly, in *General Electric Co. v. Gilbert*, the Court held that an employer’s disability benefit package that excluded pregnancy did not “discriminate on the basis of sex” within the

131. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2000)).

132. 411 F.2d 1, 2 (5th Cir. 1969), *aff’d*, 400 U.S. 542 (1971) (per curiam).

133. 400 U.S. at 544. The opinion left open the possibility of a bona fide occupational qualification defense by the employer. *Id.* (Marshall, J., concurring).

134. Ellen M. Martin, Anne O. Martinson & Claire Frost, *Evolving Theories of Discrimination Under Title VII*, 746 PLI/LIT 111 (2006); see also *City of L.A. Dept. of Waste & Power v. Manhart* 435 U.S. 702 (1978) (finding for a female plaintiff on a sex-plus theory); *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) (discussing the remedy by which an employee can recover under a sex-plus theory as a member of two different protected classes); *Miller v. Grand Holdings, Inc.*, No. 04-2688, 2005 WL 1745639, at *8 (D. Minn. July 26, 2005) (“[C]ourts have considered familial status in analyzing gender discrimination claims under a ‘sex plus’ theory.”). For a general discussion of sex-plus claims under Title VII, see Wendi Barish, Comment, “Sex-Plus” Discrimination: A Discussion of *Fisher v. Vassar College*, 13 HOFSTRA LAB. L.J. 239 (1995); and Regina E. Gray, Comment, *The Rise and Fall of the “Sex-Plus” Discrimination: An Analysis of Fisher v. Vassar College*, 42 HOW. L.J. 71 (1998).

135. 417 U.S. 484 (1974).

136. *Id.* at 489.

137. *Id.* at 494.

meaning of Title VII.¹³⁸ Justice Rehnquist emphasized that the plan was “facially nondiscriminatory in the sense that ‘[t]here is no risk from which men are protected and women are not.’”¹³⁹ With these two cases, the Court clearly established that there was no existing federal right to pregnancy leave.

Gilbert generated public outrage and a swift congressional response. In 1978, Congress passed the PDA, which overruled *Gilbert* and amended Title VII:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work¹⁴⁰

Thus, under the PDA, employers must not make hiring decisions on the basis of pregnancy, and are required to offer pregnancy-related benefits if they also offer similar disability benefits.¹⁴¹

With the issue presented in *Gilbert* clearly settled by statute, the Court was called upon to interpret the PDA under very different circumstances in 1987. The plaintiffs in *California Federal Savings & Loan Ass’n v. Guerra* challenged a California law that required employers to provide pregnancy leave, whether or not they provided benefits for other disabilities.¹⁴² The Court held that the California statute, which was admittedly more protective of pregnancy than other conditions, did not require employers to violate the PDA and was not preempted by federal law. Although the PDA’s plain language demanded that pregnancy “shall be treated the same” as other disabilities, Justice Marshall’s plurality opinion investigated congressional motivations underlying the Act and concluded that this language was not intended to “impos[e] a limitation

138. 429 U.S. 125, 133 (1976).

139. *Id.* at 138 (quoting *Geduldig*, 417 U.S. at 496-97).

140. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

141. *Id.* For a discussion of the PDA, see Julie Manning Magid, *Pregnant with Possibility*, 38 AM. BUS. L.J. 819 (2001); and Melissa Feinberg, Note, *After California Federal Savings & Loan v. Guerra: The Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 141 (1989). See also Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work*, 86 IOWA L. REV. 703 (2001).

142. 479 U.S. 272 (1987).

on the remedial purpose of the PDA.”¹⁴³ Instead, “preferential treatment of the disadvantaged class” was consistent with Title VII.¹⁴⁴

Four years later, in *International Union v. Johnson Controls, Inc.*,¹⁴⁵ the Court added nuance to this analysis by invalidating an employer’s “Fetal Protection Policy” that prohibited hiring fertile (but nonpregnant) women into positions that would pose risks to a fetus if the women became pregnant.¹⁴⁶ The Court concluded that the policy not only plainly discriminated on the basis of sex, but also represented an illegal “classifi[cation] on the basis of potential for pregnancy.”¹⁴⁷ The majority opinion remarked that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”¹⁴⁸ The fact that the fetal protection policy was designed to protect potential children, not to hinder women’s careers, was not relevant to the Court’s Title VII analysis.

In 1993, Congress passed the FMLA.¹⁴⁹ The FMLA guarantees eligible employees twelve weeks of unpaid leave to care for a newborn or newly adopted child, to attend to a seriously ill child, parent, or spouse, or to address an employee’s own serious health condition.¹⁵⁰ The Act applies without regard to the employee’s gender, but only covers large employers and excludes some highly paid employees from its terms.¹⁵¹

Before its final passage, the FMLA was vetoed twice by President George H.W. Bush, who expressed concern about its impact on American business.¹⁵²

143. *Id.* at 277 n.6, 285.

144. *Id.* at 293 (Stevens, J., concurring in part and concurring in the judgment). See generally Feinberg, *supra* note 141 (discussing *Guerra*). In *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 479 U.S. 1050 (1987), the Court considered a similar policy promulgated by the State of Montana and challenged on equal protection grounds. The Court remanded the case for reconsideration in light of its *Guerra* decision. *Id.*

145. 499 U.S. 187 (1991).

146. *Id.* at 193, 197; see also Clanton, *supra* note 141, at 712-13.

147. *Int’l Union*, 499 U.S. at 199. The Court reasoned that the policy violated the plain language of section 703 of the Civil Rights Act, and the policy constituted discrimination on the basis of pregnancy, as prohibited by the PDA amendments appearing in section 701.

148. *Id.* at 199.

149. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2000)).

150. 29 U.S.C. § 2612(a)(1).

151. *Id.* §§ 2611(2)(B), 2614(b).

152. Charles L. Baum, *Has Family Leave Legislation Increased Leave-Taking?*, 15 WASH. U. J.L. & POL’Y 93, 94 (2004) (discussing the impact of the FMLA on family leave-taking); Stephen Kurkjian, *Bush Vetoes Family Leave Legislation*, BOSTON GLOBE, June 30, 1990, at A1 (citing President Bush’s concerns regarding job creation and preservation).

The coalition of supporters that ultimately secured the Act's passage was motivated by different interests and competing agendas, and over the last twenty-five years different aspects of the enacting rationale have borne emphasis. For example, in the mid-nineties, observers described the Act as presenting a unified national policy for pregnancy leave, focusing on the physical disability suffered during pregnancy and postpartum.¹⁵³ Recent scholarship has tended to focus on the FMLA's gender neutrality, however, and authors have described the Act as a congressional attempt to "transform gender expectations about the allocation of responsibility for family-care obligations as between men and women."¹⁵⁴

The Supreme Court focused on this second rationale when it interpreted the Act ten years after its passage. The FMLA applies to states as employers, and Congress also authorized a damages remedy against the states. *Nevada Department of Human Resources v. Hibbs*¹⁵⁵ required the Court to determine whether this was a valid waiver of state sovereign immunity—a question that turned on the legitimacy of the FMLA as an exercise of the remedial power under Section 5 of the Fourteenth Amendment.¹⁵⁶ In holding that the waiver of sovereign immunity was valid, Chief Justice Rehnquist's sweeping opinion focused on evidence before Congress that many states "continue[d] to rely on invalid gender stereotypes . . . specifically in the administration of leave benefits."¹⁵⁷ *Hibbs* is, strictly speaking, a decision about the scope of Congress's Section Five remedial power, but it reflects important themes in the Court's contemporary thinking on parental leave. Indeed, both the majority opinion and Justice Kennedy's dissent suggested that state laws granting more "family-leave time to women than to men" would constitute impermissible "gender-based discrimination" in contravention of Title VII.¹⁵⁸

153. See, e.g., Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 53 (1995).

154. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2017 (2003); see also Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 11 (2006).

155. 538 U.S. 721 (2003).

156. See *id.* at 726.

157. *Id.* at 730. See generally Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006); *id.* at 1873 (describing *Hibbs*'s focus on discrimination against "mothers and mothers-to-be").

158. *Hibbs*, 538 U.S. at 739-40 & n.12; *id.* at 756 (Kennedy, J., dissenting); see also *infra* text accompanying notes 173-184.

While the case law on gender and family responsibilities discrimination in employment is much richer than the overview provided in this Section,¹⁵⁹ with this background Sections III.B and III.C turn to the viability of Title VII challenges to law firm leave policies.

B. Challenging Extended Disability Leave

Law firm leave policies that provide extremely extended fixed disability leave to women while offering little or no leave to men violate Title VII's prohibition on sex discrimination. Fixed disability leave itself is not problematic—it may simplify administration and provide women some comfort that they are adjusting normally. It is problematic, however, when the disability period extends well beyond the normal disability associated with childbirth—transforming it from childbearing leave into childrearing leave not available on an equal and nongendered basis.

It is particularly useful to focus on policies that provide fixed pregnancy disability leave of twelve weeks or longer, while offering no parental leave. Seven firms analyzed in this study have policies that meet these criteria. Two firms provide a sixteen-week fixed disability leave to women, and offer no parental leave to male attorneys. Estimates of postpartum disability cluster around six weeks, with some estimates reaching as high as eight weeks;¹⁶⁰ therefore, these policies effectively provide an additional two month leave to women with normal pregnancies and offer no comparable benefit to men. Similarly, five firms offer a twelve week fixed disability leave and no parental leave.¹⁶¹

*Guerra*¹⁶² does not create an absolute barrier to Title VII suits challenging pregnancy policies. Certainly, the Court's decision in *Guerra* established that

159. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (articulating a broad standard for employer retaliation under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (articulating a new test for making out a prima facie case); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (relaxing the requirement for proof of more favorable treatment of a member of the unprotected group).

160. See McGovern et al., *supra* note 35, at 159; see also H.R. REP. NO. 101-28, pt. 1, at 30 (1989) (citing four to eight weeks as the range of estimates for normal recovery times).

161. Four firms combine twelve weeks of disability leaves with two to four weeks of parental leave, and eight firms offer a ten or eleven weeks of disability leave combined with one or two weeks of parental leave. Indeed, these policies may be vulnerable to the types of legal challenges described in this Section, but the analysis focuses on the seven firms with the most egregious policies.

162. 479 U.S. 272 (1987).

states and employers can treat pregnancy more favorably than other disabilities. But close reading of that decision—particularly in light of *Hibbs* and other more recent developments—indicates that *Guerra* is unlikely to protect twelve-to-sixteen-week fixed disability leave.

Guerra is cited widely for its core holding that the PDA does not prohibit policies that treat pregnancy more favorably than other conditions. Justice Marshall’s plurality opinion drew a sharp distinction, however, between pregnancy classifications that “reflect archaic or stereotypical notions about pregnancy,”¹⁶³ and California’s policy, which was “narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy.”¹⁶⁴ Justice Marshall used the word “reasonable” to describe the length of the permitted leave policies on six occasions.¹⁶⁵ A sixteen-week disability leave for normal pregnancy, however, is hardly “reasonable” or “narrowly drawn.” Instead, it reflects “archaic or stereotypical notions” and is thus not freed from Title VII liability.¹⁶⁶

The Third Circuit relied on exactly this reasoning in the 1990 case of *Schafer v. Board of Public Education*.¹⁶⁷ The court concluded that a school district relied on a facially discriminatory policy by providing a year-long, unpaid leave to women but not men. Despite the employer’s insistence that it was offering a twelve-month pregnancy “disability” leave, the Third Circuit refused to extend *Guerra* to situations where there was not a “simultaneous showing of a continuing disability related to either the pregnancy or to the delivery of the child.”¹⁶⁸ Similarly, citing *Schafer*, the Seventh Circuit has observed that “failure to allow fathers to avail themselves of a more generous child-raising leave available to women employees might [violate Title VII].”¹⁶⁹

^{163.} *Id.* at 290.

^{164.} *Id.*

^{165.} *Id.* at 275 n.1 (using “reasonable” three times, quoting the California statute); *id.* at 287 & n.24 (using “reasonable” two times, quoting a Connecticut statute); *id.* at 289 (characterizing the California policy as reasonable).

^{166.} See, e.g., Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 19, 70 n.304 (1995); Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 80 & n.100 (1997).

^{167.} 903 F.2d 243 (3d Cir. 1990). Factual disputes prevented the court from granting summary judgment. *Id.* at 248.

^{168.} *Id.* at 248; see also Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2187 (1994) (“After *Schafer*, it appears that *Guerra* does not control situations in which biological differences do not dictate the need for accommodation.”).

^{169.} *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 445 n.1 (7th Cir. 1991).

While the *Schafer* decision represents the most plausible reading of *Guerra*, it should be noted that the Sixth Circuit reached a different conclusion in *Harness v. Hartz Mountain Corp.*¹⁷⁰ Although the case was brought under Kentucky law, there were no state decisions interpreting the relevant provision, and the language at issue was nearly identical to the PDA. Therefore, the federal court announced its reliance on *Guerra* and upheld an employer policy that provided a one-year unpaid leave to biological mothers.¹⁷¹ The decision is unlikely to be persuasive today for two reasons. First, *Harness* was decided in 1989, only a few years after *Guerra* and before any of the recent developments discussed below. More importantly, the *Harness* plaintiff was not a father. He was a heart attack victim who insisted that cardiac patients were discriminated against as compared to pregnant women. Thus, since his claim was not that fathers were discriminated against as compared to mothers, the case did not force the court to address the relevant question.¹⁷²

Moreover, the passage of the FMLA, buttressed by the Supreme Court's interpretation of that Act in *Hibbs*, counsels a dynamic reading of the PDA that emphatically reaches the same conclusion as the Third Circuit's *Schafer* holding.¹⁷³ Justice Marshall's classically purposivist opinion in *Guerra* focused on the "remedial purpose of the PDA," emphasizing legislative sponsors' statements that the PDA would "guarantee women the basic right to participate fully and equally in the workforce."¹⁷⁴ Because Congress in 1978 was concerned with "full and equal" participation, Justice Marshall in 1987 saw the PDA as "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."¹⁷⁵ The FMLA critically redefined Congress's belief about "full and equal" participation in the modern workforce. Congress insisted that the FMLA "minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis."¹⁷⁶ In other words, gender neutrality, specifically in the context of childrearing leave, was essential to promoting equality in the workplace. *Hibbs* underscored this belief, noting that "Congress

170. 877 F.2d 1307 (6th Cir. 1989).

171. *Id.* at 1309-10 (explaining the reliance on *Guerra*).

172. *Id.* at 1307; see also Melissa B. Kessler, Recent Case, *Schafer v. Board of Public Education*, 903 F. 2d 243 (3d Cir. 1990), 64 TEMP. L. REV. 1047 1054-57 (1991) (explaining how the *Schafer* court distinguished *Harness*).

173. Cf. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48-80 (1994) (explaining the interpretative methodology underlying "dynamic interpretation").

174. Cal. Fed. Sav. & Loan Ass'n v. *Guerra*, 479 U.S. 272, 285, 289 (1987).

175. *Id.* at 285.

176. 29 U.S.C. § 2601(b)(4) (2000).

sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees.”¹⁷⁷ This change in attitude, in Congress and on the Court, suggests that those leave policies intended for childrearing, but masquerading as disability benefits, are impermissible.

Moreover, dicta in *Hibbs* provide clear support for this position.¹⁷⁸ The opinions discuss a 1990 Louisiana statute that provided a sixteen-week disability leave¹⁷⁹—identical to some law firm policies discussed above. Chief Justice Rehnquist’s majority opinion attacked the statute’s extended disability leave, calling it an “invalid stereotype” that provided leave “far [in excess] of the medically recommended pregnancy disability leave period of six weeks.”¹⁸⁰ Furthermore, Justice Kennedy’s dissent objected to the attack only by emphasizing that the majority mischaracterized the facts: the Louisiana leave was limited to the actual period of a woman’s disability, up to a maximum of sixteen weeks.¹⁸¹ The analogous law firm policies, of course, are not so limited, and are impermissible under either view. Relatedly, Justice Kennedy, in a passage that was favorably quoted in the majority opinion, goes even further by specifically recognizing the Title VII implications of gender disparity in these policies. A policy, he says, that provides women with twenty-four weeks of leave and men with only twelve “might run afoul of . . . Title VII.”¹⁸² Chief Justice Rehnquist reflects on this passage, going further still, and commending Justice Kennedy for “recognizing that such gender-based discrimination *would* [violate Title VII.]”¹⁸³ In light of this language, in which both the majority and the dissent insist that extended leaves for women alone are illegal, caregiving leaves that merely call themselves disability policies should not be expected to survive a Title VII challenge.¹⁸⁴

177. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 722-23 (2003).

178. Although scholars have expressed concern that the addition of Chief Justice Roberts and Justice Alito to the Court may threaten *Hibbs*’s federalism holding, e.g., Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 729 n.275 (2006), the argument made here is unrelated to the Court’s federalism jurisprudence.

179. *Hibbs*, 538 U.S. at 733 n.6.

180. *Id.*

181. *See id.* at 751-52 (Kennedy, J., dissenting).

182. *Id.* at 756 (emphasis added).

183. *Id.* at 739 n.12 (majority opinion) (emphasis added).

184. Reva Siegel has offered a similar view of *Hibbs*, highlighting the Court’s disapproval of “leave [that] was nominally for childbearing but was in fact (at least in part) a kind of leave

This understanding of the Supreme Court's approach is reflected in an Iowa district court's 2005 decision in *Johnson v. University of Iowa*.¹⁸⁵ The court upheld an employer's leave policy that differentiated between men and women but emphasized that the challenged portions of the policy concerned disability leave. "If the University were to provide biological mothers caregiving leave not based on disability, and did not provide equal leave to fathers," the court observed, "that would violate Title VII."¹⁸⁶ It is clear that *Guerra* cannot appropriately be extended to cover anything beyond disability leave reflecting actual physical disability.¹⁸⁷

Similarly, EEOC guidance on caregiver discrimination has incorporated this narrow understanding of *Guerra*. An agency guidance document warns employers:

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy . . . employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes. To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.¹⁸⁸

There is no reason to think that, by calling an extended leave a "disability leave," law firms' policies can survive Title VII scrutiny.

Approaching this analysis from another perspective, the *International Union* opinion strongly cautions against any expansion of the *Guerra* exception. Justice Blackmun's opinion in that case eviscerated the Seventh Circuit for

that men might also have used for parenting purposes." Siegel, *supra* note 157, at 1889; see also Williams, *supra* note 86, at 382-83.

185. 408 F. Supp. 2d 728 (S.D. Iowa 2004), *aff'd*, 431 F.3d 325 (8th Cir. 2005).

186. *Id.* at 742.

187. One might speculate that the purposivist nature of the *Guerra* decision might trouble the current, textually oriented Supreme Court. In the context of "super-strong" statutory stare decisis, however, the Court is unlikely to overrule *Guerra* in its entirety. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363-64 (1988). Moreover, skepticism of decisions like *Guerra* actually supports the claims advanced here, as consideration of grossly uneven leave policies allows courts to limit and clarify the *Guerra* holding.

188. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 102, at 24-25. This section of the guidance document explicitly relies on *Guerra*. See *id.* at 24 n.79.

treating an “obvious” case of facial discrimination as a disparate impact claim.¹⁸⁹ The Court further chastised the employer for impermissible paternalism, analogized between “fetal protection policies” and the long-denounced protectionism of *Muller v. Oregon*,¹⁹⁰ and insisted that the Title VII analysis “does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”¹⁹¹ *International Union’s* scathing condemnation of facially discriminatory policies, whatever their purpose, suggests that *Guerra* should be read as a narrow exception allowing limited facial classifications, rather than a blank check to provide any and all benefits in the name of pregnancy.¹⁹²

Thus, while the Supreme Court has not squarely addressed the issues, it is perhaps surprising that even in the face of favorable EEOC guidance, relevant dicta in recent Supreme Court precedent, and a circuit court decision that has been on record for more than fifteen years, law firms continue to provide leave policies that arguably run afoul of Title VII. Before turning to this issue in Section III.D, the next Section discusses another vulnerability in law firm provision of parental leave: firms’ reliance on gendered primary caregiver leave policies.

C. As-Applied Challenges to Primary Caregiver Leave

Law firm policies that differentiate between primary and non-primary caregivers may also be vulnerable to employee allegations of discrimination under Title VII, and eleven firms in this sample rely on such distinctions. As discussed in Part II, primary caregiver policies are pernicious for two reasons. First, the policies often assume that women will be the primary caregiver. Second, even if neutrally applied, by affirming that each household should have a “primary” parent, these policies make it more difficult to change family patterns. While the second concern is certainly not actionable under Title VII,

189. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197–98 (1991).

190. 208 U.S. 412 (1908).

191. *Int’l Union*, 499 U.S. at 199; see also *id.* at 200 (“The beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . .”).

192. Case law within the circuit courts has provided an additional layer of support for this argument. In a series of PDA cases considering the exclusion of infertility treatments from insurance coverage, the courts have emphasized the distinction between fertility and pregnancy, echoing the need to read *Guerra* narrowly. See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003); see also *Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 843 (7th Cir. 2007); *Lambert v. McCann Erickson*, 543 F. Supp. 2d 265, 277 (S.D.N.Y. 2008).

gender-biased application can present a colorable disparate treatment claim. A complete discussion of the Court's analysis of disparate treatment cases is beyond the scope of this Note, and the shape of the claim would necessarily rely on facts particular to the challenging employee. The discussion that follows first describes primary caregiver policies in more detail, and then briefly analyzes how a claim might develop.

There is significant evidence that facially neutral primary caregiver policies are unevenly applied. Men are pressured not to request primary caregiver leave, are denied leave they request, and are stigmatized when they return from leave they do receive.¹⁹³ Martin Malin has aptly assailed this "your wife should do it" attitude and described how it negatively impacts fathers and children.¹⁹⁴ One need not reach the facts of a particular male attorney's experience to see how these policies assume that in the majority of cases, women will be the primary caregivers. In fact, law firms' own descriptions clearly reflect these biases.

Consider the descriptions, drawn from the NALP questionnaire, that appear in Table 4. In each of these cases, the employer's leave policy would be illogical without the assumption that in most cases the biological mother would be the primary caregiver.

Table 4.

EXAMPLES OF IMPLICITLY GENDERED PRIMARY CAREGIVER LEAVE POLICIES.

FIRM POLICY	EXPLANATION
For women: "12-16 weeks paid disability [and] 6 weeks [paid leave.]" For men: "2 weeks [paid leave]; 6 weeks if primary caregiver [.]" ¹⁹⁵	Men only receive 6 weeks if they are the primary caregivers, but women are automatically entitled to 6 weeks.
"[A] birth mother who is the primary caregiver will ordinarily be entitled to 2 weeks before the birth and 14 weeks after the birth. Male attorneys receive 4 or 6 weeks . . ." ¹⁹⁶	There is no provision for men who are primary caregivers.
Women receive "8 weeks if [they are the] primary caregiver," and no special disability leave is available. ¹⁹⁷	There is no standard coverage for the disability associated with childbirth. Rather, the employer assumes it is covered under the primary caregiver leave.

193. See *supra* notes 113-120 and accompanying text.

194. See Malin, *supra* note 81; Malin, *supra* note 115, at 39. In both articles, Malin describes how fathers' inability to assert family needs negatively impacts children. See Malin, *supra* note 81 at 1052-59; Malin, *supra* note 115, at 28-30.

195. *Id.* (workplace questionnaire for Pillsbury Winthrop Shaw Pittman LLP).

196. *Id.* (workplace questionnaire for Fried, Frank, Harris, Shriver & Jacobson LLP).

197. *Id.* (workplace questionnaire for Paul, Hastings, Janofsky & Walker LLP).

It is clear that, in these instances, primary caregiver policies are not really designed to accommodate families where a biological mother will not be the primary caregiver. Indeed, these policies make the most sense if viewed as a limited attempt to replicate traditional family roles in cases of adoption, including adoption by gay couples, or, alternatively, as an effort to escape Title VII liability of the type described in the preceding Section while still providing generous benefits to women.¹⁹⁸

Firms' descriptions of their leave policies do more than illustrate underlying biases; they may also be used as evidence by male attorneys who feel they have been inappropriately denied primary caregiver leave. As a consequence, even if the biased website descriptions are shorthand to describe more meticulously neutral policies, they are still persuasive and, according to the EEOC, admissible evidence of "stereotypical or derogatory comments" made by human resources officials.¹⁹⁹ Other observers have offered substantial evidence that primary caregiver leave is actually applied in the way these descriptions suggest.²⁰⁰ In addition, the fact that firms' human resources staffs choose to describe the policies in this way suggests that they are unaccustomed to granting men primary caregiver leave. One should not overstate the extent to which these brief descriptions illustrate actual firm practice, and any Title VII claim must move quickly from this language to the details of actual discrimination and workplace consequences endured by male employees. Nonetheless, the policy descriptions provide a window into employer practices, and they are certainly a reasonable source of evidence regarding bias in primary caregiver policies.

Indeed, the *Hibbs* decision and the Title VII cases discussed above indicate that the assumptions inherent in these descriptions are impermissible stereotypes. *Hibbs* denounced "stereotypes presuming a lack of domestic responsibilities for men," and employers' decisions to deny men "accommodations" for family caretaking.²⁰¹ Similarly, the *Schafer* court insisted

198. For example, after affirming that "family means different things to different people," and offering two months of paid leave to a "birth mother or primary caregiver" one firm explains that "fathers and non-primary caregivers [receive a] paid leave of up to two weeks." Orrick, Herrington & Sutcliffe LLP, Benefits and Compensation-Laterals, <http://www.orrick.com/careers/laterals/compensation.asp> (last visited Feb. 6, 2009) (emphasis added). The cumbersome phrasing and use of different conjunctions makes the most sense if you imagine how the policy would be applied to gay men adopting a child.

199. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 102, at 9; see also Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (holding that comments regarding work-life balance were evidence of discrimination).

200. See sources cited *supra* notes 80-81.

201. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

that “childrearing by a mother or childrearing by a father should be on the basis of full parity.”²⁰² The EEOC has further explained that it is impermissible for employers to “den[y] male employees’ requests for leave for childcare purposes even while granting female employees’ requests.”²⁰³

The limited case law available supports this conclusion. In *Knussman v. Maryland*,²⁰⁴ an equal protection case, the Fourth Circuit concluded that an employer applied a facially neutral leave policy in an impermissibly discriminatory way. There, the plaintiff was denied a “primary care giver” leave, despite the fact that such leaves were customarily granted to women.²⁰⁵ In a straightforward opinion, the court of appeals upheld a verdict in favor of the plaintiff, saying only that the “jury could have reasonably concluded from the evidence that [the personnel officer] should have recognized that she was applying a gender neutral leave statute in a discriminatory manner by making only men prove they are primary care givers to a newborn or adopted child.”²⁰⁶

Therefore, with the right facts, a male employee denied primary caregiver leave should be able to present a disparate treatment argument, and the EEOC is likely to show interest in resolving the claim. Similarly, female attorneys at these firms who find themselves discriminated against on the basis of assumptions about or hostility towards their family responsibilities may also find their claims supported by language about primary caregivers.

D. Explaining the Persistence of Vulnerable Policies

Nearly 20% of the country’s “most prestigious” law firms offer parental leave in ways that arguably violate Title VII, either by offering an extended disability leave that effectively provides a childrearing benefit to women alone, or by disguising gender bias in a primary caregiver leave policy. Two firms offer sixteen-week fixed disability leave in violation of Title VII. Yet these firms operate highly regarded employment law practices, and many of their male attorneys are well-versed in the scope of federal liability for gender discrimination. This Section attempts to explain why discriminatory policies persist in this climate, discussing factors influencing firms and their male employees.

202. *Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 250 (3d Cir. 1990).

203. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 102, at 24.

204. 272 F.3d 625 (4th Cir. 2001).

205. *Id.* at 628.

206. *Id.* at 632.

To begin, there may be some legitimate uncertainty about the scope of permissible “pregnancy disability leave.” Because law firms provide temporary disability insurance for other conditions, the PDA requires the provision of pregnancy disability leave. Typical estimates of postpartum disability cluster around six weeks,²⁰⁷ so employers may simply be erring to the safe side by providing eight or even ten week disability leave. This defense becomes far less persuasive as leave reaches sixteen weeks; nonetheless, the lack of clarity at the margins may lead to an expansive gray zone in which employers feel authorized to offer progressively longer disability benefits.

It is perhaps possible that law firms may recognize the Title VII implications of their behavior but nonetheless conclude that they maximize their competitive position by retaining the policies. The fact that some law firms have recently extended their maternity leave policies, without any concomitant changes in paternity leave,²⁰⁸ would be consistent with this explanation. However, given the evidence that male attorneys often do not take even the meager leave that is available to them,²⁰⁹ it seems unnecessary for firms to take that risk.

Alternatively, and more plausibly, law firms may simply be unaware of their potential Title VII liability. The lack of litigation in this area may mean that legal employers have not considered that their extended disability and primary caregiver policies run afoul of federal law. Little data is available, but there is some evidence suggesting that, in the past, law firms have offered policies that were clearly impermissible. In particular, in 1999 one researcher conducted a NALP survey of D.C. law firms, and found that 38% provided nondisability maternity leave but not paternity leave.²¹⁰ Three years later, the Fourth Circuit decided *Knussman v. Maryland*,²¹¹ which placed the impermissibility of explicitly discriminatory leave policies like these in headlines across the country. Indeed, before *Knussman*, and even before the survey of firms, several scholars had persuasively argued that these policies were plainly illegal,²¹² but law firms were apparently unaware of this liability. Though no post-*Knussman* comparative survey is available, the analysis in Part

207. See McGovern et al., *supra* note 35, at 1.

208. See sources cited *supra* note 29.

209. See *supra* notes 80-81, 113-120 and accompanying text.

210. See Catherine Cloud Barre, Note, *The Viability of Maternity Leave Policies Under Title VII and the Equal Protection Clause*, 5 VA. J. SOC. POL'Y & L. 603, 614 n.67 (1998).

211. 272 F.3d 625 (4th Cir. 2001).

212. See Barre, *supra* note 210, at 620 (concluding that the policies were “impermissibly discriminatory under Title VII”); Issacharoff & Rosenblum, *supra* note 168.

I makes clear that, at least today, no prestigious D.C. firm offers such an explicitly discriminatory policy. As a result, despite the assumption that law firms might be more aware of such issues, it would appear that these firms, like any other employer, may simply be insufficiently attentive to the contours of Title VII liability to have adjusted their leave policies accordingly.

Similarly, although Title VII liability for existing policies is fairly clear from the text of the relevant decisions, it is contained within a jurisprudence that has focused almost entirely on protecting women. Ever since the Supreme Court's decision in *Gilbert*²¹³ was overturned by the PDA, the Court's Title VII cases have extended substantive protections to women. To the extent that the Court has ruled against female plaintiffs, it has been through procedural, not substantive, decisions.²¹⁴ The EEOC guidance, which unambiguously spells out the need to limit gender-specific leave to the "period that [women] are incapacitated," is nonetheless largely focused on employers' responsibilities to female employees.²¹⁵ The Court's decision in *Guerra* authorizes favorable treatment of pregnant employees.²¹⁶ While the discussion in Section III.B illustrates the clearly articulated limits on the *Guerra* holding, the central emphasis of the case is clear. As a result, employers may simply focus on potential liability for failing to accommodate the needs of pregnant women, while ignoring the gender equity implications of these decisions.

The absence of suits challenging these types of policies, and the rarity of Title VII litigation initiated by men in the workforce as a whole, lends support to this suggestion. A recent study on "family responsibilities" litigation uncovered over six-hundred lawsuits alleging discrimination under Title VII, the FMLA, and related statutes.²¹⁷ Of these cases, only forty-three were brought by men, and the vast majority of men's suits dealt with job-guaranteed unpaid leave under the FMLA.²¹⁸ The handful of cases that have touched upon relevant themes under Title VII, discussed above, all considered men's

213. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

214. *See, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (to be codified at 42 U.S.C. § 2000e-5(e)); *Desert Palace Inc. v. Costa*, 539 U.S. 90, (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

215. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 102, at 24.

216. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

217. MARY C. STILL, LITIGATING THE MATERNAL WALL 8 (2006), http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

218. *Id.*; *see, e.g., Blohm v. Dillard's Inc.*, 95 F. Supp. 2d 473 (E.D.N.C. 2000) (suing under the FMLA).

exclusion from relatively lengthy leave of six months to a year,²¹⁹ and thus do little to explicitly suggest the consequences of extended disability leave. Furthermore, the investigation revealed thirty-three suits against legal employers, none of which involved male employees.²²⁰

Understanding why men have failed to initiate relevant lawsuits is more complicated. To begin, employers' more extreme hostility toward men asserting caregiving responsibility may be a substantial deterrent.²²¹ While individuals in professional occupations constitute a sizable percentage of relevant suits,²²² male professionals bear the brunt of "providership" assumptions about fatherhood and may be simply uninterested in legal redress. Furthermore, they may be deterred by the jurisprudential rhetoric of protecting women, which enables firms to offer these policies in the first place. Although activists have taken steps toward welcoming men,²²³ much of their platform is still focused on women and organized around the concept of the "maternal wall," and men may not feel that the litigation teams will welcome their claims. This is particularly true for challenges to extended disability leave. Indeed, the Center for WorkLife Law counsels men that they may find themselves impermissibly discouraged "from taking paternity [benefits] to which they are entitled," but does not invite them to compare their entitlements to those of their female colleagues.²²⁴ But perhaps the most important deterrent is the limitation on remedies for Title VII claims. Since 1991, Title VII has allowed victims to claim compensatory and punitive damages.²²⁵ Punitive damages, however, are only available where there is evidence of intentional and malicious discrimination,²²⁶ extremely unlikely in these cases, and the statute places a cap

219. See *supra* Section III.A.

220. See Williams et al., *supra* note 113, at 410 (stating that there were "no reported cases involving discrimination claims against law firms by men").

221. See Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 181 (2006) ("If there is a chilly climate for mothers in the workplace, there is a frigid climate for fathers.").

222. STILL, *supra* note 218, at 8.

223. See Center for WorkLife Law, Men and FRD, <http://www.worklifelaw.org/MenFRD.html> (last visited Feb. 6, 2009).

224. *Id.*

225. 42 U.S.C. § 1981a(a)(1) (2000); see Michael W. Roskiewicz, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 To Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 401-07 (1993) (describing the 1991 changes to Title VII).

226. 42 U.S.C. § 1981a(b)(1).

of \$300,000 (excluding backpay) on compensatory awards.²²⁷ Thus, new fathers may be simply uninterested in the costs—in time, resources, and professional reputation—of initiating these claims.

CONCLUSION

By providing extended maternity benefits to women without offering men any substantial period of paid time off, law firm leave policies can place hurdles in front of male and female lawyers. An empirical analysis of one hundred law firms reveals that firms generally offer women much more generous parental leave policies than they make available to men, and some firms design their leave policies in particularly troubling ways. Those firms that provide grossly disproportionate maternity and paternity leave periods entrench norms about the correct way to allocate family responsibility, stereotype attorneys of both genders, and stymie reformers seeking to restructure the American workplace. These policies, while not currently the subject of litigation, appear significantly vulnerable under modern Title VII jurisprudence. Policies that offer women extremely lengthy disability leave, and primary caregiver policies framed in less-than-equal terms, conflate the distinction between childbearing and childrearing and constitute impermissible discrimination on the basis of sex.

While they offer important insights into the manifestation of gender and family responsibilities discrimination in the workplace, improving leave policies can be, at most, only a small component of a greater reform agenda. Other scholars have emphasized the importance of gender equality in law firms' modified-work-schedule programs, stressing that men need full access to part time, flex time, and compressed schedules in order to more fully transform their roles in both the family and the workplace.²²⁸ It is also important to address barriers that prevent men from taking advantage of the benefits available to them—it will not be enough to change policies if men continue to be afraid of “tak[ing] abuse” for utilizing those family-oriented benefits to which they are entitled.²²⁹

Still, leave policies themselves can be an important early step toward change. What, then, is the appropriate design for parental leave at large law

227. *Id.* § 1981a(b)(3) (capping damages on a sliding scale based on employer size).

228. See, e.g., Cunningham, *supra* note 3, at 978-90; see also Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms*, 8 WM. & MARY J. WOMEN & L. 357 (2002).

229. ENGLISH, *supra* note 18, at 210; see also *id.* at 209-10 (describing the experiences of men who took time off); Cunningham, *supra* note 3, at 991-95 (discussing fathers' “reluctance to work part-time”). See generally *supra* notes 80-81, 113-120 and accompanying text.

firms? And are these appropriate designs at all prevalent? Of the firms surveyed, 20% offer leave policies that arguably violate Title VII. Certainly those policies are far from ideal. Another 34% provide leave in ways that do not appear subject to the same amount of legal jeopardy, but nonetheless suffer from many of the same problems. These policies, for example, offer marginally longer parental leave to men in combination with extremely extended disability leave, or they offer a somewhat shorter fixed disability leave but make no benefits available to fathers. The remaining 46% of firms offer leave policies that, by convincingly disaggregating the concepts of childbearing and childrearing, are less inherently objectionable. These policies either provide identical benefits to mothers and fathers, or they combine normal disability benefits with generous parental leave. Identical parental leave is certainly one approach to ensuring that men as well as women can spend time parenting newborns, but firms may also legitimately wish to compensate women for the period of pregnancy related disability. Firms looking to advance an optimal policy might consider offering both a disability leave that is congruent with actual pregnancy disability (approximately six weeks) and a meaningful parental leave that gives all parents the opportunity for childrearing.²³⁰ Indeed, an ideal policy might provide six weeks of fixed disability leave and six weeks of gender-neutral parental leave – offering women the twelve-week leave that is so common at firms today but offering men a more generous and proportional benefit.

Framing parental leave in this way emphasizes the need to make childrearing an important part of both male and female lawyers' lives. The argument develops not by disguising the fact that women have family responsibilities, but by insisting that those responsibilities be more widely shared, thereby offering a palatable platform for reform.²³¹ By demanding that employers distinguish childbearing from childrearing, activists can honorably recognize the physical differences associated with pregnancy while simultaneously insisting that biology is not destiny in the twenty-first century workplace.²³² Moreover, they can effectuate change in a way that benefits all employees, lessening the conflict between work and family, supporting the

230. See generally WILLIAMS, UNBENDING, *supra* note 7, at 225-26 (suggesting that the “best design for [parental leave] policies would offer, from the beginning of a child’s life, leaves both for the recovery from childbirth (available to postpartum women) and for caregiving (available to all parents)”).

231. Cf. Salomone, *supra* note 124 (explaining modern feminism’s tension around “essentialism” and the “sameness/difference” debate).

232. Cf. SIMONE DE BEAUVOIR, THE SECOND SEX 42 (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1971) (1953); BETTY FRIEDAN, THE FEMININE MYSTIQUE 19 (1963).

parents of young children, and enabling all individuals to succeed in their careers.