
Introduction

On August 13, 2019, Mark Savignac and Julia Sheketoff filed a complaint in the District Court for the District of Columbia against their former employer Jones Day, an elite global law firm. 1 The married plaintiffs, both former associates and former Supreme Court clerks, alleged, among other things, that Jones Day’s parental leave policy discriminated against men on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”). 2 Jones Day’s policy offers ten weeks of paid leave to primary caregivers, four weeks of paid leave to secondary caregivers, and eight weeks of additional paid disability leave to biological mothers. 3

The plaintiffs claim that the policy automatically and impermissibly gives women eight extra weeks of paid leave “purely on the basis of sex.” 4 They argue that this discriminates against fathers and violates Title VII because, although women legally may be granted more leave in order to heal from childbirth, that additional leave must be directly connected to need and assuming a mother’s need contravenes that requirement. 5 Without “requiring individual proof of disability,” the plaintiffs argue, Jones Day simply grants more leave to women, which discriminates against men. 6

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3 Addendum to Compl. at 3, Savignac v. Jones Day, et al. This disability leave is given to a woman regardless of her status as a primary or secondary caregiver. Id.
In stark contrast, Jones Day argues that its parental leave policy is gender-neutral, and it is allowed to provide new mothers leave in this way. The firm contends that automatically granting this period of leave “makes the plan less burdensome for the Firm, its administrator, its associates, and their doctors.” Additionally, it allows new mothers to keep their health history private, specifically as related to childbirth and any resulting issues.

In short, the case will turn on whether employers can offer new mothers, and not new fathers, extra paid leave in the form of disability automatically without any express showing of need. The answer to this question, however, will affect far more employers and employees than just Jones Day and the plaintiffs involved in that case.

About 40% of employers offer some kind of paid leave to employees upon the birth of a child. These policies come in a variety of forms. With this variety available, courts have had numerous opportunities to analyze the lawfulness of different types of policies as applied to new mothers and fathers. Courts generally assess the legitimacy of various leave policies against the backdrop of Title VII and the Pregnancy Discrimination Act (“PDA”), although other statutory regimes, such as the Family and Medical Leave Act (“FMLA”), often also play a role. The law regarding parental leave policies, regardless of how they are structured, is clear – policies that grant leave, either paid or unpaid, may not discriminate against either parent on the basis of sex

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8 Id. at 12.
9 Id.
12 See infra Part II.
and must be provided equally to both genders. The Supreme Court, however, has yet to answer the question at issue in the Jones Day lawsuit – “whether preferential treatment may be given to pregnant employees without regard to a period of disability following pregnancy, childbirth, or pregnancy complications.”

The issues raised by the Jones Day lawsuit implicate broader questions about mothers and fathers in the workplace. The majority of employers who offer paid leave ultimately provide more time off to mothers. Because mothers receive more time off than fathers, women, even in “dual-earner power couples,” take on the majority of child-raising. If new mothers are permitted to take longer periods of leave than new fathers, their role as caregiver is likely to be cemented. If they become the sole or primary caregiver for their children, their opportunities at work will likely decrease because employers will assume they will prioritize family over work. As a result, mothers may even choose to exit the workforce altogether. There is mounting evidence, however, to show that fathers today view parenting differently – they are more willing

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14 Krista Gay, Dads Are Parents, Too: Why Amending the Pregnancy Discrimination Act is Necessary for Courts to Determine if a Parental Leave Policy Violates Title VII, 13 BROOK. J. CORP. FIN. & COM. L. 191, 193 (2018). Even though the law is clear, several major companies have settled lawsuits after employees allege their parental leave policies are discriminatory. See Dena B. Calo & Jason A. Ross, EEOC Reaches $1.1 Million Settlement for Leave Policy That Discriminated Against Males, 28 NO. 11 PA. EMP. L. LETTER 2 (2018) (describing a lawsuit against Estee Lauder that settled for $1.1 million).
20 Id. Specifically, as applied to major, global law firms, “after [women] begin to climb into the upper tiers of law firms,” women “disappear,” many choosing to withdraw from the workforce altogether in order to raise their children. Id.
to share parenting responsibilities than past generations. If the father plaintiff in the Jones Day lawsuit is to be taken at face value, he hoped to receive more paid time off from his employer, so that he and his wife could more easily balance parenting duties between them. Applied more broadly, if new parents are allowed this choice to share responsibilities and to balance work and family, women are likely to be more successful in the workplace. The law and employers, however, have not kept up with these shifting views of parenthood.

This paper will argue that continuing to grant more time off to new mothers than to new fathers will hinder women’s progress toward achieving true equality in the workplace. It will also argue that “a disservice is done to both men and women to assume that child-rearing is a function peculiar to one sex.” When women get more time off, they also have more time to take on the bulk of the parenting responsibilities. This in turn leads either to women spending more time at home and less time at work or, at the very least, to their colleagues and supervisors viewing them as mothers first and as employees second, resulting in discrimination against them. By offering more time off to women following the birth of a child, employers essentially take the choice about how to balance parenting away from new parents. In contrast, if new mothers and fathers are offered the same amount of time off following the birth of a child, they are given that control back and are more likely to share parenting responsibilities more equally. With equal time off, new parents will have the choice about how to balance childrearing and their careers,

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23 Karr, supra note 21, at 235.
25 Martin H. Malin, Fathers and Parental Leave, 72 Tex. L. Rev. 1047, 1052 (1994). (“As long as parental leave remains de facto maternal leave, work-family conflicts will remain a significant barrier to women’s employment and a significant source of discrimination against women.”)
rather than having it foisted upon the mother. Although new parents may still choose to have the mother take on the bulk of the childrearing duties, by allowing them the choice, employers will no longer assume that the woman is the main caregiver and will understand that she can be both a mother and a professional. This will, in turn, create greater equality in the workplace.

This paper will also suggest how the court should decide the Jones Day case and attempt to answer the question raised by the Jones Day lawsuit, which the Supreme Court has not yet had the opportunity to address – whether new mothers may receive more leave following the birth of a child without acknowledging actual disability. Part I will discuss Title VII, the PDA, and the FMLA and how courts have applied those laws to suspect leave policies. Part II will analyze different types of leave policies, and Part III will consider the different legal theories at play, as well as policy consequences of this discrimination. Part IV will propose a potential solution to the issues raised by the Jones Day lawsuit. Specifically, if women are to achieve true equality of opportunity in the workplace, equal caregiving leave should be granted to both new parents. Part V will suggest a possible disposition to the Jones Day parental leave lawsuit.

I. Statutory Background and Other Applicable Case Law

a. Statutory Background: Title VII, the PDA, and FMLA

Discriminatory parental leave policies, as alleged in the Jones Day lawsuit, are principally governed by Title VII. Title VII, a part of the Civil Rights Act of 1964, states in relevant part: “it shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

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26 Id. at 1057. (“Significant paternal use of parental leave . . . lead[s] to a more equal division of child care between mothers and fathers.”)
individual . . . because of such individual’s race, color, religion, sex, or national origin.”28 It created the first “explicit federal statutory prohibition against employment discrimination” of the aforementioned groups of employees.29

Congress later amended Title VII to include the PDA in 1978, which explicitly included pregnancy as a group that was protected by Title VII.30 It now specifies that:

“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.”31

Under the PDA, as with all Title VII provisions, employers may not discriminate against or treat differently an employee who is pregnant.32 Furthermore, if employers offer disability benefits of any kind, they must also offer benefits for pregnancy-related disability.33

The PDA confirms that Congress had intended Title VII to protect all workers from discrimination, including pregnant women.34 The goal of the PDA was “to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”35 Congress also wanted to “address the stereotype that women are less desirable employees because they are liable to become pregnant, and to insure that the decision whether to work while pregnant was reserved for each individual woman to make for herself.”36

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29 Jablczynski, supra note 27, at 317.
34 Gay, supra note 14, at 198.
As the main enforcer of Title VII, the Equal Employment Opportunity Commission (“EEOC”) has also defined how Title VII and the PDA apply to parents, specifically in regard to parental leave.\textsuperscript{37} First, parental leave is required to be offered to “similarly situated” men and women on the same terms.\textsuperscript{38} Second, it is not discriminatory to provide only new mothers with up to 10 weeks of medical or disability leave following the birth of a child.\textsuperscript{39} To that effect, employers need to be vigilant about differentiating between leave for recovery from childbirth and leave for bonding with a new child to be sure that “any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.”\textsuperscript{40} If an employer grants a new mother leave past this period of disability, it must also grant that leave to new fathers – to not do so would be unlawful.\textsuperscript{41} Relatedly, the EEOC has said that it is discriminatory for employers to deny a new father’s request for childcare leave while allowing female employees to take this type of leave.\textsuperscript{42} In summary, the EEOC allows for leave limited to a new mother’s period of disability to be given only to new mothers, while any other leave must be granted equally to both mothers and fathers.

Although it does not directly impact an employer’s decision to provide paid leave to its employees, the policies underlying the FMLA often influence an employer’s parental leave offerings. The FMLA, passed in 1993, provides qualifying employees up to 12 weeks of “unpaid, job-protected” leave per year.\textsuperscript{43} This leave may be used to care for a newborn or newly

\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
adopted child, to care for an immediate family member with a serious health condition, or to take medical leave when the employee is experiencing a serious health condition. Employees must have worked for the employer for a minimum of 1,250 hours over the past 12 months to qualify for this benefit. Congress, in passing the FMLA, outlined a few goals it hoped the legislation would achieve: “to balance the demands of the workplace with the needs of families to promote the stability and economic security of families”; “to entitle employees to take reasonable leave . . . for the birth or adoption of a child”; and “to promote the goal of equal employment opportunity for women and men.”

b. Recent Parental Leave Case Law

One of the marquee cases applying Title VII and the PDA to a parental leave policy is *California Federal Savings and Loan Association v. Guerra*, decided in 1987. In that case, the Supreme Court considered a California statute that required all employers to provide unpaid, pregnancy leave of up to four months and to reinstate pregnant female employees to the job they previously held after they used this leave, effectively treating female employees better than required by the PDA. Employers were to provide this leave even if they did not provide any other type of disability leave. When the employee in that case notified her employer that she was ready to return to work after taking her four-month pregnancy leave, the employer told her they had filled her position, violating the provision of the law that required them to reinstate her. The employer brought an action arguing that the California statute was preempted by Title VII and the PDA.

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44 *Id.*
45 *Id.*
46 Family and Medical Leave Act (FMLA) of 1993, § 2601(b)(3)–(4).
47 *Guerra*, 479 U.S. at 274–75.
48 *Id.* at 298.
49 *Id.* at 278–79.
50 *Id.*
In making its determination, the Court looked to the intent of Congress in passing the PDA.\(^{51}\) The Court held that the statute was not preempted by federal law and that employers could be more protective of pregnancy than of other disabilities.\(^{52}\) Congress had meant for the PDA “to be a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.”\(^{53}\) The Court reasoned that both Title VII, as amended by the PDA, and California’s pregnancy disability leave statute shared a common goal – to guarantee women the right to equal employment opportunities, while also protecting their right to family life.\(^{54}\) The Court, however, emphasized that its holding was limited and that a leave policy still needed to be reasonable.\(^{55}\) Because

“the statute [was] narrowly drawn to cover only the period of \textit{actual physical disability} on account of pregnancy, childbirth, or related medical conditions…[it] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would . . . be inconsistent with Title VII’s goal of equal employment opportunity.”\(^{56}\)

After the Supreme Court’s decision in \textit{Guerra}, the EEOC specified that “the Supreme Court’s decision [in \textit{Guerra}] is not authority for the idea that women may be provided with more generous child care leave opportunities than men.”\(^{57}\) \textit{Guerra} would eventually go on to influence how Congress drafted the FMLA – specifically why the legislation was drafted in gender-neutral terms.\(^{58}\)

\textit{Guerra}’s holding – that pregnancy-related disability is required to be connected to a mother’s need to heal from pregnancy – directly applies to the issue in the Jones Day lawsuit.

\(^{51}\) \textit{Id.} at 285.
\(^{52}\) \textit{Id.} at 292.
\(^{53}\) \textit{Id.} at 285 (quotation marks omitted).
\(^{54}\) \textit{Id.} at 288–89.
\(^{55}\) \textit{Id.} at 290.
\(^{56}\) \textit{Id.}
\(^{57}\) EEOC Compl. Man. § 626.15, Investigating and Processing Pregnancy Discrimination Charges.
\(^{58}\) Suk, \textit{supra} note 24, at 42.
The court must determine whether Jones Day’s policy of allowing women eight extra weeks of leave is “narrowly drawn to cover only the period of actual physical disability.” If the plaintiffs are correct in their argument that Jones Day grants the additional leave automatically to all women regardless of their actual need, they may prevail. Although most women recover from pregnancy after 6-8 weeks, the amount of time required to heal still varies by individual, so the use of disability leave should still be tied to actual disability.

In 1990, Schaefer v. Board of Public Education similarly dealt with a significant period of leave automatically given to new mothers but not new fathers following the birth of a child. In that case, a male employee applied for unpaid “childrearing leave.” A collective bargaining agreement for school employees allowed for one year of maternity leave provided only to new mothers. There was no requirement that the new mother be disabled in order to qualify for the leave. When the male employee applied for leave after the birth of his child, he was denied.

The Third Circuit held that the agreement violated Title VII because it granted leave to new mothers, and not new fathers, for a period that exceeded the period of actual physical disability a woman would experience after childbirth. The court required that a “simultaneous showing of a continuing disability” connected to either the pregnancy or to giving birth be shown in order for a new mother to get longer leave than a new father. This would prevent “preferential treatment of female workers at the expense of male workers.”

59 Guerra, 479 U.S. at 290.
62 Id. at 245, 248.
63 Id. at 248.
64 Id. at 245.
65 Id. at 248. (“[The policy] is . . . per se void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth or related medical conditions.”)
66 Id.
67 Id.
In so holding, the court noted that it disagreed with the lower court’s assessment of *Guerra*. The district court had decided that *Guerra* allowed special treatment of employees who were new mothers without also showing a pregnancy-related disability. The Third Circuit, however, drew attention to the Supreme Court’s emphasis in *Guerra* on the limited nature of the benefits allowed by the statute in that case and how they were limited to “cover only the period of actual physical disability on account of pregnancy.” Since the leave in *Schafer* was granted to new mothers without regard to their actual disability and for a period that far surpassed the time a woman needs to heal from childbirth, it granted more leave to women and discriminated against the male employee on the basis of his sex.

The holding in *Schafer* is particularly relevant to the question at issue in the Jones Day lawsuit. The plaintiffs in the Jones Day case are essentially making the same argument as the employee in *Schafer*—that granting a period of disability that is not connected to the time a new mother actually needs to heal from childbirth violates Title VII. If the plaintiffs in the Jones Day case can show that Jones Day was granting the eight-week period of disability automatically and to mothers who ultimately needed less healing time, they will likely be able to prove that the policy is discriminatory. Supporting this claim, the plaintiffs allege in their complaint that “pregnant female associates can arrange to take 18 weeks paid leave [ten weeks of disability leave plus eight weeks of primary caregiver leave] even before they give birth and thus before they know how long they will be disabled from performing legal work.” If this is true, it would likely be relevant— if not dispositive— evidence for the plaintiffs to rely on because it shows

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68 Id.
69 Id.
70 Id.
71 Id.
73 See *Schafer*, 903 F.2d at 248.
Jones Day grants the leave without regard to how much healing time the mother will actually need.

Most recently, in 2005, the Eighth Circuit dealt with these issues in *Johnson v. University of Iowa*, a case heavily cited by both parties in the Jones Day case. In that case, the employer’s parental leave policy allowed new biological mothers to use up to six weeks of accrued sick leave to cover a period of disability relating to pregnancy or childbirth following the birth of a child without needing to provide documentation of the disability. New biological fathers, however, were not allowed to use any accrued paid sick leave following the birth of a child.

The Eighth Circuit held that the policy was not discriminatory toward new fathers. The court reasoned that because the leave was provided to new mothers because of the physical toll of childbirth, it was “conferred for a valid reason wholly separate from gender,” making the policy not discriminatory. The court noted, however, that if the leave was granted for bonding and caregiving, there would be “no legitimate reason for biological fathers to be denied the same benefit.” In other words, if the employer were to provide new mothers leave not directly related to a disability resulting from pregnancy and did not provide equal leave to new fathers, that would violate Title VII. The court also emphasized that the policy allowed new mothers to use accrued sick leave only for the actual period of disability – they could not use it once the period of disability had ended. Lastly, the court agreed with the employer that it was not

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75 See *Johnson v. Univ. of Iowa*, 431 F.3d 325 (8th Cir. 2005).
76 Id. at 327.
77 Id.
78 Id. at 332.
79 Id. at 328.
80 Id.
81 Id.
82 Id. at 329.
unreasonable to “establish a period of presumptive disability so that it does not need to review medical records for each and every employee who gives birth.”

The holding of Johnson – that a policy is not discriminatory when it allows for a presumptive period of disability leave for mothers following childbirth while not providing similar leave to fathers – is at the heart of the issue in the Jones Day lawsuit. Johnson and the Jones Day case raise nearly identical issues about presumptive periods of disability and whether that presumptive period is limited to the time of actual disability. The fact that the court in Johnson allowed for the employer to “establish a period of presumptive disability” where new mothers did not have to provide documentation about their disability could play a key role in developing a policy that both provides adequate time to new mothers to heal from childbirth, while also not being overly intrusive. Further, at issue with Jones Day’s policy is whether the eight weeks of disability leave the firm allegedly automatically offers is directly connected to a new mother’s actual disability or whether the firm presumes an eight-week period of disability regardless of need. If it is actually connected to a legitimate period of disability, the policy is likely permissible. If the firm presumes a period of disability, the court will have to decide whether it agrees with Johnson or whether it will require some level of evidence of disability.

II. Access to Leave and Types of Parental Leave Policies

As of March 2018, 17% of American employees had access to some type of paid parental leave, while 89% were allowed unpaid leave. Americans are generally supportive of paid parental leave policies – specifically, 69% of Americans support paid paternity leave. Overall,

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83 Id.
about 40% of employers provide paid parental leave.\(^8\)

Only 9% of employers, however, provide paid leave to new fathers.\(^8\)

According to the Department of Labor, about 90% of fathers take some amount of time off work following the birth of a child.\(^8\)

Fathers, however, generally do not take that much time off.\(^8\)

Around 70% of fathers who take time off take only two weeks or less.\(^9\)

The amount of time fathers take off is generally reflective of how much leave they are offered.\(^9\)

According to a study by Boston College’s Center for Work and Family (the “Boston College study”), generally, fathers who were offered two weeks of paternity leave took off two weeks, and fathers who were offered six weeks of leave took off six weeks.\(^9\)

This data “strongly supports the idea that fathers will take advantage of the policies made available to them.”\(^9\)

Employers structure their leave policies in a variety of ways. Generally, employers rely on some combination of three different types of leave – disability leave, parental leave, and nondisability leave.\(^9\)

The EEOC defines pregnancy disability leave as “a form of medical leave allowed to female employees who cannot work because of pregnancy or related medical conditions.”\(^9\)

Further, it defines parental leave as “leave... to develop a healthy parent-child relationship or to help a family adjust to the presence of a newborn... child.”\(^9\)

\(^8\) Stych, supra note 11.


\(^9\) Horowitz, Americans Widely Support, supra note 85.

\(^9\) Harrington, Take Your Leave, supra note 18.

\(^9\) Harrington, Take Your Leave, supra note 18. 64% of fathers who were offered two weeks of leave took the full two weeks; 45% of fathers who were offered six weeks of leave took the full six weeks. Id.

\(^9\) Harrington, Take Your Leave, supra note 18.

\(^9\) Young, supra note 30, at 1191.


\(^9\) Id.
Employers who provide disability leave to new mothers offer it to allow for a period of healing from the physical toll of childbirth. Some employers allow for time off specifically limited to the period of actual disability, “defining the length of the pregnancy disability leave in the same way that disability leave for, [for example], heart attacks . . . [is] defined.”97 Some employers, however, offer a “fixed” disability leave policy for pregnant employees.98 The fixed period ranges depending on the employer, but a female employee who gives birth automatically qualifies for this leave, regardless of her need.99 This appears to be the type of leave at issue in the Jones Day lawsuit.100

Parental leave allows time for employees to bond with and care for their new baby.101 It provides for a period of adjusting to the responsibilities of family life and for “parent-child bonding.”102 New parents also need this leave simply to care for their newborn child.103 Because both parents need this time, this type of leave should be offered to both parents on an equal basis.104 Lastly, some employers allow employees to take nondisability leave to supplement any other leave, usually in the form of unpaid leave or through the use of accrued sick leave or vacation days.

Another way in which employers structure their leave policies is by differentiating between primary and secondary caregivers. In these types of schemes, leave is not granted on an equal basis – primary caregivers get more leave than secondary caregivers.105 New parents should be free to choose which parent will be the primary caregiver and which will be the

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97 Young, supra note 30, at 1191.
98 Young, supra note 30, at 1191.
99 Young, supra note 30, at 1191.
100 Addendum to Compl. at 3, Savignac v. Jones Day, et al.
102 DOL Policy Brief, supra note 88.
103 DOL Policy Brief, supra note 88.
104 EEOC Enforcement Guidance, supra note 37.
secondary caregiver. Jones Day has this type of leave policy, as explained in the plaintiffs’ complaint. Although the specifics of the policies differ by employer, they generally define the primary caregiver as the parent who will be providing the child with the majority of his or her care, while the secondary caregiver will be accompanying or assisting the primary caregiver in caregiving responsibilities. These types of policies generally do not provide an opportunity for the parents to take equal leave, unless the employer allows for secondary caregivers to supplement with vacation time or other types of leave.

Employers who provide leave based on primary versus secondary caregiver status should implement these programs carefully. Although leave structured in this way is facially neutral, “these policies can become infected with bias if employers are[] not careful.” Some go so far as to argue that the primary-secondary distinction should not be used at all because it “perpetuates the idea that parents are not equal partners: one parent will be primarily in charge of caring for the children.” In making parents choose which will act as primary or secondary caregiver, employers are “essentially forcing their employees to conform to traditional, stereotypical gender roles.”

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106 See Dads Reach Historic Paid Parental Leave Class Action Settlement with JPMorgan Chase, ACLU (May 30, 2019), https://www.aclu.org/print/node/90982 (where a father who applied for primary caregiver status was denied because he was not the mother) [hereinafter ACLU].


109 Braden Campbell, Law Firms Court Risk With 2-Tiered Parental Leave Plans, LAW360 (June 7, 2019), https://www.law360.com/articles/1164807/print?section=employment. See also Young, supra note 30, at 1222. (“There is significant evidence that facially neutral primary caregiver policies are unevenly applied.”)

110 Campbell, supra note 109. Some employers go even further than simply applying gendered assumptions to facially neutral policies. A review of major law firms who list information about their parental leave policies in the National Association for Law Placement directory reveals that “the vast majority of firms have assumed that the mother will be the primary caregiver.” Arenstam, supra note 16, at 13.


112 Arenstam, supra note 16, at 15.
This problem was specifically at issue in a class action filed against JPMorgan Chase in 2017 by a father employee who was denied primary caregiver status. When the employee applied for 16-week primary caregiver leave, he was told that “men, as biological fathers, were presumptively not the primary caregiver” and was instead granted two weeks of non-primary parent leave. Although JPMorgan’s policy was gender-neutral on its face, it was administered in a discriminatory way, both perpetuating stereotypes that mothers are primary caregivers and forcing them to take on this role. The class action went on to settle for $5 million in 2019, the “largest-ever sum for a parental-leave discrimination case.” As part of the settlement, JPMorgan agreed it would take steps to guarantee that its parental leave policy is managed in a gender-neutral manner. JPMorgan also increased its nonprimary caregiver leave to 6 weeks of paid leave. Going forward, JPMorgan should be careful to avoid “primary and secondary distinctions [that] . . . reinforce gender stereotypes and continue to promote the outdated notion that families have to choose one primary and one secondary parent.” This case also serves as a reminder to all employers that parental benefits and policies need to be applied equally to all mothers and fathers.

113 ACLU, supra note 106.
114 Mary Beth Ferrante, JPMorgan Chase Settles $5M Parental Leave Case, Commits to Gender Neutrality But Not Equality, Forbes (June 1, 2019), https://www.forbes.com/sites/marybethferrante/2019/06/01/jpmorganchaseparentalleave/#7bbd65694869.
117 Scheiber, supra note 115.
118 Scheiber, supra note 115.
119 Ferrante, supra note 114.
III. Legal Theories for Challenging Unequal Leave

a. Sex Stereotyping

Sex stereotyping is a form of impermissible discrimination based on sex under Title VII. It occurs when employers make assumptions about an employee based on their sex which then impact how they interact with that employee.\textsuperscript{120} Employers in these cases expect an employee to conform to the norms of their sex and to “appear and behave” in accordance with those norms.\textsuperscript{121}

*Price Waterhouse v. Hopkins* is the leading case in this area.\textsuperscript{122} In that case, a female employee of a major accounting firm was passed over for partnership.\textsuperscript{123} During her time working for Price Waterhouse, she received feedback that indicated that, although she was pleasant to work with, she was not the easiest person to work for.\textsuperscript{124} Partners at the firm often told her she was “aggressive” or “brusque.”\textsuperscript{125} Most notably, though, she was told that to increase her chances for making partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\textsuperscript{126} The employee sued under Title VII.\textsuperscript{127}

The Supreme Court held that, although not dispositive, comments based on sex stereotypes may be used as evidence to show that the employee had been discriminated against (i.e. passed over for partnership) because she was a woman.\textsuperscript{128} The employee must demonstrate that the employer “actually relied on her gender in making a decision,” which the stereotype

\textsuperscript{120} Jableczynski, *supra* note 27, at 314.
\textsuperscript{122} See generally Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
\textsuperscript{123} *Id.* at 231–32.
\textsuperscript{124} *Id.* at 234.
\textsuperscript{125} *Id.*
\textsuperscript{126} *Id.* at 235 (quotation marks omitted).
\textsuperscript{127} *Id.* at 232.
\textsuperscript{128} *Id.* at 251.
comments could help show. In discussing why decision-making based on sex stereotypes is discriminatory, the Court noted that

“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

The Court also specifically addressed the “feminine” comments, deciding that it was likely that “the employee’s sex and not her interpersonal skills [were] draw[ing] the criticism.”

Broadly, sex stereotyping, as applied to parental leave, revolves around two roles. First, the father is the “ideal worker” – he is the breadwinner and sole provider for the family and “must sacrifice time with his family so that he can provide for them financially.” Second, the mother is the caregiver. This stereotype assumes that “women should stay at home and shoulder all domestic responsibilities,” including childrearing. She is generally unable to be committed fully to her job because she has children, and, conversely, is seen as a poor caregiver to her children if she continues to work. “Ideal workers” are presumed to not have any family responsibilities because the caregiver ensures that the children and household are attended to.

Although parental leave was meant to help women maintain a presence in the workforce, it has “indirectly reinforced biological differences” and has helped solidify gender stereotypes –

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129 Id.
130 Id. (quotation marks omitted).
131 Id. at 256.
135 Bresnahan-Coleman, supra note 132, at 151; Rimalt, supra note 134, at 986.
137 Young, supra note 30, at 1202, 1207.
that a father’s role is at work, providing for his family, while a mother’s role is at home with her children. When employers offer substantial amounts of leave to new mothers but not new fathers, they are inherently perpetuating these stereotypes. This, in turn, reinforces gender-based discrimination in the workplace because employers assume new mothers will choose their family responsibilities over their job, leading them to be “exclude[d] . . . from the public sphere” and passed over for promotions and other professional opportunities. These effects remain true even when the mother chooses to stay in the workplace. Mothers in dual-earner households still spend more time on childrearing responsibilities than fathers. They also tend to spend more time on household chores – mothers average 18 hours per week, while fathers average just 10.

Fathers, too, can experience sex stereotyping in connection with parental leave. This usually happens when they do not conform to the “ideal worker” stereotype. Employers will deny leave to fathers who want to take parental leave to spend time with their newborn children based on the assumption that they are not suited to be caregivers. Denying fathers this opportunity to give care to their newborn is to the detriment of mothers, fathers, and the baby. It extinguishes fathers’ chance to share in the family responsibilities and to provide care for their new families.

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141 Malin, *supra* note 25, at 1051.
142 McGowan, *supra* note 133, at 1201. Fathers must be breadwinners for their families. Id. at 1202.
144 Alwis, *supra* note 138, at 309 (quotation marks omitted).
In conclusion, unequal parental leave strengthens these discriminatory stereotypes for men and women as fathers and mothers. Without meaningful change to the current regime governing parental leave policies, employers will continue “to hesitate to hire or promote women of childbearing age.” Similarly, fathers will be unable to offer their families the care they would like to provide.

b. Family Responsibility Discrimination

Another prevalent, albeit new, legal theory implicated by parental leave is family responsibility discrimination (“FRD”). FRD is the “strongest and most open form of sex discrimination in the workplace today.” It occurs “when an employee, male or female, is treated adversely because of his or her family responsibilities.” It includes both pregnancy discrimination and discrimination against mothers and fathers. FRD can be alleged under several different statutes, including Title VII, the PDA, and the FMLA.

In these types of cases, employers make decisions based on assumptions about how they think an employee with family responsibilities might act in the workplace, rather than on the employee’s actual behavior and work performance. Employers may also simply assume that the employee has responsibilities as a caregiver within the family. It most frequently occurs when employees have childcare obligations and then receive inferior treatment because of those responsibilities.

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146 Arenstam, supra note 16, at 16.
147 Malin, supra note 25, at 1062.
150 Rimalt, supra note 134, at 1007. See also Jableczynski supra note 27, at 309 and Suk, supra note 24, at 12.
151 Williams & Bornstein, supra note 149, at 1313.
152 Stanford, supra note 148, at 631–32.
153 Alwis, supra note 138, at 312.
154 Kopka, supra note 36, at 50.
obligations. The EEOC recognized this legal theory in 2007. It noted that sex
discrimination and FRD are closely related. It similarly defined FRD as “the disparate
treatment of workers with caregiving responsibilities.”

FRD can either be descriptive or prescriptive. In descriptive cases, “an employer has
untested assumptions about what a [parent] wants or how [he or she] will behave at work.” In
prescriptive cases, “an employer seeks to prescribe how a particular group . . . should behave.”

As applied to mothers, FRD is often discussed in terms of the “maternal wall theory.” Under this theory, employers will assume that a mother has more childcare and household
responsibilities and that she will focus on those responsibilities over her work obligations. Because her employer will assume her time and energy is focused at home, this will lead the
employer to pass her over for promotions and other opportunities. This violates Title VII
which forbids employers from discriminating against female employees because of sex-based
assumptions about “women’s existing or future family caretaking duties diminishing their
productivity or commitment to their work.”

Men in the workplace can also experience FRD. As applied to fathers, FRD often
occurs when the employer operates under the “ideal worker” stereotype. It can also happen
when “employers . . . incorrectly assume that their male employees lack domestic

155 Jablczynski, supra note 27, at 310.
156 EEOC Enforcement Guidance, supra note 37.
157 EEOC Enforcement Guidance, supra note 37.
158 EEOC Enforcement Guidance, supra note 37.
159 Stanford, supra note 148, at 633.
160 Stanford, supra note 148, at 633.
161 Stanford, supra note 148, at 633.
162 Rimalt, supra note 134, at 1008.
163 Rimalt, supra note 134, at 1008. See also Stanford, supra note 148, at 629 and Suk, supra note 24, at 14.
164 Rimalt, supra note 134, at 1008. See also Stanford, supra note 148, at 650.
165 Kopka, supra note 36, at 50.
166 Williams & Bornstein, supra note 149, at 1321.
167 Jablczynski, supra note 27, at 310.
responsibilities.”168 Fathers alleging FRD usually are claiming they were denied the same leave that is granted to women and will bring these claims under Title VII.169 In this type of case, when the plaintiffs are fathers, the fathers reflect a shift in society where “younger generations of men are less interested in sacrificing involvement in their families’ lives for their careers.”170

According to the Boston College study, more than two-thirds of fathers agreed that caregiving should be split evenly between parents.171 Fathers today define being a good father “in terms of both active involvement with their children and meeting their family’s financial needs.”172 Additionally, 71% of Americans agree it is “equally important for new babies to have as much time to bond with their fathers as with their mothers.”173 Fathers are also growing more concerned about work-life balance, with about half of fathers reporting that “the demands of work interfere with family life,” according to the Department of Labor.174 Providing equal paid leave to both new mothers and new fathers will allow them to balance their work and family lives more adequately.175

c. Consequences of Discrimination in Parental Leave Policies

Unless leave policies are restructured to promote more equal childrearing responsibilities, both men and women will be negatively affected. Women will be disadvantaged at all points in their professional careers – from recruitment to advancement.176 This may eventually lead them

168 Kopka, supra note 36, at 51.
169 Jablezynski, supra note 27, at 311.
170 Williams & Bornstein, supra note 149, at 1313. Millennial men are also more interested than past generations in being stay-at-home-dads. Karr, supra note 21, at 235.
171 Harrington, Take Your Leave, supra note 18.
174 DOL Policy Brief, supra note 88.
175 DOL Policy Brief, supra note 88.
176 Alwis, supra note 138, at 310.
to exit the workforce completely. The role of men will continue to be minimized in the home even though they desire to spend more time with their children. Additionally, families that “seek a more equal distribution of parental responsibilities, parent-child bonding, and career opportunities” will be prevented from doing so.

The data detailing the consequences of gender inequality in the workplace is well-documented. A mother with children under the age of 18 earns less than 75-cents for every dollar that fathers make. They also suffer a “wage penalty” of five percent per child. In 2016, the ratio of women's to men's median weekly earnings for full-time workers in all occupations was 81.9 percent. The wage gap between mothers and fathers is also greater than the wage gap between men and women generally.

The negative implications of this discrimination are not limited to pay. They can be seen through the lack of advancement of women into leadership positions. In 2009, only 24% of CEOs were women. As of 2018, only 20% of equity partners of law firms were women, even though they make up over 50% of current law school graduates and approximately 35% of

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177 Alwis, supra note 138, at 310. See also Bambauer & Rahman, supra note 140, at 7 (explaining that because society generally accepts when women leave the labor force, women “have an all-too-appealing opportunity to leave the labor market” when they experience such adversities as discrimination).
178 DOL Policy Brief, supra note 88.
180 Rimalt, supra note 134, at 1001.
183 Rimalt, supra note 134, at 1001.
184 Bambauer & Rahman, supra note 140, at 4.
lawyers at law firms. In the financial sector, women make up 61% of accountants and 53% of financial managers, but only 12.5% of CFOs of Fortune 500 companies.

The fact that women take on the bulk of the responsibilities at home is directly connected to the discrimination they face at work because of these responsibilities. The stereotype becomes self-perpetuating. The more women are encouraged to stay at home with their new babies, the more they “remain confined in the role of primary family caretaker.” If discriminatory parental leave policies allow mothers to spend more time at home, the more they “both gain competence and become known as the one who knows how to perform the relevant tasks, ultimately leading both parents and the children to look to [mothers] for these functions.” Similarly, because women spend more time at home handling family responsibilities, the stereotype of women as caregivers and homemakers is also strengthened, “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.”

The economic effects of the stereotypes are also self-reinforcing. Women stay at home with the children or work part-time because they make less money. However, they also make less money because they do not spend as much time at work. The outcome is a “destructive

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188 Alwis, supra note 138, at 318.
190 Barnard & Rapp, supra note 32, at 130–31. See also Arestam, supra note 16, at 20 (quotation marks omitted).
191 Arestam, supra note 16, at 20 (quotation marks omitted).
192 Arestam, supra note 16, at 20 (quotation marks omitted).
193 Melamed, supra note 143, at 82.
194 Melamed, supra note 143, at 82. See also Suk, supra note 24, at 59. (“The gender wage gap reinforces women’s primary caregiving role in the American . . . family leave regime: . . . it is rational for the lower-paid parent, usually the mother, to take time off of work to care for children.”)
feedback loop.” The stereotypes result in disparities between men and women with respect to their work experience and income, which, in turn, lead to “income-maximizing decisions around parenting, which tend to reinforce gender stereotypes.” These decisions may even lead the mother to leave the workforce completely.

IV. Solution: Equal Leave for All Parents

If true equality in the workplace is to be achieved by women, a reformation of parental leave policies needs to be affected. This reorganization will “remov[e] a significant barrier to women’s employment” – the assumption that women need to remain at home with their children, while men go to work to provide for their families. Without removing this barrier and fighting back against these stereotypes, women’s “roles in the workplace will be subordinate to men.”

In order to increase women’s prosperity and equality in the workplace, fathers need to have more of a chance to provide care at home. Providing fathers this chance, will not only liberate them from the “ideal worker” stereotype, but will also grant women a greater opportunity to achieve equality in the workplace. Leave policies that grant leave only to new mothers will not eliminate discrimination in the workplace because they perpetuate both the “ideal worker” and caregiver stereotypes.

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195 McGowan, supra note 133, at 1202.
196 McGowan, supra note 133, at 1202.
197 O’Brien, supra note 19. However, studies show that women often “feel pushed into . . . [the] choice [to leave the workforce] and would prefer to maintain their careers and a family if a structure existed that allowed them to do so.” Id.
198 Malin, supra note 25, at 1051–52.
199 Malin, supra note 25, at 1052.
200 Malin, supra note 25, at 1065.
201 McGowan, supra note 133, at 1200.
202 McGowan, supra note 133, at 1204.
203 Jableczynski, supra note 27, at 327.
In order to do this, parental leave should be provided on an equal basis. To accomplish this, two things must happen. First, the EEOC should declare that employers may provide a presumptive period of disability leave of up to ten weeks. This step will allow employers to provide new mothers automatically with up to ten weeks of leave to recover from the physical toll of childbirth. Alternatively, an employer may also offer less than ten weeks – any period up to ten weeks will be covered by this presumptive period of disability, and it will be up to the employer’s discretion to decide how much disability leave it would like to offer. Employers may also allow a new mother to take more leave for disability if needed; in this case, the new mother would be required to provide some sort of documentation that she is truly still recuperating from childbirth so as to avoid the very discrimination issues this policy is seeking to cure.

This solution is quite feasible. The EEOC has already said that employers may provide up to ten additional weeks of leave to new biological mothers as long as it is connected to the mother’s actual physical disability resulting from childbirth. However, as noted in the Jones Day lawsuit, employers are often hesitant to require women to show documentation from a medical professional that they are, in fact, still disabled – they do not want to be intrusive or burdensome at a time when a new mother should be focusing on the health of herself and of her new baby. Furthermore, at least the Eighth Circuit has decided that it is not unreasonable to “establish a period of presumptive disability so that [employers] do[] not need to review medical records for each and every employee who gives birth.” By defining a presumptive period of disability, the intrusive, burdensome element of providing documentation is removed. Additionally, a ten-week leave period is also grounded in medical evidence that most women

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204 Arenstam, supra note 16, at 16.
205 EEOC Enforcement Guidance, supra note 37.
207Johnson, 431 F.3d at 329.
need roughly that amount of time to recover from childbirth.\textsuperscript{208} Lastly, it provides a very clear rule for employers to follow in enacting leave policies and for courts to use in assessing the lawfulness of a leave policy.\textsuperscript{209}

The second way leave should be equalized is by providing fathers with leave equal to this presumptive period of disability. This will be done by drawing a comparison between the disability leave granted to new mothers and to FMLA leave. As discussed above, an employee can take FMLA leave to care for an immediate family member with a serious medical condition.\textsuperscript{210} The effects of childbirth are, arguably, a serious medical condition.\textsuperscript{211} Therefore, employers should offer fathers the same amount of leave they offer to mothers for disability, so that fathers can help care for both mother and child. It would be as if the father was taking FMLA leave to take care of a family member or spouse that was suffering from a serious medical condition.\textsuperscript{212} Therefore, if an employer were to offer new mothers the maximum presumptive period of disability leave of ten weeks as discussed above, the employer would also offer new fathers ten weeks of leave to provide care for both the mother and the child.

Childbirth is a significant medical event that requires substantial healing time. Women who give birth via cesarean section, which accounts for about a third of deliveries, require even more time to recover.\textsuperscript{213} Women who give birth vaginally still remain in the hospital for at least 24 hours after giving birth, averaging about a total of two days, while women delivering via

\textsuperscript{208} Recovering from Delivery, supra note 60.  
\textsuperscript{209} Gay, supra note 14, at 193.  
\textsuperscript{210} FMLA, § 2601 (b)(2). See supra Part I.a.  
\textsuperscript{211} Labor and Delivery Recovery After Vaginal Birth, WEBMD, https://www.webmd.com/parenting/baby/recovery-vaginal-delivery#1.  
\textsuperscript{212} Harrington, Take Your Leave, supra note 18. “Mothers need time for their bodies to recover. It would be nice to be home with the mother to assist during this period which work sometimes doesn’t consider.” Id.  
\textsuperscript{213} Karr, supra note 21, at 237.
cesarean section experience an average hospital stay of about 3.5 days. Regardless of how a woman actually gives birth, the post-delivery body endures major changes for two to six weeks following childbirth, and it takes up to 8 weeks, and sometimes longer, for the body to heal. Therefore, it is not unreasonable that the father of the new baby would also take time off to assist the new mother in the healing process, in addition to providing childcare.

This initial period of leave should be paid, especially for new fathers. If the leave is not paid, it becomes significantly less likely that a new father will take it, often because of the “breadwinner” stereotype – the father’s salary is seen as necessary to support the family, while the mother takes time off after giving birth. Studies have shown that “wage replacement . . . strongly influence[s]” whether a new father will take leave. Additionally, according to the Boston College study, the vast majority of fathers (86%) surveyed said they would not take paternity leave unless at least 70% of their salaries were paid.

Lastly, beyond this paid disability leave granted to new mothers and equivalent paid leave granted to new fathers, all other leave provided should be provided equally regardless of gender. Employers who use the primary versus secondary caregiver distinction should do away with it and simply offer the same amount of leave to all parents. If the employer allows

215 Karr, supra note 21, at 237.
216 Harrington, Take Your Leave, supra note 18.
218 Harrington, Take Your Leave, supra note 18. 45% of new fathers indicated that they would need to be paid their full salary in order to take paternity leave. Id.
219 See Dylan Jackson, Are Parental Leave Policies Innovative or Just Expected Now?, THE AMERICAN LAWYER (Aug. 7, 2019, 3:10PM), https://www.law.com/americanlawyer/2019/08/07/are-parental-leave-policies-innovative-or-just-expected-now/. International law firm Sidley Austin recently removed its prior policy of distinguishing between primary and secondary caregivers and now provides all parents with the same amount of leave. Id.
220 Gay, supra note 14, at 194.
one parent to use accrued sick leave or a certain amount of unpaid leave, they should allow both parents to use that leave.

By encouraging equal leave, new parents will take back the choice of how to balance childrearing and career. They will be able to choose the roles each parent plays. If they want to split parenting duties equally, they will be able to do that. If they want the father to take on the bulk of the family responsibilities, they will have that option as well. Lastly, if they want the new father to forego some or all of this additional leave and the new mother to be the primary parent, adopting traditional gender roles, they can make that choice too.\(^{221}\) The important factor is that the parents have the choice of how to handle their responsibilities. By allowing them this choice and employers not merely assuming that mothers will take on primary parenting duties, gender stereotypes will be assuaged, and women will move toward a more equal workplace.

Studies have shown that when more leave is granted to new fathers, they are more likely to take the amount of time off they are given.\(^{222}\) Specifically, one study showed that after Quebec started offering five weeks of paid leave to new fathers, within two years of the province adopting the policy, 75% of new fathers were taking paternity leave, up from 22%.\(^{223}\) Therefore, it is arguable that by simply providing fathers with more leave, they will be encouraged to take it.

Some scholars have proposed compulsory solo paternity leave policies in order to help eliminate these stereotypes.\(^{224}\) These types of policies, however, do not give parents the choice about how to raise their children – they simply force the new father to take on responsibilities for

\(^{221}\) Bambauer & Rahman, \textit{supra} note 140, at 29. (“Many men and women are still proponents of traditional gender roles.”)


\(^{223}\) \textit{Id. See also} Popper, \textit{supra} note 89.

\(^{224}\) McGowan, \textit{supra} note 133, at 1203.
a period of time. Without true, meaningful choice as to how to balance childrearing, gender equality cannot be achieved.\textsuperscript{225}

By encouraging equal leave, new fathers will not only be allowed to take leave, they will be encouraged to take on more family responsibilities.\textsuperscript{226} The more time fathers take off, the more they will participate in responsibilities at home by choice.\textsuperscript{227} The connection between the women’s stereotypical role in the home and inequality at work can be transformed only by leave policies that encourage more fathers to voluntarily get involved in taking care of their children at home.\textsuperscript{228}

This policy will also advantage families as a whole. Numerous studies have shown that children greatly benefit from the presence of both of their parents.\textsuperscript{229} A father’s presence in an infant’s life “decreases the chances of behavior problems in boys, emotional problems in girls, and delinquency in both.”\textsuperscript{230} Further, studies have shown that children who have a strong paternal presence are considerably more likely “to do well in school, have healthy self-esteem, exhibit empathy and pro-social behavior, and avoid high-risk behaviors.”\textsuperscript{231} These positive effects “are not only because the children have involved parents, but also because fathers, in particular, have shaped their development.”\textsuperscript{232} Benefits to the child’s health have also been documented when a father takes paternity leave.\textsuperscript{233} Conversely, without having a father present

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\textsuperscript{225} Contra Bambauer & Rahman, supra 140, at 25. (“An option to stay at home may be a privilege. But in practice, it is a trap . . . rob[bing] women who are well-suited to professional careers of the resilience and grit that help them succeed.”)
\textsuperscript{226} Rimalt, supra note 134, at 978.
\textsuperscript{227} Adam Burtle & Stephen Bezruchka, supra note 217.
\textsuperscript{228} Alwis, supra note 138, at 320.
\textsuperscript{229} Karr, supra note 21, at 226.
\textsuperscript{230} Karr, supra note 21, at 240.
\textsuperscript{231} Melamed, supra note 143, at 58.
\textsuperscript{232} Melamed, supra note 143, at 58.
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in their lives, children suffer from increased likelihood of “behavior problems, . . . youth crime, [and] poor academic performance.”

Further, in regard to quality of childcare, there is no reason fathers should not equally contribute. There is no evidence to show that mothers are “biologically, genetically, or otherwise inherently superior at nurturing and caring for children,” so there really is no objective benefit to a mother being the main caregiver. The assumption that mothers are better caregivers is based on the fact that they go through pregnancy and childbirth, but “parenting is something learned by doing.” Mothers generally only become “better” at parenting because they have more time to practice it due to longer periods of leave. By providing fathers with more leave, that barrier of lack of “practice” is removed, parents will have more equal abilities, and employers will no longer assume that the mother is the “better” caregiver.

Women’s lives will also benefit from increased paternal involvement. Mothers whose partners take parental leave have increased wages and lower levels of depression after childbirth. In the workplace, both mothers and fathers benefit from equal parental leave. “Recruitment, retention, and employee motivation, resulting in increased productivity” result from allowing leave. Additionally, if the mother and father are married, studies have shown that when fathers take paternity leave the couples’ risk of divorce drops and “remain[s] significantly lower for as many as six years” after the birth of the child.

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234 Karr, supra note 21, at 240.
235 Malin, supra note 25, at 1054.
236 Malin, supra note 25, at 1055; Rimalt, supra note 134, at 983.
237 Malin, supra note 25, at 1055.
238 Jablezynski, supra note 27, at 330; Malin, supra note 25, at 1059.
239 Karr, supra note 21, at 225–26.
240 Karr, supra note 21, at 239.
241 Popper, supra note 89.
By adopting equal leave policies for both parents, employers will benefit in a number of ways. First, equal leave policies are clearly on the correct side of the law, so employers will significantly lower the risk of a lawsuit resulting from their leave policy. The combination of a presumptive period of disability and completely equal leave allows for employers to develop leave policies they know to be lawful. Second, as expectations surrounding work-life balance and parents more equally sharing childrearing responsibilities continue to grow stronger, equal paid leave policies will likely provide employers with “an advantage in employee recruitment and retention.”242 Lastly, employers will be promoting all of the benefits to new parents, babies, women, and society discussed above.

V. **Disposition of the Jones Day Lawsuit**

The answer to the Jones Day lawsuit lies in the holding of *Johnson v. University of Iowa*. As discussed above, the Eighth Circuit in that case held that a policy that allowed new biological mothers to use up to six weeks of accrued sick leave during a presumptive period of disability following childbirth, while not offering similar leave to fathers, was not discriminatory.243

As applied to the Jones Day policy, the court will need to determine a few factual questions before it decides whether to apply this holding. First, does Jones Day’s policy adopt an eight-week period of presumed disability, where a mother can use up to eight weeks of disability without documentation but must stop when the period of disability ends, or does the firm grant the eight-weeks of leave automatically regardless of disability? If the answer is the latter, the court should find that the policy impermissibly discriminates against fathers on the basis of sex because it offers leave only to mothers, not for recovery from the physical toll of childbirth, but for bonding and childcare. If the answer is the former, the court will next have to

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243 *Johnson*, 431 F.3d at 327, 329, 332.
determine if it agrees with the holding of *Johnson* that presumed periods of disability are permissible and if eight weeks is a reasonable period of presumptive disability.

As to the first question, Jones Day argues that their leave policy “offers leave only for the period of actual disability and then adopts a rebuttable presumption that the birth mother’s doctor has certified an eight-week post-partum disability period.” Therefore, they offer leave for a presumptive period of disability that ends when the mother’s doctor says she is no longer disabled. Jones Day directly compares their policy to the one at issue in *Johnson*, claiming that both its policy and the one in *Johnson* “are lawful because it is not unreasonable, much less discriminatory, to establish a period of presumptive disability.” The plaintiffs, however, argue that the eight weeks of disability leave “are given categorically to *every* new mother simply for being a woman, regardless of whether she is disabled for eight weeks from working.” Thus, they argue that the leave is in no way tied to actual disability as required by law and is automatically granted to all new mothers. This, in turn, “reflects and imposes sex-based stereotypes and archaic gender roles.”

As to the following questions, as justified in Part IV above, the court should allow for a presumptive period of disability with eight weeks constituting a reasonable amount of time. By allowing new mothers a presumptive period of disability, employers will avoid the burden and privacy invasion of requiring women to provide documentation of their disability.

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247 Id. at 5.
248 See supra Part IV.
Additionally, the eight weeks Jones Day allows for “is within the range of post-partum recovery time that courts have described as standard” making it a reasonable period of time.250

**Conclusion**

Mothers should not have to choose between their role as a parent and their role as a professional.251 Parental leave policies that grant more time to women force them to make this decision, often compelling them to subordinate their career in the face of family responsibilities, that fathers simply are not given the time to take on.252 These policies perpetuate the stereotype that women are best at home taking care of their children, which leads to discrimination in the workplace.253 Similarly, for fathers who want to spend more time with their kids, their hands are often forced too.254

By providing mothers and fathers with equal leave time, everyone will benefit. Parents will benefit by breaking free of these stereotypes. They will also be able to make the choice about how each balances work and childcare, rather than their employers assuming that the mother will take on the bulk of the work.255 Women will no longer be primarily thought of as caregivers, allowing them to move toward greater equality in the workplace. Fathers will be able to take the leave they need to be able to contribute to childcare at the level they would like. Employers will also benefit by increased retention and productivity in their employees.

Parents should have the choice about how to raise their children and how to spend their time at work. By allowing them, specifically women, this choice, women and mothers will be able to achieve greater equality in the workplace.

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251 Karr, supra note 21, at 232.
252 Malin, supra note 25, at 1065.
253 Melamed, supra note 143, at 55.
254 Malin, supra note 25, at 1094.
255 Young, supra note 30, at 1210. (“Those working to increase equity in leave policies seek to ensure that parents of both genders have meaningful choice in the way they structure their work and family lives.”)