

So You Want to Have a Second Child? Second Child Bias and the Justification-Suppression Model of Prejudice in Family Responsibilities Discrimination

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INTRODUCTION

“Discrimination against pregnant women and caregivers potentially affects every family in the United States.”¹

“What is killing women today is motherhood. And that’s just indefensible. In a country that is so committed to family values, that is indefensible.”²

“Even if a new mother and her employer can cope with one child, the second baby is often the final straw.”³

A senior female associate at a regional office of a national law firm is the mother of a three-year-old boy. She had handled complex litigation throughout her career—both before and after having her first child—and had received stellar performance reviews at every turn. Upon telling the managing partner of the litigation section that she is

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1. Testimony of P. David Lopez, General Counsel to the EEOC, to meeting of EEOC Commissioners, Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm>.

2. Testimony of Joan Williams, Founding Director, Center for WorkLife Law, to meeting of EEOC Commissioners, Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm>.

3. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 102 (2010).

expecting her second child, her career at the firm comes to a screeching halt. The managing partner tells her: “You are welcome to come back to this firm after your second child is born. But you will be off of the partner track and you will have to come back as *of counsel*. With this second child, you have hit the ceiling here.”⁴

A female, the mother of a two-and-a-half-year old child, recently made partner at a regional litigation firm. She tells the managing partners that she is expecting her second child and then works until the day that she goes into labor. On the first day she is back in the office after maternity leave—a date well known to the managing partners—she finds that there is no work for her. Over the next two years, the partner is pushed to the margins of the firm, both in terms of work assignments and decision-making. She is relegated to associate-level and sometimes paralegal-type work. She is told by a managing partner, prior to a client meeting set for after working hours: “I know that you like to go home right at five o’clock, so you don’t need to be at the client meeting tonight.” She is later fired from the firm, allegedly for performance reasons, although such reasons have never been previously raised and in spite of her performance reviews being consistently positive throughout her seven years at the firm.⁵

These stories are stark examples of an emerging type of family responsibilities discrimination (“FRD”) known as the “second child bias.” FRD occurs when employees who are also caregivers—most commonly, mothers—experience employment discrimination based on their caregiving activities and responsibilities. The discrimination results from employers’ stereotypes and biases about women generally and mothers in particular. The second child bias (“SCB”) describes the circumstance where mothers report little or no discrimination in the workplace until they have their second child, at which time they experience FRD.

4. Experience of an associate at a regional office of a national law firm, as told to the author.

5. Experience of a partner at a regional law firm, as told to the author.

This article explores the prevalence and causes of SCB. It argues that the second child bias arises from a discrete and unique stereotype about mothers of more than one child—what I will call the second child stereotype—by employees, employers, attorneys, courts, law-makers, and policy-makers. Naming this specific stereotype and the resulting second child bias and recognizing its impact in the employment discrimination context is important on several levels. First, it is important on a legal level: employment discrimination that results from the bias should be recognized as a cognizable harm under Title VII and other federal, state, and local laws. Its unique characteristics should lead courts to conclude that a “comparator”⁶ is not required in Title VII disparate treatment FRD cases generally and in SCB cases specifically. While some courts have begun to reach this conclusion in FRD cases (instead holding that “stereotype” evidence is a sufficient substitute for “comparator” evidence),⁷ recognizing the SCB will advance the argument that comparators should not be required in FRD cases. Second, it is important on a policy level: introducing the concept of the SCB into the continuing dialogue about employment discrimination will serve to further deepen and broaden the understanding of employers, legislators, and individuals about the nature of discrimination and its manifestation. This understanding will lead to more effective and efficient “fixes” to the problem through employers’ internal policies, through lawmaking and/or rulemaking, and through consciousness-raising in individuals. Third, it is important on a normative level: naming the discrete second child stereotype and resulting bias is a powerful tool in the larger fight to end employment discrimination based on family responsibilities because labeling previously hidden phenomena effects a

6. In a Title VII sex discrimination case, a “comparator” is an individual who is similarly situated to the plaintiff in all ways except biological sex. Comparator evidence traditionally has been required for a plaintiff to prevail in a Title VII sex discrimination claim. *See, e.g., Thomas v. Austal, U.S.A., L.L.C.*, 829 F. Supp. 2d 1162, 1173-74 (S.D. Ala. 2011).

7. *See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125-26 (2d Cir. 2004).

shifting of norms, raises consciousness, and engenders legal and social change.

Part I summarizes the state of the law for FRD claims, as well as situates this project within the current body of FRD legal scholarship. Part I also describes the current data on SCB. Part II frames the SCB phenomenon within the context of two psychological phenomena: implicit bias and the Justification-Suppression Model of the expression of prejudice. Part III argues the importance of recognizing the second child stereotype and resulting SCB as a unique manifestation of FRD. It grounds this explanation in the work of Joan Williams and Nancy Segal,⁸ and within the framework of Cary Franklin's notion of the "malleability of the 'traditional concept' of sex discrimination."⁹ Part IV concludes the article with a call for studies directed specifically at gathering additional data on the SCB.

I. FROM THE "GLASS CEILING" TO THE "MATERNAL WALL:" THE EVOLUTION OF FAMILY RESPONSIBILITIES DISCRIMINATION

A. *The Current State of the Law*

1. Family Responsibilities Discrimination Defined

Family responsibilities discrimination, sometimes referred to as 'caregiver discrimination,' is an "umbrella term for numerous kinds of workplace discrimination."¹⁰ It occurs when "an employee suffers discrimination at work

8. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 80 (2003) [hereinafter *Beyond the Maternal Wall*].

9. See Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1373-78 (2012).

10. Debra S. Katz, Continuing Legal Education Seminar Report, American Law Institute–American Bar Association Recent Developments: Sex Discrimination and Family Responsibility Claims (Mar. 5, 2009), <http://kmblegal.com/publications/recent-developments-sex-discrimination-and-family-responsibility-claims/>; see also Joan C. Williams & Consuela A. Pinto, *Emerging Discrimination Claims: Family Responsibility Discrimination*, in PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 505 (2008) [hereinafter *Emerging Discrimination Claims*].

based on biases about how employees with caregiving responsibilities will or should act.”¹¹ FRD cases share these common characteristics: (1) an employee alleges that her¹² caregiving responsibilities triggered an adverse action; (2) the adverse action occurred because of the employer’s implicit biases or stereotypes concerning caregivers; and (3) “smoking gun” evidence in the form of employers’ statements concerning the competency of caregivers (usually mothers) in the workplace.¹³

The “maternal wall” is the most common type of FRD. As described by Joan Williams and Nancy Segal,¹⁴ “maternal wall” discrimination differs from “glass ceiling” discrimination. For decades, women have litigated “glass

11. Katz, *supra* note 10; see also Cynthia Thomas Calvert, *The New Sex Discrimination: Family Responsibilities*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 33, 34-35 (2009) (“FRD occurs when an employee suffers an adverse action that affects the terms and conditions of her employment based on unexamined biases about how women with family caregiving responsibilities will or should act.”).

12. While FRD claims certainly include male caregivers, the vast majority of FRD cases involve women/mothers. In fact, between 88 and 92 percent of FRD cases are filed by women. See Lauren Block Mullins, *Balancing Work and Family: How Does Family Responsibilities Discrimination Affect Career Advancement?* 15 (May 2012) (unpublished Ph.D. dissertation, Rutgers University) (on file with author); E-mail from Cynthia Calvert, Senior Advisor, Center for Worklife Law, to the author (Mar. 8, 2013, 6:15 PM) (on file with author). As a result, this article focuses on FRD and the SCB vis-à-vis women. Moreover, while the author recognizes that FRD (and, presumably, the SCB) impacts mothers differently depending on their race, ethnicity, sexual orientation, and socio-economic position, the Article does not explore the different impact of the SCB along these lines. See JOAN C. WILLIAMS & HEATHER BOUSHEY, CENTER FOR AM. PROGRESS & WORKLIFE L., *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE* 45, 57, 63 (2010), available at <http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf> [hereinafter *THREE FACES OF WORK-FAMILY CONFLICT*]; Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1377-78 (2008) (discussing the effect of sexual orientation and race on the motherhood penalty). Rather, the Article’s goal is to introduce the concept of the SCB into the ongoing scholarly dialogue concerning FRD. While an analysis of the intersection of race, sexual orientation, socio-economic status and the SCB is important, it is outside the scope of this Article.

13. *Emerging Discrimination Claims*, *supra* note 10, at 509.

14. *Beyond the Maternal Wall*, *supra* note 8, at 77.

ceiling” cases, in which they argue that stereotypes based on *sex*, and sex alone, produced employment discrimination that thwarted them from attaining the highest levels of their professions.¹⁵ In the last decade, however, a new type of gender discrimination case has emerged: employment discrimination cases brought by mothers based on *caregiving status* rather than based on sex alone. These plaintiffs experience discrimination “not because they are women but because they are mothers.”¹⁶

The impacts of the maternal wall are real and have potential effects on a vast number of working mothers. While only 47 percent of mothers with children under the age of eighteen participated in the work force in 1975, by 2007 that number had risen to 71 percent.¹⁷ A leading study of professional women found that “mothers were 79 percent less likely to be hired, 100 percent less likely to be promoted, offered an average of \$11,000 less in salary, and held to higher performance and punctuality standards than women with identical resumes but no children.”¹⁸ In short, working women who become mothers will be viewed in a different light than their childless colleagues as well as paid far less than their childless colleagues.¹⁹

Moreover, social scientists estimate that mothers are paid seven percent less for every additional child they have.²⁰ However, because this number is based on individuals who worked the same number of hours, the

15. Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287, 287-88 (2003).

16. *Id.* at 287.

17. ELLEN GALINSKY, KERSTIN AUMANN & JAMES T. BOND, FAM. & WORK INST., TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME, 2008 NATIONAL STUDY OF THE CHANGING WORKFORCE 4, 5 (2011), available at http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf.

18. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 12, at 58 (citing Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1316, 1326 (2007)).

19. ROBERT W. DRAGO, STRIKING A BALANCE: WORK, FAMILY, LIFE 4 (2007).

20. Michele Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOCIOLOGICAL REV. 204, 204-05 (2001).

figure significantly minimizes the cost of parenting. The chief reason that becoming a mother negatively impacts earnings is that women often reduce their working time after having children or withdraw from paid work altogether.²¹ Over the course of their lifetimes, middle-income working women who have children lose over a half a million dollars in earnings, while women with a college degree who have children lose more than a million dollars in earnings.²²

FRD is largely explained by the clash between the “ideal worker” model and stereotypes and biases about women as caregivers. The “ideal worker” is one who has no demands outside of work, including no caregiving responsibilities, such that he can dedicate himself completely to his work.²³ The ideal is grounded in the “male model of work” that assumes the presence of a stay-at-home wife and mother.²⁴

21. JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 111-12 (Harvard University Press 2004).

22. *Id.* at 111.

23. PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 82-83 (University of California Press 2007).

24. *Id.*; see also DRAGO, *supra* note 19, at 10 (illustrating the “ideal worker” norm with the following vignette: “[I]n many professional workplaces, if a man announces that a new baby is on the way, he is typically congratulated. A woman making the same announcement may similarly be congratulated, but she will also likely be asked ‘how soon are you quitting?’ The presumption that she will no longer seek to function as an ideal worker means that she had crossed this particular line with a few simple words.”); *id.* at 52-53 (“I often take my daughters to conferences and meetings as a way to integrate paid work and family, and responses from colleagues have almost always been positive. It helps that I am a man, because women often avoid bringing children in order to be taken seriously as academics. When women take children to meetings, the motherhood norm kicks in, and they risk being seen as less-than-ideal workers. When men do the same thing, however, we are seen as fitting the ideal worker norm, but with a cute hobby in the form of raising children.”).

The statistics about earnings losses for working mothers, coupled with the “ideal worker” model belie the recent spurt of stories in the mainstream press that professional women are *voluntarily* “opting out” of the workforce based on a desire to embrace traditional caretaking roles at home. See STONE, *supra* note 23, at 82 (“As women talked about their jobs, the picture that emerged was not about choices and options but about constraints and limits, about failed efforts or about efforts that never got off the ground. On becoming mothers, women had fewer and fewer alternatives. Their options narrowed; their ‘choice’ to quit,

FRD is based on stereotypes and related biases rather than on the performance of an individual employee.²⁵ *Biases* are the opinions or beliefs that affect a person's ability to make a particular, objective, and fair judgment or decision; they are a personal opinion applied to a particular situation or person.²⁶ *Stereotypes* are oversimplified opinions that do not account for individual difference. Stereotypes come in several forms.²⁷

"Descriptive" stereotypes are those that purport to predict what men and women "will" do, such as the assumption that mothers do not work as hard as other employees and that men work harder than women in general.²⁸ These stereotypes arise from societal beliefs about what men and women *can* do.²⁹ Discrimination based on descriptive stereotypes takes place when women are considered incompetent to perform a "masculine" job.³⁰ This kind of discrimination thus can be reduced by learning more about the individual woman in a particular job.

while 'free' was hardly 'full.' If family was the rock, the workplace was the hard place of the double bind."); *id.* at 101 ("Women's reasons for quitting today reveal that the time demands and inflexibility of professional occupations in combination with the gendered nature of parenting create a kind of de facto motherhood bar. Put differently, being a woman in a man's world isn't the problem it used to be, being a mother is. From the reasons women give for quitting, it is easy to divine the existence of a motherhood bar based on workplace inflexibility.").

25. *Emerging Discrimination Claims*, *supra* note 10, at 510-13; *see also* Calvert, *supra* note 11, at 35 ("Assumptions and stereotypes are key elements of most FRD cases.").

26. Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414, 416 (2003).

27. *See id.*

28. Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW., 293, 296 (2007) [hereinafter *Don't Get Caught Off Guard*].

29. Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616, 619 (2010) [hereinafter *Normative Discrimination*].

30. *See id.*

“Prescriptive” stereotypes are ones that incorporate notions of what women and men “should” or “should not” do, such as when an employer terminates a new mother because she “should” be at home to care for her baby.³¹ Similar to descriptive stereotypes, prescriptive ones dictate that men act immodestly and with agency, while women act communally but in an unassertive way.³² Prescriptive stereotypes are based on norms; thus, people tend to disapprove of those who violate them.³³ Prescriptive stereotypes can be “hostile”—“If you were my wife, I would not want you working after having children”³⁴—or can be “benevolent”—such as when employers make decisions on behalf of a mother-employee, based on uninvestigated assumptions, such as when a top-performing lawyer was not offered a promotion based on her employer’s assumption that she did not want to travel.³⁵

One such stereotype is that once a woman becomes a mother, her competing interests—caregiving and working—lead to a decline in the quality of her work. This stereotype is sometimes called the “lack of fit”—an assumption that a particular (usually high-powered)³⁶ job is inappropriate for a mother.³⁷ It is also known as “role incongruity.”³⁸ This

31. *Don't Get Caught Off Guard*, *supra* note 28, at 296-97.

32. *Normative Discrimination*, *supra* note 29, at 619.

33. *Id.* at 619-20 (“Men who do not behave agentically tend to be viewed as unmasculine and subjected to a variety of sanctions. Similarly, women who do behave agentically are evaluated negatively on a number of dimensions.”) (citations omitted).

34. *Id.* at 621.

35. *Don't Get Caught Off Guard*, *supra* note 28, at 297.

36. For example, this kind of stereotyping is particularly prevalent in large law firms. See Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2274 (2010) (“This specific stereotype is related to the generic stereotype that women ought to stay at home and raise their children but takes a life of its own in the context of the large law firm. Its emphasis is not on care for children but rather disloyalty to the firm and its clients. . . . [T]he assumption . . . [is] that those women lawyers are not paying enough attention to their work and are distracted by their commitment to their role as mothers.”).

37. Katz, *supra* note 10, at 1; see also Benard et al., *supra* note 12, at 1367. (“The lack of fit model begins with the observation that there is little overlap

stereotype is exemplified by the following question posed by a supervisor to a subordinate attorney: do you want to be “a successful mommy or a successful lawyer?”³⁹ The stereotype can lead to supervisors assuming that mothers have lower competence,⁴⁰ or in fact giving them lower performance reviews than non-mothers.⁴¹

For those mothers who are able to work part-time or flex-time after having children, a common stereotype is that they are less committed to work than their full-time colleagues.⁴² This stereotype about part-time or flex-time working mothers can lead to what is known as “attribution and leniency bias.”⁴³ One illustration of this bias is in the assumptions made when a worker is absent from the office: when a part-time working mother is absent from the office, it is assumed that she is with her children even if, in fact, she is at an off-site business meeting. However, when a childless working woman or working father is absent from the office, it is not assumed that he or she is with children.⁴⁴ This stereotype may lead to mothers receiving lower quality work assignments as well as low performance reviews—even when their performance is as strong as it was prior to becoming mothers.⁴⁵ One study showed that mothers are

between stereotypes about women and the stereotypical requirements of traditionally male jobs.”).

38. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 401, 430-36 (2003).

39. *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, P.C.*, 123 F. App'x. 558, 561 (4th Cir. 2005).

40. This is known as a ‘negative competence assumption’ which ‘assumes that mothers are not as competent as women without children and men.’ See *Don't Get Caught Off Guard*, *supra* note 28, at 297.

41. See *id.* at 298.

42. *Beyond the Maternal Wall*, *supra* note 8, at 92, 97-98; see also Benard et al., *supra* note 12, at 1379; *THREE FACES OF WORK-FAMILY CONFLICT*, *supra* note 12, at 54.

43. This ‘lack of commitment’ stereotype also affects mothers who work full-time. See EEOC Guidance materials *infra* note 46.

44. *Id.*

45. *Id.*

judged as significantly less competent than childless women.”⁴⁶

2. The Legal Landscape for Family Responsibilities Discrimination Claims

Other scholars, in particular Professor Joan Williams of the WorkLife Law Program at the University of California Hastings College of Law, have written extensively about the current legal landscape of FRD claims. These scholars have provided extensive roadmaps to employees’ attorneys for asserting FRD claims (and prophylactic advice for management-side attorneys), including exhaustive reviews of the types of claims that may be asserted by FRD plaintiffs and the federal, state, and local statutes under which such claims may be asserted.⁴⁷ Because this important work has already been done, the goal of this Article is not to exhaustively describe the FRD landscape for SCB claims. Rather, the article adds to the already robust body of scholarship on FRD with the addition of the new, discrete concept of the second child stereotype and the resulting SCB. Therefore, this part includes only a brief overview of the current state of the law for FRD claims.

There is no federal Equal Employment Opportunity (“EEO”) statute that expressly prohibits FRD; those statutes only prohibit discrimination based on a protected

46. See Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1316 (2007).

47. See Family Responsibilities Discrimination, WORKLIFELAW, http://worklifelaw.org/pubs/FRD_Fact_Sheet.pdf (last visited March 1, 2013); see also STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CTR. FOR AM. PROGRESS & WORKLIFE LAW, CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION, (Dec. 2009) [hereinafter CAREGIVERS AS A PROTECTED CLASS?]; CYNTHIA THOMAS CALVERT, CTR. FOR AM. PROGRESS & WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010 (2010) [hereinafter LITIGATION UPDATE 2010]; MARY C. STILL, CTR. FOR AM. PROGRESS & WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2006); *Beyond the Maternal Wall*, *supra* note 8; *Don't Get Caught Off Guard*, *supra* note 28, at 296-97; *Emerging Discrimination Claims*, *supra* note 10, at 515-33.

characteristic, such as sex or race.⁴⁸ However, FRD has been recognized by courts when a worker with caregiving responsibilities is discriminated against based on a protected characteristic under federal EEO law.⁴⁹ The Equal Employment Opportunity Commission (“EEOC”) has explained: “Although the federal EEO laws do not prohibit discrimination against caregivers *per se*, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.”⁵⁰

In fact, in 2007 the EEOC issued guidance on what it calls “caregiver discrimination.”⁵¹ The guidance explains that FRD discrimination can manifest, for example, when an employer selects fathers, but not mothers, for a training program.⁵² It further advises that FRD can occur when an employer makes an assumption based on a stereotype, such as when an employer assigns a less desirable project to a mother based on the assumption that a mother is not as committed to her job as is a father.⁵³

The EEOC guidance also suggests that evidence about stereotyping may be sufficient to prove discrimination, even in the absence of a comparator or comparative evidence.⁵⁴

48. *Questions and Answers about EEOC’s Enforcement Guidance on Unlawful Treatment of Workers with Caregiving Responsibilities*, EEOC, http://www.eeoc.gov/policy/docs/qanda_caregiving.html (last updated May 23, 2007); see also *Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011); *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC, <http://www.eeoc.gov/policy/docs/caregiving.html> (last modified Feb. 8, 2011).

49. See *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra* note 48.

50. *Id.*

51. *Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC (Jan. 19, 2011), <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

52. See *Emerging Discrimination Claims*, *supra* note 10, at 510-11.

53. *Id.*

54. *Id.* (“All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.”). A “comparator” or “comparative evidence” traditionally has been

Such stereotypes may provide sufficient evidence for a plaintiff to prevail on a FRD claim, “even when an employer acts upon such stereotypes unconsciously or reflexively.”⁵⁵

The EEOC is on solid doctrinal ground in advising that FRD claims may be proved by stereotype evidence rather than comparator evidence. Over two decades ago, the United States Supreme Court held that discrimination based on sex stereotypes is prohibited under Title VII of the Civil Rights Act of 1964. In *Price Waterhouse v. Hopkins*, the Court held that Hopkins’ employer violated Title VII when it denied her a promotion because she was negatively perceived by her co-workers and supervisors for lacking stereotypical feminine traits.⁵⁶ These gender-nonconforming traits included using profanity, being “aggressive,” brusque, “unduly harsh,” and “impatient,” and having a “macho” appearance.⁵⁷ One supervisor advised her that, to get promoted to partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁵⁸ The Court held: “In the specific context of sex stereotyping, an employer who

required for a plaintiff to prevail in a Title VII sex discrimination claim. Historically, courts have consistently demanded that “sex discrimination plaintiffs produce opposite-sex comparators—individuals who are similarly situated to themselves in all salient respects aside from biological sex.” Franklin, *supra* note 9, at 1311. “This requirement has a devastating effect on plaintiffs’ ability to win sex-based Title VII claims, as adequate comparators are very rarely available in the contemporary workplace.” *Id.* This Article contends that the ultimate adoption of the SCB by courts will continue to chip away at the stronghold of the comparator “requirement.”

55. Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRd”: Families Responsibility Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1355 (2008); see also Testimony of Joan Williams, *supra* note 2. (“A comparator in a caregiving case is very often the same woman before she had kids. Often another comparator is the treatment of women with children and the treatment of women without children. . . . [O]ne of the dramatic things about these cases is that, although nobody says ‘This is not a suitable job for a woman,’ unfortunately—this is the need for outreach—people often say, ‘This is not a suitable job for a mother.’ That is evidence of discrimination, even in the absence of a comparator.”).

56. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989).

57. *Id.* at 235.

58. *Id.*

acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work."⁵⁹ As for the legal relevance of sex stereotyping, the court held:

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 "[i]n 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."⁶⁰

More recently, in 2003, the Court again recognized that gender stereotypes can lead to workplace discrimination; this time, however, the Court recognized that principle in the caregiving context. In *Nevada Department of Human Resources v. Hibbs*, Mr. Hibbs requested leave from the Nevada Department of Human Resources under the Family Medical Leave Act to care for his ailing wife.⁶¹ Although the employer granted the leave, Mr. Hibbs failed to return to work after exhausting that leave, after which the Department fired him.⁶² Mr. Hibbs sued the Department for alleged violations of the FMLA.⁶³

Although the question presented to the Court was whether the FMLA was a valid exercise of Congress's power under the Fourteenth Amendment,⁶⁴ the Court addressed the issue of impermissible gender stereotyping in the workplace.⁶⁵ Writing for the majority, Justice Rehnquist⁶⁶

59. *Id.* at 250-51.

60. *Id.* at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)).

61. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003).

62. *See id.* at 725-26.

63. *Id.* at 725.

64. *Id.* at 725-26.

65. *Id.* At 728-32.

66. Justice Rehnquist, who is not known as a jurist sympathetic to gender discrimination claims, came to this decision after he had to pick up his

acknowledged that Congress, by enacting the FMLA, had sought “to protect the right to be free from gender-based discrimination in the workplace.”⁶⁷ Moreover, continued the majority, Congress had evidence that state-offered parental leave for fathers was rare, and that “[t]his and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”⁶⁸ The Court then stated:

The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant. . . . Congress had already tried unsuccessfully to address this problem through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act. Where previous legislative attempts have failed . . . such problems may justify added prophylactic measures in response. . . . By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.⁶⁹

Finally, and importantly for FRD claims, the majority noted that the “faultline between work and family” is “precisely where sex-based overgeneralization has been and remains strongest.”⁷⁰

In holding that employers may not take adverse actions against employees based on sex and gender stereotypes, the Supreme Court has paved the road for successful FRD claims, including, I argue, for SCB claims even in the absence of a comparator. And, as seen below, FRD plaintiffs have, in fact, been successful in claims based on stereotypes as well as biases (both express and implicit),

grandchild from a child care facility because his daughter had to work. See Mike Dorf, *Federalism Versus Politics*, DORF ON LAW (May 20, 2010), <http://www.dorfonlaw.org/2010/05/federalism-versus-politics.html>.

67. *Hibbs*, 538 U.S. at 728.

68. *Id.* at 731.

69. *Id.* at 722-23.

70. *Id.* at 738.

notwithstanding the lack of comparator evidence. One example is *Back v. Hastings on Hudson Union Free School District*,⁷¹ in which the holdings of *Price Waterhouse* and *Hibbs* came together to support a trial court's holding that a plaintiff did not need to present comparator evidence where her evidence of gender stereotyping was sufficient to prove a *prima facie* case and survive summary judgment.⁷²

Attorneys have asserted FRD claims under state and local laws, as well as under the following federal statutes: Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), the Pregnancy Discrimination Act ("PDA"), and the Employment Retirement Income Security Act ("ERISA").⁷³ The most common FRD legal theories under these statutes are: failure to hire; failure to promote; denial of benefits; denial of or interference with FMLA rights; retaliation for exercising FMLA rights; hostile work environment; and wrongful discharge.⁷⁴

a. Title VII

Disparate Treatment. Title VII is the most commonly used statute in FRD cases.⁷⁵ Title VII claims for sex discrimination include "disparate treatment" claims and "disparate impact" claims. FRD cases most often rely on "disparate treatment" claims, under which an employer will be found liable if the plaintiff proves intentional discrimination of a protected class of employees ("sex" in the FRD context).⁷⁶ Employees can prove such intentional discrimination with either direct evidence or with circumstantial evidence.⁷⁷

71. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125-26 (2d Cir. 2004).

72. *See id.* at 120-21.

73. *See generally Don't Get Caught Off Guard*, *supra* note 28.

74. *Emerging Discrimination Claims*, *supra* note 10, at 514-15.

75. *Don't Get Caught Off Guard*, *supra* note 28, at 299.

76. *Id.* at 299, 308.

77. *Green v. School Bd. of Hillsborough Cnty., Fla.*, 25 F.3d 974, 978 (11th Cir. 1994).

Plaintiffs relying on circumstantial evidence must satisfy the three-pronged approach articulated in *McDonnell Douglas Corp. v. Green*.⁷⁸ First, a plaintiff must establish a *prima facie* case of discrimination.⁷⁹ Second, the defendant employer must produce evidence of a legitimate non-discriminatory reason for its actions; if the employer meets this burden, the presumption of discrimination dissipates.⁸⁰ Third, the plaintiff must present facts to show an inference of discrimination, which the plaintiff may do by presenting evidence that the defendant's allegedly non-discriminatory reasons are a pretext for discrimination.⁸¹

The first prong of a *prima facie* case requires that the plaintiff demonstrate that she is a member of a "protected class."⁸² In most FRD cases, "sex" is often not a meaningful protected class because plaintiffs usually assert that they were treated differently because they are women *with children* or *with caregiving responsibilities*—rather than receiving different treatment *solely* because they are a woman—and women and men without these obligations are treated differently.⁸³ Thus, some FRD plaintiffs have pursued the "sex-plus" theory of disparate treatment established by the Supreme Court in *Phillips v. Martin Marietta Corp.*,⁸⁴ although the use of the "sex-plus" theory has diminished in recent years as courts have become more accepting of stereotyping theories.⁸⁵ Regardless of the label placed on the FRD claim, the key question in a disparate

78. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

79. *Id.* at 802.

80. *Id.*

81. *Id.* at 804.

82. *Id.* at 802.

83. See *Don't Get Caught Off Guard*, *supra* note 28, at 299.

84. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971). In *Martin Marietta*, an employer refused to allow mothers of school-age children to apply for jobs that were open to men with young children. The employer claimed it did not discriminate against women because it hired women, provided they did not have school-age children. The Supreme Court held that treating men with children and women without children the same did not excuse discrimination against women with children. See *id.*

85. See *Don't Get Caught Off Guard*, *supra* note 28, at 300, 302.

treatment claim is whether the plaintiff has put forth sufficient evidence to prove intentional discrimination based on gender.⁸⁶

As discussed above, Title VII law has developed such that stereotypes about mothers or women as caregivers and sex-based comments may constitute evidence of intentional discrimination,⁸⁷ even in the absence of comparator evidence.⁸⁸ This development of law concerning stereotypes means that a plaintiff is no longer required to expressly rely on a sex-plus theory: it is possible for plaintiffs to prevail in FRD disparate treatment claims “simply by alleging that they were discriminated against because they are mothers, a subset of the protected class of women. Thus, the sex-plus theory is no longer the only way to prove an FRD gender discrimination claim.”⁸⁹

Disparate Impact. In contrast to a disparate treatment claim, a disparate impact claim does not require a plaintiff to prove discriminatory intent on the part of the employer.⁹⁰ FRD disparate impact claims under Title VII require plaintiffs to show that certain facially neutral policies have a disparate impact on female caregivers.⁹¹

86. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001).

87. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (holding that where there is evidence of gender stereotyping, plaintiff need not put forth comparator evidence in order to prove a *prima facie* case and survive summary judgment); *Plaetzer v. Borton Automotive, Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n. 3 (D. Minn. Aug. 13, 2004) (citing *Back*, 365 F.3d at 121) (holding that although plaintiff did not allege a “sex-plus” claim, parental status is a plus factor where the “employer’s objection to an employee’s parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible.” “[S]uch treatment is gender based and is properly addressed under Title VII.”).

88. *Back*, 365 F.3d at 130.

89. *Don’t Get Caught Off Guard*, *supra* note 28, at 302.

90. See *Beyond the Maternal Wall*, *supra* note 8, at 134.

91. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (articulating the “business necessity” requirement in a race discrimination case; holding that black plaintiffs stated employment discrimination claim under Title VII where evidence demonstrated facially neutral hiring policies had discriminatory effect on black workers).

Examples include sick leave policies that prohibit workers from using sick days to care for sick family members, limits on leave or absences within a prescribed time period, compensation structures that reward or penalize employees based on the quantity of work rather than the quality of work, and definitions of “full-time” work as requiring 50 or more hours per week.⁹² Some FRD plaintiffs have successfully pleaded disparate impact claims.⁹³

The Pregnancy Discrimination Act (“PDA”). The PDA was added to Title VII in 1978.⁹⁴ Pregnancy discrimination complaints with the EEOC, which are a large subset of FRD cases, have seen a 65 percent increase between 1992 and 2007.⁹⁵ The PDA directs that “women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or

92. *Don't Get Caught Off Guard*, *supra* note 28, at 308. This definition of “full time” work “excludes close to all mothers and, therefore, nearly 78% of working women.” *Id.*

93. *See, e.g., Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 811-15 (5th Cir. 1996) (the plaintiff was a licensed vocational nurse who tried to return to her position at a hospital after complications from her pregnancy required her to miss approximately one month of work. Her employer refused to allow her to return to work on the grounds that her pregnancy disqualified her from being able to lift 150 pounds. The hospital had a policy prohibiting any employee from returning to work after a medical leave with medical restrictions. A second policy provided that employees on medical leave for more than six months were subject to termination. The plaintiff would be in the eighth month of her pregnancy at the end of the six months. The plaintiff argued that the lifting requirement was artificial and that no nurse was actually required to lift that amount as part of his or her work. The defendant claimed that lifting 150 pounds was a bona fide job requirement, but admitted that it did not test any current employees or job applicants to determine whether they could perform this task. After trial, the court granted the hospital's motion for judgment on the basis that the plaintiff had failed to make out a claim for disparate treatment. On appeal, the case was remanded for consideration under the disparate impact theory, even though plaintiff had not provided any statistical comparison demonstrating a disparate impact).

94. *See* 42 U.S.C. §2000(e)(k) (2006).

95. NAT'L P'SHIP FOR WOMEN & FAMILIES, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 2 (2008), *available at* http://www.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf.

inability to work.”⁹⁶ The PDA was enacted to rebut the assumption that women are less desirable employees because they may become pregnant, as well as to preserve for every woman the choice of whether to work while pregnant.⁹⁷ Under the Act, an employer may not take adverse action against a pregnant employee based on an assumption that she will not be able to fulfill a job’s expectations.⁹⁸ By definition, all PDA cases are FRD cases because pregnant women are caregivers. Thus, PDA claims have been successfully asserted in numerous FRD cases.⁹⁹

Retaliation. “FRD retaliation cases require the same elements of proof as a general Title VII retaliation claim.”¹⁰⁰ These elements are: (1) the plaintiff engaged in a protected activity (such as filing an informal complaint to supervisors, engaging in an internal grievance procedure, filing a charge of discrimination, or bringing suit), (2) an adverse employment action occurred (such as firing, failure to promote, reassignment with vastly different responsibilities, or a major change in benefits), and (3) a causal link exists between the protected activity and the adverse employment

96. *Don't Get Caught Off Guard*, *supra* note 28, at 303; 42 U.S.C. § 2000e(k).

97. *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (quoting *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) and *Int'l Union, United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991)).

98. *Don't Get Caught Off Guard*, *supra* note 28, at 303.

99. *See, e.g., Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1154-55 (8th Cir. 2003), in which plaintiff alleged she was subjected to a hostile work environment in violation of the PDA because she was a woman who had been pregnant and taken maternity leave, and may become pregnant again. *Id.* at 1154. After she returned from maternity leave, her supervisor told her “you better not get pregnant again,” threw a telephone book at her with instructions to find a pediatrician who was open after hours, scrutinized her hours, increased her workload without additional pay, and posted notes on her cubicle when she was absent stating her child was sick. *Id.* at 1155. The defendant argued Walsh was alleging parent or caretaker discrimination, which is not protected by Title VII. The Eighth Circuit disagreed, finding sufficient evidence to support a jury verdict for plaintiff based on a violation of the PDA. *Id.* at 1158-62. The Center for WorkLife Law’s database of cases contains approximately 3,300 cases, and most of them are PDA cases; plaintiffs have succeeded in more than half of PDA cases. *See* E-mail from Cynthia Calvert, *supra* note 12.

100. *Don't Get Caught Off Guard*, *supra* note 28, at 306.

action.¹⁰¹ The Supreme Court's broad definition of "adverse action" in the 2006 retaliation case of *Burlington Northern and Santa Fe Railway Company v. White*¹⁰² ("BNSF") has impacted FRD retaliation claims.

In *BNSF*, the Court defined the harm required to demonstrate that an employment action was "adverse" in order for the plaintiff to prevail in a retaliation claim.¹⁰³ The Court articulated the following standard: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse" *in light of the particular circumstances* surrounding the action, which means that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"¹⁰⁴ The result of this standard is that a lateral transfer, which under prior retaliation case law would not have been actionable as an "adverse action," may in some instances be a materially adverse action to state a cognizable claim under Title VII. To illustrate this concept, the Court used a family responsibility example: it noted that while a change in a worker's schedule in many instances would make little difference to an employee (and thus not be materially adverse), such a change could "matter enormously" to a mother with school-age children, thus rendering the schedule change a materially adverse action.¹⁰⁵

The Court's use of this caregiver example raises the possibility that other actions in the caregiver discrimination setting will be considered 'adverse,' and thus expand the situations in which a plaintiff may prevail in an FRD

101. See 42 U.S.C. § 2000e-3(a) (2006).

102. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-68 (2006).

103. *Id.* at 68.

104. *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

105. *Id.* at 69. The Court thus adopted the findings in *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 659-663 (7th Cir. 2005) (holding, in race discrimination/retaliation case where plaintiff worked flexible schedule to care for her son with Down syndrome, that plaintiff could support retaliation claim with evidence that defendant forced her into a lateral transfer that required a standard schedule; court noted that while such transfer is not ordinarily an adverse action, for plaintiff, the change was significant).

retaliation case. Examples of other actions that could be adverse to caregivers include transferring an employee to an office that results in a longer commute, putting an employee on a rotating schedule, or ceasing an employee's telecommuting arrangement.¹⁰⁶ The application of the *BNSF* definition of "adverse action" to FRD cases will be an important issue to watch in the future.

b. Family and Medical Leave Act of 1993 ("FMLA")

The FMLA permits eligible employees of employers covered by the Act to take unpaid, job-protected leave for specified family and medical reasons.¹⁰⁷ Eligible employees are entitled to take up to twelve weeks of unpaid leave in a twelve-month period for: (1) the birth of a child and to care for the newborn child within one year of birth; (2) the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, child, or parent who has a serious health condition; or (4) a serious health condition that makes the employee unable to perform the essential functions of his or her job.¹⁰⁸

An FRD plaintiff may state a claim under the FMLA when she gives birth to or is the caregiver for an ill family member and suffers some adverse consequence as a result.¹⁰⁹ FRD plaintiffs have been successful in bringing cases under both types of FMLA claims: interference with FMLA rights and retaliation for exercising FMLA rights.¹¹⁰

106. *Don't Get Caught Off Guard*, *supra* note 28, at 307.

107. *See Beyond the Maternal Wall*, *supra* note 8, at 147.

108. 29 U.S.C. § 2612(a) (2009).

109. *See Beyond the Maternal Wall*, *supra* note 8, at 147-48.

110. *Don't Get Caught Off Guard*, *supra* note 28, at 310-12; *see also* *Liu v. Amway Corp.*, 347 F.3d 1125, 1132-38 (9th Cir. 2003) (holding that defendant-employer interfered with plaintiff's FMLA leave by pressuring her to reduce her leave and using her leave as negative factor in company's decision to terminate her; while on maternity leave, plaintiff's supervisor repeatedly pressured her to reduce her leave time); *Batka v. Prime Charter, Ltd.*, 301 F. Supp. 2d 308, 314-17 (S.D.N.Y. 2004) (holding plaintiff's evidence—that supervisor became antagonistic toward her and critical of her work after she told him that she was pregnant and intended to return to work at the end of her maternity leave, that

c. Americans with Disabilities Act (“ADA”)

The ADA prohibits workplace discrimination on the basis of disability.¹¹¹ The EEOC has interpreted the ADA’s “association” provision to prohibit discrimination targeted at a mother or other caregiver who takes time off from work to care for a family member with a disability.¹¹² Thus, FRD plaintiffs have been successful in bringing ADA claims where they prove that they were discriminated against because they care for a person with a disability.¹¹³ However, a hurdle in using the ADA to prevail in an FRD case is that the family member needing care must be an individual with a “disability” as defined by the ADA.¹¹⁴ Some FRD plaintiffs have succeeded in asserting caregiver claims under the ADA.¹¹⁵

while on leave defendant sent her a severance package, and she was terminated two weeks before she was scheduled to return from FMLA leave—defeated defendant’s summary judgment motion on plaintiff’s FMLA retaliation claim).

111. 42 U.S.C. § 12112(a) (2009).

112. *Questions and Answers about the Association Provision of the Americans with Disability Act*, EEOC, http://www.eeoc.gov/facts/association_ada.html (last modified Feb. 2, 2011).

113. *See Beyond the Maternal Wall*, *supra* note 8, at 149.

114. An individual is “disabled” under the ADA if the person has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or [has been] regarded as having such an impairment.” 42 U.S.C. § 12102 (2009). This hurdle is less significant since the ADA was amended in January 2009 to expand the scope of the definition of disability. *See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC, http://www1.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm?renderforprint=1 (last visited June 16, 2013); *see also The ADA Amendments Act of 2008: Frequently Asked Questions*, U.S. DEPT OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm> (last visited June 16, 2013).

115. *See, e.g., McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 325-27 (E.D. Pa. 1997) (denying defendant-employer’s motion for summary judgment on plaintiff-employee’s ADA association clause based on plaintiff’s allegations that defendant involuntarily transferred her from full-day teaching position to half-day teaching, half-day resource aid position after birth of her disabled son, that a less qualified teacher without a child was selected to fill her full-time position, and evidence of discriminatory animus against working mothers and mothers of children with disabilities by principal of the school; plaintiff relied on “sex-plus”

d. Employee Retirement Income Security Act of 1974
("ERISA")

ERISA has been used by FRD plaintiffs in three circumstances: "(1) to challenge refusals to hire or terminations based on employers' fears of high health insurance premiums where employees' dependents have serious medical conditions; (2) to obtain pension credits denied them due to personnel policies that required them to stop working if they became pregnant; and (3) to [challenge] an employer's decision to terminate a pregnant employee to prevent her from using maternity leave benefits."¹¹⁶ These causes of action are brought pursuant to section 510 of ERISA, which states in relevant part: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."¹¹⁷

e. The Equal Pay Act ("EPA")

The EPA prohibits wage discrimination on the basis of sex.¹¹⁸ To state a successful EPA claim, a plaintiff must show that the employer paid men and women different wages for performing "equal work" in jobs that require substantially "equal skill, effort, and responsibility, and which are performed under similar working conditions."¹¹⁹ In FRD cases, a plaintiff may be able to state an EPA claim "[when her] employer pays part-time employees less than their full-time counterparts who are performing essentially the same job and where part-time workers are

theory of discrimination, alleging that transfer was based on unfounded stereotypes concerning role of mothers of disabled children).

116. *Don't Get Caught Off Guard*, *supra* note 28, at 315-16.

117. 29 U.S.C. § 1140 (2006).

118. 29 U.S.C. § 206(d) (2007).

119. *Graham v. Texasgulf, Inc.*, 662 F. Supp. 1451, 1464 (D. Conn. 1987) (quoting 29 U.S.C. § 206(d)(1)).

disproportionately represented by women and/or women with children.”¹²⁰

It is not just part-time working mothers who may have EPA claims. EPA claims that might be asserted by full-time working mothers include (1) lower pay for the same work as a non-mother, (2) denial of bonuses after returning to work from maternity leave, and (3) pay *cuts* upon return to full time work after taking maternity leave.¹²¹

f. State and Local Causes of Action

There are a number of state and local laws that expressly cover FRD claims. As of 2009, there were at least 63 local laws in 22 states that “go beyond state and federal law to expressly prohibit discrimination at work against those who are also caregivers at home.”¹²² Several states are considering legislation that would add “family responsibilities” to their anti-discrimination statutes.¹²³

In addition to state and local statutes, state common law is also a significant source of FRD law. Plaintiffs have asserted FRD claims for wrongful discharge, breach of contract, tortious interference with contract, infliction of

120. *Don't Get Caught Off Guard*, *supra* note 28, at 318; *see also* Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 614-16, 621 (E.D. Va. 2003) (rejecting application of “categorical rule” barring comparisons between part-time and fulltime workers because “such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts”; plaintiff alleged defendant violated EPA by compensating her, a part-time female employee who had recently returned from maternity leave, at a lower rate than a full-time male employee who performed equal work).

121. *See, e.g.*, EEOC v. Lumpy LLC, No. CV-06-0830-PHX-SRB, 2008 U.S. Dist. LEXIS 123674, at *20-21 (D. Ariz. 2008) (denying, in part, defendant’s motion for summary judgment on plaintiff’s EPA and Title VII claims; holding plaintiff’s evidence that her supervisor told her that “she could renegotiate her salary after he pregnancy” along with evidence that plaintiff was “compensated at a rate below that afforded to her male counterparts” created question of fact to defeat summary judgments against some, but not all, defendants).

122. CAREGIVERS AS A PROTECTED CLASS?, *supra* note 47, at 1.

123. *See generally* CAREGIVERS AS A PROTECTED CLASS?, *supra* note 47.

emotional distress, invasion of privacy, and promissory estoppel.¹²⁴

g. Executive Order 13152

On May 2, 2000, then-President Clinton signed Executive Order 13152. The Order amended EEO law for federal employees by prohibiting employment discrimination based on a federal employee's "status as a parent."¹²⁵ This category includes biological parents, adoptive parents, foster parents, stepparents, legal custodians, in loco parentis, and those who are in the process of seeking custody or adoption.¹²⁶ Though the remedies are more limited than those available under statutes,¹²⁷ it is nonetheless another avenue for federal employees to pursue for relief from FRD.

h. Key Holdings in Family Responsibilities
Discrimination Cases

The following is a summary of some of the key holdings in FRD cases over the past decade.

• A jury awarded a woman who was pregnant with twins, and who was already a mother to two young children, over \$2 million after her employer: (1) placed her on immediate, involuntary and unpaid medical leave within an hour of learning of her pregnancy; (2) rejected her application for another position in the company; (3) ignored her doctor's express statement that she could continue to work; and (4) terminated her.¹²⁸

124. E-mail from Cynthia Calvert, *supra* note 12.

125. Exec. Order No. 13152, 65 Fed. Reg., 26,115 (May 2, 2000); *see* CAREGIVERS AS A PROTECTED CLASS?, *supra* note 47, at 4.

126. Exec. Order No. 13152, 65 Fed. Reg. 26,115 (May 2, 2000).

127. The remedies include a commitment that the unlawful conduct will cease and corrective action will take place; that an equivalent job placement will be provided; that there will be make-whole relief for lost earnings; and the possibility of recovering reasonable attorney fees. *See* 29 C.F.R. § 1614.501(a)(1)-(5), (e) (2012).

128. *Lopez v. Bimbo Bakeries USA, Inc.*, No. A119263, 2009 WL 1090375, at *1-6 (Cal. Ct. App. Apr. 3, 2009).

• A court of appeals reversed the trial court's grant of summary judgment to an employer-defendant, holding that the then-pregnant plaintiff has established a *prima facie* case of discrimination by showing that the employer: (1) made comments reflecting a belief that plaintiff would not return to work following maternity leave; (2) informed plaintiff that he would not have hired her had he known that she would be taking maternity leave so soon; and (3) suggested that she use the company's phones to look for a new job.¹²⁹

• A pregnant employee prevailed on summary judgment after showing that her employer terminated her for pretextual reasons—for allegedly violating a “no call/no show policy”—because other non-pregnant employees were not terminated for violating the policy.¹³⁰

• A working mother was awarded over \$1 million in damages in a failure to promote case after proving that her employer: (1) admitted she was qualified for the promotion; but (2) assumed that she did not want the promotion because she had children and he assumed she did not want to relocate her family; and (3) stated, when asked by plaintiff why she was not promoted: “[because] you have kids.”¹³¹

• A working mother with four children survived her employer's motion for summary judgment after showing that her supervisor (1) scheduled her for erratic work hours instead of a set schedule, (2) made comments about how his wife did not have childcare problems, (3) kept notes on her “offenses,” which he did not do with other employees, (4) told her that she should “do the right thing” and stay home with her children, and (5) told her that, as a woman with a

129. *Frederickson v. Noble Venture*, No. A05-1107, 2006 WL 696471, at *1-2 (Minn. Ct. App. Mar. 21, 2006).

130. *Garcia v. Monument Mgt. Group*, No. 4:05CV3139, 2006 U.S. Dist. LEXIS 32218, at *4-5 (D. Neb. 2006).

131. *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 981-82 (W.D. Wis. 2003), *aff'd*, 383 F.3d 580, 583 (7th Cir. 2004). The damages award was later reduced.

family, she would always be at a disadvantage in the company.¹³²

• A court held that use of stereotypical assumptions about a mother's commitment to her job, standing alone, constitutes sex discrimination in violation of Title VII in a case where the plaintiff showed (1) she had received outstanding performance reviews until she became a mother, (2) that she was denied tenure because of her family responsibilities, and (3) that her supervisors made comments such as it was "not possible" for her "to be a good mother and have this job," and that they "did not know how she could perform her job with little ones."¹³³

• A jury awarded a working mother \$625,000 in damages after she proved that, upon her return from maternity leave, her employer (1) scrutinized her work hours when no other employee's hours were scrutinized, (2) refused to allow her to leave to pick up her sick child from daycare, and (3) threw a phone book at her with a direction to find a pediatrician who was open after hours.¹³⁴

The number of FRD cases has skyrocketed in the past decade. The Center for WorkLife Law has documented a 400 percent increase in FRD claims in the last decade as compared to the prior decade.¹³⁵ This increase in FRD cases (in contrast to the steady decrease in the number of other employment discrimination cases filed in federal district courts since 1998)¹³⁶ is attributed to several factors, including an increase in the number of working mothers, an increased awareness of employees of their rights (likely driven by the media), and the Civil Rights Act of 1991,

132. *Plaetzer v. Borton Automotive, Inc.*, No. Civ.02-3089 JRT/JSM, 2004 WL 2066770, at *1, 11 (D. Minn. Aug. 13, 2004).

133. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 114-17 (2d Cir. 2004).

134. *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1155 (8th Cir. 2003).

135. *STILL*, *supra* note 47, at 7; LITIGATION UPDATE 2010, *supra* note 47, at 9; *see also* testimony of Joan Williams, *supra* note 2 ("The Center for WorkLife Law has run a caregiver hotline for over a decade, and we have a database of over 3,000 caregiver discrimination cases.").

136. LITIGATION UPDATE 2010, *supra* note 47, at 9.

which increased the availability of damages and jury trials.¹³⁷

B. *What the Maternal Wall Teaches Us About the Second Child Bias: Situating the Present Article Within the Current Body of Family Responsibilities Discrimination Scholarship*

Much has been written about FRD over the past decade, resulting in a robust body of legal scholarship on this issue. This scholarship has been descriptive and prescriptive.¹³⁸ This Article fits within the existing body of FRD scholarship by articulating an emerging and discrete form of FRD—the SCB—and arguing that recognizing SCB will advance the struggle to end FRD in significant normative, legal and social ways.

First, this Article builds on and adds to the comprehensive survey of FRD contained in Joan Williams’s and Nancy Segal’s 2001 article, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*.¹³⁹ It expands the kinds of FRD claims by defining and describing the SCB—including its causes and manifestations—by describing the status of SCB cases in current precedent and explaining the importance of expressly recognizing the SCB as a discrete subset of FRD.

Second, it fits squarely within the newly carved-out space within Title VII scholarship and jurisprudence created by Cary Franklin’s 2012 article, *Inventing The “Traditional Concept” of Sex Discrimination*.¹⁴⁰ Franklin’s article describes the common observation by courts, when

137. *Id.*

138. While scholars tend to agree about the prevalence and problem of FRD, there is disagreement among scholars about the “right” approach to addressing FRD. Compare Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001), and *Beyond the Maternal Wall*, *supra* note 8, with Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV L. REV. 642 (2001), and Mary Becker, *Caring for Children and Caretakers*, 76 CHICAGO-KENT L. REV 1495 (2001).

139. 26 HARV. WOMEN’S L.J. 77 (2003).

140. 125 HARV. L. REV. 1307 (2012).

interpreting and applying Title VII in sex discrimination cases, that Title VII has no legislative history concerning the scope and meaning of “sex” discrimination and the resulting position of courts that discrimination “based on sex” must be restricted to a “traditional concept” of sex discrimination.¹⁴¹ She describes this “traditional concept” of sex discrimination as referring only to practices that “divided men and women into two groups, perfectly differentiated along biological sex lines.”¹⁴² The result of this “traditional concept” approach would be the failure of a plaintiff’s Title VII sex-discrimination claim unless the plaintiff could produce the perfect comparator and then prove the discrimination.¹⁴³

Franklin then reviews the historical events—legal, social, and political—surrounding the enactment of Title VII’s “because of sex” provision and concludes that the “traditional concept” of sex discrimination long-relied-on by courts is, simply, an “invented tradition.”¹⁴⁴ She notes that, even today, this “traditional concept” of sex discrimination impacts Title VII common law by encouraging the continuing demand by courts that sex discrimination plaintiffs produce opposite-sex comparators.¹⁴⁵ “This requirement has a devastating effect on plaintiffs’ ability to win sex-based Title VII claims, as adequate comparators are very rarely available in the current workplace.”¹⁴⁶ Courts’ adherence to the invented “traditional concept” of sex discrimination leads to a rejection by the judiciary of “normative considerations [that] should influence the determination of what counts as discrimination ‘because of sex.’”¹⁴⁷ Put another way, courts’ insistence that Congress

141. *Id.* at 1317.

142. *Id.* at 1309.

143. *See id.* at 1367.

144. *See id.* at 1311-15 (An “invented tradition” “[refers] to social practices that purport to be old, or imply continuity with the past, but are actually quite recent in origin.”).

145. *Id.* at 1311.

146. *Id.*

147. *Id.* at 1359.

defined “discrimination” objectively, by reference to formal policies and practices, results in court decisions that restrict Title VII’s reach in sex discrimination claims by ignoring social considerations and value judgments that, if considered, would expand the definition of what “counts” as sex discrimination.¹⁴⁸

Franklin next argues that in contrast to courts’ stubborn lip-service to the limiting “traditional concept” of sex discrimination, in actuality, courts have “never consistently adhered to an anti-classification conception of sex discrimination.”¹⁴⁹ She uses the “sex-plus” doctrine of Title VII to demonstrate that the concept of sex discrimination under Title VII is, in fact, malleable and not rigidly confined to the “traditional concept” of sex discrimination.¹⁵⁰

Franklin concludes that the “traditional concept” of sex discrimination articulated by courts over the past 35 years is itself a legal fiction, and is merely just one argument in a lengthy and continuing deliberation about the extent to which Title VII should push back on cultural norms that dictate distinct family roles based on gender.¹⁵¹ As a result, the contours of Title VII’s prohibition of sex discrimination have never been stable.¹⁵²

In illustrating the malleability of Title VII’s “because of sex” provision, Franklin’s article creates normative and doctrinal space for the articulation and recognition of additional FRD theories and claims. My description of the second child stereotype and resulting SCB, and argument

148. *See id.* at 1359-60. Because this traditional concept approach uses a “formalistic conception of discrimination” by only being concerned with whether a challenged employment practice “sorts men and women along the axis of biological sex[,]” it is not concerned with “the social meaning or practical effects of the challenged employment practice.” *Id.* at 1368.

149. *Id.* at 1373.

150. *See id.* at 1373-74.

151. *See id.* at 1378-80.

152. *See id.* at 1378-79; *see also* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (holding that same-sex sexual harassment is actionable under Title VII, thus illustrating that what “counts” as sex discrimination is malleable).

for its express recognition within the FRD framework, fills in some of the space created by Franklin's malleability theory of Title VII's sex discrimination provision. And the assertion of the SCB theory as a claim in Title VII cases will add to and further the "long-standing, and ongoing, debate about how hard Title VII should press against the social norms" of sex roles in families.¹⁵³ Injecting the SCB into the dialogue about social norms, stereotypes, and Title VII will put another arrow in Title VII's quiver and take aim at both the nuanced, often implicit, second-child *stereotype*, and the resulting destructive and discriminating second child *bias*.

C. *The Prevalence of Second Child Bias Claims*

There appear to be no published court decisions that asserted a claim under a theory specifically described as a "second child bias." While some cases, discussed below, addressed factual scenarios that involved a claim of discrimination after the birth of a woman's second child, no party or court labeled that claim using the rubric of "second child bias." The Article argues below that recognizing the SCB as a unique bias arising out of a discrete stereotype, and carving out a specific claim for the SCB, is an important project for legal and normative reasons.¹⁵⁴

Notwithstanding the paucity of claims specifically characterized as the SCB, other sources indicate that such a bias exists, and that claims specific to the bias are emerging. For example, recent articles aimed at practitioners and human resources professionals have mentioned the SCB as one of three "key case trends" in FRD.¹⁵⁵ One of these publications describes the emergence of

153. *Id.* at 1380.

154. *See infra* Part III.

155. *See, e.g.*, LITIGATION UPDATE 2010, *supra* note 47, at 2-3; Charlotte N. Sweeney & Rachel E. Ellis, *Family Responsibility Discrimination: Enforcing the Rights of Caregivers in the Workplace*, 41 COLO. LAW. Oct. 2012, at 39; John Hyman, *Caregiver Discrimination, Three Years Later*, OHIO EMPLOYER'S LAW BLOG (May 6, 2010), <http://www.ohioemployerlawblog.com/2010/05/caregiver-discrimination-three-years.html>; *see also* Sylvia Hsieh, *Plaintiffs' Lawyers, EEOC See Rise in Pregnancy Bias Claims*, NEW ENGLAND IN HOUSE (Mar. 21, 2012), <http://newenglandinhouse.com/2012/03/21/plaintiffs%E2%80%99-lawyers->

the SCB: “Plaintiffs’ lawyers also say they are noticing more claims from women pregnant with their second child. ‘For executives or higher paying jobs, employers assume a woman with two children will either be less dedicated to her work or that she may quit, so they pull back on opportunities.’”¹⁵⁶ At least one law firm is counseling its clients to be aware of the SCB in a PowerPoint presentation titled “EEOC Priorities: Family Responsibility Discrimination, Systemic Claims, etc. *Are You Ready to Litigate with the EEOC?*”¹⁵⁷ In addition, the mainstream press has begun to discuss the SCB.¹⁵⁸ This Part presents evidence of the SCB through anecdotal evidence, case law, and social science research.

1. Anecdotal Evidence of the Second Child Bias.

“Conventional wisdom has it that two children constitute a kind of tipping point in favor of domesticity.”¹⁵⁹ The impetus for this Article arose from the author’s experience with friends and colleagues in the field of law. Upon entering the legal profession, and for nearly the first decade of practice, the author and most of her female friends and colleagues in the law excelled, experienced meaningful professional growth, and, for the most part, believed that, perhaps, we had finally “made it” across the

eeoc-see-rise-in-pregnancy-bias-claims/; Tim Gould, *Family Responsibility Discrimination: New Legal Minefield for HR*, HRMORNING (Sep. 7, 2012), <http://www.hrmorning.com/new-legal-threat-family-responsibility-discrimination/>; Michelle Ballard Miller, *Family Responsibility Cases on the Rise: Best Practices Can Avoid a Claim*, BLOOMBERG L. (2011), <http://about.bloomberglaw.com/practitioner-contributions/family-responsibility/>; Joanne Deschenaux, *Costs of Family Responsibilities Discrimination Increasing for Employers*, SOC’Y FOR HUM. RESOURCE MGMT. (Mar. 9, 2010), <http://www.shrm.org/LegalIssues/FederalResources/Pages.FRDRReport.aspx>.

156. Hsieh, *supra* note 155.

157. CHERYL L. BEHYMER, FISHER & PHILLIPS LLP, *EEOC PRIORITIES: FAMILY RESPONSIBILITY DISCRIMINATION, SYSTEMIC CLAIMS, ETC. ARE YOU READY TO LITIGATE WITH THE EEOC?* (2010) (on file with author).

158. Jennifer Ludden, *More Workers Alleging Bias Against Caregivers*, NAT’L PUB. RADIO (June 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=127531355>.

159. STONE, *supra* note 23, at 120.

gender divide in the male-dominated¹⁶⁰ and historically anti-woman legal profession.¹⁶¹ However, that all changed as the author and her female peers began having children—specifically, second children. Some women reported sudden, outright discrimination upon announcing their second pregnancies.¹⁶² Others experienced more gradual, but no less destructive, discrimination, such as being pushed to the margins of the firm, being stripped of responsibilities they held when they only had one child, and being subtly

160. See Barbara Flom, *Report of the Seventh Annual National Association of Women Lawyers National Survey on Retention and Promotion of Women in Law Firms*, NAT'L ASS'N OF WOMEN LAW. & NAWL FOUND. 3 (October, 2012), <http://nawl.timberlakepublishing.com/files/NAWL%202012%20Survey%20Report%20final.pdf> (“The typical AmLaw 200 firm is now a two tier partnership with many different categories of lawyer in a leveraged structure: 151 equity partners (barely 15% women), 91 non-equity partners (26% women), 54 counsel (35% women), 188 associates (46% women), and 11 staff attorneys (70% women). As the preceding numbers clearly show, women constitute a smaller percentage of each category as you move up the career ladder.”). Likewise “[w]omen’s median compensation lags men’s at all levels, with the worst discrepancy at the equity partner level, where women typically earn only 89% of what men make.” *Id.* at 5.

161. See, e.g., *In re Goodell*, 39 Wis. 232, 245 (1875) (denying Lavinia Goodell admission to the state bar on the grounds that “[n]ature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded [sic] for gentler and better things.”); see also Hannah C. Dugan, *Does Gender Still Matter in the Legal Profession?* WISCONSIN LAWYER (Oct. 2002), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=75&Issue=10&ArticleID=248> (“In 1935 women lawyers in the U.S. constituted 1 percent of all lawyers. It took 20 years to double to 2 percent; another 20 years to increase another 50 percent to 3 percent of all lawyers; and then another 20 years to increase another 300 percent to 16 percent of all lawyers.”); *Sandra Day O’Connor Biography*, ENCYCLOPEDIA OF WORLD BIOGRAPHY, <http://www.notablebiographies.com/Ni-Pe/O-Connor-Sandra-Day.html> (last visited Mar. 13, 2013) (noting that although former United States Supreme Court Justice O’Connor graduated from Stanford Law School in 1952, ranked third in her class and having been a member of the board of editors of the Stanford Law Review, “after graduating, O’Connor tried to get a job in Los Angeles and San Francisco law firms, but because of the prejudices against women at that time . . . she could not get a job as a lawyer. She was offered a position as a legal secretary. . .”).

162. See the first vignette that opened the Article.

excluded from the decision-making of the firm and then terminated.¹⁶³

A female attorney at a regional law firm reported that she had observed the second child bias within her firm. She saw anti-mother sentiments emerge when a colleague had two children in a short span of time; the attorney stated that “her group gave her a hard time for that”¹⁶⁴ and that there was an “impression [that] folks in her group were very annoyed.”¹⁶⁵ The attorneys in her practice group expressed thoughts such as “There she goes on leave . . . again,”¹⁶⁶ and “I have to pick up the slack for her . . . again. She needs to stop having kids.”¹⁶⁷

Finally, at least one story of SCB has been documented outside of the legal profession. In her book, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued*, Ann Crittenden tells the story of Cindy DiBiasi. A Washington, D.C., television news channel hired DiBiasi as an on-air medical reporter before she had any children.¹⁶⁸ Two days before she was to begin the job, she discovered that she was pregnant. She worked until her first baby was born and, after a ten-week maternity leave, returned to her position on a full-time basis.¹⁶⁹ Within a year of returning to work after her first child, she became pregnant again, at which time she requested to switch to a three-day week with a prorated salary cut.¹⁷⁰ The news director told her he would “think about it.”¹⁷¹ She worked

163. See the second vignette that opened the Article.

164. See E-mail from a female attorney at the regional office of a national law firm to the author (on file with author). The e-mail’s author requested confidentiality.

165. *Id.*

166. *Id.*

167. *Id.*

168. CRITTENDEN, *supra* note 3, at 100.

169. *Id.*

170. *Id.* at 101.

171. *Id.*

until the delivery of her second child and began an eight-week maternity leave.¹⁷²

Two days before she was scheduled to return to work, the assistant news director called her and notified her that she was being demoted: she would return to work as a general assignment reporter, which was less predictable and more demanding in terms of scheduling and time commitment than her previous medical reporter position.¹⁷³ Just a couple of months after her return to work, she was asked to do a live shot—at the end of the day—from a location about an hour from her home; completing this assignment would mean that she would not get home until 9:00 p.m. and thus not see her children.¹⁷⁴ When she objected, her boss said, “Can’t your nanny just stay?” to which she responded, “Number one, no, she can’t stay, and number two, if she *could* stay, I don’t want to get home that late. If I do that, I won’t see my kids at all.”¹⁷⁵ Her boss’s response was short and straightforward: “So, you’ll see them tomorrow.”¹⁷⁶

Realizing that her employer had not only demoted her, but demoted her into a job it knew she could not do, she retained counsel and considered bringing legal action against the television station.¹⁷⁷ However, the stress of preparing for a lawsuit, working, and raising her children was too much, and so she resigned instead.¹⁷⁸ After fifteen years in an industry she loved, DiBiasi lost her six-figure income, her health insurance, and her economic independence, all based on her attempt to work for fewer days a week while her children were young.¹⁷⁹

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 102.

178. *Id.*

179. *Id.*

DiBiasi's story demonstrates that the popular form of family planning, namely having two children in a short period of time, is not compatible with most women's careers because even though a new mother and her employer often can cope with one child, the second child is "often the final straw."¹⁸⁰ "The most sympathetic employers can prove surprisingly resistant to the second baby."¹⁸¹ The "system can only accommodate so much deviation."¹⁸²

While not based on empirical research, these anecdotes are nonetheless evidence that the SCB is real. While the collection of empirical data pursuant to social science protocols certainly would further bolster the claim of the SCB, the lack of such empirical evidence does not erase the phenomenon of the SCB.

2. Case Law.

The Center for WorkLife Law's *Litigation Update 2010* includes a section titled "Second Child Bias."¹⁸³ It notes that in a "significant subset of cases (N=89), mothers report experiencing little discrimination until they become pregnant with their second child or with a multiple birth. . . . The assumption behind these [adverse employment] actions appears to be that a mother can handle one child and work, but two are too much."¹⁸⁴ While no case law has yet labeled a FRD claim as a SCB claim, several cases indicate that such claims are viable. The facts of these cases reveal discrimination that emerged when an employer knew that a mother had, or planned to have, more than one child.

In *Santiago-Ramos v. Centennial P.R. Wireless Corp.*,¹⁸⁵ a high-level executive sued her employer alleging that she was terminated because her employer learned that she

180. *Id.*

181. *Id.*

182. *Id.* at 103.

183. LITIGATION UPDATE 2010, *supra* note 47, at 19.

184. *Id.*

185. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000).

planned to have a second child.¹⁸⁶ The plaintiff prevailed based on evidence that managers had repeatedly asked her how her husband was managing since she was not home to cook for him, and whether she could perform her job effectively after having a second child.¹⁸⁷ Additionally, a company director allegedly stated that his secretary had stopped working late after having children, and “that is what happens when we hire females in the child-bearing years.”¹⁸⁸ The trial court granted summary judgment to the employer on plaintiff’s sex discrimination and retaliation claims under Title VII; but the appellate court reversed on the Title VI sex discrimination claim, finding the comments to be evidence of discrimination.¹⁸⁹

The facts of *Trezza v. Hartford, Inc.*,¹⁹⁰ showed employment discrimination against an attorney who was a mother of two young children. She claimed that her employer failed to consider her for a promotion because she was a mother.¹⁹¹ She had received consistently excellent job evaluations, but the higher position was offered to less qualified men with children, who turned it down, and then to a woman without children.¹⁹² The employer told the plaintiff that she was not considered for the promotion because it would require extensive traveling, in which she presumably would not be interested because of her family.¹⁹³ In addition, the senior vice-president of her company complained to her about the “incompetence and laziness of

186. *See id.* at 50-52, 57.

187. *Id.* at 50. Other evidence in the plaintiff’s favor included a company employment profile that excluded married women and women with children; a vice-president allegedly told her the profile was “nothing personal against you, but that he preferred unmarried, childless women because they would give 150% to the job.” *Id.* at 51.

188. *Id.*

189. *Id.* at 57-59.

190. *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

191. *Id.* at *1-3.

192. *Id.* at *2.

193. *Id.* at *1.

women who are also working mothers.”¹⁹⁴ He also commented that “women are not good planners, especially women with kids.”¹⁹⁵ The general counsel of the legal department in which she worked stated that working mothers cannot be both good mothers and good workers, saying, “I don’t see how you can do either job well.”¹⁹⁶ The court denied the employer’s motion to dismiss based on this evidence.¹⁹⁷

In *Stern v. Cintas Corp.*, the plaintiff began working for the defendant as a salesperson to certain national accounts; when she was hired, she had no children.¹⁹⁸ Mr. Riesner became the plaintiff’s supervisor and, soon after, the plaintiff took maternity leave for her first child.¹⁹⁹ She returned as a full-time employee, “working three days per week in the office and two days per week from home or on the road.”²⁰⁰ After the plaintiff told Riesner that she was pregnant with her second child, she learned that Riesner had begun refusing to accept applications for sales positions from women.²⁰¹ Shortly after plaintiff learned of this refusal, she recommended that he interview a female applicant, to which he responded: “[Y]ou know Cintas doesn’t hire women for sales positions.” He then went on to state: “There are no females in the sales force in Cincinnati. . . . [because] they don’t view women as being long-term employees. . . . [and] because they tend to get married and have babies.”²⁰²

194. *Id.* at *2.

195. *Id.*

196. *Id.* In addition to these expressly biased comments, the court also considered that only seven of the 46 managing attorneys were females and that none of them were mothers with school age children, whereas many of the male managing attorneys were fathers. *Id.* at *3.

197. *Id.* at *7.

198. See *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841, 843-44 (N.D. Ill. 2004).

199. *Id.* at 844.

200. *Id.*

201. See *id.* at 845-46.

202. *Id.* at 846.

Plaintiff also alleged that, after she announced her second pregnancy, she observed discrimination against other saleswomen, such as being rated lower than poor-performing male salespeople in a ranking system.²⁰³ Plaintiff alleged that, after complaining about Riesner's comments, she was denied her job title, her raise, and her bonus plan.²⁰⁴ When plaintiff again expressed her views about sex discrimination, a supervisor stated that her views did not "really matter" as she was "not even going to be here" due to her impending second maternity leave.²⁰⁵ Plaintiff further testified that, beginning with her return from her first maternity leave, Riesner "often alluded to the fact that one of the reasons that he was not putting me back into sales . . . was because I probably didn't want to travel based on my pregnancy, and made inferences . . . about my preferences regarding my career and the fact that I would rather go managing people than traveling and being in sales."²⁰⁶

Approximately six weeks before she was scheduled to have her second child and take her second maternity leave, Riesner told plaintiff that he had been reassigned to another division and would no longer need her assistance with management duties.²⁰⁷ On that date, plaintiff filed a Charge of Discrimination with the EEOC and the Illinois Department of Human Rights, alleging that she had

203. *See id.* at 848.

204. *Id.* at 849.

205. *Id.* at 849. Soon after, Riesner (1) directed the plaintiff to answer telephones during some weekday departmental meetings and (2) excluded her from weekend meetings while plaintiff's supervisees attended these meetings. He explained these decisions by telling the plaintiff that her "presence wasn't required, that [she would] probably be more comfortable answering the phones, and that [she] should stay home and rest on Saturdays rather than coming to an all-day meeting." *Id.*

206. *Id.* at 853-54.

207. *Id.* at 851.

experienced sex and pregnancy discrimination.²⁰⁸ Plaintiff was then terminated and filed suit.²⁰⁹

The defendant moved for summary judgment.²¹⁰ The federal district court denied in part the motion, holding that plaintiff offered facts to support the required “adverse employment action” under a Title VII claims.²¹¹ The court then held that plaintiff had presented sufficient direct evidence of discriminatory animus to survive summary judgment by claiming that Riesner and his supervisor did not believe that mothers and mothers-to-be should be in sales; under Title VII, “an employer may not treat mothers and mothers-to-be differently from fathers and fathers-to-be.”²¹² The court also held that plaintiff’s circumstantial evidence was sufficient to survive summary judgment.²¹³

Other cases reveal facts that illustrate the SCB at work. For example, in *Eslinger v. U.S. Central Credit Union*,²¹⁴ the plaintiff began working for the defendant as a corporate representative and, over the course of ten years, advanced to the position of Assistant Vice President of Settlement Services.²¹⁵ Soon after a new president was hired, he had a conversation with the plaintiff during which he commented on another employee who was on maternity leave, stating “you can’t trust pregnant women, especially those with their second child because you never know if they are going to come back or not.”²¹⁶ The president told another employee,

208. *Id.* Approximately a month later, the plaintiff filed an amended Charge of Discrimination with the EEOC, alleging that she had been subjected to retaliation for a letter sent to defendant from her attorney. *Id.* at 852.

209. *Id.* at 852.

210. *Id.* at 842.

211. *See id.* at 857, 861.

212. *Id.* at 858, 861 n.38.

213. *Id.* at 865.

214. *Eslinger v. U.S. Cent. Credit Union* 866 F. Supp. 491 (D. Kan. 1994).

215. *Id.* at 493.

216. *Id.* at 494. At the time of this conversation, the plaintiff was pregnant with her second child, but did not yet know it. *Id.*

upon her return from maternity leave, that, in his opinion “women were better workers ‘until they have kids.’”²¹⁷

After the plaintiff returned from maternity leave for her second child, the president gave her a lecture on motherhood, stating that she “could always come back in the work force later on.”²¹⁸ At this time, the president considered eliminating the plaintiff’s position.²¹⁹ Just a few months later, he did eliminate the plaintiff’s position and terminated her; she was not offered another position or a lower position.²²⁰ The company contended that the termination was solely to improve corporate efficiency.²²¹ The plaintiff disagreed and filed a Title VII sex discrimination claim, in response to which the defendant filed a motion for summary judgment.²²² The court denied the motion for summary judgment.²²³ Importantly in the FRD context generally, in reaching this decision, the court held that remarks based on sex stereotypes can be evidence that gender played a role in the termination decision.²²⁴ Important to the SCB context in particular, the court noted that a supervisor’s comment expressing “doubts regarding the likelihood that women who give birth to a second child return to work” was evidence of sex discrimination.²²⁵

Another case with facts illustrating SCB is *Hackett v. Clifton Gunderson, L.L.C.*²²⁶ In *Hackett*, the defendant hired plaintiff as a technology consultant, and she became pregnant with her second child a few months after starting that job.²²⁷ Upon learning about plaintiff’s second

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *See id.* at 494-95.

223. *See id.* at 495.

224. *See id.* at 495-96.

225. *Id.* at 497-98.

226. *Hackett v. Clifton Gunderson, L.L.C.*, No. 03 C 6046, 2004 WL 2445373, (N.D. Ill. Nov. 1, 2004).

227. *Id.* at *1.

pregnancy, her supervisor periodically questioned her about whether she would return to work after the birth of her second child, and responded with skepticism when plaintiff responded that she would return to work.²²⁸ In addition, the supervisor expressed concern about plaintiff's "ability to handle two children and a job"²²⁹ because "it would be a lot more difficult with a second child."²³⁰ The defendant terminated the plaintiff while she was on maternity leave for her second child, and in response, plaintiff filed suit.²³¹

The defendant moved for summary judgment, which the court denied. The court held that the plaintiff's evidence—the statements by her supervisor that "appear to question her ability to handle her job after giving birth" to her second child—rebutted defendant's assertion that plaintiff's termination was based on legitimate, non-discriminatory reasons.²³²

Finally, in *Vosdingh v. Qwest Dex, Inc.*,²³³ the court held that plaintiff had met her *McDonnell Douglas* burden (and thus denied summary judgment to defendants) in a PDA case.²³⁴ Specifically, the court held that the plaintiff met her burden in rebutting the defendant's evidence of a legitimate, non-discriminatory reason for her demotion by presenting evidence that, after telling a supervisor that she was pregnant with her second child, the supervisor commented: "[W]hat are you going to do about your job?"²³⁵ and "It's hard to come back after a second child," and "It's hard to do this job with two kids"²³⁶

228. *Id.*

229. *Id.*

230. *Id.* at *3 n. 2.

231. *See id.* at *1-2.

232. *Id.* at *4.

233. *Vosdingh v. Qwest Dex, Inc.*, No. Civ. 03-4284 ADM/AJB 2005 WL 1323007 (D. Minn. June 2, 2005).

234. *Id.* at *2.

235. *Id.* at *3.

236. *Id.*

While these cases, along with others,²³⁷ resulted in positive precedent or outcomes for plaintiffs asserting an FRD claim based on the SCB, other courts have held against such plaintiffs at the summary judgment stage.²³⁸

3. Social Science Research.

In addition to case law and anecdotal evidence, social science has produced some empirical evidence to support the existence of the SCB within the realm of the “wage penalty for motherhood,” the phenomenon that motherhood negatively affects a women’s wages.²³⁹ The motherhood penalty is the wage gap between mothers and non-mothers; for individuals under age 35, this pay gap is bigger than the pay gap between men and women.²⁴⁰ This penalty is grounded in society’s understanding of the “ideal mother”

237. See, e.g., Complaint, EEOC v. Denver Hotel Mgmt Co., Inc., No. 1:10-cv-01712-REB-BNB (D. Colo. July 20, 2010). Plaintiff and the EEOC charged that defendant Denver Hotel Management Company (DHMC) violated Title VII by its refusal to promote plaintiff to a newly created position of assistant human resource director because of her caregiver responsibilities as the mother of two young children, and the job was given to a less qualified and less experienced employee; DHMC explained to plaintiff that she was being passed over for the job because of her role as a mother of young children, asserting that she could not relocate or work the required 50-60 hour work week because she “had a full-time job at home with her children,” but never asked if she would be willing to relocate or work extended hours. *Id.* at 2-4. In a consent decree, DHMC agreed to pay \$105,000 to plaintiff and also agreed to revamp its discrimination policies and conduct training for all of its employees to explain how stereotypes concerning a person’s family responsibilities can constitute illegal sex discrimination. See Consent Decree at 2-6, EEOC v. Denver Hotel Mgmt. Co., No. 1:10-cv-01712-REB-BNB (D. Colo. Dec. 8, 2010).

238. See, e.g., *Norrell v. Waste Away Group, Inc.*, 246 F. Supp. 2d 1213, 1223-26 (M.D. Ala. 2003) (holding that plaintiff met the *prima facie* prong of the *McDonnell Douglas* test, but failed to meet her additional burden of proving pretext to defendant’s legitimate, non-discriminatory reasons for her demotion; finding insufficient plaintiff’s evidence that a supervisor told her that he “was surprised that she sought the district sales manager position . . . because the position involved a good deal of travel and Plaintiff would have two young children” and instead holding that such comment was a “stray remark” that did not demonstrate pretext).

239. See Budig & England, *supra* note 20, at 217.

240. See Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1297 (2007).

which conflicts with “ideal worker” role; this tension causes evaluators to expect mothers to be less competent and less committed to their work.²⁴¹ The “ideal mother” role is, in turn, grounded in a normative expectation that mothers should (and do) engage in “intensive mothering”—a notion that mothers must place the needs of children above all other activities, including work.²⁴² However, the “ideal mother” role is based on expectations and assumptions rather than on the actual feelings and desires of women with children.²⁴³

These assumptions and perceptions play out in terms of real penalties for working mothers. In one study, “competence ratings” were approximately 10 percent lower for mothers than for non-mothers, and “commitment ratings” were approximately 15 percent lower.²⁴⁴ In addition, student participants held mothers to stricter standards for performance and punctuality.²⁴⁵ With regard to pay, the recommended starting salary for mothers was \$11,000 less than that offered to non-mothers, a 7.4 percent difference.²⁴⁶ Participants also rated mothers as significantly less promotable and were less likely to recommend mothers for management positions.²⁴⁷ Finally, participants recommended non-mothers for hire 84 percent of the time but only recommended mothers for hire 47 percent of the

241. *Id.* at 1298.

242. *Id.* at 1306.

243. *Id.* at 1306-07 (“[T]he tension between these two roles occurs at the level of normative cultural assumptions, and not necessarily at the level of mothers’ own commitment to work roles. In fact, if work commitment is measured by the importance people attach to their work identities—either absolutely or relative to other identities, such as family identities—no difference is found in commitment between mothers and non-mothers. It is the *perceived* cultural tension between these two roles that leads us to suggest that motherhood is a devalued status in the workplace.”) (internal citations omitted).

244. *Id.* at 1316.

245. *Id.* (“Mothers were allowed significantly fewer times of being late to work, and they needed a significantly higher score on the management exam than nonmothers before being considered hireable.”).

246. *Id.*

247. *Id.*

time.²⁴⁸ These negative consequences and outright penalties did not attach to men who were parents.²⁴⁹

This discrimination against mothers is known as normative discrimination, which

occurs when employers discriminate against mothers because employers believe, perhaps unconsciously, that success in the paid labor market (particularly in jobs traditionally considered masculine) signals stereotypically masculine qualities such as assertiveness or dominance. These qualities are inconsistent with those culturally expected of mothers, such as being warm and nurturing. We expect that when employed mothers violate these normative expectations by showing a high level of competence and commitment to paid work, they will be disliked and viewed as less warm and more interpersonally hostile (e.g., more selfish, cold and devious) than other types of workers. As a result, employers may be more likely to deny salary and other rewards to successful mothers than to other successful employees.²⁵⁰

Moreover, the “lack of fit” model, described above, theorizes that mothers are seen as “exemplars, or prototypes, of the female category.”²⁵¹ As a result, people attribute to women strong feminine characteristics, which in turn lead people to perceive mothers as a particularly poor fit for “male” jobs.²⁵² The “lack of fit” model thus conflates motherhood and gender.²⁵³

248. *Id.*

249. *Id.* at 1318. In fact, there appears to be a “fatherhood bonus”—childless men were offered a starting salary of \$148,000, while fathers were offered a starting salary of \$152,000. *Id.* at 1321. Parenthood had the opposite effect on women: nonmothers were offered a starting salary of \$151,000 while mothers were offered a starting salary of \$139,000. *Id.* at 1323.

250. *Normative Discrimination*, *supra* note 29, at 617. This kind of discrimination differs from the kind of discrimination that results from the devaluing of the motherhood status in the workplace, which leads to the stereotype that mothers are less competent or less committed to their jobs. Rather, normative discrimination occurs *after* a mother has proven her competence in and commitment to the workplace—these mothers who violate prescriptive stereotypes about the appropriate place for women are discriminated against. See Benard et al., *supra* note 12, at 1385.

251. Benard et al., *supra* note 12, at 1367.

252. *See id.*

253. *See id.*

These perceptions—*not* the reality of working mothers' performances at work—fuel stereotypes, lead to biases (either express or implicit), and result in discrimination in the form of FRD generally and to the manifestation of the SCB in particular. With regard to the SCB more specifically, the research reveals a gross wage penalty of 2 percent for one child, of 13 percent for two children, and of 22 percent for three or more children.²⁵⁴ The authors note that the penalty for the first child is small, but that the second child has a much larger incremental effect.²⁵⁵

Moreover, the social science research on stereotypes also suggests the potential for SCB. The two normative models that underlie prescriptive stereotyping are the “family devotion schema,” which dictates domesticity for women, and the “work devotion schema,” which dictates paid labor for men.²⁵⁶ While the post-Title VII era of the past 40-plus years seem to have educated, penalized, and sensitized employers in a way that has made them increasingly able to manage the tension between these schema when a woman is the mother to a *single* child, the SCB occurs when this fragile balance is disrupted by the arrival of the second child. The second child tips the already-tenuous balance between the “family devotion schema” and the “work devotion schema” in such a way as to permit employers to express their previously-suppressed stereotypes and prejudices about mothers and paid work, and that expression is manifested in the normative discrimination known as the SCB.

The anecdotal evidence, case law, and social science research on norms, stereotypes, biases and discrimination strongly suggest that there *is* a difference between the stereotyping of and discrimination against a mother of one child and a mother of two or more children. As a result, the article argues for the recognition and naming of this difference. The actors in the legal system—lawyers, clients,

254. Budig & England, *supra* note 20, at 217.

255. *Id.*

256. See *Normative Discrimination*, *supra* note 29, at 621 (quoting MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* (2003)).

judges, legislators, and agencies—should specifically recognize a “second child stereotype” that is distinct from the more general stereotypes currently articulated under the umbrella of the “family devotion schema” and the “work devotion schema.” As discussed below, naming this new stereotype is important for both legal and normative reasons.

II. WHAT CAUSES THE SECOND CHILD BIAS? IMPLICIT BIAS AND THE JUSTIFICATION-SUPPRESSION MODEL OF THE EXPRESSION AND EXPERIENCE OF PREJUDICE

The anecdotal evidence of the SCB, as well as the disproportionate reduction in pay after having a second child, begs the question: why does discrimination against working mothers increase after they have a second child? The answer likely lies in two psychological models: (1) implicit bias, and (2) the Justification-Suppression Model of the Expression and Experience of Prejudice. While implicit bias has been widely discussed in legal scholarship concerning FRD, the Justification-Suppression Model previously has not been applied specifically to FRD or the SCB in particular. This part summarizes both phenomena in order to explain the origins of the SCB.

A. *Biases and Stereotypes*

As described above, social scientists have identified several kinds of stereotypes concerning female workers generally and working mothers in particular. These stereotypes can lead to biases against working mothers, either express biases or implicit biases. Conscious (express or explicit) bias is objectively identifiable because it is the conscious basis for an individual’s motivation to discriminate. In the FRD context, an example of a conscious stereotype that turns into a bias would be a supervisor’s express statement that the company did not have any women in its ranks because that division did not consider women to be long-term employees because women “tend to

get married and have babies.”²⁵⁷ Such evidence would, and in fact did, support an FRD claim.²⁵⁸

Implicit bias, however, presents challenges of proof for the FRD plaintiff. An implicit bias is one that is fundamentally automatic and that manifests so quickly that people often are surprised to learn that they have, and show, the bias.²⁵⁹ Because implicit bias is unconscious, discrimination against working mothers (and other protected classes) that is based on implicit bias often lacks the explicit, “smoking gun” evidence to sustain an FRD claim.²⁶⁰

Biases against mothers, which are based on the stereotypes discussed in Part I, can lead to “role incongruity discrimination.” Role incongruity emerges from a widespread social and cultural ambivalence about the full inclusion of women into the work world. For example, one study found that almost half of Americans believe that pre-school children suffer when their mothers work.²⁶¹ Another study revealed that more than 40 percent of *working* parents fear that many working mothers care more about success in the workplace than meeting the needs of their children.²⁶² This societal expectation of “intensive mothering” exists notwithstanding increasing economic pressure on many American families that forces both parents to have paying jobs.²⁶³

257. See, e.g., *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841, 846 (N.D. Ill. 2004).

258. See *id.* at 861.

259. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 (2006).

260. See *id.* at 976 (“[A]ntidiscrimination law has long forbidden various forms of differential treatment on the basis of race and other protected traits. . . . Some of the hardest cases present problems of proof: if there is no ‘smoking gun,’ how can bias be established? . . . [I]t seems clear that when [implicit bias] is producing differential treatment, the legal system will often encounter unusually serious difficulties.”).

261. See JACOBS & GERSON, *supra* note 21, at 54.

262. See *id.*

263. See *id.* (“Whether or not they hold paid jobs, mothers face conflicting social expectations that are difficult to meet.”).

The SCB indicates that this tension between the culturally-ideal mother and the culturally-ideal worker comes to a head when a working mother has a second child. When SCB discrimination occurs, it is the second child that seems to have become the “tipping point”—the point at which the “mother” role overshadows the “worker” role to such an extent that the employer no longer believes that the woman can perform the “worker” role *at all*. But what causes the second child to act as this tipping point? The answer likely lies in the Justification-Suppression Model of prejudice and discrimination.

B. *The Justification-Suppression Model*

The Justification-Suppression Model (“JSM”) is based on the basic premise that the “expression of prejudice is marked by a deep conflict between a desire to express an emotion and, at the same time, to maintain values and self-concepts that conflict with prejudice.”²⁶⁴ It asserts that prejudice is not outwardly expressed unless a justification exists to support the release of the otherwise-suppressed prejudice.²⁶⁵

The JSM study defines prejudice as “a negative evaluation of a social group or a negative evaluation of an individual that is significantly based on the individual’s group membership.”²⁶⁶ That definition is consistent with what occurs when the SCB becomes manifest: a negative evaluation of a mother of more than one child based on her group membership in the social group defined as working women who have passed the tipping point between an “ideal worker plus one child” and a “presumptively unproductive, uncommitted worker plus two children.”

The JSM describes the process by which an underlying and suppressed prejudice becomes experienced and outwardly expressed.²⁶⁷ This model thus fits well with what

264. Crandall & Eshleman, *supra* note 26, at 414.

265. *See generally id.* at 416-17.

266. *Id.* at 414.

267. *Id.* at 416-17.

the article proposes occurs in the SCB: the latent prejudice against working mothers of one child, which most employers know on some level is culturally or legally improper (or both), finds expression once that working mother has a second child. It is that event—the arrival of the second child—that allows employers to express the previously-suppressed prejudice (and resulting discrimination) against mothers based on the employers' stereotypes that a working mother cannot attain the norm of the "ideal worker."

The JSM places the different components of prejudice into three categories: genuine prejudice; suppressors; or justifiers.²⁶⁸ Genuine prejudice is an unequivocal negative feeling toward members of an undervalued group.²⁶⁹ Genuine prejudice is learned, in part, from family, the media, religion, and peers,²⁷⁰ as well as from direct contact with the undervalued group.²⁷¹ Genuine prejudice is connected with implicit bias.²⁷²

While everyone holds some genuine prejudices, the JSM explains that prejudice is often suppressed and thus not outwardly expressed.²⁷³ Suppression of prejudice occurs both internally within a person's conscience and externally to the outside world.²⁷⁴ The suppression is a result of social and cultural pressures to maintain a nonprejudiced appearance.²⁷⁵ Suppressing prejudice, however, requires

268. *See id.* at 417-18.

269. *Id.* at 418.

270. *See id.* at 418-19.

271. *See id.*

272. *Id.* at 419 ("Like genuine prejudice, implicit attitudes are not directly accessible through self-report, and they play a subtle and underappreciated role in directing behavior. Genuine prejudice and implicit attitudes are both conceptualized to account for the discrepancy between expressed attitudes (often favorable) and intergroup activity (often discriminatory).").

273. *See id.* at 418.

274. *See id.*

275. *See id.* at 418-22. These pressures include (1) "playing for an audience," which is the notion that "[p]ublic, accountable behavior shows less evidence of prejudice than private, anonymous behavior" and that "[p]eople change reports of prejudice depending on the audience"; (2) empathy, which "makes people rethink the appropriateness of the prejudice, adding an explicit value of

mental energy that can lead to mental fatigue, which in turn can lead to suppression failures, a reduced ability to self-regulate, and inadvertent expressions of prejudice.²⁷⁶ Thus, a paradox of suppression is that it can have the effect of enhancing prejudice: suppression requires a person to inhibit expression of a genuinely-held belief—the prejudice—that otherwise would be expressed.²⁷⁷ The suppression creates a build-up of tension between the societal requirement to appear unprejudiced and the personal desire to express the prejudice.²⁷⁸ This tension forces the person to find ways to express the suppressed prejudice, so that the tension can be relieved; it is “justification” that allows the expression of a suppressed prejudice and thus the release of the tension caused by the suppression.²⁷⁹

Justification is defined as a “psychological or social process that can serve as an opportunity to express genuine prejudice without suffering external or internal sanction.”²⁸⁰ According to the JSM, justification of prejudice acts as a *releaser* of prejudice by providing a socially acceptable reason to let go of the suppression and express the prejudice.²⁸¹ The justification must allow for the expression of prejudice while simultaneously upholding the appearance of fairness, equality and egalitarianism.²⁸² As a result, a justification at once permits the expression of prejudice while covering the “roots of discrimination.”²⁸³

tolerance leading to a more favorable outward attitude (but without changing the genuine prejudice”; (3) “self as audience” which is the notion that “[n]ot only do some people wish to appear nonprejudiced to others but they also wish to appear nonprejudiced to themselves”; (4) religion; (5) politics; (6) concepts of egalitarianism; and (7) personal standards. *See id.* at 421-22 (internal citations omitted).

276. *Id.* at 423.

277. *Id.* at 417, 420 n.2.

278. *Id.* at 425.

279. *Id.*

280. *Id.*

281. *See id.*

282. *Id.*

283. *Id.*

The JSM contends that many of the factors that correlate with or *cause* prejudice, such as personal attitudes, beliefs and religion, also *justify* that prejudice in a way that leads an individual to no longer suppress the prejudice but to instead outwardly express it.²⁸⁴ While some models of prejudice argue that individuals would take steps to suppress prejudice if they could just figure out that they were prejudiced, the JSM suggests instead that individuals are motivated to find one or more justifications to permit them to outwardly express their prejudices without negative consequences, guilt, or shame.²⁸⁵

Justifications release prejudices in two ways: first, they permit the public expression of prejudice.²⁸⁶ Second, they permit an individual to “integrate a negative attitude toward a group into oneself without labeling oneself *prejudiced*. These two functions represent public avowal and private acceptance.”²⁸⁷

An example from the JSM literature illustrates the theory. Many “people tend to believe that the world is just and fair, where people ‘get what they deserve.’” People who ascribe to this “naturalistic fallacy” report higher levels of prejudice: “If one believes that people get what they deserve and deserve what they get, prejudice toward poor, unemployed, imprisoned, underpaid—any person or group doing poorly—is justified, because such people deserve their unhappy fates.”²⁸⁸ The result of the justification (“the world is fair and people get what they deserve”) is to release the prejudice (the justification of deservingness allows the expression of prejudice against out-groups).²⁸⁹ This “naturalistic fallacy” conceptualization is one of several categories of justification that in turn lead to the expression

284. *See id.* at 416.

285. *Id.* In fact, “adequately justified prejudices are not even labeled as prejudices.” Examples of adequately justified prejudices not even labeled as prejudices are prejudice toward rapists, child abusers, and enemy soldiers. *Id.*

286. *Id.* at 432.

287. *Id.*

288. *Id.* at 426.

289. *Id.*

of prejudice.²⁹⁰ Importantly in the context of asserting a SCB claim, “the individual’s justifications and suppressions may lead to a genuinely believed self-image of nonprejudice, even while the participant is behaving in a discriminatory way.”²⁹¹

C. *The Justification-Suppression Model Applied to the Second Child Bias*

As described above, the JSM is a dynamic model that describes how prejudice comes to be expressed: “Underlying prejudice becomes stymied by a variety of suppression processes but can be released into expressions by a variety of justification processes.”²⁹² The JSM likely is the cognitive mechanism underlying the SCB.

There is little dispute that a prejudice against working mothers exists. This prejudice is informed by the various stereotypes about working mothers discussed throughout the Article. Further, there is little dispute that this prejudice sometimes is expressed as sex-based employment discrimination. However, the anti-working-mother prejudice is also clearly suppressed much of the time, particularly in the post-Title VII era. Title VII’s passage, the women’s movement, and the influx of a vast number of mothers into the workforce over the past 40 years has created—at least at a surface level—a cultural norm that mothers “should” have equal employment opportunities; this norm creates an increasingly negative social view of outright prejudice toward working mothers. Suppression of the prejudice is the result.

However, the resulting suppression of prejudice against mothers is generally low. This low-level suppression results from a general belief that women choose to be mothers. We need not suppress prejudice if the status of motherhood was brought on by the woman herself. The competing social

290. The others are: (1) preservation of the status quo; (2) celebration of social hierarchy; (3) attributions and personal responsibility; (4) covering; (5) values, religion and stereotypes; and (6) intergroup processes. *Id.* at 426-31.

291. *Id.* at 432.

292. *Id.* at 437.

norm that women should be able to have children and a career may increase the level of suppression when a woman has one child. However, once that woman has one child, people think she has fulfilled her “right” to have children *and* a career, so the second child seems excessive.²⁹³ Moreover, the second child stereotype kicks in and creates the normative script within the employer that the mother “should” stay home now that she has two children, because the expectation of “intensive mothering” can no longer be satisfied if she spends *any* time in paid work, or because of the stereotype that she can no longer bring *any* commitment to her job. Thus, employers no longer suppress their anti-working-mother prejudice upon the announcement or arrival of the second child and express it through an adverse employment action.

Put another way, the JSM is consistent with the notion of treating a working mother with one child with suppressed prejudice and suppressed discrimination. However, “tolerating” the first child can become a justification to “punish” the working mother—via discrimination that results from the emergence of the prejudice—on the basis of the second child.²⁹⁴

III. RECOGNIZING AND NAMING THE SECOND CHILD BIAS WILL ENGENDER LEGAL AND SOCIAL CHANGE

Recognizing and expressly naming the SCB—in formal EEOC complaints, in complaints filed in courts, to investigators, in legal scholarship, and in the mass media—is important for several reasons, both legal and normative.

A. *The Legal Importance of Naming the SCB*

Identifying for litigants, lawyers, and courts the dynamics of the second child stereotype, SCB, and resulting discrimination will assist litigants and their attorneys in

293. See E-mail from Shelley Correll, Sociology Professor, Stanford University, to the author (Oct. 4, 2012, 2:21 PM) (on file with author).

294. See E-mail from Chris Crandall, Social Psychology Professor, University of Kansas, to the author (Oct. 5, 2012, 2:29 PM) (on file with author).

articulating viable claims under Title VII's provisions and the precedent construing that statute. More specifically, naming the SCB as its own model of discrimination will add to the body of Title VII law that protects mothers against discrimination based on sex-stereotypes and biases associated with mothers and paid work. Adding the SCB model to the existing stable of FRD models and theories will make FRD jurisprudence more robust and thus more reflective (and protective) of the actual experiences of women with two children.

More specifically, recognizing the second child stereotype and naming the resulting SCB will continue a nascent trend in Title VII jurisprudence—permitting sex discrimination plaintiffs to use “stereotype” evidence rather than “comparator” evidence, which is particularly important to prove discrimination in FRD cases.²⁹⁵ Giving plaintiffs’ attorneys and courts a new and specific stereotype (and resulting bias) will give both additional ammunition to argue and hold that comparator evidence simply is not required for a plaintiff to carry her burden in an FRD case involving SCB. Advancing Title VII jurisprudence in this way is important given that the comparator requirement has a “devastating effect on plaintiff’s ability to win sex-based Title VII claims, as adequate comparators are very rarely available in the contemporary workplace.”²⁹⁶

Naming the SCB, and thus adding this theory of discrimination to the wider FRD conversation, both inside and outside of lawsuits and courts, is also important for policy reasons. Naming the SCB will educate employers and their counsel about discrimination that may be happening in their workplaces, but that likely is implicit and thus invisible. Naming the SCB will assist company-side attorneys to better counsel employers about the nuances of discrimination against mothers not only to protect their clients from liability, but also to encourage them to supplement their training of employees about the SCB and

295. See *supra* Part I.A.2.

296. Franklin, *supra* note 9, at 1311.

therefore prevent such bias and discrimination in the future.²⁹⁷

B. *The Normative Importance of Naming the Second Child Bias*

A normative reason to expressly name the SCB lies in the critically important role of courts in fulfilling the law's expressive function. Susan Sturm advocates for a "dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches."²⁹⁸ She states:

In elaborating the general nondiscrimination principles enacted in Title VII, courts continue to fulfill the law's expressive function by articulating general norms and underscoring their continued importance. In addition, they create the focal points for non-legal actors to give these general norms meaning in new contexts, and to share the results of these context-specific elaborations. . . . [Courts can] act as a catalyst, encouraging or even providing the structure for deliberations aimed at solving problems that threaten the legality (and efficacy) of institutions. Courts also supply incentives for employers to implement effective internal problem-solving mechanisms and to evaluate their effectiveness.²⁹⁹

297. See *Beyond the Maternal Wall*, *supra* note 8, at 117-18; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 564 (2001) [hereinafter *Second Generation Employment Discrimination*]. The EEOC has recognized that naming a discrete type of discrimination is an important part of the educational component with which the EEOC is tasked:

And our job, as an agency, is to make sure that we are enforcing the laws. And that starts with education. That starts with letting people know what the law says It means putting out clear guidance, in writing, about what the law says. It means educating our investigators, so they know when charges come in that the law has been violated. And finally, if need be, it means going to court.

Testimony of Commissioner Chai Feldblum, to meeting of EEOC Commissioners, *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities* (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm>.

298. *Second Generation Employment Discrimination*, *supra* note 297, at 522.

299. *Id.* at 556-57.

Sturm's holistic approach to remedying discrimination asserts that the most effective remedies combine "elaborating general norms, building problem-solving capacity, and developing systems of accountability."³⁰⁰

Expressly naming the SCB will further Sturm's vision for remedying discrimination. When a court uses the term "second child bias" and discusses that bias, its underlying stereotype, and the resulting discrimination, it gives normative and expressive legitimacy to the experience of those mothers who have experienced the SCB. In so doing, courts will thus enlarge the scope of the wider discussion—in the mass media, within the human resources community, within companies themselves, etc.—about FRD. Thus, the work of redefining norms—to begin to reflect the reality of the experiences of working mothers with two children—will be advanced in ways that include "elaborating general norms, building problem-solving capacity, and developing systems of accountability."³⁰¹

Another normative reason to expressly name the SCB is that it empowers individuals and engenders larger social change. On the individual level, naming the SCB fits within the well-established framework of "rights talk." Because law reform takes place incrementally, "rights talk" plays an important legal *and* social role: It leads to higher success rates in litigation *and* it also "sets in motion" a larger social dynamic.³⁰² Thus, in times of societal change, "rights talk" causes cultural change by influencing our understanding of who owes what to whom, which in turn shapes our perception of what is legal *and* what is ethical.³⁰³ The transformative power of "rights talk" is its ability to render normative claims factual ones: "It is my right" means not only that things should go my way, but that I have an entitlement to ensure they do so because of my pre-existing 'right.'³⁰⁴ Naming discriminations and the rights that

300. *Id.* at 479.

301. *Id.*

302. See *Beyond the Maternal Wall*, *supra* note 8, at 113.

303. *Id.*

304. *Id.*

attach to fighting those discriminations both reflects our current identity and begins to define our future identity.³⁰⁵

Labeling SCB as a unique manifestation of FRD can empower these mothers by “[setting] up powerful social dynamics outside the courtroom” through consciousness-raising.³⁰⁶ Moreover, situating the SCB within the “rights talk” framework will assist in reconceptualizing what we mean by “work-family conflict” into a *structural* problem rather than a *personal* one. As a result, mothers will begin to look outward for the cause of the conflict and insist on social change, rather than looking inward and blaming themselves.³⁰⁷ This process of “naming, blaming and claiming” will only begin by naming SCB, blaming its underlying stereotypes, and claiming the resulting discrimination as sex-based discrimination.³⁰⁸

Additionally, naming the second child stereotype and the SCB as its own phenomenon within FRD is normatively important because “naming the processes of prejudice, discrimination, and oppression . . . helps to question society’s values, categories, and rules”³⁰⁹ about working mothers with two children. “Even in the simple act of

305. *Id.*

306. *Id.* at 114.

307. *Id.*

308. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC’Y REV. 631, 633 (1980-81) (“In order for disputes to emerge an remedial action to be taken, an unperceived injurious experience . . . must be transformed into a perceived injurious experience.”); see also *id.* at 635-37 (“[S]aying to oneself that a particular experience has been injurious —we call *naming*. . . . The next step is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or societal entity. . . . [T]he transformation from perceived injurious experience to grievance *blaming*. . . . The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. We call this communication *claiming*.”).

309. Shannon B. Dermer, Shannon D. Smith and Korenna K. Barto, *Identifying and Correctly Labeling Sexual Prejudice, Discrimination, and Oppression*, 8 J. COUNSELING & DEV. 325, 327 (2010).

naming society's prejudice and hostility," we "help 'identify it as a problem for individuals and society.'"³¹⁰

Finally, naming the SCB matters—normatively, socially, and politically—because the "act of naming also gives activists, advocates, and allies the ability to externalize and battle against [negative] . . . attitudes that may, at first, seem nebulous but result in real, systematic oppression."³¹¹

CONCLUSION

The area of employment discrimination law known as FRD has grown from a handful of cases into a groundswell of litigation and scholarship over the past decade. An emerging trend in FRD is the SCB. There is strong anecdotal evidence of the SCB, but no body of empirical data pursuant to social science protocols. One reason that naming the SCB is important is that naming it allows it to "become a societal issue capable of scientific study and intervention."³¹² This article proposes that social science researchers and lawyers work together to gather empirically-sound data on the SCB.

The SCB has not yet been named as such in any court opinion, but it should be. The naming of the SCB and the underlying second child stereotype is an important legal and normative endeavor that will advance the larger project of FRD litigation and scholarship—transforming normative claims of caregivers in the workforce into "factual claims"³¹³ and ending discrimination against them—by adding to the "long-standing, and ongoing, debate about how hard Title VII should press against the social norms that prescribe distinct sex and family roles for men and women."³¹⁴

310. *Id.* (internal citations omitted).

311. *Id.* at 329.

312. *Id.*

313. *See, e.g., Beyond the Maternal Wall, supra* note 8, at 113.

314. Franklin, *supra* note 9, at 1380.