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A Mother of a Problem: How the Language of Inequality Affects Maternity Leave Policies and Women in Law Firms

Hannah Arenstam*

I. INTRODUCTION

The recognition of women's¹ rights in the United States, or the women's movement, is generally divided into two periods of historical significance.² The first of these begins with the Seneca Falls Convention in 1848 and ends with the successful passage of the Nineteenth Amendment, which gave women the right to vote.³ The second period of major activity in the women's movement began in the 1960s and continues into the present, although many describe recent decades as feminism's "third wave."⁴ During each phase of the women's movement, women achieved great progress in overcoming the hurdles that prevented their equality with men in American society. From the Married Women's Property Act, which spread among the states in the late nineteenth and early twentieth centuries giving women the right to own property even after they were married,⁵ to women's entrance into the workforce in major numbers during the Depression and World War II,⁶ to the Family and Medical Leave Act of 1993 (FMLA), which finally provided protection for women in their role as caretakers not only of new children, but also of elderly loved ones,⁷ women have made considerable ground in catching up with men regarding the ability to dictate the course of their own lives. The underlying problem, however, is that women have had to endure this struggle at all. This deeply rooted inequality between genders has not changed significantly in the nearly 170 years that have passed since women first stood up and demanded what should have been theirs already: equality, dignity, autonomy.

This article will not document the major victories of women in their struggle to cease being construed as second-class citizens, but rather will focus on an area that continues to cripple women in the workforce. Despite significant improvements in the

*The author would like to express her deepest gratitude to Professor James Lupo and Professor Destiny Peery, for their wonderful guidance, advice, and support in conducting this research.

¹ This article will occasionally refer to distinction based on gender, rather than sex. This choice is meant to emphasize the stereotypical gender roles that maternity leave policies tend to reinforce. It is not meant to deny the experience of transgendered persons, who may be pregnant men, or women who cannot become pregnant due to being born biologically male. In fact, the growing cultural understanding of gender fluidity is further reason to de-"gender" maternity leave policies.

² CYNTHIA BOWMAN, LAURA ROSENURY, DEBORAH TUERKHEIMER & KIMBERLY YURACKO, FEMINIST JURISPRUDENCE: CASES AND MATERIALS, 1, (4th ed. 2010) [hereinafter FEMINIST JURISPRUDENCE].

³ *Id.*

⁴ *Id.* at 1, 186.

⁵ *Id.* at 7.

⁶ *Id.* at 15.

⁷ *Id.* at 654–62.

lives of women in the United States, this country is woefully behind the rest of the world when it comes to maternity leave policies.⁸ America is one of only three countries in the entire world that does not have a paid maternity leave⁹ law for women in the workforce.¹⁰ The FMLA, which is discussed in depth below, offers unpaid leave for new mothers, but lack of paid leave is only one of the FMLA's several shortcomings.¹¹ Due to this significant disadvantage for working mothers, some of the most educated and economically successful women are "opting-out" of their careers in favor of undertaking more traditional gender roles, such as childcare.¹² The evidence of this trend occurring specifically within the legal world is made plain through the statistics concerning women in the law. Although women make up 51% of law school enrollment,¹³ 45% of summer associates, and 44.8% of associates, only 20% of partners are women.¹⁴ Additionally, only 17% of equity partners are women, and a discouraging 4% of managing partners within the 200 largest law firms are women.¹⁵ Women are leaving law firms, whether for other jobs or to stay at home, before reaching their highest career potential. The choice to make the home a first priority, however, is not always a permanently satisfying option, and leaves many women feeling ousted rather than in charge.¹⁶

Opting-out is only the most recent development in a historic pattern of women lawyers "chang[ing] jobs sooner and more frequently than men, typically moving in a direction that would be considered downwardly mobile," and being "consistently paid less than men."¹⁷ The focus of this article is how the lack of adequate maternity leave policies has furthered the deeply ingrained perception of women as separate and lesser than men, specifically within the field of law. A fault in the foundation of American society is that women are presumed to be the designated caretakers for new children, and that this circumstance of gender is limited in its effects to women alone. Childbirth and childrearing have so long been considered the sole purview of women that they have been

⁸ See Margaret Talbot, *America's Family-Leave Disgrace*, NEW YORKER (Jan. 22, 2015), <http://www.newyorker.com/news/daily-comment/paid-family-leave-obama-work>.

⁹ This article focuses on maternity leave exclusively, rather than the broader topic of family leave. This article discusses both paternity leave and un-gendered family (or parental) leave as potential solutions to the problem of maternity leave; however, it distinguishes between the three different types of policies, since they are treated differently within the workforce.

¹⁰ The only other two countries in the world without paid maternity leave policies are Papua New Guinea and Oman. *Id.*

¹¹ FEMINIST JURISPRUDENCE, *supra* note 2, at 656.

¹² Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>.

¹³ Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html?_r=1.

¹⁴ COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2014), http://www.americanbar.org/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf.

¹⁵ *Id.*

¹⁶ Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES MAG. (Aug. 7, 2013), http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?_r=0 (highlighting the lives of three highly educated and successful women who opted-out after having children, and are struggling to re-enter the workforce in jobs equal to their old positions).

¹⁷ FEMINIST JURISPRUDENCE, *supra* note 2, at 963.

entirely delegated to the female sphere and are not viewed as the broad economic and social issues that they are. For example, during World War II, when many middle-class mothers joined the workforce for the first time, the federal government subsidized childcare in a way that had not occurred before, nor has it been seen since.¹⁸ Using “both federal and local money allocated by an amendment to the Lanham Act . . . childcare services were established in communities contributing to defense production.”¹⁹ These government-funded daycare centers allowed mothers to contribute to the war effort by going to work, without forcing them to leave their children unattended or without adequate care.²⁰ Despite the enormous scope of the project,²¹ the need for childcare was far from satisfied,²² and the daycare centers closed at the end of the war, forcing women to vacate their jobs to make way for returning soldiers.²³ This brief experiment in federally funded childcare demonstrates the great need for government support of working mothers, both socially and economically.

This article examines specific features of the ways with which maternity leave is engaged and the various forms such policies take. Also, this article highlights connections between the separation of “men’s” and “women’s” issues, and the subjugation of women’s needs to male-driven society. Part II of this article briefly outlines the history of maternity leave in the United States, beginning with women’s entry into the workforce. This Part also includes a review of case law dealing with pregnancy discrimination in the workplace, and an analysis of the language used by both the legislative and judicial branches to discuss women in relation to pregnancy and childbirth. Part III provides examples of maternity leave policies from a variety of law firms. This Part compares and contrasts policies from large, medium, and boutique-sized firms to highlight the similarities in language regarding the needs and treatment of women.

Part IV departs from primary sources, and analyzes the connections between governmental language focused on women and maternity leave, and traces the impact of that language to its analogous use in policies drafted by law firms. This Part demonstrates that the long-standing assumption that women are lesser in value and ability than men makes its way from the highest branches of government to the most ubiquitous language in Human Resources policies across the legal profession. Part V relates the reified paternalistic views explored in the previous Parts to the effects such policies have on women who are currently working in the law. This Part includes the findings of a survey sent to over 200 women, both mothers and non-mothers, currently practicing law at a variety of firms. The methodology, results, and limits of the survey are discussed at length. This Part also draws conclusions about how women are responding in reality to policies that are drafted about hypotheticals drawn from ideals perpetuated by those in power. The deep-seated notions about the nature and needs of women that have remained

¹⁸ Rhaina Cohen, *Who Took Care of Rosie the Riveter’s Kids?*, ATLANTIC (Nov. 18, 2015), <http://www.theatlantic.com/business/archive/2015/11/daycare-world-war-rosie-riveter/415650/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (“Between 1943 and 1946, spending on the program exceeded the equivalent of \$1 billion today, and each year, about 3,000 childcare centers served roughly 130,000 children.”).

²² *Id.* (“The Department of Labor estimated that each year, Lanham funds made it to only about 10 percent of the children in need.”).

²³ *Id.*

unchecked across the broad landscape of American politics are having a real and immediate impact on women in pursuit of a life in the law.

II. RIGHT TO MOTHERHOOD

Until compelled by the labor shortage during World War II, many industries did not hire women,²⁴ leaving women few options should they want to enter the workforce. In the 1920s and '30s, “over 40% of all women in manufacturing worked in the textile industry, and more than 75% of women professionals were either teachers or nurses.”²⁵ A significant percentage²⁶ of American women entered the workforce for the first time during the Depression, and shortly afterwards to replace the labor of men fighting in World War II.²⁷ Despite overcoming this first hurdle of employment, women still faced severe discrimination in the workplace.²⁸ Women worked in gender-segregated jobs, and were consistently paid less than men for doing the same work.²⁹ Additionally, there were no widely available community or childcare services that would have enabled mothers to more easily combine their traditional social and newly economic roles.³⁰ Although returning veterans replaced many women in their jobs, most women continued to work and were forced into less well-paid positions.³¹ Despite their presence in the workforce for the past century, women, particularly lawyers, are still consistently paid less than their male counterparts, are lacking in significant numbers from positions of power, and are not provided with adequate family and childcare services to facilitate their ability to work.³²

Another aspect of women's lives that has not changed despite their continued and valuable presence in the workforce is the social perception of women as caretakers. According to a recent (2013) study from the Pew Research Center, although mothers and fathers in dual-income households spend comparable amounts of time on paid work each week,³³ fathers are spending 41% fewer hours on childcare every week,³⁴ and 44% fewer

²⁴ FEMINIST JURISPRUDENCE, *supra* note 2, at 15.

²⁵ *Id.* (citing WILLIAM H. CHAFE, *THE PARADOX OF CHANGE: AMERICAN WOMEN IN THE 20TH CENTURY* 73 (1991)).

²⁶ Between 1940 and 1945, the percentage of women in the workforce rose from 27% to 37%, and by 1945 almost 25% of married women worked outside the home. *American Women in World War II*, HIST. CHANNEL, <http://www.history.com/topics/world-war-ii/american-women-in-world-war-ii> (last visited Jan. 31, 2016).

²⁷ FEMINIST JURISPRUDENCE, *supra* note 2, at 15. Many of these were white, middle-class women; women of color and immigrant women were already members of the workforce, but were “largely confined to the most marginal jobs.” *Id.* (citing PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 232–36 (1984)).

²⁸ *Id.* at 15.

²⁹ *Id.*

³⁰ *Id.* (citing CHAFE, *supra* note 25, at 141–51). Although the daycare centers funded by the Lanham Act were operating at this time, they were not nearly prolific enough to provide assistance to the majority of working mothers. See *supra* note 21 and accompanying text.

³¹ FEMINIST JURISPRUDENCE, *supra* note 2, at 15.

³² *Id.* at 962–63.

³³ See Anne-Marie Slaughter, *Women are Sexist, Too*, TIME (Sept. 2015), <http://time.com/women-are-sexist-too/> (showing women spend an average of 31 hours per week on paid work, while men spend an average of 42 hours: a 26% difference).

hours on housework every week.³⁵ While there have been some improvements to workplace policies regarding gender-neutrality with respect to leave-taking, these changes have not led to more men taking advantage of these policies for childbirth or childcare.³⁶

A. *Overview of Maternity Leave in the United States*

In the United States today, the FMLA is “the guiding federal law pertaining to maternity leave.”³⁷ In conjunction with the Pregnancy Discrimination Act of 1978 (PDA), the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (Title VII), the FMLA provides protection at a federal level for pregnant women and new mothers against discrimination and inequality in the workplace.³⁸ This article focuses on the PDA and the FMLA, and the language within both Acts used to define and protect pregnant women and mothers.

1. The Pregnancy Discrimination Act

The PDA was enacted in 1978 with the express purpose of amending Title VII “to prohibit sex discrimination on the basis of pregnancy.”³⁹ In relevant part, the PDA reads:

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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.⁴⁰

Based on the legislative history, and the wording of the amendment itself, Congress intended the PDA to enforce equal treatment of pregnant women and individuals with other, temporary, non-pregnancy-related disabilities in the workplace.⁴¹ While the PDA was a positive development in the protection of women’s right to motherhood,⁴² there are still some undeniable flaws with the language in the PDA.

³⁴ *See id.* (showing women spend an average of 12 hours per week, while men spend an average of 7 hours).

³⁵ *See id.* (showing women spend an average of 16 hours per week, while men spend an average of 9 hours).

³⁶ FEMINIST JURISPRUDENCE, *supra* note 2, at 658.

³⁷ Sara Cohen, Note, *Have Your Cake and Eat it Too: How Paid Maternity Leave in the United States Could End the Choice Between Career & Motherhood*, 36 WOMEN’S RTS. L. REP. 1, 2 (2014).

³⁸ *Id.* at 2–3.

³⁹ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) [hereinafter Pregnancy Discrimination Act].

⁴⁰ *Id.* at subsection (k). The PDA also includes language about the circumstances under which employers must provide insurance coverage for abortion, but that is outside the scope of this analysis. *Id.*

⁴¹ Daniela M. De la Piedra, Comment, *Flirting with the PDA: Congress must give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275, 280 (2008).

⁴² Not only did the PDA increase employment protections for women, but it also recognized women’s economic disadvantage due to the prior exclusion of pregnancy as a protected limitation on the ability to work. *Id.*

An easily substantiated accusation against the PDA is that it does not provide guidance to employers regarding the level of accommodation that must be made for employees who are temporarily limited in their abilities by pregnancy.⁴³ What the PDA does say explicitly is that pregnant women must be treated in the same way as any other temporarily disabled employee.⁴⁴ The PDA mandates that pregnant women must be treated, “for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”⁴⁵ This language obviously and unabashedly equates pregnant women to disabled individuals.⁴⁶ Such a parallel is damaging to women in the workplace. Non-pregnancy-related disabilities, like injury or illness, are endured by employees: the employee is passive in the accrual of the disability. No individual breaks his leg or has a heart attack on purpose. Pregnancy, however, is often intentional and pretending otherwise is a disservice to the women who sacrifice their bodies and mobility to give birth. Further, the term “disabled” has evolved in its implications from meaning merely temporarily physically debilitated, to implying that a person is permanently, mentally or physically, unable.⁴⁷ The distinction between debilitated and unable is a crucial one, especially for women who are already perceived to be less capable than their male counterparts in the workforce.⁴⁸ Even if the language of the PDA is a function of outdated views of women from nearly forty years ago, when pregnancy may not have been considered the choice it has come to be for most women, the text of the Act problematically categorizes pregnant women as passive participants in the changes their bodies undergo, and not as autonomous contributors to both their families and the workplace. Also, identifying women as “disabled” perpetuates the assumption that pregnant women are incapable of achieving the same quality in their work that non-pregnant women and men can provide.

⁴³ *Id.* at 285.

⁴⁴ *Id.*

⁴⁵ See *supra* note 40 and accompanying text.

⁴⁶ For a thorough analysis of pregnancy as a disability, see generally Cohen, *supra* note 37.

⁴⁷ See Willi Momm & Otto Geiecker, *Disability: Concepts and Definitions*, ENCYCLOPEDIA OCCUPATIONAL HEALTH & SAFETY, <http://www.ilocis.org/documents/chpt17e.htm> (explaining that the term and identity of disability can result in discrimination and negative treatment); Change in Terminology: “Mental Retardation” to “Intellectual Disability,” 78 Fed. Reg. 46499 (Sept. 3, 2013) (codified at 20 C.F.R. pts. 404, 416), available at <https://www.federalregister.gov/articles/2013/08/01/2013-18552/change-in-terminology-mental-retardation-to-intellectual-disability> (changing the term “mental retardation” to the term “intellectual disability” because of the negative connotations associated with the former); Disability Cultural Ctr., *An Introductory Guide to Disability Language and Empowerment*, SYRACUSE UNIV., <http://sudcc.syr.edu/LanguageGuide/> (last visited Mar. 28, 2016) (stating that various words used to describe disability all have their own connotations and can be offensive to certain groups). Although the *Federal Register* changed its terminology, the two terms are now linked, and the connotations of the former term have become the connotations of the latter, as the Syracuse University Disability Cultural Center indicates with its description of words related to disability.

⁴⁸ See PEW RESEARCH CTR., WOMEN & LEADERSHIP: PUBLIC SAYS WOMEN ARE EQUALLY QUALIFIED, BUT BARRIERS PERSIST at 5 (2015), <http://www.pewsocialtrends.org/2015/01/14/women-and-leadership/> (stating women “have to do more than their male counterparts to prove themselves”); *What’s Holding Women Back?*, ECONOMIST (Jan. 23, 2015), <http://www.economist.com/blogs/democracynamerica/2015/01/women-and-work> (“[W]hile mothers are often penalised for their family commitments, fathers tend to be ‘recommended for management training more than men without children.’”); see generally *Women in the Workplace seen as ‘Less Qualified and Capable Leaders than Men,’* DAILY MAIL (July 18, 2011), <http://www.dailymail.co.uk/sciencetech/article-2016003/Women-workplace-seen-qualified-capable-leaders-men.html>.

Additionally, the PDA presents an internal conflict that further illuminates the long-standing American tradition of ignoring women's rights until specifically forced to acknowledge and respect them. While it is unhelpful, to say the least, that the PDA tells employers that pregnancy is the same as any other "disability," it was still necessary for the PDA to be added to Title VII before employers and the courts⁴⁹ would treat pregnant women the same way they had been treating other disabled employees. Despite being physically limited by their pregnancies, women were not offered the same accommodations that other similarly limited employees received.⁵⁰ Just as with the right to vote and the right to work, women were compelled to demand a right that was already theirs: the right to equal treatment under the law. Although the PDA provides protection for pregnant women, it is a piece of legislation that should not exist. It is duplicative of Title VII, which offers protection from discrimination on the basis of sex.⁵¹ If pregnancy, perhaps the most obvious and physically demanding difference between the sexes, was not considered to be protected from discrimination under Title VII, it was only because of the historical refusal of American jurisprudence to equate women with men. Once again, legislation specific to women had to be enacted before the hardships being endured by pregnant women in the workplace were acknowledged as discriminatory.

2. The Family and Medical Leave Act

The FMLA took eight years to become law.⁵² It was first introduced into Congress in 1985 and passed both houses only to be vetoed by President George H.W. Bush in both 1991 and 1992.⁵³ In early 1993, President Clinton signed the bill into law shortly after the start of his administration.⁵⁴ The FMLA is broader than the PDA in both scope and purpose. Congress outlined several purposes it intended the FMLA to serve: "to balance the demands of the workplace with the needs of families" while promoting "stability and economic security of families"; to enable employees to take "reasonable leave" for medical reasons, the birth or adoption of a child, or to care for a child or close relative with a "serious health condition"; and "to promote the goal of equal employment opportunity for women and men."⁵⁵ The FMLA is intended to accomplish these goals in a manner that "accommodates the legitimate interests of employers," and, "consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex."⁵⁶ While the FMLA allows both states and individual employers to provide leave policies more generous than what the Act itself provides, "the overwhelming majority of states and employers do not extend extra coverage beyond that of the FMLA."⁵⁷

There are several positive aspects of the FMLA. It recognizes that many American families either have a single, working parent or two working parents, and that both

⁴⁹ A further discussion of the cases that led to the creation of the PDA follows below; *see infra* Part II.B.

⁵⁰ *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). *See also infra* Part II.B.i. for related discussion.

⁵¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1991) [hereinafter Title VII].

⁵² FEMINIST JURISPRUDENCE, *supra* note 2, at 654.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(1)–(2), (5).

⁵⁶ *Id.* § 2601(b)(3)–(4).

⁵⁷ Cohen, *supra* note 37, at 6.

parents should be able to participate in childcare and contribute economically, but that there are not enough employment leave policies that allow parents a meaningful choice regarding where and how they spend the majority of their time.⁵⁸ The FMLA also acknowledges that employment policies with gendered language can act as encouragement for employers to discriminate against employees based on gender.⁵⁹ Perhaps Congress's most salient finding within the FMLA is that the "primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."⁶⁰ Unhelpfully though, Congress writes that this division of caretaking labor is "due to the nature of the roles of men and women in our society."⁶¹

While the remainder of Congress's findings make it clear that the FMLA is designed to improve, not endorse, the current situation of women in the workplace, Congress does not offer further illumination as to its views on "the nature of the roles of men and women in our society." Additionally, although Congress was careful to use gender-neutral language in providing rights to parents and caretakers within the context of the FMLA, the Act does nothing to functionally incentivize men to take on these roles in greater numbers. In fact, nearly ten years after the FMLA was passed, there had been no significant change in leave-taking behavior: women took time off for childbirth and childcare, but men did not.⁶² The stereotypical role of women as caregivers is so embedded in American national identity that without more forceful language from Congress, the FMLA functions more as a codification of, rather than a challenge to, established gender norms regarding women in the workplace and in the home. Given the stated intentions of the FMLA to promote and encourage equality between work and family needs, as well as equal workplace opportunities for men and women, the current language describing women within the FMLA is a notable failure on this front.

3. Maternity Leave in the Courts

In the mid-1970s the Supreme Court decided two significant cases relating to women in the workplace, holding in each that the state or employer's action against a pregnant woman was not discriminatory.⁶³ The Court's decisions in these two cases spurred Congress to enact the PDA to expand Title VII and protect pregnant women in the workplace.⁶⁴ Additionally, in the past two decades since the FMLA was passed, there have been thousands of cases⁶⁵ where women allege discrimination on the part of employers against them due to their pregnancies and the needs associated with taking maternity leave. This subpart briefly outlines the facts of both cases that led to the PDA,

⁵⁸ FMLA, § 2601(a)(1)–(3).

⁵⁹ *Id.* § 2601(a)(6).

⁶⁰ *Id.* § 2601(a)(5).

⁶¹ *Id.*

⁶² FEMINIST JURISPRUDENCE, *supra* note 2, at 658 (citing Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 51 (2004)).

⁶³ See *Geduldig*, 417 U.S. 484; *Gilbert*, 429 U.S. 125.

⁶⁴ Cohen, *supra* note 37, at 3.

⁶⁵ See Frank C. Morris Jr. & Teresa L. Jakubowski, *Recent Decisions Under the Family and Medical Leave Act of 1993*, SH061 ALI-ABA 515 (2003) (discussing these recent FMLA cases).

as well as several that have been brought since the enactment of the FMLA, and highlights the language used by courts to describe and respond to women who are dealing with pregnancy in the workplace.

i.Pre-PDA

In *Geduldig v. Aiello*, the Court held that California's Unemployment Insurance Code was not discriminatory towards women, despite language in the Code that defined "disability" as excluding "any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."⁶⁶ One of the plaintiffs in this case had a normal pregnancy, while the other three plaintiffs experienced complications during their pregnancies, which led to their inability to work as usual.⁶⁷ None of the women were eligible for benefits under the California disability insurance system.⁶⁸ Before the Court could rule in *Geduldig*, a case was decided in the California Courts of Appeal that provided disability coverage to women who suffered medical complications during their pregnancies,⁶⁹ which refocused the *Geduldig* decision only on the merits of covering normal pregnancies through disability insurance.⁷⁰ In its decision against the remaining plaintiff, the Court wrote that, "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program."⁷¹ The Court further held that the Equal Protection Clause did not apply in this case because there was no evidence "that the selection of the risks insured by the program worked to discriminate against any definable group or class There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."⁷² The Court apparently chose to ignore the fact that pregnancy is a risk to which women are exposed, but men are not.

The *Geduldig* decision is a plain example of the Court refusing to take into consideration the needs of women in the workplace, and permitting discrimination based on sex to continue unchecked.⁷³ Inexplicably, the Court refused to identify women as a "definable group or class" that was subject to discrimination based on the risks that California chose to cover under its disability insurance scheme. Pregnancy is an obviously gendered condition and to exclude it from protection is to invalidate it as a physical limitation on the women who experience it. This, however, is not the same as characterizing pregnancy as a disability. As discussed above, the word disability has negative connotations that are inappropriate and damaging to women when it is applied to pregnancy.⁷⁴ Ideally, pregnancy would be acknowledged as a temporary physical limitation on female employees, but on its own terms and not under those already in place

⁶⁶ *Geduldig*, 417 U.S. at 489.

⁶⁷ *Id.*

⁶⁸ *Id.* at 490.

⁶⁹ See *Rentzer v. Unemployment Ins. Appeals Bd.*, 32 Cal. App. 3d 604 (1973).

⁷⁰ *Geduldig*, 417 U.S. at 491–92.

⁷¹ *Id.* at 494.

⁷² *Id.* at 496–97.

⁷³ Justice Brennan wrote a dissent, in which Justices Douglas and Marshall joined, rightfully declaring that such a policy was a blatant and impermissible example of discrimination on the basis of gender. *Id.* at 497–505 (Brennan, J., dissenting).

⁷⁴ See *supra* notes 43–47 and accompanying text.

to address mental and physical disabilities of non-pregnant employees, whether male or female. Policies dealing with accommodations for pregnant employees and new mothers should not be framed in the same manner as those designed to address problems arising from employees who are unable to complete the required tasks of their employment due to disability. Although pregnant women may be physically limited in their movements, they remain fully capable employees, which distinguishes them from employees seeking accommodations because they are disabled. Unfortunately, however, the *Geduldig* case did not exist in ideal circumstances, and so the best protection available to pregnant women in the workplace was under the California disability plan, which the Court still saw fit to deny them.

The Court went even further in *General Electric Co. v. Gilbert* when it held that Title VII did not protect pregnant women from discriminatory disability policies that did not cover injury or illness related to pregnancy.⁷⁵ *Gilbert* involved an individual employer's disability plan that excluded from coverage any disabilities arising from pregnancy.⁷⁶ The Court clung to a "plain meaning" interpretation of Title VII, writing that without a further explanation of Congress's intention, the Court could not infer that discrimination "because of . . . sex" was meant to include "something different from what the concept of discrimination has traditionally meant."⁷⁷ Again, the Court refused to acknowledge that pregnancy is gendered, and that policies offering no protection for pregnancy-related harm or limitations only affect women. There could be no clearer discrimination because of sex short of an employer announcing that he no longer hires women. Fortunately, these decisions were not allowed to stand for long: the PDA was enacted in 1978 as a response to the flawed and sexist reasoning of the Supreme Court.⁷⁸

ii. Post-FMLA

Even since the enactment of both the PDA and the FMLA, there has been no shortage of cases alleging discrimination on the basis of pregnancy or the need for accommodations relating to maternity leave. An example of such cases is *Kennedy v. Schoenberg, Fisher & Newman*, where the Seventh Circuit Court of Appeals affirmed the District Court's decision to grant the defendant's Motion for Summary Judgment on the plaintiff's claim that her law firm fired her due to her pregnancy, in violation of the PDA.⁷⁹ In its decision, the court writes four lengthy paragraphs outlining in detail complaints made against the plaintiff for her failings at work.⁸⁰ At the end of this description of her faults, the court includes the fact that the plaintiff informed her firm that she was pregnant, but additionally that at this time, not only did the firm "not have a paid leave policy in place," but also "[p]rior to that time, no [firm] attorney had ever taken a disability leave."⁸¹ The court goes on to continue listing shortcomings of the plaintiff as reported by the defendant, including seemingly minor issues related to the

⁷⁵ *Gilbert*, 429 U.S. at 145–46.

⁷⁶ Victoria R. Riede, Comment, *Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance*, 27 GOLDEN GATE U. L. REV. 223, 229 (1997).

⁷⁷ *Gilbert*, 429 U.S. at 145 (internal citations omitted).

⁷⁸ Riede, *supra* note 76, at 229–30.

⁷⁹ *Kennedy v. Schoenberg, Fisher & Newman*, 140 F.3d 716, 719 (7th Cir. 1998).

⁸⁰ *Id.* at 719–20.

⁸¹ *Id.* at 720.

plaintiff's method of requesting reimbursements from her attendance at a business-related conference.⁸² Throughout its decision, the court highlights complaints against the plaintiff that are more related to administrative tasks—such as submitting a brief to the Supreme Court with the wrong color cover, or not typesetting a brief quickly enough to avoid needing expedited printing—than to the plaintiff's substantive responsibilities as an attorney.⁸³ Ultimately, the court concludes that the plaintiff did not present a meritorious claim that could survive the defendant's Motion for Summary Judgment.⁸⁴ Although the case was likely rightly decided against the plaintiff, the framing of the court's decision leaves no doubt in a reader's mind that pregnancy and utilizing maternity leave at a law firm are mistakes to be held against the employee.

The court includes no discussion of the law firm's lack of paid disability or maternity leave policies, except to say that such measures are not necessarily required by the PDA.⁸⁵ Furthermore, the court holds that the plaintiff was not treated differently because of her pregnancy and maternity leave despite comments from the plaintiff's superiors such as, "if you were my wife, I would not want you working after having children."⁸⁶ The court dismisses the discriminatory tone of this comment by holding that it was not "temporally related" to the plaintiff's discharge.⁸⁷ Even assuming the litany of work-related complaints against the plaintiff were legitimate, the court's focus is on the faults of the employee and not those of the employer.

Another example of a case in which a woman cites her pregnancy as a contributing factor in her termination is *Troupe v. May Department Stores, Co.*⁸⁸ In this case, the plaintiff was late to work numerous times due to severe morning sickness as a result of her pregnancy.⁸⁹ As a consequence of her repeated tardiness, the plaintiff was placed on probation, and then ultimately fired.⁹⁰ The plaintiff was fired the day before her maternity leave was due to begin.⁹¹ Additionally, the plaintiff testified at her deposition that her immediate supervisor had told her that she would be terminated "because [the supervisor] didn't think [the plaintiff] was coming back to work after [the plaintiff] had [her] baby."⁹² The court writes that there was "no evidence" regarding whether the employer "was less tolerant of [the plaintiff's] tardiness than it would have been had the cause not been a medical condition related to pregnancy."⁹³ Despite the fact that the plaintiff's pregnancy was functionally the but-for causation of her termination, the statement made to the plaintiff by her supervisor, and the timing of the plaintiff's discharge, the court held that she was not discriminated against because she presented no evidence that a non-pregnant employee would not have been similarly discharged.⁹⁴ The court here is following Congress's lead, as established in the FMLA and the PDA, of requiring a minimal

⁸² *Id.* at 721.

⁸³ *Id.* at 720.

⁸⁴ *Id.* at 721–22.

⁸⁵ *Id.* at 722.

⁸⁶ *Id.* at 724.

⁸⁷ The comment was made five months before the plaintiff was fired. *Id.*

⁸⁸ 20 F.3d 734 (7th Cir. 1994).

⁸⁹ *Id.* at 735.

⁹⁰ *Id.* at 735–36.

⁹¹ *Id.* at 737.

⁹² *Id.* at 736.

⁹³ *Id.*

⁹⁴ *Id.* at 738–39.

amount from employers when accommodating employees who are pregnant and utilizing maternity leave policies.

III. LANGUAGE AND LAW

The information publicly available regarding maternity leave policies at law firms of various sizes encompasses a broad spectrum in both reliability and completeness. Perhaps one of the best sources for this type of information, which many firms are reluctant to share,⁹⁵ is the NALP Directory of Legal Employers.⁹⁶ NALP provides information on firms' demographics, practice areas, partnership and advancement, recruiting and hiring, professional development, pro bono work, and several other categories of information that potential employees may be interested in when researching a firm. Most useful to this analysis, however, was the directory's collection of data regarding compensation and benefits, specifically, the category titled "Benefits Offered in Addition to Those Provided by FMLA."⁹⁷ This section of each firm's page within the directory includes information about whether the firm has an official maternity or family leave policy; the number of paid weeks off, if any, provided by the firm to both male and female employees; and whether that firm's policy applies to same-sex (or opposite-sex) domestic partners or to adoptions. Many firms provide only single-word responses to these inquiries, but some firms include additional information regarding to whom the policy applies and under what circumstances. The analysis that follows below is based on a combination of the data assembled from these NALP Directory pages, as well as from actual maternity leave policies from several law firms of varying size.⁹⁸

A. *Language in Maternity Leave Policies*

Maternity leave policies in law firms vary across many data points, including amount of time off allotted; whether that time off is paid, unpaid, or some combination of both; when employees are eligible to take this type of leave; and how secure an attorney's job is after returning from this leave. Among the policies included in this analysis, the most common length of time off available for new mothers was 12 weeks, typically paid.⁹⁹ A handful of the larger firms surveyed offered 16–18 weeks,¹⁰⁰ and the largest firm included in this analysis offered 24 weeks off (18 weeks paid, and 6 weeks

⁹⁵ The author had a difficult time convincing most firms to share their specific leave policies, with many firms alleging that their policies were confidential, despite having the bulk of the information available through NALP.

⁹⁶ NALP DIRECTORY OF LEGAL EMPLOYERS, <http://www.nalpdirectory.com> (last visited Jan. 30, 2017) [hereinafter NALP].

⁹⁷ See generally *id.*

⁹⁸ Due to the closely-protected nature of law firm policy documents, the law firms that contributed their maternity leave policies have asked to remain anonymous. These firms have been given pseudonyms, such as Large Firm A, Large Firm B, etc. As a result of honoring their request for confidentiality, the author is unable to provide citations to the documents upon which much of this analysis is based. These documents are on file with the author.

⁹⁹ This general information comes from the nearly thirty firms surveyed on NALP.

¹⁰⁰ Large Firm B offers 16 weeks. Large Firm B maternity leave policy (on file with author) [hereinafter Large Firm B]. Sidley Austin and Kirkland & Ellis both offer 18 weeks. NALP, *supra* note 96 (search firm name, click "Compensation & Benefits" tab, expand "Benefits Offered in Addition to Those Provided by FMLA").

unpaid).¹⁰¹ These data are only applicable to female employees. Nearly every firm surveyed on NALP for this analysis offers different leave options to new fathers than to new mothers, despite attempts by the FMLA to encourage more gender-neutral leave-taking, and attempts by firms to use gender-neutral language in their leave policies, such as referring to new parents as primary or non-primary caregivers rather than mothers and fathers.

Similar to the courts in the decisions discussed above in Part III, law firms also follow Congress's lead when it comes to drafting maternity leave policies for their attorneys. The specific information gleaned from reviewing the actual language of several firm leave policies (rather than the general data reported to NALP) reviewed for this analysis shows that nearly every policy used gender-neutral language to outline the available benefits associated with maternity or parental leave. Only one firm differentiated explicitly between maternity leave and paternity leave, offering 16 weeks for the former and 10 weeks for the latter.¹⁰² Most firms used terms such as "primary caregiver" when allotting differing amounts of time off to different parents. Despite this attempt at gender-neutrality, the NALP directory pages reveal that the vast majority of firms have assumed that the mother will be the primary caregiver. The NALP form has separate inquiries about how many paid weeks off are offered to female employees and to male employees.¹⁰³ When filling out these forms, firms often put the information about leave granted to primary caregivers in the section regarding female employees.¹⁰⁴ This pattern indicates that no matter how neutral the language in a maternity leave policy may appear, firms still view childcare as a mother's duty.

An additional problem with the use of the term primary caregiver is that even if it is not explicitly associated with a specific gender, it still perpetuates the idea that parents are not equal partners: one parent will be primarily in charge of caring for the children. Without a society in which men and women are considered equally likely to be involved parents, the term primary caregiver will almost always be assumed to refer to the mother, just as is shown by the NALP informational forms. While the idea of a primary caregiver is an attempt not to pigeonhole women into the role of sole caregiver, without more of a shift in perception regarding how parents divide childcare responsibilities, firms are still burdening women with the bulk of the responsibility for a new child.

A related discernible trend among both the written maternity leave policies reviewed for this study and the various firm information available on NALP, is that firms generally give more paid time off to women. Firms vary in their rationale for this with reasons ranging from associating women with the role of primary caregiver, to acknowledging the physical toll giving birth takes on women, to no reason at all (other than an apparent implicit bias towards women as caregivers). One firm has separate maternity and paternity leave policies, with another policy for adoptions.¹⁰⁵ The

¹⁰¹ NALP, *supra* note 96 (search "Jones Day," click "Compensation & Benefits" tab, expand "Benefits Offered in Addition to Those Provided by FMLA").

¹⁰² Large Firm B, *supra* note 100.

¹⁰³ *See generally* NALP, *supra* note 96.

¹⁰⁴ *See, e.g.*, Large Firm A maternity leave policy (on file with author) [hereinafter Large Firm A] (showing that although Large Firm A uses gender-neutral language in its leave policy, the amount of time offered to the primary caregiver has been designated as leave offered to female employees on Large Firm A's NALP form).

¹⁰⁵ Large Firm B, *supra* note 100.

maternity leave policy offers women a total of 16 weeks off with 100% of their salary paid during that time.¹⁰⁶ The policy then explains that the benefit is broken down into a “6-week disability portion and a 10-week non-disability maternity leave portion.”¹⁰⁷

Given that the paternity leave and adoption policies both provide employees with 10 weeks off at 100% salary, the extra 6 weeks given exclusively to mothers appears to be explicitly tied to the physical nature of birth and the time it takes most women to recover.¹⁰⁸ This conclusion is further supported by the statement within the policy that, “[t]he disability portion of the benefit extends beyond 6 weeks if the period of actual disability lasts longer.”¹⁰⁹ This division of the maternity leave benefit between disability and non-disability is especially telling since this firm also has separate short- and long-term disability policies, neither of which mention pregnancy. Large Firm B is both recognizing that giving birth results in a temporary physical limitation for women, but also that pregnancy is not a disability in the same way that, say, being paralyzed is. Similarly, Large Firm C offers 4 paid weeks off to all new parents, with an additional 6 weeks for primary caregivers.¹¹⁰ However, birthmothers are entitled to receive 8 additional paid weeks off, instead of only an additional 6 weeks.¹¹¹ According to the policy, these extra 2 weeks shift birthmothers into a disability leave, rather than merely a leave for new parents.¹¹² Large Firm C is also acknowledging the bodily toll birth can have on women, but the line between pregnancy and disability is more blurred in this policy than in the policy of Large Firm B.

Although providing mothers with more time off than fathers can be rationalized in a largely non-harmful way, such as in the policy of Large Firm B, other firms provide slightly more dubious reasons for this difference in treatment. One firm provides 18 paid weeks off to both birth and adoptive mothers who are also primary caregivers, but only 10 paid weeks off to primary caregivers who are neither adopting a child, nor giving birth to one.¹¹³ Non-primary caregivers, both birth and adoptive parents, at this firm are given 4 paid weeks off.¹¹⁴ Initially, this firm’s approach seems similar to that of Large Firm B as outlined above, however, it equates birthmothers and adoptive mothers in their need for an extra 8 paid weeks off. While this additional paid time off no doubt goes a long way in terms of a parent’s ability to both bond with and care for a new child, it also further cements the idea of one parent taking the lead in terms of childcare.

By equating birthmothers and adoptive primary caregivers, Large Firm A is effectively stating that the extra 8 weeks of paid time off are not directly related to a woman’s need to recover from the physical trauma of giving birth. Since adoptive primary caregivers are not physically giving birth to their new children, the extra 8 weeks of paid time off cannot possibly be designed to allow these parents to recover physically,

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Postpartum checkups are often scheduled around 6 weeks after giving birth. *Pregnancy: Recovering from Birth*, WOMENSHEALTH.GOV, <http://womenshealth.gov/pregnancy/childbirth-beyond/recovering-from-birth.html> (last updated Sept. 27, 2010).

¹⁰⁹ Large Firm B, *supra* note 100.

¹¹⁰ Large Firm C maternity leave policy (on file with author) [hereinafter Large Firm C].

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Large Firm A, *supra* note 104.

¹¹⁴ *Id.*

thus, they must be intended to give new parents time to bond with and care for their new child. If that is the case, there is no need to further divide parents between primary caregivers and non-primary caregivers. If one parent will need the full 18 weeks to bond with and care for a newly adopted child, there is no reason why the second parent would not also need those same 18 weeks for the same reasons. By forcing parents to choose whether they will be primary or non-primary caregivers, firms are essentially forcing their employees to conform to traditional, stereotypical gender roles. If a new non-adoptive father wanted to be a primary caregiver under this policy, he would only be granted 10 paid weeks off, rather than the full 18 weeks because he did not give birth to the child. The new non-adoptive mother, however, would be granted the full 18 weeks as the child's birthmother and primary caregiver. This firm's policy, despite its well-meaning, gender-neutral language, is incentivizing parents to play by the rules of a society that no longer exists: one in which a woman's only role is that of wife, mother, and caregiver, and in which a male primary caregiver is an inconceivable irregularity.

B. *Structure of Maternity Leave Policies*

Aside from the language of the policies themselves, the structure of firms' maternity leave policies also reveals that many firms parrot Congress's language regarding treating pregnancy as a disability. Medium Firm explicitly stated, "[w]e treat pregnancy as any other medical condition,"¹¹⁵ while Large Firm D functionally treats pregnancy as a medical condition by requiring a "written determination of pregnancy" before allowing an attorney to make use of the firm's maternity leave policy.¹¹⁶ Large Firm D also requires a "full medical release, written and signed by the employee's attending physician" before an employee who had been on maternity leave is allowed to return to work.¹¹⁷ While this type of precaution makes sense for physical disabilities that may impair an employee's ability to effectively do her job, such as recovering from a broken leg and returning to work at a construction site, unless the attorneys at this firm conduct their duties via their uteruses, such a restraint on returning to work is, at best, unnecessary, and is more likely a patronizing hurdle that slows women down in their advancement at work.

Medium Firm, which explicitly treats pregnancy as a medical condition, unsurprisingly, does not have a separate maternity leave policy. Instead, Medium Firm applies its medical leave policies to attorneys seeking parental paid time off. As a result of this conflation, much of the policy reads as nonsensical when applied to pregnancy and maternity leave. For example, the policy states that medical leave will "run until it is exhausted, as long as the employee is under a healthcare professional's care and the employee provides a medical certification."¹¹⁸ Women who have just given birth, with the exception of perhaps spending a day or two in the hospital, are not necessarily under a "healthcare professional's care," especially since postpartum checkups often do not occur until 6 weeks after a birth.¹¹⁹ Additionally, other than a birth certificate, it is unlikely that women would have any sort of "medical certification" that they have indeed given birth

¹¹⁵ Medium Firm medical leave policy (on file with author) [hereinafter Medium Firm].

¹¹⁶ Large Firm D maternity leave policy (on file with author) [hereinafter Large Firm D].

¹¹⁷ *Id.*

¹¹⁸ Medium Firm, *supra* note 115.

¹¹⁹ *Pregnancy: Recovering from Birth*, *supra* note 108.

to a child, and therefore have a meritorious reason to make use of the medical leave policy. Additionally, this specific policy grants only 2 weeks of paid leave to attorneys who have worked for a full year, 4 weeks to attorneys who have worked for 2 full years, and only 6 weeks of paid leave to attorneys who have worked for more than 3 full years.¹²⁰ Under this schedule of paid leave, even the postpartum checkup would not occur before the attorney's medical leave has been exhausted, making the "healthcare professional" and "medical certification" language even more inapplicable to pregnancy and maternity leave.

Policies that treat pregnancy as any other medical condition are functionally equating pregnancy and disability. This type of paralleling of pregnancy and disability, as discussed earlier,¹²¹ compounds the problematic nature of the structure and content of medical and disability leave policies that firms attempt to apply to employees seeking maternity leave. Linguistically categorizing women as passive sufferers of some permanent harm is neither an effective nor accurate method of identifying employees who may need to make use of a maternity leave policy. Policies like Large Firm B's discussed above, which offers both time off to recover from the physical impact of giving birth and time off to care for and bond with a new child, are perhaps the best solution to the problem of how to acknowledge the bodily limitations birth can sometimes impose, while also providing both parents an opportunity to stay home after a new child arrives.

One of the most prevalent, and perhaps most easily fixed, problems across all the policies reviewed for this analysis is differentiating between primary caregivers and non-primary caregivers. Nearly every policy considered within this analysis identifies parents in this way, and as mentioned earlier, this hierarchy of care is not conducive to reshaping social norms to reflect more equivalent parenting. One major problem with such categories for parents is that they are largely unenforceable and therefore unnecessarily antagonistic toward equal parenting teams. If both parents work for the same firm, forcing one parent to be the primary caregiver and one to be the non-primary caregiver is essentially forcing two employees to ally themselves either with their new child or with their employer. Not exactly a cheerful start to family life. If the two new parents work for different firms, neither firm will ever know if both parents are considering themselves to be primary caregivers in order to take advantage of the extended time off available. However, if both parents follow their respective firms' guidelines and choose one parent to be the primary caregiver, the non-primary caregiver parent will undoubtedly be given fewer weeks of paid leave. Thus, one parent (the non-primary caregiver) is unnecessarily at a disadvantage in terms of taking paid time off to bond with and care for the new child. In forcing new parents to navigate unequal parental leave policies, firms are incentivizing their employees to either mislead the firm about which parent is the primary caregiver, or to ration out parenting responsibilities in a way that further perpetuates the problem of one parent working while the other parent stays at home.

For women to truly become the equally valued members of the workforce they have long deserved to be, maternity leave policies must be offered in equal measure to both new parents. Underlying assumptions about women being primary caregivers will continue to exist as long as new parents are compelled to identify themselves in such a way. Small Firm is an example of the equality that all firms should strive for in their

¹²⁰ Medium Firm, *supra* note 115.

¹²¹ See *supra* Part II.A.i.

parental leave policies. At Small Firm, all new parents—mothers and fathers, both biological and adoptive—are given 12 weeks of paid leave.¹²² Although there is no formal or written policy at this firm, attorneys are not forced to identify themselves as being either a primary or non-primary caregiver, nor are they limited in their leave options by their gender. The more this type of parental leave equality spreads, the less women in the workplace will be expected to consistently be the more involved, more caregiving parent.

IV. INFERENCES OF INIQUITY

The language used in the laws, cases, and maternity leave policies discussed above paints a bleak but consistent picture of women working in law firms. In the manner of trickle-down social policy, the language used to discuss pregnancy flows from federal statutes like the FMLA and the PDA, to the decisions of federal courts, and then to the standard terms included in many firms' maternity leave policies. One striking example of this is the idea of using the word "disability" to refer to both pregnancy and to the leave given to new mothers. The PDA essentially mandates that pregnant women be treated with the same accommodations given to other disabled employees,¹²³ and the very structure of the FMLA binds together leave for family purposes and for medical purposes.¹²⁴ It seems logical that courts would follow the same rationale of conflating pregnancy with other medical conditions, and that law firms would take the PDA and the FMLA at face value by simply wrapping pregnancy into already existing disability or medical leave policies. The plaintiff in the *Troupe* case, who was terminated for tardiness due to morning sickness as discussed above,¹²⁵ is an example of a woman who suffered from the comparison of pregnancy to other medical conditions.¹²⁶ Similarly, both Medium Firm and Large Firm D are examples of the practice of equating pregnancy with other medical disability, since both firms have policies that undeniably deal with pregnancy as if it were any other medical condition requiring a doctor's note both to leave work and to return.¹²⁷

As discussed earlier in this analysis,¹²⁸ referring to pregnancy, or the need to recover from a pregnancy, as a disability does a significant disservice to women in the workplace. Such linguistic fusion ignores the agency of female attorneys who become pregnant and decide to take time off to bond with and care for a new child. As briefly discussed above, pregnancy is no longer a passive event for women, but something that can, and most often is, purposeful. Denying the decision-making power of women lawyers by treating their pregnancies as disabilities only furthers the subjugation of women to men in the workplace. Continuing to treat women as passive participants in both social and economic realms only serves to further the stereotypes that prevent women from being seen as capable and authoritative figures, particularly in the

¹²² E-mail from Small Firm female attorney to author (Feb. 6, 2016) (on file with author).

¹²³ Pregnancy Discrimination Act, *supra* note 39.

¹²⁴ FMLA, *supra* note 55.

¹²⁵ *See supra* Part II.B.ii.

¹²⁶ *Troupe*, 20 F.3d at 736 (ruling against the plaintiff after the plaintiff's employer, who refused to accommodate the plaintiff's pregnancy-specific symptoms, fired the plaintiff).

¹²⁷ *See supra* Part III.B.

¹²⁸ *See supra* Part II.A.i; *see also supra* note 74 and related text.

workplace. Women are fully equipped to make educated decisions for themselves both at home and at work, but treating pregnancy as a disability that has befallen certain women only increases the difficulties women face in being taken seriously as both colleagues and leaders. Despite the unfortunate habit of equating pregnancy and disability practiced by both the legislative and judicial branches of the federal government, law firms must begin to change this tendency and treat maternity leave and medical leave as the separate entities that they are.

In addition to recognizing that pregnancy is not a disability, firms must also finally acknowledge that pregnancy does not affect only women. The perception that pregnancy is a female problem, and therefore only female-centric solutions are needed, is one that causes widespread harm to both women and men in the workforce. Although the attempt within the FMLA to promote the use of gender-neutral language is mirrored by firms using non-gendered words like “primary caregiver,” all of the plaintiffs seeking protection for pregnancy-related issues in the cases outlined in the subparts above were women. This is unsurprising since women are those with the most cause to sue for rights under acts like the PDA; however, it is a mistake to misconstrue this trend in litigation as evidence that only women are affected by the reach of the PDA and the FMLA.

There are several trends within firm maternity leave policies suggesting that firms expect that only women will need to take advantage of parental benefits. The most obvious of these trends is that some firms blatantly allot more paid time off for the birth or adoption of a new child to women. Firms like Sidley Austin,¹²⁹ Kirkland & Ellis,¹³⁰ Large Firm B,¹³¹ and Large Firm D¹³² all explicitly designate more time off to the mother when a new child is born or adopted, while Large Firm E¹³³ provides maternity leave exclusively to women and offers its male employees no equivalent benefit. Many of these firms do not even attempt to rationalize such a choice. The fact that these firms believe such a disparity between parents needs no explanation is an obvious indication that these firms are all operating on the outdated understanding that childcare is a woman’s work, and that paternity leave is a rare perk.

A second, similar trend is that many firms assume that women will be the ones to utilize the time off permitted for primary caregivers. Both Jones Day¹³⁴ and Large Firm A¹³⁵ have filled out their NALP forms with the information about leave for primary caregivers in the section designated for information about paid time off for female employees.¹³⁶ This division of parenting labor is based on an obsolete understanding of

¹²⁹ NALP, *supra* note 96 (search “Sidley Austin,” click “Compensation & Benefits” tab, expand “Benefits Offered in Addition to Those Provided by FMLA”).

¹³⁰ *Id.* (search “Kirkland & Ellis,” click “Compensation & Benefits” tab, expand “Benefits Offered in Addition to Those Provided by FMLA”).

¹³¹ Large Firm B, *supra* note 100.

¹³² Large Firm D, *supra* note 116.

¹³³ Under this firm’s policy, men are expected to make do with their “paid vacation, sick, and personal time,” as well as the unpaid leave granted under the FMLA. Large Firm E maternity leave policy (on file with author).

¹³⁴ NALP, *supra* note 96 (search “Jones Day,” click “Compensation & Benefits” tab, expand “Benefits Offered in Addition to Those Provided by FMLA”).

¹³⁵ Large Firm A, *supra* note 104.

¹³⁶ The NALP form itself is partly at fault for this trend since it provides separate spaces for male and female attorneys. *See generally* NALP, *supra* note 96. Firms, however, should follow Large Firm C’s lead on this issue and put the same information in both sections. *See* Large Firm C, *supra* note 108; NALP,

how families work. It is no longer the case that the vast majority of women with children stay home to care for those children. In most married-couple houses with children, both parents work.¹³⁷ A significant proportion of women with children are contributing to the workforce. In fact, in 2015, “[t]he labor force participation rate—the percent of the population working or looking for work—for all mothers with children under age 18 was 69.9[%].”¹³⁸ For married mothers with a spouse present, the participation rate in the labor force was 67.6% in 2015.¹³⁹ The 2015 participation rates for all fathers with children under age 18, and for married fathers with a spouse present, were 92.7% and 93.7%, respectively.¹⁴⁰ Numbers like this make it impossible to ignore that the American workforce has shifted to include both parents.

With both parents working in the majority of married-couple houses, it is both economically and socially foolish for law firms to assume that the default primary caregiver will be the mother. For women working in law firms, there is an undeniable conflict in timing between when to have children and attempting to reach the partner tier. Biologically, the best time for women to have children is between ages 20–35.¹⁴¹ The partnership track at most firms ranges anywhere from 8 to 11 years, depending on each firm’s specific structure.¹⁴² If a woman goes through each year of school, from kindergarten to the third year of law school, without taking any time off, and starts work at a firm promptly after graduation, the youngest she will be when she begins to work is 25 years old. This means, assuming she did not have children while being a full-time student, she will have the same 10 years to make partner—an endeavor that often requires billing at least 2,200 hours per year and bringing significant business to the firm through networking extensively¹⁴³—and to have children with minimal risk of complications.

By continually bringing new business to the firm, partners contribute to the firm’s profit margins.¹⁴⁴ As such, firms should be doing whatever they can to encourage their best associates to succeed, including acknowledging the double-bind women are facing

supra note 96 (showing that Large Firm C includes the same information in both sections). Because Law Firm C has requested that its policy remain confidential, a more accurate cite to the firm-specific NALP page has not been provided.

¹³⁷ “In 2015, 34.4 million families included children under the age of 18, about two-fifths of all families . . . Among married-couple families with children, 96.7 percent had at least one employed parent; both parents worked in 60.6 percent of married-couple families.” Bureau of Labor Statistics, *Employment Characteristics of Families Summary*, U.S. DEP’T LABOR, <http://www.bls.gov/news.release/famee.nr0.htm> (last updated Apr. 22, 2016).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ “Fertility in women starts to decrease at age 32 years and becomes more rapid after age 37 years.” *Frequently Asked Questions: Pregnancy*, AM. C. OBSTETRICIANS & GYNECOLOGISTS, <http://www.acog.org/~media/For%20Patients/faq060.pdf> (last updated Sept. 2015). After age 35, the risk for medical complications such as ectopic pregnancy, miscarriage, stillbirth, and fetal anomalies like Down’s Syndrome begins to increase. Denis Campbell, *The Best Age to Become a Mother—Between 20 and 35*, GUARDIAN (Dec. 31, 2010, 5:00 PM), <http://www.theguardian.com/society/2010/dec/31/pregnancy-mothers-fertility-children>.

¹⁴² Matt Shinnors, *How to Become a Law Firm Partner*, AM. BAR ASS’N (June 7, 2012), <https://apps.americanbar.org/litigation/committees/yungadvocate/email/spring2012/spring2012-0612-how-become-law-firm-partner.html>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

regarding reaching the partner tier while also having children. Firms that force parents to divide into primary and non-primary caregivers, and assume that the mother will be the primary caregiver, are not only ignoring the fact that since both parents are likely working, they would both benefit from their partner being allowed equal time off after the arrival of a new child, but also perpetuating the stereotype that women should prioritize childcare over their careers. While the balance between work and caring for children is a fluid process in which all working parents must engage, it is both economically and socially short-sighted for firms to put a thumb on the scale against their female attorneys when they would be better served by encouraging more equal competition among all associates seeking to become partners.

An equally problematic trend among firm maternity leave policies is treating pregnancy as merely a medical condition. Firms like Medium Firm¹⁴⁵ and Large Firm D¹⁴⁶ only provide women with time off for a new child under their medical leave policies, which functionally prohibits men and adoptive parents from taking advantage of parental benefits. This type of firm policy often requires women to have their “condition” confirmed by a medical professional, or be under continual medical care while on leave.¹⁴⁷ These requirements are entirely inapplicable to new fathers or to adoptive parents, since neither group is physically giving birth to a child. Once again, firms are singling out women as those responsible for childbirth and childcare, and are disincentivizing men from being equally involved in the process of caring for a new child. The language from federal statutes like the FMLA is present in firm policies that equate family leave and medical leave, to the detriment of women attorneys.

Each of these three trends—firms giving more parental leave to women, firms assuming women will be the primary caregivers, and firms excluding men from parental benefits by treating pregnancy as a medical condition—contributes to the deeply entrenched stereotypes regarding the division of responsibilities between men and women with respect to childcare. The continued perpetuation of these antiquated ideals results in women and men consistently being forced into their stereotypical roles, which provides more “evidence” that such assumptions are accurate, leading to a never-ending cycle of unequal division of labor when it comes to family caregiving. This problem is particularly salient when it comes to raising children, since parenting skills are almost exclusively learned “on the job”.¹⁴⁸ The more a woman is encouraged to stay home with new children for longer periods of time than her male counterpart, the more she “both gains competence and becomes known as the one who knows how to perform the relevant tasks, ultimately leading both parents and the children to look to her for these functions.”¹⁴⁹

This issue is eloquently explained by then-Chief Justice Rehnquist in a 2003 Supreme Court case upholding the FMLA as an appropriate use of legislative power:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.

¹⁴⁵ Medium Firm, *supra* note 115.

¹⁴⁶ Large Firm D, *supra* note 116.

¹⁴⁷ *See, e.g.*, Medium Firm, *supra* note 115; *see also* Large Firm D, *supra* note 116.

¹⁴⁸ FEMINIST JURISPRUDENCE, *supra* note 2, at 659.

¹⁴⁹ *Id.*

Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn . . . lead to subtle discrimination that may be difficult to detect on a case-by-case basis.¹⁵⁰

Chief Justice Rehnquist goes on to say that the FMLA was intended to combat any "state-sanctioned stereotype that only women are responsible for family caregiving."¹⁵¹ It is time for law firms to follow the spirit of the FMLA, more than twenty years after its enactment, and stop enforcing leave policies that serve to further harmful stereotypes of women and men, and to start encouraging equal division of labor both in the office and at home.

Both the language used in the PDA and the FMLA, as well as the trends of content and structure revealed by analyzing firm maternity leave policies, illustrate that women are considered a sub-group of the American population rather than part of the citizenry in general. An example of this mode of thinking is demonstrated by the very existence of the PDA. Title VII, originally enacted in 1964, plainly prohibited employment discrimination based on the sex of an employee.¹⁵² However, it took until the enactment of the Pregnancy Discrimination Act, in 1978, for courts to start forcing employers to not discriminate against pregnant employees.¹⁵³ Pregnancy is experienced exclusively by the female sex; therefore, to discriminate based on pregnancy is to discriminate based on sex as prohibited by Title VII. Regardless of this common sense reasoning, it still took fourteen additional years for pregnant employees to be explicitly protected from discrimination in the workplace. Such a significant gap in coverage can hardly be considered a legislative or judicial oversight. Just as it took the United States over 130 years to certify women's right to vote despite there being no language in the Constitution that prohibits women from voting, women have once again been forced to fight for a right that was already theirs: the ability to fully participate in the workforce without fear of discrimination based on their childbearing capabilities. The result of such willful denial of women's equality is that female attorneys who choose to have children are faced with unrealistic expectations for both their work and family life. Part V, which follows here, examines these pressures and their effects on women working in law firms.

¹⁵⁰ Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

¹⁵¹ *Id.* at 737.

¹⁵² Title VII, *supra* note 51.

¹⁵³ *See supra* note 64 and accompanying text.

V. EMPIRICAL EVIDENCE

A. Background

To gain a more comprehensive picture of how maternity leave policies are affecting women who currently work in law firms, I created a survey that asked these women a variety of questions designed to decipher the landscape of law firm maternity leave. My first concern was to get as much information from as many respondents as possible, without excluding any particular group of women. To this end, I created three different versions of the survey questions so they would be tailored to three types of women: (1) women who have children; (2) women who do not have children, but are planning to have children; and (3) women who do not have children and are either not planning to have children or are unsure if they will ever decide to have children.¹⁵⁴ After answering basic demographic questions about age, marital status, the size of their law firm, and how many years they had been practicing, the respondents were asked to answer two questions that allowed these women to self-identify as a member of the first, second, or third group.

The form of the remainder of the questions in the survey was conditioned upon respondents' answers to these grouping questions. Mothers were asked about their past experiences with giving birth and taking leave while working at a firm, and planning non-mothers were asked about what they intended to do or expected to encounter when they gave birth and took leave. Non-planning non-mothers were asked questions in the form of a hypothetical situation in which they were planning to have children while working at their current firm. In this way, I avoided having to exclude any one group of women from being potential respondents, and I gained a spectrum of perspectives on the topic of childbirth and maternity leave while working as an attorney.

Apart from the initial demographics questions, the survey asked questions intended to illuminate experiences female attorneys have, or expect to have, when interacting with their firm's maternity leave policy. I asked whether each firm had a formal maternity leave policy, and if not, I asked for a description of what happened when new mothers needed time off. I asked for estimations of percentages of women who used the full time off available, and whether similar leave was offered to male attorneys. I asked about whether women returned to full-time or part-time schedules after giving birth, and whether there was pressure to come back to a full-time schedule as soon as possible. I also asked women about whether there was a perception at their firms that having children slowed women down in terms of becoming a partner. The end of the survey asked women if their firm's maternity leave policy, or any of the related pressures and perceived hurdles to partnership, had affected their choice to either have children or to not have children. I also asked women whether they had chosen to delay having children to accommodate these workplace problems associated with childbirth and maternity leave.

I distributed the survey through the Northwestern Pritzker School of Law alumnae network, the limits of which are addressed below. The survey was sent to women who worked at law firms that varied in size and location. I expected to receive results that showed that although most women were being offered maternity-specific time off, paid

¹⁵⁴ For the sake of brevity, throughout the remainder of this article these groups will be referred to as (1) mothers, (2) planning non-mothers, and (3) non-planning non-mothers.

or unpaid, that most women did not take the full amount of time available. I also expected to see responses that indicated that women felt pressure in the office to return to work at a full-time schedule as soon as possible, and that failure to do this would further inhibit a woman's rise to partner. I expected that male attorneys would not be offered equivalent leave for new children, and that some of the smaller law firms may not even have formal maternity leave policies. The majority of the questions in my survey were designed to allow women to answer on a scale,¹⁵⁵ which helped to convey the most information possible across the spectrum of experiences reported by these women.

Considering the already significantly demanding schedules of the women I was hoping to hear from, the response rate to my survey surpassed my expectations. I received over 200 responses to my survey, with more than 150 of those responses coming in the first day that the survey was open. This fact alone is an indication that maternity leave, particularly in a law firm context, is an issue that women are ready to discuss and on which they want to be heard. I cleaned the data I received through these responses by removing data from respondents who did not complete the entire survey. This allowed me to keep the number of respondents for each question constant, and therefore, my data are more consistent. Ultimately, there were 97 mothers, 47 planning non-mothers, and 15 non-planning non-mothers on which my analysis below is based.

B. Results & Analysis

As described above, the majority of the questions in my survey were conditioned on whether respondents had children, were planning to have children, or were not planning to have children. As such, the bulk of the information and analysis that follows is similarly divided into these same three categories.

1. Mothers

There were 97 total respondents who identified themselves as already being mothers, whose ages ranged from 29 to 62. The vast majority of these women were between the ages of 30 and 38. In terms of marital status, this group was largely homogenous, with 95% of respondents identifying themselves as married. This group of women was fairly evenly divided with respect to law firm size, with equal numbers working at firms ranging in size from over 500 attorneys to between 15–100 attorneys. The smallest group within the respondent mothers was women who worked at firms with fewer than 15 attorneys; there were only 9 of these women. Approximately 71% of the respondent mothers worked at offices that were part of a regional or national firm, and the average length of time these women had been working at their current firm was 8.67 years. The average amount of time these women had been practicing attorneys was 12.16 years, indicating that several of these respondents have switched firms at least once during their careers.

For this group of respondents, 92% currently work at a firm with a formal maternity leave policy, and 73% of those policies apply to adoptions as well as to natural births. Of the firms with formal maternity leave policies, 88% of those policies allocate paid time off specifically for maternity leave, which is to say, that these policies offer

¹⁵⁵ For example, “Definitely, Probably, Not Sure, Probably Not, Definitely Not” or “Strongly Agree, Agree, Slightly Agree, Neither Agree nor Disagree, Slightly Disagree, Disagree, Strongly Disagree.”

women time off apart from any sick time or any vacation days they may have accrued. A significant 92% of mothers made use of their firm's maternity leave policy when they had their children, and 85% of mothers used the full allotment of available paid time off. The majority of respondents in this group also reported that this was consistent with trends at their firms, with respondents estimating that anywhere from 80% to 100% of women choose to use the full amount of available time off under a firm's maternity leave policy.

Just over a third of firms with formal maternity leave policies that allocate time specifically for use on maternity leave also allow their attorneys to supplement that time with paid time off for short-term disability. Of these firms that allow women to supplement their maternity leave with a short-term disability leave, 35% of mothers say they used this extra leave time. When asked what percentage of women in their firm would similarly supplement their maternity leave policy using short-term disability time, mothers were divided, estimating that either 80%-100% of women followed this trend, or that 0% of women would supplement their maternity leave in such a way. Nearly 74% of mothers reported that their firms offer analogous leave to new fathers, and also estimated that anywhere from 40% to 80% of men made use of these parental leave opportunities.

Many of the respondents from smaller sized firms reported that their firms did not have an official maternity leave policy, but that they were approached individually to talk about what the firm could provide. One woman from a firm of 100–200 lawyers wrote that, “every woman has to negotiate for herself [because] the firm only offers the [leave available under the] FMLA.”¹⁵⁶ Women who have ownership stakes in their firms are often able to take a more flexible view of their maternity leave, particularly at smaller firms without formal policies. One respondent wrote that since her firm offered no paid time off, she “saved enough money for maternity leave and found other attorneys in the office to help [her] in [her] absence.” This same respondent explained that she was “an owner of [her] firm,” which allowed her to take off “as much time as [she] want[ed].” Another trend at smaller firms is that some of these firms have never had a female associate have a baby, so there is no protocol for how to handle the situation. The same female partner explained, “[w]e have never had an associate have a baby so I don't know what would happen.” Another respondent wrote that in the 8 years she had been practicing at her firm, she was “the only woman who has had children” at the firm. Even in these cases where there is no formal maternity leave policy, the majority of respondents knew to whom within their firm they should go with any questions about maternity leave.

With respect to returning from maternity leave, most respondents said that women in their law firms generally return from maternity leave to a full-time schedule, rather than to a part- or flex-time schedule. Only 16% of respondents reported that more women return to part-time schedules than to full-time schedules. Additionally, 58% of mothers said that they had returned to a full-time schedule after their maternity leave had ended. In apparent opposition to this, however, respondents in the mothers group were fairly evenly split regarding whether or not they agreed that there was pressure at their firm to return to a full-time schedule as soon as possible. When asked if they had felt pressure themselves to return to a full-time schedule as soon as possible after maternity leave,

¹⁵⁶ The data collected from this survey are on file with the author; however, further citations have not been provided since these responses were solicited under a promise of strict confidentiality pursuant to the consent form signed by each respondent.

82% of mothers reported that they had felt at least some degree of pressure, even if it wasn't overwhelming.

Relatedly, mothers were asked whether they agreed that there was a perception at their firms that having children slows down a woman's advancement to a partner position. Over 73% of mothers agreed with this statement, with some mothers specifically noting the lack of a formal track to partner after coming back from maternity leave on a part-time schedule. One woman wrote, "[i]t seems to me that once an attorney goes part-time or [f]lex-time, the road to partnership ends." In fact, 53% of mothers reported that they agreed that having children had slowed down their advancement to partner, while only 35% of mothers disagreed with the same statement. However, nearly 63% of mothers did not agree that their decision about when to have children was affected by their firm's partnership timeline. The majority of mothers also reported that their decision to have children was not affected by their firm's maternity leave policy, and that they did not have children any later in life than they would have if they were not lawyers.

2. Planning Non-Mothers

There were 47 respondents who identified themselves as women who did not yet have children, but were planning to have children in the future. One of these planning non-mothers said she was "very pregnant with [her] first child" at the time she filled out this survey, so in a matter of months she will shift categories. The average age of these planning non-mothers was 31.5 years old, and the vast majority of these women were either 30 or 31 years old. This group of respondents was split down the middle regarding marital status, with 40% identifying themselves as married, and 42% as in a committed relationship. About half of these women worked in law firms with at least 200 attorneys, and just under a third worked in a firm with 15–100 attorneys. Similarly to the mothers, about 81% of these respondents worked in offices that were part of a regional or national firm, but the average years of working at their current firm and of being a practicing attorney were only 3.01 and 4.3, respectively.

Within this group of respondents, 94% said their firm had a formal maternity leave policy, and of this group, 60% of those policies also applied to adoptions. Approximately 91% of planning non-mothers reported that their firm offered maternity-specific paid time off through the maternity leave policy, and 89% of women estimated that at least 80% of women at their firm use the full amount of maternity-specific time when taking maternity leave. Consistent with these estimates, 91% of planning non-mothers are planning to use their firm's maternity leave policy, and 87% plan to use the full amount of time off available. Almost half the women in this group reported that their firm's maternity leave policy could be supplemented with short-term disability leave, but they were evenly divided regarding the percentage of women at their firms who take advantage of this additional time off. Mirroring this division, the women were equally split about whether they planned to supplement their maternity leave with short-term disability leave. About a third of women said yes, a third said no, and a third were unsure about their decision. Nearly 81% of planning non-mothers reported that men in their law firms were offered analogous leave policies, but differed in their estimates regarding what percentage of men take advantage of those policies with answers ranging evenly from 100% to 1%–20%.

Over half of the women in this group reported that most women in their firms return from maternity leave to a full-time schedule right away. Only 6% of planning non-mothers said that they planned to return to work on a part-time schedule, while 43% said they would be returning to full-time schedules. Over 57% of women at least slightly agreed that there is pressure at their firms to return to a full-time schedule as soon as possible. Only 15% disagreed that there was any such pressure. Nearly 81% of planning non-mothers responded that they anticipated experiencing at least some pressure to return to full-time as soon as possible after taking maternity leave, with almost 15% of women anticipating an overwhelming amount of this type of pressure.

Nearly 73% of planning non-mothers at least slightly agreed that there is a perception at their firm that having children slows down a woman's advancement to a partner position, and 77% of women anticipate that having children will slow them down while they attempt to advance to a partner position. Despite this anticipated hurdle, women were equally divided on whether their plan about when to have children was affected by their firm's partnership track. Almost 43% agreed that their firm's partnership timeline had affected their plan about when to have children, and a nearly equal 49% disagreed with the same proposition. However, 51% of planning non-mothers reported that they were planning to have children later in life than they would if they were not lawyers. Only 36% of women disagreed with this statement. Planning non-mother respondents were almost equally split on whether their plan to have children was affected by their firm's maternity leave policy: 40% agreed that it was, while 42% reported their decision was not so affected.

3. Non-Planning Non-Mothers

There were a total of 15 respondents who identified themselves as women who did not have children, and either did not plan to have children or were unsure if they would have children in the future. The average age of these non-planning non-mothers was 34.5 years old, and all but three of the respondents were age 35 or younger. Two-thirds of these women identified themselves as married, and this group as a whole was fairly evenly divided between large and small sized law firms. Of these women, 53% worked in offices that were part of a regional or national chain, and the number of years worked at their current firm ranged from 0.5 to 20, with the average being 5.5 years. The number of years of being a practicing attorney ranged from 0.5 to 32, with an average of 8.23 years.

All but one of these respondents reported that their firms have formal maternity leave policies, and 67% of these policies apply to adoptions. The woman who replied that her firm did not have a formal maternity leave policy works at a firm with fewer than 15 attorneys and reported that, "[n]o women attorneys at this firm have had a child in the 20 years I have been here. There is no policy and no precedent." Every firm in this group that has a formal maternity leave policy offers maternity-specific paid time off, and 100% of respondents said they would make use of their formal maternity leave policy (if such a policy exists). Of these respondents, 80% said that at least 60%–80% of women in their firms use the full amount of paid time off available for maternity leave, and all but two of the respondents agreed that if they were to plan to have a child, they would also plan to use all of the available maternity-specific paid time off. Half of these respondents were unsure whether their firm allows women to supplement their maternity-specific leave with short-term disability leave, and the respondents were evenly split on what

percentage of women in their firms do supplement their maternity leave with short-term disability leave, with answers ranging evenly from 0% to 100%. Similarly, this group of non-planning non-mothers was evenly divided on the question of whether they would plan to supplement their maternity leave in this way if they were to have children: 40% said they were not sure if they would or not, and 26% said they would definitely not. Nearly 67% of this group of women reported that men at their firms are offered analogous leave policies, but when asked to estimate what percentage of men make use of these policies, answers ranged in equal numbers from 100% to 1%–20%.

Over 73% of women reported that a majority of women in their firms return to work from maternity leave on full-time schedules. When asked whether they would return on full-time or part-time schedules if they were to have children, 33% of women said they would return at full-time and 30% said part-time. Of the non-planning non-mother respondents, 53% agreed that there is pressure at their firms to return to a full-time schedule after maternity leave as soon as possible, and 80% of respondents reported that if they were to have children they would anticipate feeling at least some pressure to return to a full-time schedule as soon as possible. Additionally, 60% of these respondents agreed, at least slightly, that there is a perception at their firms that having children slows down a woman's advancement to a partner position, and 73% said that if they were to have children they would anticipate their own advancement to a partner position would be slowed as a result of that choice. Further, 60% of respondents in this group reported that if they were to have children, that decision would be affected by their firm's partnership timeline, and 47% of non-planning non-mothers said that they would have children later in life than they would if they were not lawyers, if they were to have children at all. However, 80% of this group of respondents reported that their plan to not have children was not affected by their firm's maternity leave policy.

4. Analysis

These data reveal several trends among women in law firms, as well as a few significant differences between mothers and non-mothers in terms of perceptions about having children while practicing as an attorney. Of particular interest is the idea that there is generally pressure within firms to return to a full-time work schedule as soon as possible after taking maternity leave. In what seems to be a very successful instance of cognitive dissonance, women across the three categories (mothers, planning non-mothers, and non-planning non-mothers) were fairly evenly split in whether or not they believed there was pressure at their firm to return to full-time as soon as possible, but women were overwhelmingly in agreement that they either had felt or anticipated feeling this pressure to come back to work at a full-time schedule as soon as possible after taking maternity leave. Across the three categories of women, at least 80% of each category agreed that they had either felt this pressure personally, or anticipated feeling it if or when they chose to have children and take maternity leave. This surprising difference between what women think of the atmosphere at their firms and what they report actually experiencing suggests that what firms are advertising to women is not necessarily what they are ultimately delivering.

Another significant data point is that the majority of women in all three categories agreed that there is a perception at their firms that women who have children become partners at a slower rate than women who do not have children. A higher percentage

(73%) of both mothers and planning non-mothers agreed with this perception, and 60% of non-planning non-mothers agreed. These numbers were reversed when respondents were asked whether they had either actually experienced, or anticipated experiencing, a slowing of their advancement to partner. Only 53% of mothers reported having felt their advancement to a partner position slow as a result of having children, while over 70% of both planning non-mothers and non-planning non-mothers reported expecting to experience this slow-down of their professional lives. This divergence in what is expected and what is lived suggests either that the overwhelming perception that having children slows women down professionally within law firms is incorrect, or that women who have had children are inclined to believe that their professional lives have not been negatively impacted by their personal choices. Given the infinitesimal number of female partners and managing partners in law firms generally,¹⁵⁷ the latter is decidedly more likely.

The attempts, through this survey, to partially determine what affects women's choices about if and when to have children were largely unsuccessful given the varied responses across all three categories of women. The majority of women with children said their decisions about when and whether to have children were not affected by their firms' partnership timelines, by their firms' maternity leave policies, or by their choices to be lawyers in general. Similarly, responses from women who are planning to have children indicated that this group was divided about whether their plans to have children were affected by their firms' respective partnership tracks or maternity leave policies. In terms of timing when to have children, however, 51% of planning non-mother respondents said they were planning to have children later than they would if they were not lawyers. While this percentage represents a majority of this group, it is not substantially significant in determining the rationale of whether or not a female attorney will choose to have children at a certain time. While 80% of women who did not plan to have children said their decision was not affected by their firm's maternity leave policy, 60% of these same women said that if they were to have children, that decision would be impacted by their firm's partnership timeline, although a minority of this group also reported that they would have children later in life than they would if they were not lawyers. Despite lending some understanding to the decision-making process, these three factors are not sufficiently illuminating to draw meaningful conclusions about why and when women working in law firms choose to either have children or not.

The issue of whether men are offered analogous leave policies, and whether or not men take advantage of such policies, however, indicates a clear direction in which firms can move to better facilitate becoming a parent for their female (and male) attorneys. Of the respondents who are mothers, 74% reported that their firm offers male attorneys analogous leave policies to those offered to female attorneys, and that 40%–80% of men take advantage of these policies. Although planning non-mothers and non-planning non-mothers reported similar figures in terms of analogous policies being offered to men (81% and 67%, respectively), both groups estimated that anywhere from 1% to 100% of men actually take advantage of these options. The fact that whether or not men will take advantage of parental leave policies is so unpredictable leaves women in a position of having to plan on being the primary caregiver for any potential children. As discussed at

¹⁵⁷ See *supra* notes 13–14 and accompanying text.

length in an earlier subpart,¹⁵⁸ forcing women to fit into stereotypical roles regarding childcare limits the ability of female attorneys to participate fully in the workforce, and reinforces outdated ideas about their capabilities as professionals. By offering, and encouraging the use of, analogous leave policies for men, firms can substantially improve the current imbalance suffered by women who choose to have children while working at a law firm.

Relatedly, many respondents commented on the impact of the decision about whether to use the full amount of maternity leave available. Women across all three groups of respondents consistently reported that the majority of women in their firm use the full amount of maternity-specific time off that is made available through leave policies. Additionally, at least 85% of all three groups responded that they had either used the full amount of paid time off available, or they were planning or would plan to use the full amount of time if they planned to have children. Despite these high numbers of women utilizing their maternity leave to the fullest extent possible, many women commented that there is a tension between women who use all of their maternity leave and women who return from leave early. One respondent wrote that when women come back early from leave, it “creates dissent among female lawyers, as the pressure to not ‘need’ all of the leave and come back to work ‘early’ predominates.” This same woman wrote that an additional problem with firm maternity leave culture is that, “many women take the full leave and depart from the firm at the end of the leave. This puts all women in a tough position . . .” She adds that she was “questioned . . . the entire time [she] was on leave as to whether [she] was ‘coming back’ after the baby.” Similarly, another respondent wrote that, “[a] lot of women will stay at firm’s [sic] to take advantage of generous maternity leave policies, and then use that maternity leave as a time to find their next job.” Combined with the fact that most women reported either using or planning to use the full amount of maternity leave offered, these negative assumptions about women on maternity leave are certainly a contributing factor to the low numbers of female partners at the majority of law firms.

As one respondent aptly summed up the issue, “[t]he impact on [billable] hours and revenue while on maternity leave cannot be immediately rectified, as it takes time to get ‘ramped up’ after being out for a while. Thus[,] there are lingering effects that are not remedied by a good maternity leave policy.” Despite the obvious flaws with many firms’ maternity leave policies as discussed throughout this article, the greatest problem remains the implicit assumptions firms make about their female attorneys, especially those who have children, in comparison to male attorneys. Firms need to actively change their perceptions of women and of parents to enable all their attorneys to participate equally in the workplace and in their families. Improved maternity leave policies are merely a start to the amelioration of this deeply rooted problem.

C. *Limits*

Although the data presented above help to more fully illustrate the current situation for many women in law firms who have or may have children, there are limits to the usefulness of this survey. The most significant limit on this survey is its scope. The questions within the survey are not broad enough to glean as much information as

¹⁵⁸ See *supra* Part III.A.

possible from all the types of women who have had children and have experience working at a firm. For example, some women have had children at more than one firm. There are no questions in this survey designed to ask those women about how their experiences differed at each firm where they had a child. Further, some women have had children at law firms and were so unsatisfied with the experience that they left for other forms of employment. There are no questions designed to gain the perspectives of these women since this survey was limited only to women who were currently working at a law firm. While these types of experiences would no doubt shed additional light on the challenges facing women working at law firms who want to have children, I intentionally decided to focus my survey on women still working at firms so that I could access the most accurate information about firm environments currently. A natural extension of my research would be to investigate the experiences of women who left law firms for reasons related to motherhood or childcare.

An additional limitation of my survey is the pool of respondents. Since the survey was only distributed via the alumnae network of Northwestern Law, the responses are consequentially limited to graduates of Northwestern. This was done purely for convenience and to expedite the responses rate of potential participants. Further work on this subject should expand beyond this pool of respondents. Each of these limits to my survey was carefully considered when this project began, and they do not detract from the value of the responses I gathered and the analysis they allowed.

IV. CONCLUSION

Despite making up nearly half of the population of people who have earned a J.D., and nearly half of those hired by firms as summer associates, women comprise only 20% of partners, 17% of equity partners, and 4% of managing partners within the 200 largest law firms.¹⁵⁹ Apart from being an unacceptable disparity between genders, these statistics show that women are being treated undeniably differently within the overall promotion structure of law firms. Since being able to give birth is a trait exclusive to women, and one that has historically handicapped women in the workplace, childbirth and childcare are an unsurprising contributing factor to this obvious exclusion of women from the highest ranks within the legal profession.

This detrimental treatment of women in the law is not only socially outmoded, but also economically foolish. When women are reaching their most profitable years, they are simultaneously being forced into the manufactured role of primary caregiver, and are often directly punished for it. In reflecting on the effect taking maternity leave had on her professional career, one survey respondent wrote that she had worked part-time for three years after taking maternity leave for her third child. Although she had already become an equity partner before shifting to a part-time schedule, she explained, “I was required to give up my equity partnership and become an income partner during this time.” She was only allowed to return to her equity partner status once she resumed a full-time schedule. This type of policy is as outrageous as it is nonsensical. Women’s achievements are literally being stripped from them if they choose family over work.

Firms must begin to counteract the deeply ingrained stereotypes about women in the workplace rather than actively perpetuating them by pigeonholing women into certain

¹⁵⁹ See *supra* notes 14–15 and accompanying text.

roles. To start this process, more firms should incorporate paternity leave into their parental leave structure, and should design these policies to provide equal benefits to both parents. The more firms encourage men to be equal partners in parenting, the more opportunities women will have to be equal participants in the workplace. Additionally, these leave policies should apply to all types of arrivals of new children, including adoptions and surrogacy. Bringing a new child home and learning how to be a parent takes the same extensive amount of time regardless of how that child arrives. Further, parental leave policies should be standardized across the industry and should be increased to prevent the perception that women (and men) who take less time to care for their child after its arrival are better workers.

Perhaps the most substantial change that must occur across all law firms is a shift in firm culture away from the billable hour as the ultimate measure of success as a lawyer. As long as an attorney's value is strictly measured in the number of hours that person can bill to clients, parents will be at a disadvantage, and as long as women are considered the primary parent, they will be at a substantially more significant disadvantage. This change in the management of firms is at once both elementary and extremely complex. A discussion of how best to manage the economics of law firms is largely outside the scope of this analysis, but without a change in the structure of how lawyers are assessed, there is no impetus for firms to be less demanding of their employees' time. It is impossible for any attorney to maintain a healthy balance between work and family if there is a constant feeling that he or she should be putting more time in at work if he or she wants to be considered successful.

The language of inequality between men and women is a long-existing problem that has flowed from federal legislation to the most ubiquitous language in firm maternity leave policies. This language has significantly impacted the way the role of women has been shaped, and women have been severely disadvantaged because of these trends in rhetoric. Women in law firms have been particularly subjected to reified ideas of womanhood being different than personhood. Parenthood must no longer be viewed as an exclusively female state, and the workplace can no longer be presumed to be an inherently male arena. More comprehensive parental leave policies for both male and female attorneys are a necessary first step in reversing such harmful perceptions about the roles of men and women in both the workplace and the home, and the equally detrimental assumption that value in one area inversely relates to value in the other. Firms must begin facilitating the success of men and women equally, regardless of their decisions about whether or not to have children. Anything less is not only a severe disservice to women, but also a reckless disregard for the profession as a whole.