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Sanders, Bailey

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# ON THE BASIS OF CHILDBIRTH: How the Federal Clerkship’s Lack of Parental Leave Fosters Gender Inequality

Bailey Sanders<sup>1</sup>

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## ABSTRACT

This Essay argues that the lack of paid parental leave for federal law clerks enables pregnancy discrimination, restricts women’s reproductive choice, and perpetuates gender inequality within the legal profession. Protections against pregnancy discrimination are hollow when clerks can be fired—or have clerkship offers rescinded—for requiring maternity leave, and the lack of leave disproportionately impacts female clerks by constraining their ability to pursue career and family simultaneously. The lack of leave also restricts (some) pregnant women’s reproductive choice by forcing them to choose between keeping their position or carrying their pregnancy to term. Such a state of affairs was intolerable in the past but has now become unconscionable in the devastating wake of *Dobbs v. Jackson Women’s Health Organization*. Many clerks will be serving in vast abortion deserts, cut off from medical care, and facing threats of criminal prosecution should they attempt to end their pregnancies to save their jobs. For these reasons, current congressional efforts to provide greater protections to term law clerks from discrimination and workplace misconduct, while an

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important step forward, must be supplemented to include guaranteed parental leave.

## INTRODUCTION

On July 29, 2021, a bipartisan group of Congress members introduced the Judiciary Accountability Act of 2021 (JAA), which would ensure that employees of the federal judiciary are protected from discrimination based on race, color, religion, sex (including sexual orientation and gender identity), national origin, age, and disability. Such legislation would be welcome news for federal judiciary employees, as they are currently not covered by federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act. But there are two essential provisions missing from this Act: protection from pregnancy discrimination and paid parental leave for federal term law clerks.<sup>2</sup>

Providing term law clerks both with protection from pregnancy discrimination and guaranteed parental leave is essential if women are to reap the rewards of the federal term clerkship with the same ease as men.<sup>3</sup> Protections against pregnancy discrimination are hollow when clerks can be fired—or have clerkship offers rescinded—for requiring maternity leave, and the lack of leave disproportionately impacts female clerks by constraining their ability to pursue career and family simultaneously. The lack of leave also restricts (some) pregnant women’s reproductive choice by forcing them to choose between keeping their position or carrying their pregnancy to term; indeed, it incentivizes women to choose abortion. Such a state of affairs was intolerable in the past but has now become unconscionable in the devastating wake of *Dobbs v. Jackson Women’s Health Organization*.<sup>4</sup> Many clerks will be serving in vast abortion deserts,

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2. Term clerks work in the chambers of district and appellate judges and provide assistance to their judges in a myriad of ways. The federal term law clerk position is typically a one- or two-year position held by recent law graduates. This is in contrast to a career law clerk position, which is a permanent position. When referring to “law clerks” in this Article, I am referring solely to term law clerks.

3. The focus of this Article is on the need for guaranteed parental leave for pregnant clerks and clerks with the capacity to become pregnant, a group that includes individuals who identify as male. However, because the vast majority of pregnant capable persons serving as law clerks will identify as ciswomen, this Article uses “women” and “female” as a shorthand for pregnant capable persons.

4. On June 24, 2022, in *Dobbs v. Jackson Women’s Health Organization*, the U.S. Supreme Court held that the United States Constitution does not confer a right to abortion, thereby allowing state legislatures to ban the procedure.

cut off from medical care and facing threats of criminal prosecution should they attempt to end their pregnancies to save their job.<sup>5</sup>

For all these reasons, pregnancy protections and parental leave must be added to the JAA. And although figuring out how to provide parental leave while minimizing the costs to the judiciary may take careful thought and even some degree of experimentation, it is worthwhile work. In this piece, I provide several policy options worth considering, from the more conservative to the more aspirational. Regardless of which path is chosen, however, it is clear that *some* form of parental leave must be provided to term clerks if women are to stand on equal footing with their male co-clerks.<sup>6</sup>

This Essay is organized as follows.<sup>7</sup> Part I demonstrates how the lack of parental leave leads to an implicit prohibition against childbirth, thereby enabling pregnancy discrimination and restricting women's reproductive choice. Part II shows how the lack of parental leave fosters gender inequality within the profession by allowing men, but not women, to build their career and family simultaneously. Part III explains why the clerkship's unique structure is no justification for denying parental leave to term clerks.

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5. The term "abortion desert" refers to cities where the lack of abortion facilities may force people to travel over one hundred miles to get abortion services. Alice F. Cartwright et al., *Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search*, 20 J. MED. INTERNET RSCH., no. 5, May 2018, at 1, 7.

6. I use the term parental leave, rather than maternity leave, deliberately. My main focus in this piece is to expose the disparate impact that the clerkship's lack of parental leave imposes on female law clerks. But the lack of leave has consequences for men too. Male law clerks may not require leave for medical reasons, but they have an equal interest in being fully present in their child's life. See Ryan Park, *What Ruth Bader Ginsburg Taught Me About Being a Stay-At-Home Dad*, ATLANTIC (Jan. 8, 2015), <https://www.theatlantic.com/business/archive/2015/01/what-ruth-bader-ginsburg-taught-me-about-being-a-stay-at-home-dad/384289/> [<https://perma.cc/KSF6-4PTC>]. My suggested proposals are therefore gender neutral.

7. This Essay is part of a larger project critically examining the clerkship institution. The larger project argues that the clerkship is premised on the ideal worker norm, which assumes workers are able and willing to devote themselves wholeheartedly to their professional work while relying on another adult to handle any and all caregiving responsibilities. See MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 174 (2003). Although the ideal worker norm permeates the American work force, particularly white-collar professions, it can take on a different flavor within the clerkship institution because of the mythos of the judge-clerk relationship—a belief that the judge-clerk relationship is more than a mere employer-employee relationship. See, e.g., Patricia Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990) ("The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.").

## I. ENABLING DISCRIMINATION AND RESTRICTING CHOICE

Federal term law clerks, unlike most other federal employees, do not fall under the protection of the federal anti-discrimination statutes such as Title VII of the Civil Rights Act. Instead, each federal court has adopted and implemented an employee dispute resolution plan (EDR plan), modeled after the Federal Judiciary Model EDR Plan.<sup>8</sup> Although every circuit's EDR plan prohibits discrimination on the basis of pregnancy<sup>9</sup>—as well as a wide range of other protected categories—this unanimous prohibition is illusory, as the majority of federal law clerks are not entitled to parental leave.<sup>10</sup> A judge may not be able to withdraw a clerkship offer<sup>11</sup> or terminate a current clerk because she is *pregnant*, but they can do so because the clerk will require *maternity leave* and the judge does not wish to provide it.

Consider the case of Caitlyn Clark, a former district court clerk who filed a formal complaint through the Eleventh Circuit's EDR plan, alleging that she had been fired by her district judge on account of her pregnancy.<sup>12</sup> The Judicial Council of the Eleventh

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8. See generally Jud. Conf. of the U.S., *Model Employment Dispute Resolution (EDR Plan)*, in 12 GUIDE TO JUDICIARY POLICY app. 2B (2018), <https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2b-model-edr-plan.pdf> [<https://perma.cc/WJK9-JEMN>].

9. Indeed, given that every federal circuit provides protections against pregnancy discrimination, the decision to leave pregnancy out of the JAA is baffling.

10. Federal law clerks are exempt from the federal Leave Act unless specifically included by their appointing judge or local rule of court under authority of 28 U.S.C. §§ 712, 752, 156(a), 634(c), and 794. Data on the number of judges who choose to have their term law clerks covered by the Leave Act is not available, but that number is likely small since, by requiring judges to specifically opt *in*, the system makes a lack of coverage the default. This means that most federal law clerks do not accrue any formal leave and are exempt from parental leave provisions. Furthermore, although law clerks who are covered by the Leave Act are technically eligible for parental leave under the Family Medical Leave Act, they must have served in their position for at least a year before they qualify for that leave. This means that a pregnant law clerk is only entitled to maternity leave if (1) her judge opts into the Leave Act; (2) she is in a multi-year clerkship; and (3) her due date is in the second year of her clerkship.

11. The circuit plans apply not only to current and former judiciary employees, but also to applicants for employment who have been interviewed. See, e.g., U.S. CT. OF APPEALS FOR THE FIRST CIR., EMPLOYMENT DISPUTE RESOLUTION PLAN (2021), <https://www.ca1.uscourts.gov/sites/ca1/files/COA%20EDR%20Plan%20Updated%20December%202021%20-Current.pdf> [<https://perma.cc/B88R-MH5M>].

12. In Re Caitlyn Clark, General Order 2022-E on Request for Review of Decision on EDR Complaint No. GAMD-FC-21-01, at 52 (11th Cir. Jud. Council Mar. 17, 2022), [https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjoezaxpr/clark\\_ruling.pdf](https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjoezaxpr/clark_ruling.pdf) [<https://perma.cc/U3VM-MQQB>]. In fact,

Circuit rejected her claim after finding that she had failed to show her dismissal was a result of her pregnancy and not her standard work performance.<sup>13</sup> Notably, the Council’s memorandum repeatedly emphasized that Clark, although she had been granted twelve weeks unpaid maternity leave by her judge, was not entitled to any leave *at all*.<sup>14</sup> In doing so, the Council implicitly admitted that Clark’s judge could have chosen *not* to provide her with maternity leave and, as a result, could have fired her had she missed work to recover from childbirth, just as he could fire any employee who misses work without permission. And this would be true even if Clark had outperformed every law clerk in the history of law clerks.

Similarly, although a judge may not discriminate against a clerkship applicant on the basis of pregnancy, he or she *can* inquire into a clerk’s pregnancy status (or pregnancy plans) in order to determine whether or not a prospective clerk would require leave during her clerkship term.<sup>15</sup> Or, should the judge find out—prior to the start of the clerkship term—that a clerk will require some

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the opinion appears to suggest that the Council felt Clark should have been exceedingly grateful to receive any leave at all.

13. *Id.* at 56.

14. *Id.* at 25, 52 & 52 n.21.

15. According to the clerkship grapevine judges, male and female alike, do pose this question to interviewees. Consider the following anecdote posted on an online forum for law students:

One of my law school classmates interviewed with a fed. Judge recently. She received an offer after the interview so it must have gone well on her end; however, during the interview, the judge point blank asked her how old she was, if she was married, and if she planned on “getting herself pregnant” during the clerkship term as a past clerk had done in his chambers. She was upset about the rude/offensive tone of the question. I can’t imagine something like this happening in the private sector. Obviously[,] she can’t do much without jeopardizing her future career prospects.

Another poster explained how she felt when an interviewer asked whether she planned to get pregnant during her clerkship term:

When I interviewed, I was younger than the average law student and not wearing an engagement ring. Judge []’s question, which came out of the blue, made me feel like she pegged me, by virtue of my gender, as a grifter who was disingenuous and non-substantive, not serious about working so much as about getting a resume line and federal benefits.

Anonymous, *Judge’s Behavior During Interview*, TOP LAW SCHOOLS (July 16, 2018, 11:58 AM, September 15, 2018, 6:39 AM), <https://www.top-law-schools.com/forums/viewtopic.php?f=34&t=296635> [<https://perma.cc/3K5H-D5L9>].

In such a scenario, the clerk who answers yes and is not hired, of course, will have no way of knowing, barring an outright admission by the judge or a member of chambers, if it was her pregnancy (or anticipated pregnancy) that caused her not to be selected.

degree of maternity leave, he or she can rescind the clerkship offer.<sup>16</sup> A judge who does so can credibly say that the reason is *not* that the clerk is pregnant, but that the clerk's need for some degree of leave time imposes too high a burden on chambers. And since the clerk is not entitled to leave, the judge certainly does not have to provide it. A law clerk who learns she has a due date within her clerkship term is therefore entirely dependent upon her judge's generosity, as demonstrated by this blog post by a clerk seeking advice:

Looking for anyone who has experience with either having a baby or being the partner of someone who had a baby during a one-year federal clerkship. I'm preparing to tell my judge that I am expecting and would love any insight from those who already navigated this situation. I am already aware that, as far as I understand, I am not entitled to any leave benefits or job protection. Thanks in advance!<sup>17</sup>

Luckily, as indicated by the author's later update to her post, this clerk's judge was willing to allow her to take some degree of maternity leave and return for the remainder of her clerkship. Certainly, some judges are very supportive of clerks who find themselves with a due date during their clerkship term,<sup>18</sup> but the judge could have chosen not to provide this clerk with leave. As recent congressional testimony has shown, judges do not always behave in

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16. For instance, one former clerk reported that:

[W]hile many judges are perfectly fine with pregnant clerks, I have heard of more than one instance where a judge reacted very negatively to hearing that his/her clerk was going to be giving birth during her clerkship (the idea being, you're only here for a year, if you need however many weeks/months off after giving birth, that really screws with the judge's plans). I've even heard one instance of a judge revoking an offer after hearing. . .

Anonymous, *Female Perspectives on Applying [to a Clerkship]?* TOP LAW SCHOOLS (Apr. 28, 2013, 4:46 PM), <https://www.top-law-schools.com/forums/viewtopic.php?f=34&t=208808> [<https://perma.cc/P9N6-J2XV>] [*hereinafter Female Perspectives*].

17. Anonymous, *Parental Leave/Pregnancy During District Clerkship*, TOP LAW SCHOOLS (Nov. 11, 2021, 3:42 PM), <https://www.top-law-schools.com/forums/viewtopic.php?f=34&t=311385> [<https://perma.cc/8KCP-YMPV>].

18. As the following anecdote indicates, some judges are all too happy to provide accommodations:

[M]y co-clerk got pregnant unexpectedly (use protection, everyone) and had the baby as a single mom. Our judge was also a single mom due to an unexpected pregnancy during law school, so she was incredibly supportive. She let my co-clerk take off 2 months off and didn't notify HR, etc.

Anonymous, *Clerkships and Maternity Leave*, TOP LAW SCHOOLS (April 8, 2014, 12:13 PM), <https://www.top-law-schools.com/forums/viewtopic.php?f=34&t=227546> [<https://perma.cc/ZW6A-FMTM>].

the most laudable of ways.<sup>19</sup> In denying the clerk maternity leave, the judge would have implicitly required the clerk's resignation.<sup>20</sup> Perhaps the judge could have allowed the clerk to work up until her due date, and then be replaced by a new clerk. Or perhaps they could have asked the clerk to resign ahead of time. Judges are the kings and queens of their chambers—either avenue is available.

Taking stock, then, it is clear that protections against pregnancy discrimination, without a concomitant guarantee of parental leave, fail to protect pregnant law clerks from arbitrary dismissals. This is because the failure to provide parental leave to term law clerks makes *childbirth*, not *pregnancy*, incompatible with employment. Pregnancy clearly is compatible with employment as a federal law clerk, at least so long as its culmination occurs after the clerk's term of employment ends.<sup>21</sup> If the blog poster's due date had taken place after her clerkship ended, she would not have had to worry about losing her position. It is therefore only childbirth—and a woman's need to recover from it—for which the clerkship makes no allowances.

Given this, the federal clerkship is not neutral on the issue of abortion, since the lack of parental leave reflects an assumption that clerks can and will be able to avoid childbirth if they become pregnant.<sup>22</sup> The only way to intentionally avoid childbirth after

19. *See Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 116–75 (2020) (statement of Olivia Warren), <https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf> [<https://perma.cc/S5U7-2THP>].

20. This is because presumably very few women could, or would be willing to, time childbirth to occur on a weekend and then return to chambers the following Monday to avoid missing work.

21. The timing can also work out if a clerk's due date is very close to the end of her clerkship:

I had my first at the end of my clerkship (ended 2 weeks early and replacement clerk started two weeks early), then used my clerkship bonus to fund an unpaid 5 month maternity leave, before starting at a firm with a 5 month old . . . I was so grateful that I was pregnant with my first while clerking, which was a pretty relaxed schedule for me.

Kat Griffin, *Should She Have a Baby During Law School? (What Point in Your Career IS The Best Time to Have a Baby?)*, CORPORETTE (March 3, 2020, 12:23 PM), <https://corporette.com/have-a-baby-during-law-school/> [<https://perma.cc/C23J-8ATS>].

22. One might also say there is an assumption that law clerks will avoid pregnancy entirely. But this is not true, because pregnancies that culminate after the clerkship are not prohibited, and, indeed, all circuits profess to prohibit discrimination based on pregnancy.



becoming pregnant is to end the pregnancy. This means that the current structure of the clerkship incentivizes clerks who find themselves faced with an unexpected pregnancy to choose abortion over continuing the pregnancy.<sup>23</sup>

Obtaining a federal clerkship is no mean feat, and the benefits that will accrue over the course of a former clerk's legal career are considerable. Losing such an opportunity is a serious blow. Consider a scenario, for instance, in which an incoming clerk discovers she is pregnant and due to give birth in the first four months of her federal appellate clerkship. She is single, has over \$100,000 in law school debt, and has her sights set on a career in appellate litigation.<sup>24</sup> Despite not having planned this pregnancy, she is not entirely opposed to having a child at this time. But she also strongly suspects her judge would not provide leave—or would be angry if pressured to do so—because the judge asked her point blank during her interview if she intended to become pregnant. Losing the clerkship means not only losing a key resume item for an aspiring appellate lawyer, but also losing the \$50,000 bonus she was due to receive from the law firm she will be joining following her clerkship.<sup>25</sup> In the end, she decides that the costs of continuing the pregnancy are too great, so she chooses to terminate her pregnancy.

Of course, whether she *can* terminate her pregnancy—and how safely she can do so—will depend upon where she happens to be clerking. American women no longer have a constitutional right to avoid childbirth once pregnant. Many clerks are and will be clerking within vast abortion deserts, cut off from adequate medical care and facing threats of criminal prosecution should they attempt to end their pregnancies to save their jobs. Some will surely turn

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23. Adoption or relinquishment of parental rights under a safe haven law are not viable alternatives, as each require a woman to carry the pregnancy to term and undergo childbirth.

24. A recent American Bar Association survey found that law students owed on average about \$108,000 in debt upon graduation. AM. BAR ASS'N, STUDENT DEBT: THE HOLISTIC IMPACT ON TODAY'S YOUNG LAWYER 3 (2021), [https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/2021-student-loan-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf) [<https://perma.cc/SYF8-7F2K>].

25. Major law firms routinely provide hiring bonuses to individuals with federal clerkship experience. Currently, most firms are offering \$50,000 to those who completed a single clerkship and \$70,000 for those who completed two clerkships. Some elite firms, however, offer even higher sums: Susman Godfrey recently increased its clerkship bonus to \$125,000 for those who completed one clerkship and \$150,000 for those who completed two federal clerkships. Kathryn Rubino, *Elite Law Firm Will Offer \$150,000 in Clerkship Bonuses*, ABOVE THE LAW (Apr. 26, 2022, 12:16 PM), <https://abovethelaw.com/2022/04/elite-law-firm-will-offer-150000-in-clerkship-bonuses/> [<https://perma.cc/U6JH-CBZH>].

to the abortion pill, while others will attempt to secure time off to travel out of state. The stress and fear that these women will experience is difficult to fathom.

That some pregnant clerks (or pregnant incoming clerks) may feel pressured to choose abortion—and in doing so put themselves at risk of criminal prosecution—to save their job is deeply problematic. Although the abortion debate is intense and divisive, Americans on both sides should be able to agree that a woman should not feel forced to end her pregnancy to avoid losing a job she has spent years working for, and which could have a transformative effect on her career trajectory. Those who support a woman's right to choose should want her to be able to chart her own destiny as she sees fit, free from social constraints. Those who oppose abortion should want an institutional structure that supports, rather than penalizes, women who choose to bring new life into this world. Yet by threatening the law clerk who chooses to carry a pregnancy to term with the threat of dismissal, the clerkship tilts the deck in favor of abortion, regardless of the clerk's own wishes.

Finally, it is worth emphasizing here that while the federal clerkship incentivizes pregnant clerks to choose abortion (if they are due during their clerkship term), it imposes significant financial costs on pregnant clerks regardless of whether they carry the pregnancy to term or not. The federal health insurance offered to law clerks only provides coverage for abortion services in the case of rape, incest, or when necessary to save a woman's life.<sup>26</sup> This means that a clerk who chooses abortion for any other reason, including to remain gainfully employed, will bear the full cost of the procedure. And while the federal health employee program purports to support pregnant employees from “prenatal to postpartum,” such coverage is going to be of cold comfort to a pregnant law clerk who, after deciding to continue her pregnancy, has lost her position due to the lack of maternity leave.<sup>27</sup>

For many readers, the threat of arbitrary dismissals and an institutional structure that pushes women to choose abortion are likely sufficient reasons to justify extending parental leave to law clerks. But the lack of parental leave has broader implications

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26. Anusha Ravi, *How the U.S. Health System Excludes Abortion* at 2, CTR. FOR AM. PROGRESS (June 27, 2018), <https://americanprogress.org/wp-content/uploads/2018/07/Abortion-Health-Insurance-System-brief.pdf> [<https://perma.cc/6R3A-EYF6>].

27. *Pregnancy*, BLUE CROSS BLUE SHIELD, <https://www.fepblue.org/manage-your-health/managing-specific-conditions/pregnancy/maternity> [<https://perma.cc/2KRJ-VGMG>] (last visited Jan. 24, 2023).

for gender equality within the profession, as the following Part demonstrates.

## II. PERPETUATING GENDER INEQUITY WITHIN THE PROFESSION

The federal clerkship is a highly coveted position, and with good reason. Clerking on a federal court provides a (usually freshly minted) lawyer with an opportunity to see how the judiciary works from the inside, to hone her legal research and writing skills, to develop relationships with judges, and to develop a professional network that can lead to a plethora of other opportunities. Given the substantial benefits that flow from clerking, then, some might argue that it is not a “big ask” to require clerks to be willing to work for a year or two without guaranteed parental leave. While this argument might have merit if men and women were equally impacted by the lack of leave, the fact is they are not. And because the clerkship is an important steppingstone within the legal profession, indeed a prerequisite for some positions, the federal clerkship perpetuates gender inequity within the legal profession by allowing men, but not women, to pursue both career and parenthood simultaneously.<sup>28</sup>

First, although the lack of parental leave is gender neutral on its face, it disproportionately impacts women because it is only women who require medical leave after the birth of a child. A male clerk may very well prefer to take parental leave after his child is born, but he will not require the type of leave a female clerk would after giving birth.<sup>29</sup> Unexpected fatherhood therefore will not derail his clerkship in the way unexpected motherhood might derail a woman’s. And *planned* fatherhood is also perfectly compatible with the federal clerkship.

The federal term clerkship, then, imposes an opportunity cost on women that is not imposed on men. For women, the privilege of clerking requires that they avoid biological family-building for a period equal to their clerkship term.<sup>30</sup> Practically, this means

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28. For instance, state Solicitor General Offices often offer one- or two-year fellowships designed to provide top graduates with hands on experience in appellate work; competitive applicants will have completed one or two clerkships. Similarly, clerkship experience, particularly at the appellate level, has often been an important resume item for those pursuing a career in legal academia.

29. Although I focus in this Piece on women’s need for parental leave, both men and women should be able to pursue a career and a fulfilling family life. Parental leave is therefore essential for *all* clerks.

30. The amount of time a clerk needs to avoid conception will always

women who wish to clerk must either practice abstinence or, if sexually active, use contraception for their clerkship's duration.<sup>31</sup> There is no similar constraint imposed on men's intimate lives. And even if men were somehow similarly prevented from family-building due to the lack of leave, the opportunity cost they would face would not be of the same magnitude. This is because women face a shorter reproductive clock than men. While a man can father children well into middle age or even later, a woman's key childbearing years are in her twenties and early thirties; female fertility begins to take a sharp nosedive around the age of thirty-five.<sup>32</sup> Delaying family building is therefore not without its risks for women, particularly women who matriculate from law school at a later age.<sup>33</sup> Thus, not only does the clerkship as currently structured impose an opportunity cost on women that it does not impose on men, but it also imposes that cost on the very group for which it is most consequential.<sup>34</sup>

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be the duration of the clerkship, but it does not overlap perfectly with the period of employment. In the case of a one-year clerkship, a clerk must avoid conceiving during the nine months prior to the start of her clerkship and the first three months of the clerkship itself. In a two-year clerkship, she must avoid conceiving during the nine months prior to her clerkship and the first fifteen months of the clerkship itself.

31. Neither abstinence nor contraception are foolproof methods against pregnancy. Various studies over the last two decades estimate that there are between 17,000 and 32,000 rape-related pregnancies in the United States every year. *Parental Rights and Sexual Assault*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx> [<https://perma.cc/A2DE-JJZ8>] (Mar. 9, 2020).

Furthermore, no method of contraception is 100 percent effective. See *Contraception*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/contraception/index.htm> [<https://perma.cc/KR29-QBLG>] (Nov. 1, 2022).

32. *Age and Fertility*, BETTER HEALTH CHANNEL, <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/age-and-fertility> [<https://perma.cc/9YQY-44MG>] (Sept. 6, 2021).

33. Most law students are in their early to mid-twenties (22–27), but roughly 20 percent are thirty or older. Gabriel Kuris, *Advice for Older Law School Applicants to Consider*, U.S. NEWS (Dec. 5, 2022, 9:34 AM), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/advice-for-older-law-school-applicants-to-consider> [<https://perma.cc/2DLE-QPZA>].

34. In her 2001 nationwide survey of high-achieving professional women and men, Sylvia Hewlett found that while 72 percent of women in her sample wanted to have more than one child, 32 percent of these high-achieving women had only one child. Notably, high-achieving men did not experience a similar gap between dream and reality: 79 percent wanted children and 75 percent had children; of those, 84 percent had more than one child. SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* 98–99 (2002). For some of these women, intentional delay in childbearing had turned

Undoubtedly, many women are willing to avoid child-bearing for the year(s) required to reap the benefits of a federal clerkship.<sup>35</sup> Indeed, women have increasingly been delaying and/or avoiding childbirth over the past few decades in order to pursue their educational and career goals.<sup>36</sup> But whether or not a woman chooses to delay childbearing should be her *choice*, and not simply a function of a workplace structure that makes childbirth incompatible with employment. Many ambitious women do not want to wait until their early thirties to have children, a time when doctors start flinging around the phrase “geriatric” with reckless abandon.<sup>37</sup> And, of course, many men would also prefer to start their families before they are thirty. But while male clerks can reap the rewards of a federal clerkship—one of the most prestigious steppingstones in the legal profession—while building their families, female clerks cannot, at least not if they want to do the gestational work themselves.<sup>38</sup>

Some readers may still be unconvinced. Even if the lack of leave disproportionately impacts women, it is still *just* a year, they will say. But really it is not just a year, because the clerkship year does not exist in a vacuum, detached from the rest of a clerk’s life course. The clerkship’s prohibition against childbirth, when coupled

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into unintentional childlessness—or smaller families than desired—due to biological limitations. *Id.*

35. This is not an option for all women. Women with certain medical conditions, for instance, may know that they will have a difficult time conceiving a child and wish to begin trying earlier rather than later to increase their odds of success. Other women, due to their religious beliefs, may find it morally impermissible to use contraception. If a married woman with such religious beliefs seeks to clerk at the federal level, she must either practice abstinence or accept that she may become pregnant and possibly lose her position due to the lack of parental leave.

36. Gretchen Livingston, *For Most Highly Educated Women, Motherhood Doesn’t Start Until the 30s*, PEW RSCH. CTR. (Jan. 15, 2015), <https://www.pewresearch.org/fact-tank/2015/01/15/for-most-highly-educated-women-motherhood-doesnt-start-until-the-30s/> [https://perma.cc/B8UX-CFLA] (finding that the median age of first birth among women with a master’s degree or higher is thirty). Many women, of course, do not want to have children at all.

37. The term “geriatric pregnancy” is a term that has been used to refer to pregnancies in women over the age of thirty-five. But because many women (understandably) find it insulting to be referred to as geriatric in their thirties and forties, the medical profession has been begun using the phrase “advanced maternal age” instead. Leah Groth, *What Is a Geriatric Pregnancy? Here’s What to Know About the Outdated Term*, HEALTH (Jan. 15, 2020), <https://www.health.com/condition/pregnancy/what-is-a-geriatric-pregnancy#:~:text=The%20somewhat%2C%20well%2C%20incredibly%20offensive,younger%20than%20it%20is%20now> [https://perma.cc/4UVB-5J9Y].

38. Those who seek to build their families through adoption or surrogacy would not be impacted by the lack of leave in the same manner.

with other positions imposing similar institutional constraints on women's pursuit of family and career, can have ripple effects that last long past the end of a woman's time in chambers.<sup>39</sup> Most obviously, when the clerkship is a prerequisite to another position that also requires women to avoid childbearing, the imposed period of delay can become quite long indeed.

A key example would be what is perhaps one of the most prestigious positions a young lawyer can obtain: a U.S. Supreme Court clerkship. To have any chance at securing a clerkship at One First Street, an applicant must have first clerked on one of the lower federal circuit courts.<sup>40</sup> In fact, increasingly one needs to have completed not one, but *two*, lower court clerkships (one of which can be a district court clerkship).<sup>41</sup> This means that, at a minimum, the path to a U.S. Supreme Court clerkship requires three years of law school, two years of clerking on the lower federal courts, and one year clerking at the U.S. Supreme Court itself.<sup>42</sup> *Three* of those years *require*<sup>43</sup> women to avoid childbirth.<sup>44</sup> They do not require

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39. One anonymous poster honed in on this point:

These are huge decisions: how to weigh this short-term disruption of current and future family obligations with professional ambitions. People say it's only a year, but it's much more than that—it's when to start a family, which takes thought and planning. There are really multi-year implications. At the same time, do we self-select ourselves out of clerkships because of decisions of when to start a family? Men don't really face this choice, for better or worse.

*Female Perspectives, supra* note 16.

40. Since 2005, 100 percent of U.S. Supreme Court clerks have clerked for a federal circuit judge prior to arriving at the High Court. David Lat, *Supreme Court Hiring Watch: The Complete Clerk Roster for October Term 2020*, ABOVE THE LAW (Dec. 29, 2020, 11:01 AM), <https://abovethelaw.com/2020/12/supreme-court-clerk-hiring-watch-the-complete-clerk-roster-for-october-term-2020/> [https://perma.cc/Q9YF-6U8D]. It should also be noted that some federal circuit judges prefer to hire clerks with district court experience.

41. In 2020, thirty-four out of forty-two (81 percent) clerks had clerked for two lower court judges. While fifteen clerked for a district court judge and a circuit judge, nineteen had clerked for two circuit judges. *Id.*

42. An analysis of U.S. Supreme Court law clerks from 2015 through 2020 suggests that the average age of a High Court clerk is thirty, with the youngest clerk coming in at age twenty-six, and the oldest at forty-six (unpublished analysis) (on file with author).

43. Law school does not *require* a woman to avoid childbirth but, practically speaking, giving birth while also navigating the demands of law school is an immense challenge. See Griffin, *supra* note 21; Emma Smoler, *The Reverse Course Career Plan: What It's Like to Have a Child in Law School*, ABOVE THE LAW (Dec. 5, 2019, 11:46 AM), <https://abovethelaw.com/2019/12/the-reverse-course-career-plan-what-its-like-to-have-a-child-in-law-school/> [https://perma.cc/PK7P-H8BA].

44. We can also think about this in terms of reliance interests. In picking

men to avoid fathering a child. So, while many women who aspire to a U.S. Supreme Court clerkship will necessarily walk a path that requires them to delay childbearing (or, at the very least, requires timing the birth of their children very carefully),<sup>45</sup> men who have similarly high aspirations will face no such constraint. They may want to delay family building, but they will not *have* to, at least not because of any lack of leave.

It is true that very few individuals can and do aspire to secure a U.S. Supreme Court clerkship. But it is undeniable that those who do often become leaders in the legal profession—and even outside of it.<sup>46</sup> U.S. Supreme Court clerks routinely land at prestigious firms, gain coveted faculty positions at top law schools, secure high level government positions and, importantly, are often at the top of the list for judgeships later in life. Indeed, six of the current justices clerked on the U.S. Supreme Court in the early days of their career.<sup>47</sup> Notably, however, women have been and continue

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clerks to staff their chambers each year, the U.S. Supreme Court justices, including the conservative majority striking down *Roe*, rely on a job pipeline that implicitly requires women to avoid childbirth for a period of several years.

45. This path will be doable—and indeed desirable—to many women. It will be most attainable to those who graduate from law school at earlier ages. Justice Amy Coney Barrett is a good example of this. Justice Barrett graduated from law school in 1997 at the age of twenty-five and transitioned into a clerkship with Judge Silberman of the D.C. Circuit. She then clerked for Justice Scalia on the U.S. Supreme Court during the 1998 term, after which she married her husband, Jesse Barrett, and began practicing at Miller, Cassidy, Larroca, & Lewin. She stayed there for two years, before joining the faculty at Notre Dame Law School. *The Current Court: Justice Amy Coney Barrett*, SUP. CT. HISTORICAL SOC'Y, <https://supremecourthistory.org/supreme-court-justices/associate-justice-amy-coney-barrett/> [https://perma.cc/FHR5-ACNJ] (last visited Jan. 25, 2023). Based on her children's ages, she appears to have had her first child around the age of twenty-nine or thirty. However, Justice Barrett's path will not work for all women. Her path is a much riskier path for a woman who graduates from law school in her late twenties or early thirties, for it would mean attempting to conceive when a woman's fertility is starting to take a sharp downturn. It would not be possible for a married woman whose faith prohibits the use of contraceptives, nor would it be desirable for a woman who matriculate at twenty-five but who would like to have a child before she is thirty.

46. Senators Richard Blumental (D-Connecticut), Mike Lee (R-Utah) and Ted Cruz (R-Texas) both formerly clerked at the U.S. Supreme Court. David Lat, *A New Trend Among Supreme Court Clerks?: Why Are So Many Former SCOTUS Clerks Flocking to Capitol Hill?*, ABOVE THE LAW (Aug. 18, 2015, 4:32 PM), <https://abovethelaw.com/2015/08/a-new-trend-among-supreme-court-clerks/> [https://perma.cc/XY6D-ZRRU].

47. Justice Breyer clerked for Justice Arthur J. Goldberg (1964); Chief Justice Roberts clerked for Justice William H. Rehnquist (1980); Justice Kagan clerked for Justice Thurgood Marshall (1987); Justice Gorsuch clerked for

to be underrepresented in the ranks of U.S. Supreme Court clerks.<sup>48</sup> Perhaps one cause (but certainly not the only cause) of this is the different burdens the pipeline imposes on prospective male and female clerks.<sup>49</sup>

### III. THE FEASIBILITY OF PROVIDING PARENTAL LEAVE

At this point, some readers may be convinced that the lack of parental leave for term clerks is a gender equity issue. But they still may question the feasibility of providing leave to term clerks. After all, a clerkship is a short-term position, and judges rely on their clerks to keep cases moving through chambers. One might therefore conclude that while providing leave would be *preferable*, it is simply not *doable*. We should reject this argument.

First, the short-term nature of the clerkship is only a sufficient reason for denying clerks parental leave if one accepts the proposition that the clerkship exists as it does because it is *truly* the most efficient institutional format, and not simply because it developed during a period in which women were generally barred from pursuing careers, legal or otherwise.<sup>50</sup> So, let's engage in a little thought experiment. Imagine that the gendered plot of our nation's history was flipped on its head. Substitute the matriarchy for the patriarchy and assume that every man in power was a woman and vice versa. In this alternative timeline, the legal profession has been dominated not by men, but by women. This means that in the 1930s, the period in which federal courts were first authorized to hire law clerks, women accounted for all but one of the 218 judges in the

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then-retired Byron R. White and Justice Anthony M. Kennedy (1993); Justice Brett M. Kavanaugh clerked for Justice Anthony M. Kennedy (1993); and Justice Amy Coney Barrett clerked for Justice Antonin Scalia (1998).

*Frequently Asked Questions on Justices*, SUP. CT. (last visited Feb. 27, 2023) [https://www.supremecourt.gov/about/faq\\_justices.aspx](https://www.supremecourt.gov/about/faq_justices.aspx) [<https://perma.cc/CN5A-SY8X>].

48. For instance, between 2005 and 2017, a time in which women's law school enrollment averaged approximately 47 percent, the percentage of female law clerks hired at the High Court averaged around 33 percent—twice as many men were hired. Tony Mauro, *SCOTUS Law Clerks: The Gender Imbalance*, NAT'L L. JOURNAL (Dec. 11, 2017, 6:00 AM), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/scotus-law-clerks-the-gender-imbalance/?sreturn=20220430102450> [<https://perma.cc/ALK5-8CC3>].

49. Sarah Isgur, *The New Trend Keeping Women out of the Country's Top Legal Ranks*, POLITICO (May 4, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/05/04/women-supreme-court-clerkships-485249> [<https://perma.cc/F6PQ-BKTH>].

50. Court of appeals judges were first authorized to hire law clerks in 1930; district judges were first permitted to do so in 1936. See Act of June 17, 1930, ch. 59, 46 Stat. 774; Act of Feb. 17, 1936, ch. 75, 49 Stat. 1140.



federal judiciary.<sup>51</sup> Indeed, it took until 1981 before Sam O'Connor became the first male justice of the U.S. Supreme Court.

It defies imagination to think that law clerks in this alternative timeline would be denied parental leave. The federal clerkship would have been designed around women's bodies, not men's, and as a result it would have accepted women's childbearing capabilities as the norm, not the deviation. It certainly would not have penalized women for daring to want both career and family, simultaneously. Thus, to say that the clerkship's unique structure *requires* that clerks be denied parental leave is simply a refusal to recognize that our concept of how the clerkship must be is not natural or necessary—it is instead a social creation, the result of designing institutions around male experiences. And because it is a social creation, it can be modified and revised to suit a long overdue recognition that men and women should be able to enjoy professional life and parenthood equally.<sup>52</sup>

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51. Atthar Mirza & Chiqui Esteban, *Female Judges Were a Rarity When Ruth Bader Ginsburg Was Born. They Still Are.*, WASH. POST. (Sept. 21, 2020), <https://www.washingtonpost.com/politics/2020/09/21/female-judges-were-rarity-when-ruth-bader-ginsburg-was-born-they-still-are/> [https://perma.cc/53JV-7L7U].

52. This sort of institutional reckoning is not unique to the judiciary. For example, over the past several years there has been an increasing awareness of the ways in which the lack of parental leave impedes women's ability to pursue careers in both academia and medicine. See, e.g., LEE ET AL., *PARENTS IN THE PIPELINE: RETAINING POSTDOCTORAL RESEARCHERS WITH FAMILIES 2* (2017), <https://worklifelaw.org/publication/parents-pipeline-retaining-postdoctoral-researchers> [https://perma.cc/DT8W-435J]; Kendall Powell, *Why Scientist-Mums in the United States Need Better Parental-Support Policies*, NATURE (Apr. 30, 2019), <https://www.nature.com/articles/d41586-019-01315-2> [https://perma.cc/G5EZ-DN2M]. The lack of leave is particularly consequential for those whose career trajectory that cap graduate training with short-term postdoctoral positions. George E. McCue, *Start a Family or Become a Professor—Parental Leave Policies for Postdoctoral Fellows Training for Academic Careers in the Sciences*, 26 WIS. J.L. GENDER, & SOC'Y 109, 113–115 (2011). In response, an increasing number of universities, hospitals, and grant-providing institutions have begun to craft parental leave policies aimed at supporting women as they pursue career and family. In 2018, for instance, the University of Michigan Medical School began allowing all postdocs to take a paid leave of absence when they add children to their families. *Maternity and Paternal Leave for Postdoctoral Research Fellows*, OFF. OF GRADUATE & POSTDOCTORAL STUD., <https://ogps.med.umich.edu/post-docs-maternity-paternal-leave/> [https://perma.cc/YAN8-RJFT] (last visited Oct. 23, 2022). Similarly, the National Institute of Health now provides postdocs with up to 8 work weeks of parental leave. NAT'L INST. OF HEALTH, ET AL. NOT-OD-16-105, REVISED NIH PARENTAL LEAVE POLICY FOR RUTH L. KIRSCHTEIN NATIONAL RESEARCH SERVICE AWARDS (2016), <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-16-105.html> [https://perma.cc/3AH6-5S2N]. Although much work remains to be done, the change

Second, we know that the judiciary would not collapse if law clerks were suddenly provided parental leave because some judges are *already* providing their clerks with leave. Judges have been willing to provide traditional forms of leave, including a number of weeks off, as well as more creative leave solutions, like allowing an able and willing firm associate to step into a clerk's shoes while she recovers from childbirth.<sup>53</sup> Indeed, creativity and a willingness to support parents, of either gender, can go a long way in this context. And it should be more doable than ever before given current technology. Many judges, for instance, have warmed up to the idea of allowing clerks to telecommute when needed in the post-Covid era.

Now, the fact that providing leave is feasible does not mean that providing leave is costless. Judges are used to a constant supply of clerks who take few, if any, vacations. A clerk's absence from chambers, for any significant<sup>54</sup> length of time, will affect chambers. If the judge does not hire a temporary replacement, more work will necessarily fall on the judge and the other clerks during her (or his) leave. Alternatively, a judge could hire a replacement, but this would require the judge to invest time and energy into screening potential replacements and getting the replacement up to speed when he or she joins chambers. Yet, these are not insurmountable costs<sup>55</sup>—and they certainly do not justify a refusal to provide

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taking place within these professions shows both that it *can* be done and that the federal judiciary is increasingly behind the times on the issue of parental leave.

53. Staci Zaretsky, *Revolutionary Arrangement Will Allow Federal Law Clerk to Take Parental Leave During Clerkship*, ABOVE THE LAW (July 2, 2018, 12:09 PM), <https://abovethelaw.com/2018/07/revolutionary-arrangement-will-allow-federal-law-clerk-to-take-parental-leave-during-clerkship/> [https://perma.cc/H293-DDEG].

54. What counts as significant is certainly in the eye of the beholder. Some judges expect their clerks to devote themselves to the clerkship day and night. See, e.g., Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1711 (1991) (writing that “it is widely known that my clerks are on call 24 hours a day: ‘More than one former [Kozinski] clerk remembers getting a call from the judge in the wee hours of the morning’”). Certainly, an employer with such a perspective would view even a week of parental leave as significant.

55. I am suspicious that hiring replacements impose any significant costs. First, many judges delegate the drudgery of the hiring process to their staff and current clerks, only examining the applications of those who make the final cut. Second, getting a qualified replacement up to speed on chambers' particulars should *not* take much time, particularly if the clerk taking leave works to prepare their replacement ahead of time. Clerks are, by the nature of the job, *fungible*. They are not experts—the majority have just graduated law school; nor do they have years of institutional knowledge under their belt. Most clerk for only one year. If we really thought that law clerks take two to three months to be useful in chambers, then the clerkship term would be much longer in

any leave at all, not when the lack of leave leads to such blatant gender inequities.<sup>56</sup> Figuring out how to provide parental leave to term clerks while enabling the judiciary to continue functioning smoothly may require work, even experimentation, but it is work worth doing.

Providing parental leave is possible *if* institutional stakeholders are willing to commit to supporting clerks who seek to build their families during the clerkship. For instance, a conservative proposal would be to provide clerks with four weeks of paid parental leave, plus the right to telecommute for another two weeks. This would provide a term clerk who has given birth with six weeks of recovery time—the postpartum period—at home before she is expected to physically return to chambers. And this type of leave package is eminently doable. After all, even now, term clerks are entitled to thirty days paid leave to engage in organ donation.<sup>57</sup> If term clerks are afforded thirty days to participate in the life saving process of organ donation, then presumably they could be accorded the same amount of time for undergoing the process of childbirth. And COVID has made all too clear that telecommuting will not send chambers to a screeching halt.

A more generous and aspirational solution, however, would be to provide term clerks with two to three months of paid parental leave. To ensure that judges continue to be supported in their work while a clerk is on leave, the judiciary could emulate the National Science Foundation's (NSF) recent efforts to reduce the rate at which women depart from science, engineering, technology and math (STEM) fields. Recognizing both that a lack of parental leave plays a significant role in the underrepresentation of women in STEM fields and that a postdoctoral researcher's absence from her lab can prove quite costly for the larger research team, the NSF now provides a gender-neutral supplemental funding opportunity to NSF postdocs who welcome a new child into the family. This funding allows postdoctoral researchers to hire replacement

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order to justify two to three months of dead weight.

56. These arguments certainly do not justify firing pregnant clerks, rescinding clerkship offers, or pressuring women to choose abortion in order to save their job. The costs imposed to individual women far outweigh the costs imposed on the judiciary.

57. The Organ Donor Leave Act, which provides up to thirty days paid leave to any federal employee who is willing to donate an organ, was passed in 1999 in an effort to make it easier for federal employees to take part in the “life saving effort” of organ donation. U.S. OFF. OF PERS. MGMT., CPM 99-O, ORGAN DONOR LEAVE ACT 1 (1999), <https://www.chcoc.gov/content/organ-donor-leave-act> [<https://perma.cc/52VN-L45J>].

personnel to keep their research labs fully staffed during their leave of absence.<sup>58</sup>

Translating this initiative to the clerkship context would be simple: judges could be provided with funding to hire a short-term replacement, and a new section on OSCAR could be created for short-term clerkship hires.<sup>59</sup> There is *no* dearth of qualified candidates wanting to clerk on the federal courts.<sup>60</sup> Indeed, there are many qualified individuals who would find a short-term position to be superior to a one-year or two-year position. A young firm associate may jump at the chance to gain an inside view of the judiciary, for instance, without having to sacrifice an entire year's worth of her Big Law salary.<sup>61</sup> Similarly, a recent law graduate coming off a one-year public interest fellowship in late summer may seek to fill in the gap between his fellowship and the October start date of his new position. And some prospective clerks who are unable to relocate for an entire year or two—perhaps because of family commitments—may be able to do so for just two or three months. Providing parental leave therefore will not only further gender equality, but also make the benefits of clerking more accessible to a wider range of applicants.

Finally, we might also consider allowing clerks who take parental leave to extend the length of their clerkship by the amount of their leave time. Clerkships tends to run from August to August, but this is largely an artifact of an incoming clerkship class that is coming straight from law school (and a summer of bar studying) or a previous clerkship. There is nothing preventing judges from setting the start and end dates of a clerkship term to suit their particular needs. And, again, there is no shortage of qualified applicants willing to clerk—at any point in the year.

The point is, figuring out how to provide parental leave while minimizing the costs to the judiciary may take careful thought and

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58. NAT'L SCI. FOUND., NSF 13–109, DEAR COLLEAGUE LETTER: FY 2013 CAREER-LIFE BALANCE 1–2 (CLB) SUPPLEMENTAL FUNDING OPPORTUNITIES IN SUPPORT OF POSTDOCTORAL INVESTIGATORS FUNDED BY NSF AWARDS (2013), <https://www.nsf.gov/pubs/2013/nsf13109/nsf13109.pdf> [https://perma.cc/D5QS-Q328].

59. Currently, the shortest clerkship term listed on OSCAR is six months.

60. See U.S. Courts, *Law Clerk Hiring Historical Statistics*, ONLINE SYSTEM FOR CLERKSHIP APPLICATIONS AND REVIEW, [https://oscar.uscourts.gov/law\\_clerk\\_hiring\\_statistics](https://oscar.uscourts.gov/law_clerk_hiring_statistics) [https://perma.cc/C4VJ-9SB6] (last visited Oct. 22, 2022) (showing how over a judge will typically receive over one hundred applications for one clerkship position).

61. Law firms presumably would also appreciate the opportunity to have young associates gain valuable knowledge and insider knowledge of a particular court at no extra cost to the firm.

even some degree of experimentation, but it is worthwhile work. Indeed, our nation's most prestigious law firms have begun to recognize that if they want to recruit the best and the brightest, they need to support attorneys who seek both career and family.<sup>62</sup> It's time the judiciary realize this as well.

### CONCLUSION

Recently, there has been a growing awareness that the federal clerkship needs an upgrade. Much of the action taken by the federal judiciary centers on preventing and addressing sexual harassment and workplace misconduct, and ensuring that clerks who are mistreated by their judges can seek recourse through a neutral and fair resolution process.<sup>63</sup> These are important and worthwhile goals, and they should be pursued. However, providing guaranteed parental leave to clerks is equally important. After all, "if the legal profession is structured so that female lawyers and male lawyers cannot enjoy professional life and parenthood equally, then the profession perpetuates the very gender inequality which disadvantages women."<sup>64</sup> It's 2023. It's about time we stopped penalizing women for their ability to give birth.

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62. Staci Zaretsky, *Elite Biglaw Firm Offers up to 22 Weeks Paid Leave with Its Enhanced Parental Leave Program*, ABOVE THE LAW (Mar. 2, 2022, 3:27 PM), <https://abovethelaw.com/2022/03/elite-biglaw-firm-offers-up-to-22-weeks-paid-leave-with-its-enhanced-parental-leave-program/> [https://perma.cc/KRM6-W98A].

63. See, e.g., Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 610 (2020).

64. Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 136 (1997).