NOTES

TEARING DOWN THE MATERNAL WALL IN THE LEGAL PROFESSION: A PERSPECTIVE INSPIRED BY DIFFERENCE FEMINISM

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ABSTRACT

Since 1985, women have been attending law school in roughly equal numbers as men, but today, they are approximately only 20% of all equity partners, 35% of federal judges, and 36% of tenured or tenure-track professors. This Note examines why women are still underrepresented in positions of power in the legal profession. Tracing the legal profession's historical exclusion of women, this Note argues that the path towards making partner at a law firm, which was built around the experience of an archetypical male, unfairly ignores the biological and cultural experience of motherhood. Key career-building years—the late 20s and early 30s—directly conflict with the healthiest years for pregnancy, disproportionately disadvantaging women. This Note analyzes policies for partnership through the lens of feminist legal theory, a critical legal theory devised by women law school students in the 1970s and 1980s. It contends that policies shaped by equity feminism, which insists that women can and should adapt to male-defined standards, while well-intentioned, have failed to surmount the motherhood roadblock. Instead, policies grounded in difference feminism, which observes that women have different biological and cultural experiences—specifically, a six-month paid maternity leave and flexible work arrangements—would help tear down the maternal wall and place more women in positions of power. With more women leaders in the legal profession, shaping the law and public policy, society may shift towards one that embraces and supports critical attributes of motherhood.

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"I had three strikes against me: One I was Jewish; two, I was a woman. But the killer was that I was the mother of a four-year-old child."[1]

I. INTRODUCTION

Myra Bradwell, a publisher at a legal news company, an apprentice in her husband's law office, and a mother of four, sat for the Illinois bar in 1869 upon the recommendation of the state's attorney and a federal judge.[2] Although Bradwell passed the examination with high honors, the Illinois Supreme Court nonetheless denied her admission to the bar.[3] As a married woman, Bradwell could not perform legal tasks without her husband's consent.[4] Moreover, the court added that women were ill-suited for the "hot strifes of the bar."[5] Undeterred, Bradwell appealed her case to the Supreme Court of the United States.[6] Eight male justices, however, upheld the prior decision on federalism grounds,[7] stating that the

1. Justice Ruth Bader Ginsburg speaking in an interview with CBS in 2016 about her employment prospects after graduating first in her class from Columbia Law School in 1959. *Ruth Bader Ginsburg: Her View from the Bench*, CBS NEWS (Oct. 9, 2016, 9:54 AM), https://www.cbsnews.com/news/ruth-bader-ginsburg-her-view-from-the-bench/.

2. Two of Bradwell's children passed away at an early age. *See* Jane M. Friedman, Myra Bradwell: On Defying the Creator and Becoming a Lawyer First Women: The Contribution of American Women to the Law, 28 VAL. U. L. REV. 1287, 1287–92 (1994).

3. Friedman, *supra* note 2, at 1288.

4. Melissa Murray, *Law School in a Different Voice*, *in* WOMEN & LAW 131, 133 (2020) (joint publication of the top sixteen law reviews).

5. *In re* Bradwell, 55 Ill. 535, 542 (1869); *see also* Friedman, *supra* note 2, at 1291 (observing that the Illinois Supreme Court did not want to admit Bradwell to the bar because it would "open the floodgates," allowing women to occupy other public positions).

6. Murray, *supra* note 4, at 134.

7. Friedman, *supra* note 2, at 1297–98.

regulation of professional occupations was within the power of the state.[8] In his concurrence, Justice Bradley departed from this deferential approach, claiming that the legal profession should exclude women, when he noted that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[9]

Fast forward about a century and a half later, and I am a first-year student at Georgetown University Law Center, reading Justice Bradley's concurring opinion and critiquing his sexist rhetoric reinforcing the ideology of "separate spheres,"[10] what feminist scholars have referred to as the patriarchal belief that women belong in the private sphere of the home and men belong in the public sphere of the workplace.[11] Today, American women outnumber men attending law school across the country.[12] Additionally, the editors-in-chief of the top law reviews are all women.[13] Despite these profound achievements, vestiges of Justice Bradley's opinion still linger. Although 40% of law school students were women in 1985 and women reached a majority of incoming J.D. candidates in 2001,[14] women have not yet attained parity with men in the upper echelons of the profession. Approximately 20% of law firm equity partners are women;[15] 35% of federal court judges are women;[16] and 36% percent of tenured or tenure-track

8. Writing for the majority, Justice Miller cited the recently decided *Slaughterhouse Cases*, finding that a state does not violate the Fourteenth Amendment and abridge the Privileges and Immunities of its citizens by regulating admission to the bar. *Id.* at 1297; *see* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (holding that it is the states' right to regulate admission to the bar).

9. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

10. Murray, *supra* note 4, at 134 (providing further information on the comparisons between the ideology of separate spheres and Justice Bradley's concurrence). The Illinois Supreme Court also noted the ideology of separate spheres in its opinion denying Bradwell's admission to the bar, stating, "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth." *In re* Bradwell, 55 Ill. 535, 539 (1869).

11. *See* Linda Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 14–16 (1988) (providing an in-depth historical overview and explaining the "public/private dichotomy" concept of the separate spheres ideology).

12. Stephanie Francis Ward, *Women Outnumber Men in Law Schools for First Time, Newly Updated Data Show*, ABA J., (Dec 19, 2016, 9:03 AM CST), https://www.abajournal.com/news/article/women_outnumber_men_in_law_schools_for_first_time_newly_updated_data_show. The incoming Georgetown University Law Center class of 2021 was 59% female. Georgetown Law Juris Doctor 2019-2020, https://www.law.georgetown.edu/wp-content/uploads/2019/09/JD_Viewbook_19.pdf (last visited Mar. 26, 2020).

13. Karen Sloan, *Women Hold Editor-in-Chief Positions at the Sixteen Most Elite Law Reviews*, LAW.COM (Jan. 21, 2020, 3:52 PM), https://www.law.com/2020/01/21/women-hold-editor-in-chief-positions-at-the-16-most-elite-law-reviews/.

14. Dara Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology*, 2012 MICH. ST. L. REV. 1693, 1695 (2012).

15. Risa L. Goluboff, *On Firsts, Feminism, and the Future of the Legal Profession*, *in* WOMEN & LAW 81, 90 (2020) (joint publication of the top sixteen law reviews).

16. *Id.* For minority women, this number hovers around 2.8%. For more information about the additional obstacles and hardships that minority female attorneys experience, see Kristen Hardy, *Don't*

professors are women.[17] Although women attorneys are no longer explicitly denied admission to the bar, the underrepresentation of women leaders in the legal profession suggests that there is still an implicit assumption that women are ill-suited for the "hot strifes of the bar."[18]

Multiple reasons[19] have been given for the striking deficit of women leaders[20] in the legal profession; however, motherhood and the caretaking labor it requires stands as the most persuasive explanation.[21] Since the legal profession was built

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Forget About Women Lawyers of Color, MARQ. UNIV. LAW SCH. FACULTY BLOG (Feb. 26, 2020), https://law.marquette.edu/facultyblog/2020/02/dont-forget-about-women-lawyers-of-color/.

17. Goluboff, *supra* note 15, at 90.

18. *In re Bradwell*, 55 Ill. at 541.

19. The lack of women leaders in the legal profession may be caused by factors present early in a woman's legal career. Indeed, some research indicates that the style and format of a legal education may be disadvantageous to women, having reverberating effects. *See* Clifton B. Parker, *Stanford Research Suggests Ways to Close the Gender Gap in Law Schools*, STAN. UNIV. NEWS (Nov. 11, 2014), http://news.stanford.edu/news/2014/november/gender-law-pedagogy-111014.html (explaining a study conducted by two Stanford Law School Professors which found that Socratic method style classes may place women at a disadvantage). Moreover, some studies find that women law school students are more prone to anxiety, depression, and other mental disorders. *See* Purvis, *supra* note 14, at 1701–02. Other research suggests that women exit the legal profession at greater rates than men due to sexual harassment. *See* Debra Cassens Weiss, *Why are Experienced Women Lawyers Leaving BigLaw? Survey Looks for Answers and Finds Big Disparities*, ABA J. (Nov. 14, 2019, 8:00 AM), https://www.abajournal.com/news/article/why-are-women-lawyers-leaving-biglaw-survey-looks-for-an-answer-and-finds-big-disparities (finding that half of women attorneys report experiencing unwanted sexual attention during work compared with 6% of male attorneys). Although sexual harassment may not be as prevalent as it once was in the profession, other scholars contend that subtle, more nuanced forms of gender discrimination may be responsible for women exiting the legal profession. *See* Martha Ertman, *The Cost of Non-Billable Work*, 98 TEX. L. REV. ONLINE 184, 186 (2020) (explaining the claims of gender discrimination in the pending gender discrimination lawsuit against Jones Day); *see also* Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL'Y. 58, 58 (2018) (recognizing the prevalence of more subtle forms of gender discrimination as "gender sidelining" and noting that the gender sidelining can adversely affect a woman's career).

20. The purpose of this footnote is to clarify the terminology used in this Note as well as this Note's objective. This Note recognizes that the term "woman" encompasses anyone who identifies as a woman, regardless of whether or not they were assigned female at birth. The term "female" is used to refer to women who are biologically assigned female at birth. Furthermore, throughout this Note, the term "mother" is generally used to refer to parents who identify as women, except in discussions about pregnancy, breastfeeding, or childbirth. In those instances, the term "mother" refers to parents who identify as women and who were biologically assigned female at birth. This Note contends that womanhood does not and should not entail motherhood. Moreover, this Note focuses on the experiences of two-parent households with at least one mother; however, it recognizes that families take many forms, and many families do not include a mother. Discussions regarding the role of the "default parent," or the division of care work between parents, are not intended to exclude households with no mothers. The intention behind this Note is not to advocate for attorneys who identify as women to become mothers. Conversely, it is not intended to convince mothers who decide to exit the legal profession to return to work. The solutions proposed in this Note are designed to expand the number of options available to mothers and women who desire motherhood, so that they face less of a tradeoff between excelling in their careers and spending time with their children.

21. *See* MARY ANN MASON & EVE MASON EKMAN, MOTHERS ON THE FAST TRACK: HOW A NEW GENERATION CAN BALANCE FAMILY AND CAREERS 24–26, 29–32 (2007) (finding that the thirties and forties are the most important career-building years, yet this is also when many women attorneys are raising children); Rosa Brooks, *What the Internet Age Means for Female Scholars*, 116 YALE L.J. POCKET PART 46 (2006), http://yalelawjournal.org/forum/what-the-internet-age-means-for-female-scholars (explaining that the lack of tenured female law school professors can be attributed to their

around masculine norms, it neglected to account for the experiences of women, particularly the unique experiences of biologically female bodies. A common trend observed by scholars is for a professional woman to work towards advancing her career in her thirties, even though these years also coincide with when she may decide to start a family.[22] Although blatantly sexist statements that women should not be working outside of the home are no longer commonplace, the insidious nature of the separate spheres ideology has transformed into what Professor Joan Williams has termed "maternal wall discrimination," or the bias that results from a woman's perceived or actual caregiving experiences as a mother.[23] As a result of this bias, coupled with a timeline for career advancement that does not mesh with her reproductive clock, a woman attorney who chooses to become a parent suffers from numerous disadvantages in the workplace, most notably, a significant pay cut.[24] Although motherhood and caretaking labor are essential, quite literally, for perpetuating the human race,[25] the profoundly important function of birthing and raising children has hindered women from attaining full equality.

This Note relies upon the insights of feminist legal theorists[26] to honor the contributions they have made in the crusade towards gender equality and to rectify

caregiving responsibilities, which precludes them from dedicating as many hours to their scholarship, which is the critical performance marker in the legal academy).

22. Anusia Gillespie, *The Horrible Conflict Between Biology and Women Attorneys*, ABA, https://www.americanbar.org/careercenter/blog/the-horrible-conflict-between-biology-and-women-attorneys/ (last visited Mar. 25, 2020) (noting that it takes approximately ten years to make partner, yet the average woman graduates law school at age twenty-seven, and her fertility rate will decelerate at a greater rate each year after age thirty-five).

23. Maternal wall discrimination can be considered a subset of Family Responsibilities Discrimination (FRD) or the discrimination that employees experience as a result of their caregiving responsibilities. The University of California, Hastings College of Law Professor Joan C. Williams has written extensively about maternal wall discrimination and FRD. *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, 78 (2003); *see also* Claire-Therese D. Luceno, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost-Effective Solutions for a Flexible Workplace*, 3 HASTINGS BUS. L.J. 157, 158–59 (2006).

24. *See* Jennifer Cheeseman Day, *Number of Women Lawyers At Record High But Men Still Highest Earners*, U.S. GOV'T CENSUS BUREAU, https://www.census.gov/library/stories/2018/05/women-lawyers.html (last visited May 12, 2020) (finding that an attorney's earnings peak mid-career, and "the top 10% of female lawyers earn more than $300,000 a year, while the top 10% of male lawyers earn more than $500,000"). Women attorneys are also more likely to be working part-time, therefore, earning less income. *See Rate of Part-Time Work Among Lawyers Unchanged in 2012 – Most Working Part-time Continue to Be Women*, NAT'L ASS'N FOR LAW PLACEMENT (Feb. 21, 2013), https://www.nalp.org/part-time_feb2013.

25. In response to a criticism regarding her extended maternity leave, Fox News reporter Megyn Kelly stated, "We're populating the human race. It's not a vacation. It's hard, important work." ANNE-MARIE SLAUGHTER, UNFINISHED BUSINESS: WOMEN, MEN, WORK, FAMILY 235 (Random House ed., 2015).

26. Women law school students in the 1970s, 1980s, and early 1990s developed feminist legal theory as a means to examine the ways in which the law subordinated women. Although feminist legal theory is critical of current societal and institutional structures, it still endeavors to find legal solutions within our current institutional framework for addressing women's subordination. For a deeper discussion of the development on feminist legal theory within feminist jurisprudence, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

the historical silencing of women's voices in the legal profession. Feminist legal theory consists of numerous strands,[27] all of which have contributed to the advancement of women's equality in various ways; however, this Note focuses on exploring the tension between liberal equality or equity feminism, which insists that women can and should adapt to male-defined standards,[28] and cultural or difference feminism, which embraces and values the biological and social differences of women.[29]

Using feminist legal theory as a theoretical framework, this Note argues that pathways to leadership in the legal profession must be reshaped from a difference feminist perspective, instead of the current equity feminist agenda, to tear down the maternal wall. Part II traces the history of women in the legal profession to underscore its discriminatory legacy of viewing women as ill-suited for legal work and its discounting of women's interests and experiences once they were included. Part III introduces the classic debate that emerged during the second-wave feminist movement of the 1970s and 1980s between equity and difference feminism. This Part observes that although equity feminism was largely responsible for the acceptance of women into the legal profession, difference feminism aptly critiqued equity feminism's neglect of the caregiving experiences of women. Recently, the ideas behind the "sameness or difference"[30] debate between equity and difference feminism have been renewed. Women are now debating not how to best enter into professions that historically excluded them but how to attain positions of leadership within them. Part IV examines how history has repeated itself. Similar to the equity feminist tactics employed during the second-wave feminist movement that were designed to allow women to partake in the legal profession, current policies, such as subsidized social egg freezing, that are designed to address maternal wall discrimination are also inadequate solutions. Lastly, Part V claims that difference feminist legal theory should provide the guiding framework through which to propose solutions, such as a

27. While there are many strands of feminist legal theory, feminist legal scholars consider there to be four main schools of feminist legal theory: liberal equality feminism; difference feminism; radical, or dominance feminism; and intersectional feminism. Each of these schools add insightful critique for how to best realize sex equality; however, due to the scope of this Note, only liberal equality and difference feminism will be discussed. *See* Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977 (2018); *see also* Cynthia Grant Bowman & Elizabeth Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 258 (1998) (explaining the four main strands of feminist legal theory).

28. Amy R. Baehr, *Liberal Feminism*, STAN. ENCYC. OF PHIL., 2.2.1, https://plato.stanford.edu/entries/feminism-liberal/ (last viewed on June 1, 2021).

29. There are several subsets of feminist legal theory within the larger category of difference feminism. *See* EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 10 (1999); ENCYCLOPEDIA OF WOMEN AND AMERICAN POLITICS 187 (Lynne E. Ford ed., Facts on File 2010) (2008). For the purposes of this Note, difference feminism will refer to one of the most widespread strands, which argues that due to social conditioning, women are more inclined to have an "ethic of care" and be nurturers and caregivers. *See* West, *supra* note 26, at 15–17.

30. *See* Tori D. Kutzner, *Helping Out Supermom: Gender-Aware Policymaking & Mothering In the Twenty-First Century American Workforce*, 21 GEO. J. GENDER & L. 171, 185–88 (2019) (providing an in-depth discussion of the notable sameness-difference debate during the litigation of *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987)).

six-month paid maternity leave and flexible work arrangements that allocate sufficient time for caregiving, so that the timeline for career advancement in the legal profession accounts for the responsibilities of motherhood.

While this Note focuses on how these solutions would support women who become pregnant, a six-month paid leave and flexible working arrangements after undertaking the care of a child are proposals that should not be interpreted as exclusive to cis-gendered women. These solutions would benefit all new parents, regardless of gender, family structure, or how the child comes into their lives. The conclusion reiterates that this solution, which embodies a difference feminist framework, would enable the number of women in positions of leadership in the legal profession to reflect the composition of the profession, which is important for achieving gender equality and for supporting society as a whole.

II. SEPARATE SPHERES AND SEPARATE LEGAL STATUS

The following Part provides a brief overview of the status and role of women in the American legal profession from its inception, demonstrating that Justice Bradley's widely-shared belief that women should strictly be wives and mothers remained largely undisputed until the 1960s.[31] By charting the early historical obstacles that women attorneys faced, such as discriminatory laws,[32] which greatly limited their ability to engage in political activities, and later, blatantly sexist policies,[33] which hindered their ability to enter the legal profession, this Part provides the context necessary for understanding how the separate spheres ideology persists in the form of maternal wall discrimination.

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31. *See generally* Cynthia G. Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?,* 61 ME. L. REV. 1, 3–13 (2017) (discussing the sexism and obstacles that women in the legal profession experienced while in law school and upon graduation from the 1920s to the late 1970s; however, elite law schools and law firms were more receptive towards women beginning in the 1950s and 1960s).

32. Women were denied the right to vote until the ratification of the Nineteenth Amendment on August 18, 1920. *See* Marina Koren, *Why Men Thought Women Weren't Made to Vote*, ATLANTIC (July 11, 2019), https://www.theatlantic.com/science/archive/2019/07/womens-suffrage-nineteenth-amendment-pseudoscience/593710/ (finding that women were denied the right to vote because political participation was believed to cause infertility). The Pregnancy Discrimination Act (PDA) of 1978 was another notable legal development for women's rights. Amending Title VII of the Civil Rights Act of 1964, the PDA precluded employers from discriminating against expecting mothers because of their pregnancy. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1340–41 (2015). Employers with less than fifteen employees, however, are still exempt from the Act. *Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/pregnancy-discrimination (last visited May 25, 2020). The interpretation of the PDA, and the extent to which it affords protection to pregnant employees, however, has been litigated well into the twenty-first century. *See Young*, 135 S. Ct. at 1340–41 (addressing whether an employer must accommodate pregnant women when the employer accommodates employees requiring the same accommodations due to a disability).

33. For example, until 1969, NYU Law School explicitly barred women from applying to its prestigious Root-Tilden-Kern Scholarship Program. *See Discrimination Against Women: Hearing on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. & Lab.*, 91st Cong. 611 (1971) (statement of Susan D. Ross, Women's Rights Committee of New York University Law School); *see also* Diane Schulder, *Women and the Law*, ATLANTIC (Mar. 1970), https://www.theatlantic.com/magazine/archive/1970/03/women-and-the-law/304923/.

During the colonial period, and well into the nineteenth century, married women were largely excluded from all aspects of the American legal system and legal profession.[34] Under the English common law doctrine of coverture, which was imported to the newly formed legal system of the United States, the legal rights of married women were subsumed by their husbands.[35] As a result, married women could not form contracts, sue in court, or purchase and sell property on their own.[36] Moreover, since their bodies belonged to their husbands, married women lacked the legal right to retain any wages earned.[37] The law of coverture effectively reduced married women to the property of their husbands, thus greatly limiting their ability to participate and practice in the legal profession.[38]

In addition to lacking the legal status required to participate in the legal profession, women were thought to lack the "logical facult[ies]" necessary for everyday decision-making, let alone legal reasoning.[39] Menstruation and pregnancy were thought to render women unfit for participation in the political system and the legal profession.[40] While the legal profession depended upon a rational man, it was believed that women were prone to medical and mental ailments and,therefore, incapable of practicing law.[41] The inferior legal status, assumed frailty and

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34. *See* Allison A. Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate,* 26 YALE J.L. & FEMINISM 166, 167 (2014).

35. Sir William Blackstone describes the doctrine of coverture:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . .

See Allison A. Tait, *The Return of Coverture*, 114 U. MICH. L. REV. FIRST IMPRESSIONS 99, 101 (2016) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (1765)).

36. *See* Tait, *supra* note 34, at 167 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 442–45 (1765)).

37. *See* Catherine Allgor, *Coverture: The Word You Probably Don't Know But Should*, NAT'L WOMEN'S HIST. MUSEUM (Sept. 4, 2012), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should. ("Married women had no rights to their bodies. . . . [N]ot only would a husband have a claim to any wages generated by his wife's labor or to the fruits of her body (her children), but he also had an absolute right to sexual access.").

38. *See* JOAN HOFF, LAW, GENDER, AND INJUSTICE 165 (NYU Press ed. 1990).

39. The belief of a nineteenth-century physician Dr. James Weir that "[w]oman is a creature of emotions, of impulses, of sentiment, and of feeling; in her the logical faculty is subordinate. She is influenced by the object immediately in view, and does not hesitate to form a judgment which is based on no other grounds save those of intuition. . . ." was commonly held among members of the medical profession. Lauren MacIvor Thompson, *The Reasonable (Wo)Man: Physicians, Freedom of Contract, and Women's Rights, 1870-1930*, 36 L. & HIST. REV. 771, 784 (2018) (quoting JAMES WEIR, THE PSYCHICAL CORRELATION OF RELIGIOUS EMOTION AND SEXUAL DESIRE 252–54 (1897)).

40. *See* Koren, *supra* note 32.

41. *See* Audrey Wolfson Laourette, *Sex Discrimination in the Legal Profession: Contemporary and Historical Perspectives*, 39 VAL. U. L. REV. 859, 862–63 (2005). Even today, the belief that women are irrational or too emotional may contribute to physicians failing to take women's complaints of pain and suffering seriously. *See* Camille Pagan, *When Doctors Downplay Women's Health Concerns*, N.Y. TIMES (May 3, 2018), https://www.nytimes.com/2018/05/03/well/live/when-doctors-downplay-womens-health-concerns.html (observing that physicians may be more likely to ignore female patient complaints).

reproductive capacity of women ostracized them from the public sphere of the American legal system.

The first signs of women attorneys entering the legal profession began to unfold in the late nineteenth century.[42] Before fighting for the right to practice law, early women's rights activists were primarily concerned with acquiring basic legal rights, such as the right to vote and to hold property.[43] Indeed, beginning in 1839, several states passed a series of Married Women's Property Acts, which permitted married women to own property and engage in other legal activities.[44] A few women, however, were able to challenge the separate spheres ideology and overcome seemingly insurmountable obstacles to break into the legal profession. Although Illinois had denied Bradwell admission to the bar, other states were more progressive in allowing women to practice law. In 1869, Iowa admitted Arabella Mansfield to the bar, making her the first female attorney in the United States.[45] Just three years later, the District of Columbia admitted Charlotte E. Ray to the bar, making her the first Black female attorney in the United States.[46] Additionally, there were a handful of women attorneys in the mid-nineteenth and early twentieth centuries, and these advances continued into World War II when women attorneys were needed to replace the men who had been drafted.[47] After the war, however, many women attorneys exited the profession, returning back to the home.[48] Thus, while a few women managed to practice law prior to the early twentieth century, men still overwhelmingly dominated the profession, suggesting that the separate spheres ideology remained a powerful societal force in excluding women.

Perhaps this phenomenon is best illustrated by the high maternal mortality rate. Indeed, a lack of medical attention for new mothers, especially in comparison to their infants, is considered to be a contributing factor of the high maternal morbidity rate in the United States. *See* Nina Martin & Renee Montagne, *The Last Person You'd Expect To Die In Childbirth*, NPR (May 12, 2017, 5:00 AM), https://www.npr.org/2017/05/12/527806002/focus-on-infants-during-childbirth-leaves-u-s-moms-in-danger (explaining why the United States' maternal mortality rate remains shockingly high, especially in comparison with other developed nations); Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth, Shalon Irving's Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM), https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why ("According to the CDC, black mothers in the U.S. die at three to four times the rate of white mothers, one of the widest of all racial disparities in women's health."); *see also The Pandemic is Making America Rethink It's Shunning of Midwifery*, ECONOMIST (June 18, 2020), https://www.economist.com/united-states/2020/06/18/the-pandemic-is-making-america-rethink-its-shunning-of-midwifery (providing further support for the high maternal mortality rate in the United States).

42. *See* Bowman, *supra* note 31, at 2.

43. Sarah Pruitt, *American Women's Suffrage Came Down to One Man's Vote*, HISTORY, https://www.history.com/news/american-womens-suffrage-19th-amendment-one-mans-vote (last visited May 12, 2020); *see also* Tait, *supra* note 35, at 102 (explaining that the passage of the Married Women's Property Acts helped to dismantle the doctrine of coverture).

44. HOFF, *supra* note 38, at 152.

45. Friedman, *supra* note 2, at 1288.

46. Erin Blakemore, *Charlotte E. Ray's Brief But Historic Career as the First U.S. Black Woman Attorney*, HISTORY, https://www.history.com/news/charlotte-e-ray-first-black-woman-attorney (last updated Aug. 22, 2018).

47. *See* Bowman, *supra* note 31, at 8.

48. *Id.*

Although the United States experienced a period of magnified conservatism in the 1950s, glorifying the traditional nuclear family with a breadwinning husband and homemaker wife as the hallmark of American success, aspiring women attorneys still experienced a glimmer of hope.[49] In 1950, Harvard Law School admitted its first female student,[50] and Georgetown Law School followed suit a year later.[51] The attendance of women at these prestigious institutions, however, remained fairly stagnant into the 1970s.[52] With several of the nation's elite law schools gradually accepting more women in the 1960s and 1970s, this shift signaled that society could be more willing to recognize that women were capable of both practicing law and taking care of children.[53]

Rather than celebrate the momentous achievements of these women trailblazers, many law schools welcomed them with less-than-open arms.[54] Rampant sexism made their experience arduous.[55] For example, professors only called on female students during specifically designated "Ladies Days,"[56] a property casebook stated that "land, like woman, was meant to be possessed,"[57] and women had to sprint across campus to use the one and only women's restroom between classes and during exams.[58] Discriminatory admissions policies often precluded women from attending law school,[59] and the few who did matriculate experienced a hostile learning environment.[60]

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49. *See* David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/ (observing that the nuclear family has been viewed as a "cultural ideal" since the 1950s).

50. *HLS to Celebrate 50 Years of Women Graduates*, HARV. L. TODAY (Apr. 30, 2003), https://today.law.harvard.edu/hls-to-celebrate-50-years-of-women-graduates/.

51. *Georgetown Law Timeline*, GEO. L. LIBRARY, https://www.law.georgetown.edu/library/special-collections/archives/georgetown-law-timeline/ (last visited Feb. 2, 2021).

52. *See* Goluboff, *supra* note 15, at 87–88. In 1964, there were only fifteen women at Harvard Law School. *See* Bowman, *supra* note 31, at 11.

53. *See* Goluboff, *supra* note 15, at 86–88.

54. SUSAN EHRLICH MARTIN & NANCY C. JURIK, DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS 109–10 (2d ed. 2006).

55. Purvis, *supra* note 14, at 1695.

56. *Id.*

57. *Id.* (quoting Cara L. Nord, *"What Is" and "What Should Be" An Empirical Study of Gender Issues at Gonzaga University School of Law,* 10 CARDOZO WOMEN'S L.J. 60, 63 (2003)).

58. *See* Wolfson Laourette*, supra* note 41, at 883–84.

59. Many law schools employed "off-the-record" quota systems for women applicants, but professors and administrators of some of the most elite law schools readily admitted to the use of such systems. For example, one Harvard Law School female student in the class of 1967 reported that the Dean had explained to her class:

> Harvard Law had reached enrollment for women of 5% for each class; that Harvard would probably not go above the 5% level since that was Yale Law School's percentage; and that, after all, there could never be a great influx of women into the school . . . because the policy was never to give any man's place to a woman.

Discrimination Against Women: Hearing on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. & Lab., 91st Cong. 587 (1971) (statement of Women's Rights Committee of New York University Law School).

60. MARTIN & JURIK, *supra* note 54, at 110.

Employment prospects for female students after graduation were even bleaker than their law school experiences. During the 1960s, NYU Law School reported that almost every private law firm that had contacted its placement office had denied female graduates even the opportunity to interview.[61] The few women who were hired by private firms in the late 1950s and 1960s reported not feeling welcomed and were often even subjected to open hostility.[62] For example, the law firm Baker McKenzie would hold most of its social events at the Bohemian Club, a social club that only permitted male membership.[63] Thus, women attorneys were excluded from networking and career building events.[64] Many firms were wary of hiring women, claiming that they could not "keep up the pace,"[65] their "responsibility is in the home,"[66] they have "emotional outbursts,"[67] and "the clients prefer not to have them."[68] As law firm hiring practices of the 1950s and 1960s demonstrated, the widespread belief that women were too emotional and incompetent to practice law was still commonplace.

Although explicit sexism was largely responsible for keeping women out of the legal profession, subtle maternal wall discrimination also precluded their entrance. Indeed, some legal employers recognized that, upon graduation from law school, women would start a family, and they feared that women would be unable to commit to the workload of a private firm given the demands of motherhood.[69] Additionally, most employers were reticent, or even explicitly refused to accommodate working mothers. For example, in the 1960s, after she had asked for unpaid maternity leave, Kay Woodward, the first female attorney hired by the New York law firm Coudert Brothers, was told that she "ought to be fired."[70] Moreover, after returning from her unpaid leave, she "suffered a loss in seniority, salary and reputation."[71] In part due to discriminatory firm hiring practices, some women were pushed into government service work benefiting the public

61. Bowman, *supra* note 31, at 12.

62. *See Jennifer Pierce*, *Women and Men as Litigators: Gender Differences on the Job, in* GLOBAL PERSPECTIVES ON GENDER AND WORK: READINGS AND INTERPRETATIONS 179, 179 (Jacqueline Goodman ed., 2000). Although perhaps it is not as explicitly overt, exclusionary law firm culture has not entirely disappeared. *See* Ertman, *supra* note 19, at 186 (explaining that some firms disproportionately push women attorneys to complete non-billable and less lucrative work); *see also* Kathryn Rubino, *Jones Day Hit With Explosive Gender Discrimination Case*, ABOVE THE LAW (June 19, 2018, 5:58 PM), https://abovethelaw.com/2018/06/jones-day-hit-with-explosive-gender-discrimination-case/ (detailing the claims of a gender discrimination lawsuit against Jones Day, such as the firm's "fraternity culture").

63. Bowman, *supra* note 31, at 12.

64. *Pierce*, *supra* note 62, at 177–80.

65. JUDITH HOPE, PINSTRIPES AND PEARLS 151 (2003).

66. *Id.*

67. *Id.*

68. Bowman, *supra* note 31, at 12 (quoting ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 47 (1964)).

69. *Id.* at 8.

70. *Id.* at 13 (quoting VIRGINIA KAYS VEENSWUK, COUDERT BROTHERS: A LEGACY IN LAW: THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM: 1853-1993 (1994)).

71. *Id.*

good.[72] For example, even though she had graduated first in her class from Columbia Law School, Ruth Bader Ginsburg was not hired by a single private New York law firm, and she later co-founded the ACLU Women's Rights Project.[73] The early experiences of women attorneys reified the persistence of Justice Bradley's separate spheres ideology.

III. THE ENTRY OF WOMEN INTO THE LEGAL PROFESSION: DIFFERENT FEMINIST APPROACHES

This Part introduces two strands of feminist legal theory, equity and difference feminism, which will be used in Part IV and Part V as the theoretical frameworks through which solutions for addressing the deficit of women in positions of leadership in the legal profession will be analyzed. As Part II demonstrates, women's experiences have been historically ignored, thus rendering feminist legal theory an imperative framework for the analysis. This Part explains the historical development and theoretical underpinnings of equity and difference feminism for understanding how these two theories provide a useful framework for analyzing the current obstacles confronting women in the legal profession.

Against the backdrop of the Civil Rights Movement and the Vietnam War, women in the 1960s and 1970s experienced a cultural upheaval and reawakening, questioning whether their "paramount destiny" was really to fulfill the "benign and noble offices of wife and mother."[74] As a result, the second-wave feminist movement sprang into action, with lasting effects until the 1980s. Since women had already attained the right to vote, and thus the battle over the explicit recognition of many legal rights had been won, the second-wave movement was primarily concerned with issues related to gender equality and discrimination.[75] Although "feminism" took many forms during the second-wave movement, many feminists believed in women's liberation, using the slogan "the personal is political"[76] to express the idea that the treatment and experiences of women in the private sphere of the home had political ramifications.[77]

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72. *See generally* HOPE, *supra* note 65, at 151, 154–59 (providing the accounts of several early female law school graduates who entered the public sector).

73. *See Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff (last visited Oct. 31, 2020).

74. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

75. *See* West, *supra* note 27, at 983 (noting that two of the second-wave feminists' primary initiatives were anti-discrimination policies in the workplace and expanding the number of reproductive choices available to women).

76. This slogan was coined by feminist and civil rights activist Carol Hanisch in 1968. Theresa Man Ling Lee, *Rethinking the Personal and the Political: Feminist Activism and Civic Engagement*, 22 HYPATIA 163, 163 (2007).

77. *See id.* at 163, 165. Betty Friedan believed that women's liberation entailed working outside of the home. *See* Mari Mikkola, *Feminist Perspectives on Sex and Gender*, STAN. ENCYC. OF PHIL. 3.1.1, https://plato.stanford.edu/entries/feminism-gender/ (last viewed on June 1, 2021).

Just how to go about achieving liberation, however, was disputed among the schools of feminist thought.[78]

Many feminist scholars believe that the ignition necessary for the second-wave movement was the 1963 publication of Betty Friedan's progressive yet not too disruptive book, *The Feminine Mystique*.[79] Although working-class women of all races did not have the luxury of choosing whether to stay at home or work for wages, many middle and upper-class women, the majority of whom were white, did not work outside the home.[80] Friedan's seminal work appealed to the 1960s American housewife because it drew attention to the "problem that has no name,"[81] or the widespread discontent that women in the early 1960s were experiencing. Friedan reasoned that meaningful, waged work would be the cure for the depression of American housewives.[82] Friedan's remedy, though, was still framed in a way palatable to a woman's husband. As a result of working outside of the home, a woman would experience fulfillment and self-gratification,[83] which in turn would appease her depression, allowing her to be a better wife and mother. Thus, Friedan's galvanization of women into the labor force was not intended to cause a woman to abandon her responsibility as a mother, homemaker, and wife, but rather to support it. Friedan's *The Feminine Mystique* helped to catalyze the second-wave movement,[84] pressuring women to exit the private sphere of the home and enter the public sphere of the workplace while still remaining as devout wives and mothers.

Some of the most influential second-wave feminists, such as the female law school students who founded feminist legal theory,[85] followed Friedan's philosophy and entered the public sphere. As more women attended law school, feminist legal theory developed to explain how the law contributed to women's

78. *See* Bowman & Schneider, *supra* note 27, at 251–55, 257–60 (explaining the critical feminist legal theories that emerged in response to formal equality feminism); *see also* Maxine Eichner, *Market-Cautious Feminism*, 69 STUD. IN L., POL., AND SOC'Y (SPECIAL ISSUE) 141, 143 (2016) (explaining that while liberal equality feminists believed that women's participation in the market and waged labor would liberate women, other feminists, such as Marxist and socialist feminists, were skeptical of the waged labor remedy).

79. BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963); *see* Eichner, *supra* note 78, at 146.

80. *See* Mikkola, *supra* note 77, at 3.1.1 (noting feminist theorist bell hooks's critique of *The Feminine Mystique* for being both racist and classist). For many American women, staying at home was often viewed as a sign of social status. *See* FRIEDAN, *supra* note 79, at 18 ("The suburban housewife–she was the dream image of the young American women and the envy, it was said, of women all over the world. . . . As a housewife and mother . . . she had everything that women ever dreamed of.").

81. FRIEDAN, *supra* note 79, at 19–26 (explaining the phenomenon of the "problem that has no name").

82. *See* Eichner, *supra* note 78, at 146–48.

83. Lindsey Blake Churchill, *The Feminine Mystique*, ENCYC. BRITANNICA, https://www.britannica.com/topic/The-Feminine-Mystique (last visited Jan. 20, 2021); *see also* Eichner, *supra note* 78, at 156.

84. Friedan's philosophy was thought to have motivated the second-wave feminist movement. *See* Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them, Explained*, VOX (July 20, 2018, 9:57 AM EDT), https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth.

85. Bowman & Schneider, *supra* note 27, at 255–56; West, *supra* note 27, at 984–85.

oppression.[86] Equity feminism advocated for women's assimilation into the male-structured workplace, insisting that women were equally as capable as men.[87] While the underpinnings of Friedan's second-wave equity feminist philosophy had existed since the colonial period when Mary Wollstonecraft had urged women to obtain an education and become more involved with politics,[88] it was not until the second-wave movement that Wollstonecraft's vision for women began to unfold. In the late 1960s, only a handful of women were attending law school and just 4% of firm associates were women.[89] By 1985, however, at what many would consider the conclusion of the second-wave movement, approximately 40% of law school students and firm associates were women.[90] Indeed, equity feminism's insistence on women's assimilation propelled women into positions that had previously excluded them.

Although equity feminism made great headway in getting women into otherwise unattainable positions, other women observed that many barriers still precluded their full assimilation into the workforce.[91] In response to equity feminism, difference feminism emerged, questioning whether the goals of equity feminism were in the best interests of women.[92] Unlike equity feminism, which assumes that, like men, women are equally individualistic and autonomous, difference feminism contends that women are more relational, maternal, and connected to other human beings.[93] Thus, difference feminist scholars argued that women should not have to adapt to the male-defined workplace because doing so would ignore their unique biological and cultural experiences, reinforcing current standards for reaching positions of power as normative.[94]

One notable difference feminist is NYU Law School Professor Carol Gilligan, who argued in her highly influential 1982 book, *In A Different Voice*, that women

86. Bowman & Schneider, *supra* note 27, at 256; West, *supra* note 27, at 985.

87. *See* West, *supra* note 27, at 986–88 (explaining that liberal feminists largely followed the "feminist-aspirational claim" of feminist legal theory, which insisted that current liberal laws and policies could also afford women equality); *see also* Leslie Bender, *Sex Discrimination or Gender Inequality*, 51 FORDHAM L. REV. 950, 950 (1989) (noting that the "women's liberation, liberal-humanist approach," a model of feminist theory comparable to equity feminism, argued that "women can do anything men can do").

88. *See* SANDRINE BERGES, THE ROUTLEDGE GUIDEBOOK TO WOLLSTONECRAFT'S A VINDICATION OF THE RTS. OF WOMAN 24, 39–40 (2013) (explaining that in her seminal work, A VINDICATION OF THE RIGHTS OF WOMEN, Mary Wollstonecraft envisioned that women would benefit from an education and participating in politics).

89. Purvis, *supra* note 14, at 1694–95.

90. *Id*.

91. Bowman & Schneider, *supra* note 27, at 256.

92. *See generally id*. at 251–52 (explaining that difference feminism emerged as a critique of formal equality feminism).

93. *See generally* West, *supra* note 26, at 2–5, 14 (explaining her "connection thesis," which claims that liberal legalism is "inherently masculine" because it relies upon separate and autonomous individuals; however, women are excluded from this framework because they are "in some sense 'connected' to life and other human beings").

94. *See generally* Bowman & Schneider, *supra* note 27, at 257–59 (explaining the insights of several difference feminist scholars).

differ from men because they have an "ethic of care."[95] Gilligan determined that rather than viewing morality through an individualistic lens, like men, women's moral reasoning depends heavily upon relationships and interconnectivity.[96] Difference feminists recognized that given the psychological and physiological experience of birthing children,[97] women may be more inclined to think about ethics in terms of connectivity rather than independence.

Gilligan's study also highlights the debate undergirding many strands of feminist legal theory regarding whether the feminine inclination to be caring and maternal is a product of "nature or nurture."[98] Although some scholars believe that stereotypically feminine or masculine characteristics, such as being submissive or aggressive, are intimately tied to one's sex at birth, others claim that these characteristics are a result of social upbringing.[99] While women tend to be the primary caregivers, attributes bestowed onto women, such as a maternal instinct, may be the product of socialization and patriarchal pressures rather than an innate desire to care.[100]

Although feminists in the legal academy developed other theories during the second-wave movement, equity feminism and difference feminism acquired the greatest following in feminist circles.[101] Today, while feminist legal theory has lost some of its social currency, the ideas behind equity and difference feminism still provide a useful framework for addressing the deficit of women in positions of power.[102] Furthermore, similar to the second-wave feminists who relied upon their own experiences, rallying around the slogan "the personal is political"[103] to advocate for change, Part IV and Part V employ the experiences of several women attorneys for supporting evidence. By weaving feminist legal theory

95. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 74 (1993) (ebook); *see also* Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTING WOMEN'S L.J. 117, 132–34 (1997) (explaining Gilligan's philosophy).

96. Bowman & Schneider, *supra* note 27, at 258 (noting Gilligan's conclusion that women have an "ethic of care").

97. *See id.* at 252 ("The emergence of cultural feminism or 'difference' perspectives in the law were largely shaped by efforts to understand the uniquely female experiences of pregnancy and motherhood."); *see also* Bender, *supra* note 87, at 950–52 (explaining that some forms of feminism recognized that societal structures should be redesigned to accommodate the caregiving experiences of women).

98. *See generally*, Mikkola, *supra* note 77.

99. *See id.*; *see generally* Bender, *supra* note 87, at 941, 946, 949–52 (explaining that gendered characteristics are a product of socialization).

100. *See* Mikkola, *supra* note 77, at 2.1 (noting that gendered characteristics may be the product of socialization); *cf.* Karin A. Martin, *Becoming a Gendered Body: Practices of Preschools*, 63 AM. SOC. REV. 494, 494–96 (1998) (claiming that young children are often taught to use their bodies in ways that embody stereotypically gendered characteristics).

101. *See* Kutzner, *supra* note 30, at 185 (noting the longevity of the "sameness or difference" debate among feminists).

102. *See* West, *supra* note 27, at 980–81 ("Feminist legal theory so understood–a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination . . . . is now seemingly in decline, and may soon disappear altogether.").

103. Lee, *supra* note 76, at 163.

together with the experiences of women attorneys, Part IV and Part V honor the work of early feminist scholars and ensure that policies are revised and proposed from a woman's perspective.

IV. HOW EQUITY FEMINISM HAS FAILED: THE PERSISTENCE OF THE SEPARATE SPHERES

The following Part argues that the current concern among professional women to address the lack of women in leadership positions parallels the debate between the second-wave equity and difference feminists.[104] This Part explains that although equity feminism successfully allowed women to break into the public sphere of the legal profession, vestiges of the separate spheres ideology remain, most notably, in the form of maternal wall discrimination. Next, this Part describes the two-fold nature of maternal wall discrimination. First, the responsibility of caring for children understandably preoccupies the minds of many mothers.[105] Second, this preoccupation, coupled with the sexist legacy that women are not mentally or physically capable of working in the legal profession, makes employers hesitant or blatantly unwilling to promote mothers.[106] As a result, some women find employment in areas of the legal profession that embrace their caretaking qualities.[107] Lastly, this Part presents subsidized elective oocyte cryopreservation, or social egg freezing, as a textbook example of an equity feminist solution to this motherhood roadblock to illustrate the unsettling consequences that a continued reliance on equity feminism may hold for both women and men.

A. WOMEN SHOULD LEAN BACK, NOT IN

Although most second-wave feminists were primarily concerned with getting women into the professional workplace,[108] over the past decade, women of various professions have again questioned the status quo, this time analyzing the deficit of women leaders in the corporate world.[109] While professional women may not necessarily label themselves as either equity or difference feminists, the same debate

104. *See* Joan C. Williams, *It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate Response Essay*, 102 COLUM. L. REV. 812, 814 (2002) (referring to equity feminists as "tomboys" and difference feminists as "femmes" to describe the sameness/difference debate among feminists).

105. *See* Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC (July/Aug. 2012), https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/; *cf.* Jane Aiken, *Motherhood As Misogyny*, *in* WOMEN & LAW 19, 22 (2020) (joint publication of the top sixteen law reviews) (critiquing the social expectation of mothers to be selfless when caring for their children through the extreme examples of mothers who kill their children, fail to protect their children from abuse, and kill others to protect their children).

106. *See, e.g.*, JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 68–72 (2000).

107. *See* LINDA L. LINDSEY, GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE 335 (6th ed. 2015).

108. *See* West, *supra* note 27, at 989.

109. *See* Emily Bazelon, *Why Aren't Women Advancing More in Corporate America?*, N.Y. TIMES MAG. (Feb. 21, 2019), https://www.nytimes.com/interactive/2019/02/21/magazine/women-corporate-america.html.

between the second-wave equity and difference feminists has resurfaced and was arguably sparked by *Lean In: Women, Work, and the Will to Lead*,[110] a best-selling book written by Facebook Chief Operating Officer Executive Sheryl Sandberg and published in 2013. Urging young women to quite literally "lean in" by climbing to the top of the corporate ladder through a variety of prescriptive methods, such as "sit[ting] at the table"[111] and "keep[ing] a foot on the gas pedal,"[112] Sandberg's book reifies the male-defined workplace as normative. Redolent of Betty Friedan's *The Feminine Mystique*, *Lean In* also glosses over the structural hurdles and obstacles that make it arduous for women to achieve high-ranking positions.[113] Indeed, even the very title of Sandberg's book, *Lean In*, indicates that she approves of the current timelines for professional advancement, such as the five- to ten-year track for making partner at a law firm,[114] or the "fast track"[115] for securing a position as a tenured professor.[116] Thus, similar to Friedan, Sandberg's prescription for a successful career requires women to conform to schedules that do not adequately consider the time and energy motherhood requires.

Lean In generated significant controversy not only because many believed that it had ignored the experiences of many women of color and was written to appeal to an affluent audience,[117] but also because it would perpetuate the systemic inequalities that even upper-middle and upper-class women experienced.[118] Indeed, Georgetown Law Professor Rosa Brooks, a former classmate of Sheryl Sandberg, claimed that she followed Sandberg's advice and began "leaning in" by picking up extra assignments, speaking at more conferences, and accepting media requests, all the while making organic lunches for her children

110. SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (Alfred A. Knopf ed., 2013) [hereinafter LEAN IN].

111. *Id.* at 38.

112. *Id.* at 103.

113. *See* Eichner, *supra* note 78, at 142 (observing that Friedan and Sandberg both advocate for women to join the workforce).

114. MASON & EKMAN, *supra* note 21, at 29–32 (2007).

115. *Id.* at 36 ("The road to tenure can last up to nine pressure cooker years for all young professors. The race to publish in peer-reviewed journals is unrelenting . . . new faculty are under daily pressure . . . to become academic stars.").

116. *Id.* at 36–38; *see also* Rosa Brooks, *supra* note 21 (explaining that "the legal academy is structured in ways that make it harder for the average woman to succeed than the average man" because, due to their caretaking responsibilities, women have less time to dedicate to their scholarship than their male colleagues).

117. *See* Janice Gassam, *Why Leaning In Doesn't Apply To Women Of Color*, FORBES (Mar. 23, 2019, 1:17 AM EDT), https://www.forbes.com/sites/janicegassam/2019/03/23/why-leaning-in-has-not-worked-for-women-of-color/#705436851e41.

118. Aja Romano, *Michelle Obama on Sheryl Sandberg's Lean In Philosophy: "That Shit Doesn't Work,"* VOX (Dec. 3, 2018, 12:00 PM EST), https://www.vox.com/culture/2018/12/3/18123796/michelle-obama-criticizes-lean-in-becoming-tour.

and volunteering as a homeroom parent.[119] Despite the heightened recognition she received from her colleagues and invitations to be on radio talk shows, Brooks recalls that she was absolutely miserable and exhausted.[120] Instead, Brooks recommends that women need to "fight for [the] right to lean back and put [their] feet up."[121] As Brooks's personal experience conveys, to lean in, a woman must have infinite time and energy.

Similar to the difference feminist critiques of equity feminism during the second-wave movement, Sandberg's critics observe that expecting women to meet male-defined standards is simply an unrealistic framework for thinking about women's equality. While some older women trailblazers may contend that women can have "high-flying careers if they just want them badly enough,"[122] other women have argued that the historical absence of women at the decision-making table necessarily negates their interests, making it difficult, if not impossible, to lean in.

B. THE DOUBLE-BIND OF MATERNAL WALL DISCRIMINATION

Although scholars have identified numerous stages throughout the course of a woman's career as being potentially responsible for hindering her ascension in the legal profession, one of the most notable roadblocks occurs if she decides to become a mother.[123] Indeed, a woman's "key-career building years,"[124] ages twenty-five to forty-four, also coincide with her healthiest child-bearing years,[125] and, as a result, women in professions with extensive hours must decide whether to remain in the workforce or take time off for motherhood.[126] Accordingly, the majority of attorneys working reduced schedules are women.[127]

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119. Rosa Brooks, *Recline, Don't 'Lean In' (Why I Hate Sheryl Sandberg)*, WASH. POST (Feb. 25, 2014, 10:07 AM EST), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/02/25/recline-dont-lean-in-why-i-hate-sheryl-sandberg/.

120. *Id.*

121. *Id.*

122. SLAUGHTER, *supra* note 25, at 10.

123. *See, e.g.*, Williams, *supra* note 23, at 77–78.

124. Heather Bennett Stanford, *Do You Want to be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination*, 17 AM. U. J. GENDER SOC. POL'Y & L. 627, 653–55 (2009).

125. Dana R. Gossett et al., *What Do Healthy Women Know About the Consequences of Delayed Childbearing?*, 18 J. HEALTH COMMUN. 118, 119 (2013).

126. *See* MASON & EKMAN, *supra* note 21, at x–xvi (finding that the "make it or break it years" for making it to the top in numerous professions, such as medicine, business, and journalism, coincide with the years that women are typically burdened with the most family responsibilities, and women who are in leadership positions in their professions are more likely to be unmarried and childless).

127. *See* Debra Cassens Weiss, *Fewer in US working remotely, but it's a popular option at top law firms for women*, ABA J. (July 25, 2017, 3:54 PM), https://www.abajournal.com/news/article/fewer_u.s._workers_are_working_remotely_but_its_a_popular_option_at_top_law (finding that at the Working Mother's List of the best fifty law firms for women, "44% of female counsel while 23% of male counsel had a reduced schedule, [and] 27% of female staff attorneys while 7% of male staff attorneys worked reduced hours"); *see also Rate of Part-Time Work Among Lawyers Unchanged in 2012*, *supra* note 24 (finding that women attorneys comprise the majority of attorneys working part-time schedules).

While women comprise slightly less than half of incoming associates at big law firms,[128] the number of women equity partners hovers below 20%.[129] One account of a former associate at a large law firm in Washington, D.C., reveals why many women decide to exit the profession:

> 4:00 am: Hear baby screaming, hope I am dreaming, realize I'm not, sleepwalk to nursery, give her a pacifier and put her back to sleep . . .
>
> 7:30 am: Realize that I am still in my pajamas and haven't showered, so pull hair back in a ponytail and throw on a suit . . .
>
> 9:00 am: finally arrive at daycare, baby spits up on suit, get kids to their classrooms, realize I have a conference call in [fifteen] minutes . . .
>
> 9:30 am: Get an email that my time is late, Again! Enter my time
>
> 10:00 am: Team meeting; leave with a [fifty]-item to-do list . . .
>
> 2:45 pm: postpone work on task number [two] of [fifty] from to-do list and attempt to draft a response to client's question . . .
>
> 6:00 pm: race to daycare to get the kids (they are the last two there) . . .
>
> 7:15 pm: Finally arrive home, throw chicken nuggets in the microwave, feed the family . . .
>
> 9:15 pm: Make a cup of coffee and open laptop; login to Citrix . . .
>
> 1:30 am: Finally go to bed
>
> REPEAT[130]

This attorney's experience is not atypical for women attorneys with children. Thus, motherhood stands as the most persuasive explanation for the lack of women leaders in the profession.

Feminist scholars have noted that before women can even reach the "glass ceiling" to break it, they first hit a "maternal wall."[131] This roadblock, known as maternal wall discrimination, refers to the discrimination that mothers

128. Cassens Weiss, *supra* note 19.

129. *Id.*

130. Elie Mystal, *Departure Memo of the Day: Parenting Gets the Best of One Biglaw Associate*, ABOVE THE LAW (Nov. 8, 2012, 12:09 PM), https://abovethelaw.com/2012/11/departure-memo-of-the-day-parenting-gets-the-best-of-one-biglaw-associate/.

131. *See* Williams & Segal, *supra* note 123, at 77.

experience due to their actual or perceived caregiving responsibilities.[132] A study found that professional mothers with the same resumes as childless women were less likely to be hired and more likely to experience profoundly detrimental career consequences.[133] An example of negative career consequences can be seen in dissimilar salaries: women without children make about 90% of what a man earns while mothers make about 70%.[134] Indeed, economist Ann Crittenden reports that being a mother may cause a woman to lose $600,000 of her salary throughout her career.[135] On the other hand, men tend to be rewarded when they become fathers, often receiving a "fatherhood bonus" to their salaries.[136] Ironically, mothers are expected to complete the vast majority of the incredibly important, uncompensated labor in the home and are then punished for their selflessness by taking a pay cut.

Maternal wall discrimination is two-fold. Many mothers report that it is emotionally exhausting to both excel in their profession and have the strength to care for and nurture their children.[137] Moreover, working mothers report feeling guilty for dividing their time between the two spheres of their work and home.[138] Due to these potential distractions, employers hesitate to hire or promote mothers because they believe that their caretaking responsibilities and other demands outside of the office will preclude them from being productive employees.[139] Some scholars have observed a phenomenon known as "second-child syndrome,"[140] finding that mothers are likely to have greater caretaking responsibilities with each additional child. As a result, mothers with more children are more likely to suffer from career setbacks since employers assume that more children will

132. *See* Bennett Stanford, *supra* note 124, at 651–52 (referring to the "double bind" female attorneys with children experience between their caretaking responsibilities and their responsibilities as an attorney).

133. *See* Kyle Velte, *So You Want to Have a Second Child? Second Child Bias and the Justification-Suppression Model of Prejudice in Family Responsibilities Discrimination*, 61 BUFF. L. REV. 909, 913–14 (2013).

134. Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict Is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1612 (2010).

135. *Id*. at 1608.

136. *See* Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus*, N.Y. TIMES (Sep. 6, 2014), https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html (finding that while mothers receive a "motherhood penalty" in terms of wage loss, fathers often receive a "fatherhood bonus" in terms of a salary increase). *But see* Nancy Reichman & Joyce Sterling, *Parenthood Status and Compensation in Law Practice*, 20 IND. J. GLOBAL LEGAL STUD. 1203, 1203 (2013) (finding that gender more than parenthood status likely determines compensation discrepancies in the legal profession).

137. *See* SLAUGHTER, *supra* note 25, at 235.

138. B. Glenn George, *The Focus Factor*, 15 TEX. J. WOMEN & L. 147, 159–61 (2006).

139. WILLIAMS, *supra* note 106, at 68–72.

140. *See* SLAUGHTER, *supra* note 25, at 20–21 (explaining that with the birth of their second child, women often experience more difficulty juggling their family and work responsibilities than they did when they had just one child).

make mothers less committed to their work.[141] Women are thus left with a choice that no mother should have to make: "succeeding at work [or] being a good mother."[142]

The first bind of maternal wall discrimination is that working mothers often cannot fully clock out of their caretaking responsibilities; thus, the caretaking labor motherhood requires may prevent mothers from putting in sufficient face time at the office.[143] The demands of caretaking prove especially problematic for mothers in the legal profession because work at a private law firm can often be time-consuming and unpredictable.[144] Although the workload in many legal professions is often unrelenting, women are still expected to complete the majority of the household and caretaking labor.[145] Indeed, feminists have noted that the vast majority of mothers are the "default parent," or the one who shoulders the majority of the family caregiving responsibilities.[146] Professor Arlie Hochschild identifies this exact phenomenon in her influential work, *The Second Shift*,[147] finding that upon return from the office, women are culturally expected to work an additional shift of household and caretaking labor in the home.[148] In her interviews with several working mothers, Professor Hochschild observed, "these women talked about sleep the same way that a hungry person talks about food."[149] Despite Friedan's recognition of household labor as a source of depression more than fifty years ago, professional women now undertake the vast majority of this work alongside their demanding jobs.

In addition to the physical demands of the second shift, such as cooking, cleaning, and running after young children, mothers bear a mental burden, colloquially known as the "mental load,"[150] which refers to all of the behind the scenes work, such as planning a memorable birthday celebration or stocking a refrigerator full of healthy foods, expected of the default parent.[151] As the default parent, the organization of a birthday party or the preparation of nutritious meals is not a

141. *See* WILLIAMS, *supra* note 106, at 69–72; *see also* Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay (finding that mothers experience a pay cut of about 7% for each additional child they have).

142. LEAN, *supra* note 110, at 92.

143. SLAUGHTER, *supra* note 25, at 11–12, 68–69.

144. Mommy Dear, Esq., *Biglaw Mommy: Share and Share Alike*, ABOVE THE LAW (July 22, 2015, 3:40 PM), https://abovethelaw.com/2015/07/biglaw-mommy-share-and-share-alike/.

145. Eichner, *supra* note 78, at 151.

146. Emily Glover, *True Life: I'm the Default Parent*, MOTHERLY, https://www.mother.ly/life/true-life-im-the-default-parent (last visited Apr. 22, 2020).

147. ARLIE HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT 11–13 (3rd ed. 2012).

148. *Id.*

149. Eichner, *supra* note 78, at 151 (quoting HOCHSCHILD WITH MACHUNG, *supra* note 147, at 10).

150. *The 'Mental Load' Falls Squarely on Mother's Shoulders—and It's Making Us Very Tired*, MOTHERLY, https://www.mother.ly/life/the-mental-load-falls-squarely-on-mothers-shouldersand-its-making-us-very-tired (last visited July 11, 2020).

151. Sarah Sophie Flicker, *Anne-Marie Slaughter on Raising Men Who Do Housework*, CUT (Mar. 31, 2016), https://www.thecut.com/2016/03/anne-marie-slaughter-feminist-sons.html.

delegated task but an assumed one. One attorney at a New York law firm equated being the default parent to having "forty tabs open on an internet browser."[152] Another attorney stated, "at any moment I have work stuff and mommy stuff."[153] The mental load is just another constant, exhausting, and unsolicited component of motherhood.

Recently, this already burdensome mental load has developed into a mental ton. Although mothers have always been concerned with their children's extra-curricular activities and academic performance, today, with an ever-increasing pressure for children to be accepted into elite universities, many parents report spending endless hours taking their children to SAT prep classes, piano lessons, and soccer games.[154] This phenomenon, known as "overparenting," or "intensive parenting," is especially pronounced among more educated mothers, such as attorneys.[155] While their partners are also spending much more time parenting than in previous years, default parents still shoulder the majority of the workload.[156] Thus, women attorneys are working more hours than the already overworked population in the office and are typically working more hours in the home, not only completing the uncompensated and often unappreciated labor of cleaning the house and cooking meals but also doing everything in their power to try to get their children accepted into a top-tier college.[157] Today, mothering for many attorneys has become even more time intensive than it was during the second-wave movement.[158]

The second hurdle of maternal wall discrimination is how the default parent role causes employers to be wary of hiring, promoting, and advancing women,

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152. Interview with Female Partner at Large Law Firm in New York (Oct. 14, 2020) [hereinafter Interview 1]. Three partners at a large, private law firm in New York shared their experiences about becoming mothers while working as attorneys at the firm. These interviews occurred on different dates and will be cited throughout this Note.

153. Interview with Female Partner at Large Law Firm in New York (Oct. 16, 2020) [hereinafter Interview 2].

154. *See, e.g.*, MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 62 (2020).

155. *Id.* at 62–63.

156. *Id.* at 66–68.

157. *Id.* at 64–68; *see also* Slaughter, *supra* note 105 ("[I] had left government . . . because of my desire to be with my family and my conclusion that juggling high-level government work with the needs of two teenage boys was not possible.").

158. While the pandemic has increased stress levels for many parents, especially for those who are trying to make ends meet, mothers in particular have experienced additional stress to their health. *See* Eliana Dockterman, *These Mothers Wanted to Care for Their Kids and Keep Their Jobs. Now They're Suing After Being Fired*, TIME (Mar. 3, 2021, 6:11 PM), https://time.com/collection/women-covid19-pandemic/5942117/mothers-fired-lawsuit-covid-19/. Since February 2020, over two million women have exited the workforce. *Id.* (citing Claire Ewing-Nelson, *Another 275,000 Women Left the Labor Force in January*, NAT'L WOMEN'S LAW CTR. (Feb. 2021), at 1, https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf). Although prior to the pandemic, the number of women in the workforce had surpassed the number of men, now, due primarily to closures of schools and childcare centers, the number of women working for wages has returned to the level of the late 1980s, "with Black mothers, Hispanic mothers and single mothers being among the hardest hit." *See* Jessica Grose, *America's Mothers Are In Crisis*, N.Y. TIMES (Feb. 4, 2021), https://www.nytimes.com/2021/02/04/parenting/working-moms-mental-health-coronavirus.html.

whether or not they are mothers, because their additional caretaking responsibilities may make them appear to be less committed employees.[159] One reason why women have had difficulty assimilating into the legal profession is because it embraces the ideal worker theory or the idea that the ideal worker is one who can dedicate countless hours to his or her job.[160] With the average attorney working at least fifty hours per week, and women performing the vast majority of the unpaid labor in the home, legal employers likely believe that women cannot reach the ideal worker standard.[161] Difference feminism observes that the ideal worker is only possible with someone to support them.[162] In the legal profession, in which many careers consist of erratic and unpredictable hours, an attorney is assumed to have someone at home to care for the children.[163] Numerous studies have shown that employers and male coworkers consider female attorneys to be less dedicated employees, even if they are working the same hours as their male coworkers.[164] Although legal employers have created numerous programs to try to retain women attorneys, women often exit the legal profession when they become mothers.[165] Since the ideal worker, one who is always available to work, and the ideal mother, one who is always available to care for her children, clash, maternal wall discrimination intensifies.

As a result of the maternal wall discrimination that women often experience, they may be more likely to seek employment in areas of the profession that embrace caretaking, often sacrificing higher wages, prestige, and a greater role in shaping the law.[166] Indeed, women attorneys are clustered

159. *See* Nancy Reichman & Joyce Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 37, 70–71 (2004); *see also* Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 581 (2007).

160. *See* Bennett Stanford, *supra* note 124, at 653–55.

161. *Id.*

162. *Id.*

163. *Id.*; *see also* Korzec, *supra* note 95, at 117–18.

164. *See* Ivana Djak, *The Case for Not "Accommodating" Women at Large Law Firms: De-Stigmatizing Flexible Work Programs*, 28 GEO. J. LEGAL ETHICS 521, 529 (2015) (citing a 2011 ABA Commission study which found that a majority of women feel that they are viewed as less committed after adopting or birthing a child, and a 2007 survey which found that 25% of male attorneys believed that their female coworkers, who worked the same number of hours as they did, had worked less than they had).

165. *See* Gillespie, *supra* note 22.

166. *See* LINDSEY, *supra* note 107, at 331; *see also* West, *supra* note 27, at 979 (finding that fields with more women in them tend to be less prestigious). Generally speaking, within various professions, women tend to be more concentrated in careers that emphasize caretaking labor and are lower-paid and less valued. For example, in the field of medicine, women tend to be nurses and men tend to be physicians. In the field of education, women tend to be teachers, and men tend to be superintendents. *See Employed Persons By Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU OF LABOR STATISTICS (Jan. 22, 2020), https://www.bls.gov/cps/cpsaat11.htm; *see also* Cheeseman Day, *supra* note 24; Alia Wong, *The U.S. Teaching Population Is Getting Bigger, and More Female*, ATLANTIC (Feb. 20, 2019), https://www.theatlantic.com/education/archive/2019/02/the-explosion-of-women-teachers/582622/.

in the practice area of family law,[167] which often involves emotional labor.[168] But family law is also often considered one of the less prestigious practice areas.[169] Furthermore, women attorneys are heavily clustered in government service work and nonprofit work,[170] areas of the law that benefit the public good and that closely align with the feminine attribute of caregiving but also tend to be lower paid.[171] Women working in the government and nonprofit sector, however, are still underrepresented in positions of leadership.[172] Moreover, women professors at law schools tend to teach in areas that are considered less prestigious.[173] Thus, to some extent, even within the legal profession, the separate spheres ideology has taken shape.

C. SOCIAL EGG FREEZING: AN EXEMPLAR OF THE EQUITY FEMINIST SOLUTION

The following Part argues that the recently offered benefit of subsidized elective egg freezing, also referred to as social egg freezing, because women of reproductive age use it to delay pregnancy for reasons unrelated to their health,[174] exemplifies the startling efforts that equity feminists are willing to take so that women can be represented in positions of power. The reason why social egg freezing is an equity feminist solution is because it adheres to the equity feminist philosophy of making women do the work of reaching male-defined standards.[175] In the case of social egg freezing, women are doing the work of following the male-defined timeline for partnership by, quite literally, altering their bodies. As Part I conveys, the legal profession was built around the body and experience of an archetypal male attorney, yet an egg freezing "perk" insists that women undergo a medical procedure simply to adapt to a structure wholly dismissive of their interests.

In an effort to retain and attract talented young women, Fortune 100 companies, investment banks, and most recently, large law firms, have begun

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167. *See* Goluboff, *supra* note 15, at 86; Alaina Purvis, *Women in the Legal Profession: How Gender Barriers and Attrition Are Keeping Women Out of the Judiciary*, 43 J. LEGAL PROF. 283, 290–92 (2019).

168. *See* Jill Switzer, *On the Emotional Labor of Being a Lawyer*, ABOVE THE LAW (June 27, 2018, 4:48 PM), https://abovethelaw.com/2018/06/on-the-emotional-labor-of-being-a-lawyer/ (explaining that being a family law attorney involves emotional labor).

169. CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 688, 688 (Robert E. Emery ed., 2013).

170 LINDSEY, *supra* note 107, at 335.

171. *Id.* at 331.

172. *See* Sheryl Sandberg, *Why We Have Too Few Women Leaders*, TED TALK at 00:00:33-00:01:11 (Dec. 2010), https://www.ted.com/talks/sheryl_sandberg_why_we_have_too_few_women_leaders (stating that women are underrepresented in leadership positions in government and the nonprofit sector).

173. West, *supra* note 27, at 979.

174. *See* Ana Borovecki et al., *Social Egg Freezing Under Public Health Perspective: Just a Medical Reality or a Women's Right? An Ethical Case Analysis*, 7 J. PUB. HEALTH RSCH. 101, 101 (2018); Lauren Geisser, *Gender Norms, Economic Inequality, and Social Egg Freezing: Why Company Egg Freezing Benefits Will Do More Harm Than Good*, 25 UCLA WOMEN'S L.J. 179, 181–84 (2018) (explaining that "social" egg freezing is another term for cryopreservation for "otherwise healthy women").

175. *See* Geisser, *supra* note 174, at 185 ("[E]gg freezing as an employment benefit . . . ultimately reinforces a male-oriented workplace, upholds gender norms, and distracts from policies that would have more meaningful benefits for both women and men seeking to balance work and family.").

offering social egg freezing as a benefit.[176] Social egg freezing permits a woman to freeze her eggs at her employer's expense and then undergo in-vitro-fertilization (IVF) once she has reached a desirable position in the profession. Most attorneys at large law firms are close to or begin making partner around age thirty-five.[177] Proponents of social egg freezing explain that it allows a woman attorney to establish her career and have the job security, economic resources, and likely the flexibility necessary to care for children.[178] Indeed, one partner at a firm in New York explained that she had her kids after she had already made partner, which gave her the seniority and flexibility necessary to handle the demands that come with being the default parent.[179] The typical cost of two egg freezing cycles for a woman who is thirty and then decides to undergo IVF at age forty-five is between $32,500 and $53,000.[180] Due to attorney requests, employees covered under law firm Weil Gotshal's health plan can have social egg freezing, one year of free storage, and the opportunity to undergo up to three IVF cycles.[181] Egg freezing ostensibly accommodates the motherhood roadblock so that motherhood does not threaten a woman's chance at partnership.[182] Given that a woman's optimal childbearing years coincide with her prime age to advance her career, many believe that social egg freezing is a pragmatic solution.

Although some women attorneys may consider social egg freezing as the technological answer to their prayers, comparing it to the birth control pill and abortion, arguing that it likewise affords greater control over one's reproduction,[183] social egg freezing may actually be disadvantageous because it is a potentially

176. *See* Lauren Geisser, *INSIGHT: Employer-Subsidized Egg Freezing Benefits-Who Really Pays?*, BLOOMBERG LAW (Dec. 21, 2018, 7:00 AM), https://news.bloomberglaw.com/health-law-and-business/insight-employer-subsidized-egg-freezing-benefitswho-really-pays. According to the Society for Human Resource Management, 4% of all large employers offer health plans that include social egg freezing and 25% of large employers offer health plans that include IVF. *See 2018 Employee Benefits Report*, SOC'Y FOR HUMAN RES. MGMT. (2018), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf.

177. Gillespie, *supra* note 22.

178. *See* Geisser, *supra* note 174, at 193–95 (explaining that some support social egg freezing because it enables women to have children once they are secure in their careers).

179. Interview 2, *supra* note 153.

180. *See* Geisser, *supra* note 176.

181. Staci Zaretsky, *Top Biglaw Firm Wows All Employees With New Fertility And Family-Planning Benefits*, ABOVE THE LAW (Feb. 3, 2020, 11:15 AM), https://abovethelaw.com/2020/02/top-biglaw-firm-wows-all-employees-with-new-fertility-and-family-planning-benefits/.

182. *See* Geisser, *supra* note 174, at 202–05 (noting that proponents of egg freezing claim that it can expand the options women have when planning their career and family).

183. *See id.* at 186 (observing the similarities between the birth control pill and egg freezing); *see also* Michele Gilman, *How Limiting Women's Access to Birth Control and Abortions Hurts the Economy*, CONVERSATION, http://theconversation.com/how-limiting-womens-access-to-birth-control-and-abortions-hurts-the-economy-57546 (last visited May 12, 2020) (explaining the "health and autonomy benefits" of contraception, as well as recently enacted state laws on abortion, such as mandatory waiting period or counseling sessions, are burdensome).

risky,[184] and perhaps coercive, procedure. If a woman decides to delay childbirth until age thirty-five, the likelihood of pregnancy complications, such as stillbirth and miscarriage, begins to increase with each year.[185] While a woman's fertility rate is approximately 85% at age twenty, by the time she reaches forty-five, it drops to 5%.[186] Thus, while social egg freezing may allow a woman to have children when it would be easiest for her to do so career-wise, it may also preclude her from having a healthy pregnancy.

Moreover, unlike abortion and birth control, which afford women the autonomy to make choices about their reproduction, social egg freezing at the expense of an employer may pressure women into delaying childbirth. By having access to the social egg freezing benefit, women attorneys who choose not to take it may be viewed as less committed and ambitious employees.[187] Although there is little evidence of this trend happening now because these benefits have only recently been offered, in the future, employers may expect women to electively freeze their eggs, and those who choose not to do so may face career penalties.[188] Thus, women may experience an undue pressure to undergo a medical procedure for job security. Moreover, women who wanted to have children may forfeit the opportunity to do so if they decide to eventually forego IVF or if the procedure is ultimately unsuccessful.[189] While equity feminists will contend that social egg freezing is an ingenious way for women to have greater autonomy, it is also an alarming and unsettling example of equity feminism's insistence that women homogenize to a male-defined career trajectory.

Although social egg freezing allows women to attain equal footing in the workplace because it delays childbirth and permits them to focus on their careers—or anything else they choose—during their twenties and thirties, this equity feminist solution asks women to, quite literally, reconfigure their reproductive timeline for the purpose of aligning with the male-defined pathway for career advancement. Social egg freezing reaffirms the problematic concept that motherhood during a woman's prime childbearing years conflicts with a legal career.

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184. *See* Angel Petropanagos et al., *Social Egg Freezing: Risk, Benefits and Other Considerations*, 187 CMAJ 666, 666 (2015) ("Although egg freezing has benefits, evidence is limited as to the outcomes for liveborn children, and adverse events associated with both in vitro fertilization and later-life pregnancies are well known.").

185. Gossett et al., *supra* note 125, at 119 (explaining that after age thirty-five, the risk of pregnancy complications, such as stillbirth and miscarriage, increase even though more women are choosing to have children after age thirty-five); Petropanagos et al., *supra* note 184 at 666–67 (finding several health risks to young women who undergo social egg freezing and their future offspring). Moreover, some research suggests that older women having their first child may experience greater difficulty breastfeeding. *See* Amy Norton, *Older Age, Extra Pounds May Delay Breast-Milk Production*, REUTERS (July 27, 2010, 11:56 AM), https://www.reuters.com/article/us-milk-production-idUSTRE66Q4YV20100727.

186. *See* Geisser, *supra* note 174, at 193.

187. *Id*. at 201–02.

188. *Id*.

189. Brigette Adams, *The Side of Egg Freezing No One is Talking About*, INSIDER (Mar. 22, 2017, 4:49 PM), https://www.insider.com/egg-freezing-failure-risks-2017-3.

V. THE CASE FOR DIFFERENCE FEMINISM

As Part IV demonstrates, although women comprise a substantial portion of the population of the legal profession,[190] their experiences as mothers receive cursory attention. This Part advocates that difference feminism should be employed as a framework for rectifying the historical legacy of discrimination that women experienced in the legal profession and for addressing maternal wall discrimination. Using the perspective offered by difference feminism can initiate a conversation that engenders much broader structural and cultural shifts that are more inclusive of women's biological and cultural differences. The pathway for career advancement should align with the experiences of its female members, rather than fit the ideal worker norm, which was built around a male experience.

This Part argues that difference feminist legal theory is the more appropriate legal theory for addressing the realities that women in the legal profession experience and proposes a two-pronged solution embodying a difference feminist framework. In the first part of the solution, in contrast to a subsidized social egg freezing benefit, this Part argues that mothers should be offered at least six months of paid maternity leave to properly rest and recover from childbirth and to adequately care for their newborns.[191] In the second part of the solution, this Part advocates that the legal profession should permanently adopt the flexible

190. NAT'L ASS'N OF WOMEN LAWYERS, 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN LAWYERS AT LAW FIRMS 3 (2019), https://www.nawl.org/p/cm/ld/fid=1163.

191. *See* EICHNER, *supra* note 154, at 96–98. This solution is centered on the experiences of mothers who give birth to live infants because medical evidence and personal anecdotes support six months as an adequate window to recover postpartum and to bond with one's newborn. Parents who have experienced pregnancy loss, however, should also be entitled to paid leave. Approximately one out of every four women have experienced a pregnancy loss. *See* Sally Maitlis & Gianpiero Petriglieri, *Going Back to Work After a Pregnancy Loss*, HARV. BUS. REV. (Dec. 5, 2019), https://hbr.org/2019/12/going-back-to-work-after-a-pregnancy-loss. Pregnancy loss is defined as a miscarriage, if it occurs before twenty weeks, or as a stillbirth, if it occurs after twenty weeks. *See What is Stillbirth?* CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/stillbirth/features/pregnancy-infant-loss.html (last reviewed Nov. 16, 2020). Despite the emotional and physical toll of pregnancy loss, there is "no statutory Family and Medical Leave after a stillbirth." *See* Maitlis & Petriglieri, *supra* note 191. The lack of leave policies for pregnancy loss is a pressing issue that recently garnered attention after a D.C. Public Schools teacher was denied Washington, D.C.'s eight-week paid family leave program for government workers following the birth of her stillborn daughter. *See* Mikaela Lefrak & Martin Austermuhle, *After a Teacher Spoke Out About Her Stillbirth, D.C. May Give Workers More Paid Leave*, NPR (Feb. 3, 2021), https://www.npr.org/local/305/2021/02/03/963615412/after-a-teacher-spoke-out-about-her-stillbirth-d-c-may-give-workers-more-paid-leave. As a result, the D.C. Council ultimately passed a bill that provides two weeks of paid leave following a stillbirth. D.C. CODE § 1-612.03. (amended Mar. 17, 2021). While D.C.'s legislation is a step in the right direction, it arguably does not provide enough time to heal from the physical and emotional toll of having a stillborn baby. The amount of leave that should be provided following a pregnancy loss is beyond the scope of this Note; however, this Note recognizes that current policies are inadequate, and any leave given should be paid. *Cf.* Coleman v. Court of Appeals of Md., 566 U.S. 30, 57 (2012) (Ginsburg, J., dissenting) ("It would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby."). For a greater discussion on the legal reforms that should be taken to address stillbirths, see Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 955–62 (2019).

work arrangements of the COVID-19 pandemic so that work product over face time is valued and mothers have the flexibility necessary to excel in their careers and handle the unpredictable responsibilities of motherhood.[192]

A. A SIX-MONTH PAID MATERNITY LEAVE: GIVING MOTHERS REST AND RECOVERY

Current federal legislation and employer policies provide new mothers with an insufficient amount of time to rest and recover after childbirth. Numerous studies recommend that women should take at least six months off of work after giving birth,[193] but one in four women will take less than two weeks off.[194] Under the Family Medical Leave Act (FMLA), only employers with more than fifty employees are federally mandated to provide new mothers twelve weeks of *unpaid* leave.[195] While several states provide parents with paid leave protections, the United States is the only well-developed country without a universal paid maternity leave policy.[196]

Although some women in the legal profession may be more fortunate than women in other fields because their employers qualify under FMLA guidelines or offer generous paid leave policies, many women attorneys may be unable to take the leave offered to them either because they cannot afford to financially, would face a career setback for doing so, or a combination of these two factors.[197] Some legal employers do not offer paid leave since it is not federally mandated.[198] Moreover, some legal employers with less than fifty employees do not even offer unpaid leave.[199] Even professors at the most elite law schools in the nation have suffered from the lack of adequate leave policies.[200] For example, the Dean of Wake Forest Law School, Jane Aiken, recalls having to teach three days after

192. *See* Williams, *supra* note 104, at 817 (explaining that in order for alternative arrangements or flexible schedules to benefit mothers these arrangements or scheduless cannot be stigmatized).

193. EICHNER, *supra* note 154, at 96–98.

194. Miranda Bryant, *'I Was* Risking *My Life': Why One in Four US Women Return to Work Two Weeks After Childbirth*, GUARDIAN (Jan. 27, 2020, 3:00 EST), https://www.theguardian.com/us-news/2020/jan/27/maternity-paid-leave-women-work-childbirth-us.

195. U.S. DEP'T OF LAB., EMPLOYERS GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 6 (n.d.), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf.

196. California, New York, New Jersey, Rhode Island, and the District of Columbia all offer paid leave. *See* Gretchen Livingston, *Among Forty-one Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/.

197. Gayle Cinquegrani, *Generous Parental Leave Policies Spreading in Law Firms*, BLOOMBERG LAW (Aug. 10, 2020, 7:19 AM EST), https://news.bloomberglaw.com/business-and-practice/generous-parental-leave-policies-spreading-in-law-firms.

198. Carolyn Elefant, *Can Solos And Smalls Afford To Offer Paid Maternity Leave?*, ABOVE THE LAW (June 15, 2017, 10:02 AM), https://abovethelaw.com/2017/06/can-solos-and-smalls-afford-to-offer-paid-maternity-leave/.

199. *Id.*

200. Dean Aiken's experience occurred in 1996. *See* Aiken, *supra* note 105 at 19. ("I remember the day that I sat in a chair teaching my second class of the day, three days after having a C-section. I could not afford leave without pay, the only leave available. It was my fault anyway; I had not timed this pregnancy well.").

having a caesarean section while she was a professor at Georgetown Law School because she could not afford to take unpaid leave.[201] Certainly, Dean Aiken's three-day recovery was an inadequate amount of time, and, sadly, she is one of the many women who returns to work just days after undergoing labor and a major surgery.[202]

While unpaid leave is insufficient, even some mothers who have what would be considered generous leave packages do not fully utilize them.[203] Some women attorneys at big law firms, which typically offer between sixteen to eighteen weeks of paid leave, report not taking as much time off as they would like to because of a fear of stigma upon their return.[204] To combat this stigma, several firms have offered "gender neutral"[205] or "primary caregiver leave";[206] nonetheless, since women are still culturally considered the default parent, new mothers overwhelmingly take this leave.[207] Furthermore, men who take long paternity leaves also feel stigmatized by law firm culture of emphasizing face time[208] until the switch to remote work arrangements during the current pandemic. Although some have argued that generous leave policies would attract less committed and dedicated employees, just the opposite appears to be true since women in the legal profession do not fully utilize paid leave policies and instead return to the office soon after giving birth.[209] Thus, with the ideal worker as the norm, taking parental leave may actually be detrimental for attorneys who do not want to risk losing a promotion while on leave or stigmatization upon their return to work.

Regardless of whether leave is paid or unpaid, even some of the most generous leave policies are insufficient for new mothers to properly recover postpartum and nurture their infants. Numerous studies recommend that a new mother be at home for at least six months after giving birth.[210] Women can experience physical symptoms, such as dizziness and hair loss, for several weeks after pregnancy.[211] In addition to physical impairments, new mothers may be prone to

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201. *Id.*

202. *See generally The Pandemic is Making America Rethink It's Shunning of Midwifery*, *supra* note 41 (noting that caesarean sections are risky procedures and commonplace methods of delivery).

203. *See* Cinquegrani, *supra* note 197.

204. *See id.*

205. Miranda McGowan, *The Parent Trap: Equality, Sex and Partnership in the Modern Law Firm*, 102 MARQ. L. REV. 1195, 1260 (2019).

206. *Id.*

207. *Id.*

208. Maridel Reyes, *How to Deal with the Stigma of Taking Paternity Leave*, N.Y. POST (Feb. 25, 2018, 12:30 AM), https://nypost.com/2018/02/25/how-to-deal-with-the-stigma-of-taking-paternity-leave/.

209. *See* Selmi, *supra* note 159, at 582 (observing one of the unintended consequences of generous leave policies).

210. *See* EICHNER, *supra* note 154, at 96–98.

211. Brigid Schulte et al., *Paid Family Leave: How Much Time Is Enough?*, NEW AMERICA, at 14 (June 16, 2017), https://d1y8sb8igg2f8e.cloudfront.net/documents/Paid_Family_Leave___Final.pdf.

depression and other mental illnesses.[212] A now partner explained that while a four-month maternity leave was enough time for her to physically recuperate, it was barely enough time for her to emotionally recover.[213] Another partner recalled, "I don't know how women can do three months."[214] Most women do not physically or mentally recover after giving birth for at least six weeks, and, for some, recovery can take several months.[215]

Additionally, even mothers who are fortunate enough to fully utilize generous paid leave policies can still miss the opportunity to develop a potentially stronger maternal bond with their newborns. Infants between the ages of four to six months begin reaching important milestones, such as babbling words and grabbing objects, which can be enjoyable developments for new parents to observe;[216] however, many of the longer paid leave policies, which are between sixteen to eighteen weeks,[217] expire right before babies exhibit these motor skills. One attorney stated that her six-month leave was the ideal amount of time for her to recover from pregnancy and want to return to work.[218] Thus, new mothers should have at least six months to properly rest, recover, and spend some of motherhood's most memorable moments with their newborns.

An extended maternity leave also promotes neonatal health. The United States has the highest infant mortality rate of any developed country,[219] and research suggests that more robust maternity leave policies can help to reduce infant deaths.[220] One of the significant advantages of a six-month paid maternity leave is that it provides mothers with the flexibility to breastfeed, which is considered to be extremely important for an infant's health due to the numerous nutrients in breast milk[221] and for fostering a maternal connection.[222] Since the World

212. *Id*. at 15.

213. Interview 1, *supra* note 152.

214. Interview 2, *supra* note 153.

215. *Recovering From Delivery (Postpartum Recovery)*, FAMILY DOCTOR, https://familydoctor.org/recovering-from-delivery/ (last updated Aug. 28, 2020).

216. *Infant Development: Milestones from Four to Six Months*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/infant-and-toddler-health/in-depth/infant-development/art-20048178 (last visited May 30, 2020).

217. Cinquegrani, *supra* note 197 (finding that sixteen to eighteen weeks of paid parental leave is considered to be a generous leave policy at large law firms and that some firms offer twenty weeks).

218. Interview with Female Partner at Large Law Firm in New York (Oct. 12, 2020) [Interview 3].

219. Schulte et. al., *supra* note 211, at 12. According to the CDC, the United States' 2017 infant mortality rate was 5.7 deaths per 1,000 live births. *Infant Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 27, 2019), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm. The infant mortality rate for African-American newborns is approximately 2.2 times higher than for other racial groups – a larger gap than in 1899. *The Vulnerability of African Americans to the Coronavirus is a National Emergency*, ECONOMIST (May 28, 2020), https://www.economist.com/united-states/2020/05/28/the-vulnerability-of-african-americans-to-the-coronavirus-is-a-national-emergency.

220. Arijit Nandi et al., *Increased Duration of Paid Maternity Leave Lowers Infant Mortality in Low- and Middle-Income Countries: A Quasi-Experimental Study*, 13 PLOS MED (2016).

221. Pamela Laufer-Ukeles & Arianne Renan Barzilary, *The Health/Care Divide: Breastfeeding in the New Millennium*, 35 COLUM. J. GENDER & L. 264, 318 (2018).

222. *Id*. at 269.

Health Organization (WHO) advises that "infants should be exclusively breastfed for the first six months of life,"[223] a six-month paid maternity leave would permit mothers to adhere to this official guideline set forth by the WHO. Some may contend that providing mothers with an extended maternity leave to breastfeed is not necessary because women can still feed their babies breast milk by pumping during work. Breastfeeding, however, has additional advantages to pumping, such as preventing overfeeding and fostering a bond between mother and child.[224] Moreover, some professional women report that they are unable to pump during work hours and forego delivering some of the vital nutrients[225] found in breast milk to their babies.[226] Currently, many women are caught in a double-bind, both wanting to and being culturally pressured to breastfeed but unable to do so given stringent leave policies.[227] Although affording mothers the opportunity to nurture their newborns during their most critical stage of development may seem obvious, current policies do not ensure that mothers and infants have this most elementary right.

While both sides of the political aisle concur that there should be some sort of federal paid maternity leave policy, it is beyond the scope of this Note to discuss the logistics for implementing a revised maternity leave policy;[228] however, this Note contends that it should be at least six months and that it should be paid. Current leave policies provide insufficient time and financial support for new mothers to recover postpartum and nurture their newborns. A difference feminist framework would support a six-month paid maternity leave policy because it restructures career advancement around a woman's healthiest[229] childbearing years, rather than encouraging women to freeze their eggs and delay motherhood to conform to a male-defined timeline.

B. FLEXIBLE WORK ARRANGEMENTS: SUPPORTING MOTHERS AFTER CHILDBIRTH

As Part IV of this Note demonstrates, motherhood is often incompatible with an unspoken requirement of "forty years of unbroken face time"[230] for partnership. For women to reach the apex of the legal hierarchy, employers must realistically consider the amount of time and energy that motherhood requires.

223. *Id*. at 273

224. *Id*. at 318.

225. *Id*. at 277 (explaining that breast milk contains important antibodies, fat cells, proteins, stem cells, and other "protective agents," and that colostrum, which is the breast milk produced just a few days after giving birth, contains unparalleled proteins to help develop an infant's immune system).

226. Laufer-Ukeles & Renan Barzilary, *supra* note 221, at 279.

227. *Id*. at 288.

228. Claire Cain Miller, *Republicans Now Support a Form of Paid Leave. So What's the Holdup?*, N.Y. TIMES (Nov. 21, 2019), https://www.nytimes.com/2019/11/21/upshot/paid-leave-2020-debate.html.

229. Gossett et al., *supra* note 125.

230. Djak, *supra* note 164, at 529.

This Part argues that the flexible work arrangements attorneys have been afforded during the pandemic should continue even after the pandemic is over.[231]

Women have been advocating for close to thirty years for flexible work arrangements that value end results over face time to accommodate their experience as the default parent.[232] Not until the coronavirus-related restrictions forced attorneys to work remotely did legal employers realize that less face time does not mean a less committed attorney.[233] Though some women have been able to make partner while working a part-time or flexible schedule, many are unable to do so because of a "flexibility stigma" that causes women to feel negatively judged by their employers for working outside of the office.[234] Given that many more women than men work flexible schedules, women's work schedules were commonly belittled as "mommy tracks."[235] Indeed, the majority of the few attorneys who work reduced or flexible schedules are women.[236] Since women are more likely to be working at home, when employers value face time, women are disadvantaged.[237] The history of valuing face time over end results likely stems from separate spheres ideology, given that the home was ordinarily the private, stereotypically female sphere separate from political and public life.[238] Now that almost all attorneys must work from home, however, the flexibility stigma that usually only those on the mommy track experienced has largely dissipated.[239] Rather than valuing attorneys based on their amount of face time, legal employers should value the end result.

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231. *See generally* Qian Julie Wang, *INSIGHT: Pandemic Debunks Three Myths, Teaches Lessons on Diversity*, BLOOMBERG LAW (June 3, 2020, 4:01 AM), https://news.bloomberglaw.com/us-law-week/insight-pandemic-debunks-three-myths-teaches-lessons-on-diversity (claiming that face time does not boost worker productivity).

232. *See generally* Brigid Schulte, *What Moms Always Knew About Working From Home*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/opinion/Coronavirus-remote-work.html.

233. *Id.*

234. *See generally* Debra Cassens Weiss, *Survey Chronicles Female Lawyers' Exodus from Equity Partnership, Belief They Can't Have It All*, ABA J. (Nov. 1, 2017, 7:00 AM CDT), https://www.abajournal.com/news/article/survey_chronicles_female_lawyers_exodus_from_equity_partnership_belief_they (citing study which finds that men and women are equally likely to think that working part-time will detrimentally impact their careers); *see also* Djak, *supra* note 164, at 522 (claiming that women at large firms who work part-time schedules are disproportionately stigmatized and, as a result, are less likely to be promoted to partner).

235. *See* Korzec, *supra* note 95, at 124.

236. Noam Scheiber, *A Woman-Led Law Firm That Lets Partners Be Parents*, N.Y. TIMES (May 1, 2015), https://www.nytimes.com/2015/05/03/business/a-woman-led-law-firm-that-lets-partners-be-parents.html (citing *Rate of Part-Time Work Among Lawyers Unchanged in 2012*, *supra* note 24 (finding that women attorneys were more likely than men to be working part-time)). A 2016 report conducted by the Law Firm Diversity & Flexibility Alliance found that less than 9% of attorneys used the flexible work options offered by the participating large firms, and the majority of these attorneys were women. *See* Adrianne Bibby, *A Look at Ten Law Firms Embracing Flexible Work*, FLEXJOBS EMP'R BLOG (Aug. 2, 2017), https://www.flexjobs.com/employer-blog/law-firms-embracing-flexible-work/.

237. *See* Schulte, *supra* note 232.

238. *Id.*

239. *See* Meg McEvoy, *Will Covid Force Firms to Ditch the Fancy Offices?*, BLOOMBERG LAW (Aug. 20, 2020, 3:01 PM), https://www.bloomberglaw.com/product/health/document/X7E99QQ0000000?resource_id=c8ba85577e5d0221f193fad2eac96e61.

Flexible work schedules benefit mothers in numerous ways. For example, new mothers who want to breastfeed or who have erratic sleep schedules can adapt their work hours accordingly.[240] Although attorneys of all genders have reported that working remotely has greatly increased their productivity, saving valuable time getting ready for work, commuting to the office, and chatting with co-workers about unrelated work matters, women attorneys tend to especially benefit from these arrangements. As the default parent, they already have fewer hours in the day to spend on such tasks, with one attorney observing that not having to commute saves her approximately three hours each day.[241]

Furthermore, flexible work arrangements must remain as a destigmatized option in the legal profession even after the pandemic is over because they may encourage non-default parents to assume more of the caretaking labor, and they have the additional bonus of benefiting employers. A woman attorney explained that since her husband was also working from home, he was more willing to handle some of the household responsibilities that ordinarily would fall to her.[242] The same attorney noted that many of the male attorneys at her firm enjoyed finally being able to eat dinner with their families.[243] While men are completing more household and child-care labor than they ordinarily would have during the lockdown, women are still responsible for the vast majority of the work.[244] Nonetheless, flexible work arrangements have illuminated the large extent to which mothers work a second shift, and may make their partners and employers more understanding of the challenges mothers had previously undertaken with little support.[245]

The success of remote work has made many law firms consider adopting flexible work arrangements as a long-term solution. Some are even considering permanently shuttering their physical offices.[246] Since attorneys seem to be just as, if not more, productive working remotely than at the office, law firms may have difficulty justifying the exorbitant overhead costs of maintaining a physical office, often in large cities with some of the highest real estate costs in the country.[247]

240. *See* Roxanna Maddahi, *Employers and New Mothers Benefit from Flexible Work Schedules*, FORBES (May 18, 2018, 8:00 AM EDT), https://www.forbes.com/sites/forbesfinancecouncil/2018/05/18/employers-and-new-mothers-benefit-from-flexible-work-schedules/#27a5346269d3.

241. Interview 2, *supra* note 153.

242. *Id.*

243. *Id.*

244. *See* Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES, https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html (last updated June 30, 2020).

245. *Id.*

246. *See* Roy Strom, *This Big Law Firm Has Permanent Plans for Remote Working*, BLOOMBERG LAW (July 16, 2020, 4:56 AM), https://news.bloomberglaw.com/business-and-practice/this-big-law-firm-has-permanent-plans-for-remote-working; Roy Strom, *Coronavirus is Forcing Big Law Out of Office—What They Can Learn*, BLOOMBERG LAW (Mar. 12, 2020, 4:51 AM), https://news.bloomberglaw.com/business-and-practice/coronavirus-is-forcing-big-law-out-of-office-what-they-can-learn.

247. *Id.*

Moreover, the caregiving work that occurs intermittently while working remotely benefits legal employers. Skills that caregiving cultivates, such as multitasking, patience, and organization, are vital to a successful career as an attorney.[248]

While working remotely seems to better accommodate the differences that women attorneys experience as the default parent, some have observed that there are certain advantages to face time or having a clearly defined work schedule. One of the main downsides to remote work, especially for the default parent, is that between the demands of work and the demands of parenting, there is never a break. As one attorney explained, "a conference call could be at 6:30 p.m. or 6:30 a.m.—it does not matter because we are all at home anyways."[249] For the default parent, which overwhelmingly tends to be the mother, this is especially problematic because interruptions from children make it difficult to concentrate on work.[250]

Prior to the pandemic, women attorneys who were already working remotely part-time had already experienced this phenomenon, describing it as "schedule creep," or when a part-time schedule warps back into a full-time one but with much less pay.[251] As Professor Williams explains, "Employers allow someone to go part-time, but they don't change the job expectations. So, when that happens, hours typically creep back up towards full-time."[252] Without a definite boundary between the office and the home, all attorneys are experiencing the previously female-associated experience of schedule creep while working flexible schedules. Even after all schools and daycare facilities reopen, some women report that they would at least prefer the option of occasionally reporting to the office to combat schedule creep.

Furthermore, some women attorneys argue that face time helps them advance their legal careers. While attorneys of both genders report that meetings over Zoom or conference calls can be uncomfortable and impersonal, for some women, virtual environments seem to amplify the existing difficulties they face, such as speaking up in group settings or apologizing for an unprofessional appearance.[253] In addition,

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248. SLAUGHTER, *supra* note 25, at 229.

249. Interview 1, *supra* note 152.

250. *See* Megan Leonhardt, *Parents Struggle with Remote Learning While Working from Home: 'I'm Constantly Failing,'* CNBC (Sept. 17, 2020, 8:30 AM), https://www.cnbc.com/2020/09/17/remote-learning-why-parents-feel-theyre-failing-with-back-to-school-from-home.html; *see also* Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. Three Percent of Women Agree.*, N.Y. TIMES, https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html (last updated May 8, 2020).

251. Leigh McMullen Abramson, *Making One of the Most Brutal Jobs a Little Less Brutal: Can Lawyers Balance Work and Leisure?*, ATLANTIC (Sept. 10, 2015), https://www.theatlantic.com/business/archive/2015/09/work-life-balance-law/404530/.

252. Monica Torres, *Going Part Time Can Be a Cruel Trap for Women, But There's a Way To Do It Right*, HUFFPOST LIFE (June 21, 2019, 5:45 AM EDT), https://www.huffpost.com/entry/part-time-work-trap-tips-women_l_5d091ea2e4b06ad4d256f856.

253. *See* Alisha Haridasani Gupta, *It's Not Just You: In Online Meetings, Many Women Can't Get a Word in*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/zoom-meetings-gender.html (finding that it is more difficult for women to participate in virtual settings because they are already less likely to speak up and virtual environments make it more difficult for everyone to participate); Leslie Goldman,

women attorneys may experience greater difficulty receiving favorable assignments than they did before the pandemic. Women associates already experience greater difficulty receiving as many assignments as their male coworkers from male partners because, to some extent, the legal profession still functions as an "old boys club" with male associates and male partners forming closer working relationships because of their common interests, such as sports.[254] Thus, male partners may subconsciously give male associates assignments that would make them more eligible for partnership.[255] The additional obstacle of trying to connect with male partners in a virtual, remote environment compounds the problem women attorneys face trying to advance their careers. Evidently, flexible work arrangements do not resolve all of the challenges women experience in the male-defined legal profession.

A viable firm model could mandate a set number of flexible hours to avoid flexibility stigma but also provide some opportunities for face time to prevent schedule creep. Prior to the pandemic, some law firms had already begun to follow the trend seen in other professional sectors by moving towards creating work environments that are results-focused, due to a push, especially among millennial attorneys, for a more reasonable work-life balance.[256] One notable example of a firm that had a workplace model that seemingly anticipated the pandemic was the woman-led law firm Geller Law Group.[257] The firm does not have a permanent office and instead rents space when needed to meet with clients or have firm meetings.[258] The firm's six attorneys maintain control over their own schedules while working approximately sixty hours a week.[259] The work of the firm is mostly remote, allowing its attorneys the flexibility to simultaneously handle work commitments and the responsibilities that come with being the default parent.[260] The work arrangements of this woman-led firm seem to rightfully balance remote work with office face time, making it an ideal model for other firms to follow.

The Inescapable Pressure of Being a Woman on Zoom, VOX (May 13, 2020, 9:40 AM EDT), https://www.vox.com/the-highlight/2020/5/13/21248632/work-from-home-zoom-women-appearance-beauty-no-makeup (finding that virtual environments seem to exacerbate the female tendency to apologize for appearance, especially in professional settings). One New York attorney, however, is not so apologetic:

> I'm too busy working sixteen-hour days while managing my kids' hourly school schedule and going to bed at 3:00 a.m., and I'm not getting up an hour earlier to do any of that stuff I used to do. I am exhausted, and looking glam as I advise my business partners or negotiate and close deals is just not my priority right now.

Goldman, *supra* note 253.

254. Gillespie, *supra* note 22.

255. *Id.*

256. Meghan Boone, *Millennial Feminisms: How the Newest Generation of Lawyers May Change the Conversation About Gender Equality in the Workplace,* 45 U. BALT. L. REV 253, 252 (2016).

257. Scheiber, *supra* note 236.

258. *Id.*

259. *Id.*

260. *Id.*

Some may argue that reshaping pathways to leadership in the legal profession from the perspective of difference feminism, such as allowing attorneys to work remotely from their homes, reinforces the extremely harmful stereotypes about traditional gender roles that early equity feminists fought to change.[261] Moreover, some may argue that the many successful women in the profession suggests that women who are unable to excel in their careers lack ambition.[262] While these criticisms do raise valid concerns, requiring male attorneys to work an equal number of remote hours as women would help prevent gender stereotypes about flexible work from resurging. Although many women have certainly proven that they are just as capable as men in a legal career, they typically must work twice as hard as the default parent to achieve the same position.[263] The current timeline for career advancement is both unjust and unsustainable for many women attorneys who decide to become mothers. Even Sheryl Sandberg, author of *Lean In*, the quintessential modern equity feminist book, admitted that never speaking "about being a woman . . . wasn't working."[264] The flexible work arrangements women have used in the past are a viable model that the legal profession should permanently employ.

Unlike the "add women and stir" model of equity feminism, difference feminism asks for caregiving to be valued and for workplace structures to be redesigned for the female experience to be embraced.[265] Rather than continue to push women to comply with male-defined expectations, pathways to leadership need to be restructured and cultural expectations need to be rewired in order to accept and reward women's differences. A difference feminist solution that provides mothers with a six-month paid maternity leave and the autonomy to decide where and when to complete work-related matters would support their well-being and provide them with the flexibility necessary for caretaking labor. This solution, grounded in difference feminism, centers the female experience of motherhood

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261. *See* Heejung Chung, *Flexible Working Can Reinforce Gender Stereotypes*, CONVERSATION (Jan. 10, 2019), http://theconversation.com/flexible-working-can-reinforce-gender-stereotypes-109158 (explaining that women working from home may work overtime and also do more caretaking labor); *see also* Aliya Hamid Rao, *Is Working from Home a Solution to Gender Inequality?*, STAN. UNIV.: CLAYMAN INST. FOR GENDER RSCH. (July 9, 2020), https://gender.stanford.edu/news-publications/gender-news/working-home-solution-gender-inequality (finding that since the home is "drenched with gendered expectations . . . working from home is thus a narrow response to gender inequality in the workplace").

262. *See generally* SLAUGHTER, *supra* note 25, at 10. *But cf.* Emma Bowman, *Sheryl Sandberg: Companies Need To "Lean In" As Pandemic Threatens Women's Progress*, NPR (Oct. 1, 2020, 7:54 PM ET), https://www.npr.org/2020/10/01/919228757/sheryl-sandberg-companies-need-to-lean-in-as-pandemic-threatens-women-s-progress (explaining that companies now need to "lean in" too).

263. *See* discussion, *supra* Part IV.B.

264. Sheryl Sandberg, *So We Leaned in . . . Now What?*, TED TALK, at 00:00:40-00:01:12 (2013), https://www.ted.com/talks/sheryl_sandberg_so_we_leaned_in_now_what (last visited Apr. 24, 2020).

265. *See* Bender, *supra* note 87, at 950–52 (observing that some difference feminists believe that workplace structures should accommodate the caregiving experiences of women but that these proposals still arguably do not go far enough in "question[ing] institutional assumptions").

to permeate the boundary between the home and office and to help dismantle the separate spheres ideology.

VI. CONCLUSION

Responding to Justice Bradley's concurring opinion in *Bradwell v. Illinois*, that the "law of the Creator"[266] dictates that a woman's place is in the home, then general counsel of the ACLU Women's Rights Project Ruth Bader Ginsburg wryly wrote in a brief, "the method of communication between the Creator and the jurist is never disclosed."[267] Indeed, after arguing and winning five out of six cases that helped make women more equal citizens before an all-male Supreme Court, becoming the first female professor with tenure at Columbia Law School, serving as the second female justice on the Supreme Court, and becoming an icon for women around the world, Justice Ruth Bader Ginsburg proved that Justice Bradley's version of the "law of the Creator" was simply untrue.[268]

Without the valiant efforts of Justice Ruth Bader Ginsburg, women would be largely absent from many male-dominated fields in the public sphere.[269] Nonetheless, there is still a glaring deficit of women at the pinnacle of the legal hierarchy. This Note has argued that utilizing difference feminist legal theory as the framework to solve maternal wall discrimination would permit pathways to leadership to properly value motherhood so that women attorneys do not need to choose between motherhood and a legal career.

Restructuring the legal profession to value the different experiences that women have as mothers would not only allow for greater representation of women in positions of power but would also have ripple effects benefitting both women and men. As with men, not all women share the same values and interests. Perhaps the ideological differences between Justice Ruth Bader Ginsburg and Justice Amy Coney Barrett neatly convey this point.[270] Nevertheless, promoting

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266. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

267. *See* Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L J. 771, 785 (n.73) (2010) (quoting Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840, at *39).

268. *Ruth Bader Ginsburg*, HISTORY (Nov. 9, 2009), https://www.history.com/topics/womens-history/ruth-bader-ginsburg.

269. There is debate among scholars whether Justice Ruth Bader Ginsburg should be viewed strictly as a "formal equality" feminist. *See* Wendy Webster Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 43–44 (2013).While she did advocate for equal treatment of women under the law, some scholars have argued that Justice Ruth Bader Ginsburg held antisubordination or reconstructive feminist values. *See* Siegel & Siegel, *supra* note 267, at 783–84 (claiming that Justice Ruth Bader Ginsburg held antisubordination values that shaped her perspective of "constitutional equality"); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1269 (2012) ("[G]insburg is best understood as a reconstructive feminist, with a very concrete vision of what the world would look like if gender roles changed as she thinks they should.").

270. *See* Lara Bazelon, *Amy Coney Barrett Is No Ruth Bader Ginsburg*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/opinion/amy-coney-barrett-nominee.html ("The fact that President Trump's nominee is a woman matters less if she does not support the causes at the heart of the long, continuing march for gender equality that Justice Ruth Bader Ginsburg championed."); Ross Douthat, *The*

more women to positions of power is essential to show younger generations of women that they, too, can become leaders. In addition to having more women sitting on the bench, delivering lectures to law school students, and arguing cases before the Court, more women would likely be holding seats in office since many politicians have law degrees.[271] With a greater representation of women leaders in law and politics, the broader social and cultural shifts necessary to transition our society towards one that embraces and rewards attributes of motherhood are possible.[272] Just imagine what our society would look like if the strength, resilience, and tenacity of women, who both work and care for children, shaped and informed the law.

Meaning of Amy Coney Barrett, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/opinion/amy-coney-barrett-supreme-court.html (observing that Justice Amy Coney Barrett's conservatism embodies a different kind of feminism than the feminism of Justice Ruth Bader Ginsburg).

271. Thomas Lewis, *INSIGHT: Law School Popular for Congress, with Harvard, Georgetown Topping List*, BLOOMBERG LAW (Jan. 25, 2019, 4:01 AM), https://news.bloomberglaw.com/us-law-week/insight-law-school-popular-for-congress-with-harvard-georgetown-topping-list.

272. *See* Amanda Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*, N.Y. TIMES, https://www.nytimes.com/2020/05/15/world/coronavirus-women-leaders.html (last updated Aug. 13, 2020) (claiming that nations with women leaders have suffered fewer deaths compared to nations led by men and that the gender of a nation's leader is likely a causal factor in better COVID-19 outcomes); *see also* Avivah Wittenberg-Cox, *What Do Countries With The Best Coronavirus Responses Have In Common? Women Leaders*, FORBES (Apr. 13, 2020, 8:27 AM EDT), https://www.forbes.com/sites/avivahwittenbergcox/2020/04/13/what-do-countries-with-the-best-coronavirus-reponses-have-in-common-women-leaders/#744db1a33dec (observing that the traits of women leaders, such as compassion and love, may be responsible for the positive outcomes regarding the coronavirus pandemic experienced in countries with women leaders).