

FAMILY, GENDER, AND LEADERSHIP IN THE LEGAL PROFESSION

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INTRODUCTION

One hundred years ago, our nation ratified the Nineteenth Amendment to the Constitution, extending to women the right to vote, run for public office, and serve on juries. Today, we celebrate all we have gained. Women are now leaders throughout society—of states, cities, and towns, of corporations, universities, and foundations. Indeed, this issue represents not only a celebration of the Nineteenth Amendment but also the leadership of women in the field of law: women now make up over 50 percent of law students,¹ and the coeditors of this issue are the sixteen female editors-in-chief of the flagship law reviews of sixteen of the most prestigious law schools in the country. All told, these sixteen law schools have seven female deans.

Our progress, however, is far from finished. In law, and in most elite professions, men still dramatically outnumber women in positions of leadership. Although half of law students and nearly half of lawyers are women, women make up only one-third of attorneys in private practice, 21 percent of equity partners, and 12 percent of the managing partners, chairmen, or CEOs of law firms.² Men also run the corporations that we represent as lawyers: fewer than 5 percent of CEOs of Fortune 500 companies are women.³ Women are also underrepresented as lawmakers and interpreters of the law, making up about 24 percent of Congress, 18 percent of governors, 29 percent of state legislators, 27 percent of mayors of the

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1. Stephanie Francis Ward, *Women Outnumber Men in Law Schools for First Time, Newly Updated Data Show*, ABA J. (Dec. 19, 2016), http://www.abajournal.com/news/article/women_outnumber_men_in_law_schools_for_first_time_newly_updated_data_show.

2. Cristina Violante & Jacqueline Bell, *Law360's Glass Ceiling Report, by the Numbers*, LAW360 (May 28, 2018), <https://www.law360.com/articles/1047285>.

3. Judith Warner, Nora Ellmann & Diana Boesch, *The Women's Leadership Gap*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2>.

largest one hundred cities,⁴ 27 percent of federal judges,⁵ and 35 percent of state appellate judges.⁶ Why, despite years of equality in access to voting for lawmakers, do women still trail behind men in the legal profession?

To understand what holds us back, I believe we need to look beyond political rights—voting, holding office, jury service—to gendered family norms and the workplace structures that reinforce these norms. Equality in the workplace and in the public sphere surely matters, and some of the most egregious cases of discrimination occur overtly. But the more pernicious and intractable problem is not overt discrimination but the covert discrimination that occurs every day, in kitchens, living rooms, and bedrooms, and seeps over into the workplace. Those of us who have managed to become leaders in government, academia, or business succeeded not because we are smarter, faster, or wiser than others, but because we have managed to work our way around these norms. This complex dance requires the support of spouses and partners, family members, supervisors, and coworkers. It requires a tenacious insistence on our own self-worth. Perhaps most importantly, it requires a large dose of pure luck. For most women, gendered family norms at home and in the workplace still make the possibility of obtaining a position of leadership extraordinarily difficult.

This phenomenon has been amply documented across many fields by social scientists. In law, one of the most comprehensive and important studies is a longitudinal analysis of graduates of the University of Virginia School of Law, where I taught for thirteen years. This study shows the stark differences that children make in the lives of male and female attorneys who are otherwise identically situated. Fifteen years after graduation, male and female lawyers without children living at home were virtually identical in their working patterns: 96.4 percent of men worked full time, versus 95 percent of women. But for lawyers with children at home, the story was very different: 99.2 percent of men worked full time, but only 50 percent of women.⁷ With this large number of women, even from a very prestigious law school, exiting paid work at a critical time in their careers, it is no wonder that so few women are achieving the highest levels of career success in law.

The entire project of evaluating “women’s” advancement, especially this project of considering advancement in light of gendered family law and

4. *Current Numbers*, CTR. FOR AM. WOMEN AND POL., <https://cawp.rutgers.edu/current-numbers>.

5. Debra Cassens Weiss, *The Percentage of Women in the Federal Judiciary Is the Same as Men with These Names*, ABA J. (Apr. 26, 2018), http://www.abajournal.com/news/article/the_percentage_of_women_in_the_federal_judiciary_is_the_same_as_men_with_th.

6. Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829, 889 (2016).

7. John Monahan & Jeffrey Swanson, *Lawyers at the Peak of Their Careers: A 30-Year Longitudinal Study of Job and Life Satisfaction*, 16 J. OF EMPIRICAL LEGAL STUD. 4, 13 (2019).

family norms, depends of course on a binary notion of sex, a convergence of sex and gender, and a heterosexual family. Many LGBTQ people will find the constraints of the heteronormative family to be the least of their problems, as they fight against overt discrimination rather than oppressive social norms.⁸ Even LGBTQ people, however, can find themselves hemmed in by the application of heteronormative gender roles, especially within families.⁹

In this Essay, I consider the path to female leadership from my own personal perspective. I am interested in sharing my experiences as an “exception”—as a woman who has obtained a position of leadership in my profession—to explore what it would take for women as a group to be truly equal in our field. To put it differently, what are the circumstances necessary to ensure that the sixteen female editors-in-chief of this joint issue continue to be leaders throughout their careers?

WORK AND FAMILY, THEN AND NOW

Understanding inequality in the family requires a look back into the age in which the law actually *mandated* gender inequality. The Nineteenth Amendment focused on political rights, but equally important to women’s equality over the last century have been civil rights—the rights to enter into enforceable contracts, to sue in a court of law, and to own and manage one’s own property.¹⁰ Like political rights, these rights were also denied to women in the United States at common law and under our original Constitution.

The mechanism for this denial was, quite literally, the family. Although single women had civil rights, even before they had the vote, the law treated married women as incapacitated, no longer possessing civil rights. This system was referred to as “coverture” because, under it, a married woman “perform[ed] every thing” under the “wing, protection, and cover” of her husband.¹¹ A married woman was referred to as a “feme-covert,” or covered woman, and her condition during marriage was called “coverture.”¹²

Under the doctrine of coverture, married women were incapable of entering into contracts. They could own property, but during the marriage their husbands had the authority to manage it, and any income generated by

8. See, e.g., Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1612–26 (2019) (analyzing case law that shows patterns of discrimination in custody determinations involving transgender parents).

9. See generally Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57 (2012).

10. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 10 (1950).

11. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 442 (1771).

12. *Id.*

the property belonged to the husband.¹³ If a woman worked outside the home, her husband owned her wages. In turn, husbands were legally responsible for supporting their wives, for their wives' debts, and for torts their wives committed.¹⁴ The coverture doctrine reflected legal, social, and cultural norms. Indeed, one of the chief arguments against the Nineteenth Amendment was that granting political rights to women would undermine the "natural" gender roles within the family.¹⁵

The incapacitation of married women had profound implications for the rights of all women. For example, in the case of *Bradwell v. Illinois*,¹⁶ the U.S. Supreme Court upheld a law excluding women from practicing law.¹⁷ In a famous concurrence, Justice Bradley justified the result based on the incapacity of married women to enter into contracts—including contracts to represent clients.¹⁸ For Justice Bradley, coverture justified excluding *all* women, not just married women, from the legal profession: "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," he wrote, "but these are exceptions to the general rule."¹⁹ He then went on to write: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."²⁰

Indeed, the law of coverture affected women both in and out of marriage. Because the social structure of marriage presumed that a husband was responsible for providing for his family, it was legally and socially justifiable to pay grossly disproportionate wages to men and women for identical work, regardless of their marital status.²¹ Women could also be excluded from some jobs or subjected to restrictions on the hours or conditions in order to protect their future as mothers; too much work would "impair their reproductive capacities and threaten the future of the race."²²

13. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 115–25 (2000).

14. HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 219–20 (1968).

15. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977–97 (2002).

16. *Bradwell v. Illinois*, 83 U.S. 130 (1873).

17. *Id.* at 139.

18. *Id.* at 141–42 (Bradley, J., concurring).

19. *Id.* at 141 (Bradley, J., concurring).

20. *Id.* at 141–42 (Bradley, J., concurring).

21. Federal law did not require equal pay until the passage of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)).

22. ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 31 (2001) (discussing *Muller v. Oregon*, 208 U.S. 412 (1908), and subsequent labor legislation).

Today, our cultural understanding of women's political equality is sometimes oversimplified into a "before" and an "after." Before the Nineteenth Amendment, women could not vote; after the Nineteenth Amendment, they could. Of course, the world was always more complicated than that. For example, prior to the passage of the Nineteenth Amendment, women already had the right to vote in nearly all the Western states.²³ But there is a fairly simple truth in the notion in that the Nineteenth Amendment provides a clear moment of constitutional transformation in which women's citizenship was finally ratified nationally and enshrined in the most important public statement of our most basic values.

In contrast, there was no clear moment when we publicly ratified as a nation the idea that women should have equal civil rights. This regime began to change with the passage of Married Women's Property Acts in the 1830s, which allowed women to continue managing property they brought into a marriage as well as keep wages earned during marriage. As numerous legal historians and law professors have shown, however, the change brought by these statutes was not as dramatic or swift as a constitutional amendment.²⁴ The thousands upon thousands of statutes and precedential cases that made up the doctrine of coverture were slowly amended or overturned, although some are still officially on the books.²⁵

A dramatic transformation almost *did* happen. In 1972, Congress passed the Equal Rights Amendment, and by 1977, thirty-five states had ratified it. But then the amendment stalled, and so the continued work of dismantling coverture continued to be addressed piecemeal. Ruth Bader Ginsburg and other feminist advocates developed theories of gender equality under the Equal Protection Clause of the Fourteenth Amendment. They then brought—and won—cases challenging the legal structures that proscribed rigid gender roles within the family.²⁶ But Ginsburg and others chose their plaintiffs strategically, so the cases that dismantled the remnants of the coverture system were largely cases about how sex stereotyping harmed *men*.²⁷ These

23. T.A. Larson, *Woman Suffrage in Western America*, 38 UTAH HIST. Q. 7, 19 (1970), https://issuu.com/utah10/docs/uhq_volume38_1970_number1.

24. See, e.g., Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082–83 (1994) (showing how coverture unwound slowly and unevenly, so that women might only have capacity to contract in some states).

25. See BLACKSTONE, *supra* note 11, at 442 (noting that a married woman "perform[ed] every thing" under the "wing, protection, and cover" of her husband, and therefore, she was referred to as a feme covert, or covered woman, and her condition during marriage was called "coverture").

26. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1972).

27. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a law allowing women to purchase 3.2 percent beer at age eighteen but requiring men to wait until age twenty-one).

cases have been foundational and crucial for advancing women's rights and for reducing the stereotyping of both women and men, but they fall short of the dramatic paradigm shift represented by the Nineteenth Amendment in the political sphere.

Today, the social ideal of marital unity persists. Although some coverture rules are still technically in force, for the most part culture rather than law dictates the meaning of marital unity. Even when not legally prescribed, these gendered family norms continue to shape how families divide labor. Those decisions, in turn, shape the expectations that employers and coworkers have for how workers should behave and shape the law of the workplace. The dismantling of these expectations and structures is the work that remains unfinished.

HUSBANDS AS BREADWINNERS

Even though the law of coverture no longer dictates gender roles within the family, the entire structure of heterosexual marriage still reflects these rules.²⁸ I have experienced in my own life some vestige of most of the rules. For example, when I married in 2005, I was thirty-four years old.²⁹ I had a career—I had graduated from law school, clerked for a federal judge, practiced law at a New York firm, and taught law for three years. Both my future husband and I knew that marrying would change our relationship with one another. But we did not fully understand how marriage would change the way *other* people saw us and the extent to which social norms still dictate how married women (even women with flourishing careers) and married men (even men who wholeheartedly support their wives' careers) are expected to behave.

The first and most obvious indication that my status had shifted were the many congratulatory wedding cards I received for "Mr. and Mrs. [His Last Name]." I had decided to keep my birth name, but a significant number of our family and friends clearly never even considered that we might have made this choice. (My husband had also decided to keep his surname; this surprised no one.) The taking of a husband's name by a wife, of course, was one of the clearest and most symbolic indications of the coverture regime. The law *required* a married woman to take her husband's surname—this

28. Same-sex couples appear to structure their relationships differently, although they are still constrained by social expectations. See Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 771–79 (2012) (discussing gender norms in same-sex couples and their role in the debate over same-sex marriage).

29. I was relatively old; in 2008, the average age of first marriage for college-educated Americans was twenty-eight years old. RICHARD FRY, PEW RESEARCH CTR., THE REVERSAL OF THE COLLEGE MARRIAGE GAP 1 (2010), <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/11/767-college-marriage-gap.pdf>.

signaled to the world that she had lost her legal identity, as “covered” by her husband, and was now his responsibility. Even though name changing is no longer legally required, the persistence of gendered social norms means that in reality the rules of coverture continue to operate in a way that subsumes wives’ legal identity to that of their husbands. Fewer than 10 percent of married women have names other than husbands’ surnames.³⁰ My friends and relatives were not wrong in their guess that my name had probably changed upon marriage.

Names are of course not the only vestige of coverture that shapes married people’s lives; there is also money and who is presumed to control it. Marriage equality—thankfully—has forced many state agencies to stop asking for information about “husband” and “wife.” Now people fill out forms as “applicant #1” or “taxpayer #2.” These seemingly neutral terms are not treated as such: with every new title, deed, loan application, or tax form, we have to make a decision about whether we will fight to have my name—which comes first alphabetically—come first.³¹

Another hangover from the coverture days is the assumption that a woman will follow her husband to further his career, even at the expense of her own. At common law, courts termed this principle the “derivative domicile.” A husband decided where a couple lived, and his wife shared his legal domicile—even if she was not physically present with him. This rule reflected the husband’s duty as a breadwinner; in order to support his family, he needed the freedom to decide where he could best make a living. Today, in most states, a husband’s domicile no longer dictates his wife’s, and the law presumes that both husband and wife “usually regard the same place as home.”³²

I first discovered the persistence of the derivative domicile rule in today’s culture when my future spouse and I were both seeking tenure-track academic positions at law schools. One committee chair asked me at the very beginning of an interview whether my “husband” had an interview at the other law school in the region where the interviewing school was located. (I did not yet have a husband, just a fiancé, and I had not disclosed to the

30. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 785 n.82 (2007) (casting some doubt on the reliability of the 10 percent number cited in the text).

31. Our experience is an example of what Elizabeth Emens has termed “desk-clerk law,” the “advice given by government functionaries who . . . frequently mislead people and discourage unconventional naming choices as a result of ignorance or their own views about proper practice.” *Id.* at 762.

32. Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 426 (2013) (citing Restatement (Second) of Conflict of Laws § 21, cmt. b (1988 revision)). As a practical matter, however, in a heterosexual marriage, it is usually the wife who would have to demonstrate, for tax purposes or others, that she does not regard her husband’s home as her own. *Id.*

committee that I was in a serious relationship.) The rest of the interview was an extremely awkward exercise in clock watching, as it was clear to the committee that it was essentially over—if my “husband” could not move to the region, then neither could I. My interviews included a series of similar fumbles by other hiring chairs, each of which reminded me that my relationship and the constraints the faculty imagined it must place on me were at the forefront of the committee members’ minds.

WIVES AS CAREGIVERS

So far, all of my examples of lurking coverture norms have involved situations where a wife loses her social identity, where the “one” person a married couple becomes is the husband. Women take their husband’s names; vendors and banks treat women as secondary on financial accounts and documents; employers expect that women will follow their husbands wherever their careers take them. But coverture had another very important feature that likely shapes family life even more. Although women under coverture lost their legal identity, they gained through marriage a very important new role of “wife.” This role included a legal obligation to render “services” to their husbands. These services included the work of maintaining a home and caring for children.³³

This feature of coverture, like others, no longer exists today in the same form it did at common law. There are always multiple ways to make a law gender neutral. In the case of spousal services, the law could have been changed to promote either independence or mutual dependence. Courts opted in this case for mutual dependence. The law is now gender neutral; *both* spouses are required to support each other and provide services.

Imagine for a moment that, instead, courts had opted for independence. In that world, the law would no longer require either spouse to support the other financially and would no longer require either spouse to provide services for the other. In this alternative world, spouses would be able to reach agreements to provide services or support, and if their relationship ended, through divorce or death, they could receive compensation for the services they had given.

This imaginary world was one that courts were forced to consider in interpreting married women’s property acts, which allowed women to keep wages that they earned during marriage. Instead of allowing married couples to contract with each other, courts instead interpreted the married women’s

33. They also included sexual services, hence the impossibility at common law of marital rape. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

property acts as *prohibiting* contracts between spouses for domestic services.³⁴ The rule they created was gender neutral on its face: now, *both* spouses have a legal right to each other's uncompensated services, and *both* spouses have a legal obligation to financially support the other. Yet today, women continue to do the lion's share of housework, "life admin," and childcare, often to the detriment of their careers and to their impoverishment upon divorce.³⁵

Nowhere is the social expectation that wives are different from husbands clearer than in the norms around caring for children. Some of these norms may have biological roots—women can become pregnant, and we sometimes breastfeed our children after birth. These biological facts give us a head start on bonding with a newborn child. Often, however, they lead families down a path where the mother becomes the dominant caregiver, even when it is no longer necessary. Health professionals, family, neighbors, and friends all contribute to this slide. Same-sex couples, who "often divide responsibilities more evenly than their heterosexual counterparts," nevertheless experience pressure to conform to a heteronormative model.³⁶

The law charges parents with responsibility for their children, but virtually no parent performs every childcare task alone. Schools, extended kin, siblings, daycares, babysitters, au pairs, nannies, long-term or temporary romantic partners, friends, and neighbors all contribute to childcare.³⁷ The management and negotiation of these care relationships is the responsibility of a sex-neutral "parent," and it is difficult to tell from outside a family how that parent is actually able to handle this complex task.³⁸ We know, however, from surveys, sociological studies, and the barrage of evidence that is everywhere around us in our daily lives, that the person coordinating, managing, and negotiating childcare—even childcare she does not do herself—is usually a woman.³⁹

The legal requirement that women have the sole responsibility in

34. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 845 (2004) (noting that this prohibition "protect[ed] a husband's prerogatives under common law coverture from the potential threat that the married women's property acts posed").

35. Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1419 n.34 (2015) (describing household "admin" as "the office-type work involved in running a life," including everything from completing institutional paperwork to creating shopping lists to managing and coordinating schedules).

36. Rosenblum, *supra* note 9, at 88; *see id.* at 58.

37. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390–91 (2008)

38. *Id.* at 398 ("[A] zone of privacy that prevents the state from seeing into the black box of family life to understand how caregiving responsibilities actually are performed.").

39. *See generally* ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989) (discussing research on the balance of household work between working women and their spouses).

marriage to provide services and childcare may no longer exist, but the social norm is still broadly present, resulting in daily reminders to mothers and fathers alike that certain tasks are (or are not) their responsibility. At every school my children have attended, teachers have contacted me first if a child has a cold, seems nervous meeting other children, or has been the subject of discipline. This pattern has continued from school to school, even though our registration forms are riddled with special notes: “Call dad first! Then grandma and grandpa! Only call mom if there is no other option!” These notes appear to be completely ignored by school administrators and teachers, and when they do remember, it is often with a comment such as “oh right, you guys have that special deal” or “oh yes, you’re a *working* mom.” The same is true of other parents (usually mothers), who will persist in calling and texting me to get our kids together even when my husband was the one to make the first overture.

Coverture-era norms of childcare do not only affect women. Our culture reminds fathers constantly as well that childcare is not *really* their job. Of course, many men do a lot of childcare, but when they do, they are often met with either amazement (“What an incredible dad! He’s spending time with his child!”) or amusement (“Poor guy, he’s trying so hard but just isn’t as good as mom”). Sometimes the cultural refusal to recognize fathers as competent parents is dangerous. Calling “mom” first when a child is sick at school is not only an irritant to the mother who is on a business trip, but it is also dangerous for the child waiting to be taken to the hospital while the school officials fail to contact “dad” because they presume he is too busy.

For me, flouting the expectation that women manage households and childcare has been necessary to the development of my career. It has also required meticulous planning, constant communication with my spouse and extended family as our needs change, and, over the years, an army of babysitters and nannies, preschools and day-care centers, and housekeepers and lawnmowers. The situation is, of course, far more challenging for parents who are single or impoverished (or both) and stuck in a system that still presumes a child has two parents, one of whom is constantly available. I frequently have to forgo “parent’s night” at my kids’ school because I am traveling for work, but my husband or my parents are able to attend. In contrast, many other parents miss “parent’s night” and a host of activities because they are working the night shift at a second job. For me, the persistence of coverture norms is an irritation, a time waster, and socially awkward; for many, the persistence of these norms threatens their economic stability and livelihood. In all cases, these norms make it much, much harder to put in the little bit of “extra” time and effort that it takes to make it to the top of a profession.

TOO MANY JOBS

Of course, the gender norms that exist within families do not stop when one arrives at work. If anything, this is where they really impact women's ability to rise in organizations. In my experience, this dynamic happens for two reasons. First, the amount of time and mental energy people are able to devote to their jobs is affected directly by the gendered dynamics of their families' lives. Second, the gendered dynamics of family lives bleed over into how people behave at work and what their expectations are for male and female employees.

Go into most workplaces today, and you will see women and men working side by side, often doing what appears to be the same job. But looks can be deceiving. Often, some workers—disproportionately women—are doing their job while simultaneously planning for what sociologist Archie Hochschild describes as their “second shift”: picking up children, making dinner, paying bills, helping with homework, taking care of elderly parents.⁴⁰ It is not that men do not do these tasks—they certainly do—but women do them much more often.⁴¹ Women are also judged more harshly if they fall short of perfection in carrying them out.⁴²

I have experienced this dynamic in almost every job I have ever had. In my factory and retail work, I noticed that different people had very different reactions in identical situations. Sometimes, we would reach the end of a shift and discover that the next worker had called in sick. Some of us would rejoice at the opportunity for overtime. Others—usually parents of small children, most often mothers—would panic because they could not afford to be late for childcare pickup. Women are, statistically speaking, far more likely to work a significant second shift than men. Women are more likely to be single parents and more likely to have “primary” responsibility for children if they are coupled.

Employees who do not jump at the opportunity for overtime, whether

40. See generally *id.*

41. According to a 2005 study, married women with no children do an average of 16.5 hours of housework per week, and married men with no children an average of seven hours. In contrast, single women did a little over ten hours per week and single men about eight. The study concluded that marriage “saves” men an hour of housework per week and “costs” women seven hours. *Chore Wars: Men, Women and Housework*, NAT. SCI. FOUND. (Apr. 28, 2008), https://www.nsf.gov/discoveries/disc_images.jsp?cntn_id=111458; see also *Charts by Topic: Household Activities*, BUREAU OF LABOR STATISTICS (Dec. 20, 2016), <https://www.bls.gov/tus/charts/household.htm> (providing various data demonstrating that women, on average, spent more time on household activities than men in 2016).

42. See Sarah Thebaud, Leah Ruppanner & Sabino Kornrich, *The Simple Reason Why Men Do Less Housework, On Average, Than Women*, FAST COMPANY (July 3, 2019), <https://www.fastcompany.com/90372399/why-men-do-less-housework-than-women> (“Women may be judged more harshly for having a less-than-spotless home . . .”).

literally or metaphorically, fall behind in the long run by appearing less committed and motivated than others. This is especially true in professions such as law where “face time” is important and some of the most interesting and career-advancing work comes in late in the day. Many of the best assignments I received as a law firm associate were ones that I volunteered for at 7:00 p.m., after associates with small children had left for the day. Lawyers are also sometimes more relaxed in the evening, and there is a feeling of camaraderie among the people who are so committed that they are willing to stay late into the night. In my experience, some lawyers will purposely schedule themselves to be at the office in the evening precisely so they can get credit for their commitment, even when they do not actually have work that requires them to be there.

It should be obvious how these workplace cultures affect disproportionately people with families. Those people who are responsible for a second shift lose out overtime and find themselves falling behind. They are less likely to become, in the legal world, partners, or in the corporate world, senior executives. They are more likely to find an alternative path—a “mommy track”—that allows reduced hours. The reality of those tracks, however, is that they often lead to a permanent reduction in income and in satisfying, challenging work.

What is less obvious is not what happens to *women*, but what happens to men. Women are not simply “opting out” of full-time work. Many men, buoyed by the gendered norms of who does housework and childcare at home, are “opting in” to longer and longer workweeks. A *part-time* schedule at many law firms is forty-to-sixty hours per week. “Full time” is really “all the time”—which means someone else is handling everything outside of work. Men and women tend to work the same number of hours when they are single with no children, but after marriage, men work several hours more than women each week (and, as noted above, married women do more housework). Some researchers have identified this difference, rather than overt gender discrimination, as the reason for the gender wage gap.⁴³

For men, the impact of this difference is both a benefit and a burden. It tends to mean more pay, greater prospects for promotion, and higher status at work. It also means that men who rise high in the legal profession are less likely to spend significant time with their families. And it provides very little choice. The notion that women choose to “opt out” has been roundly critiqued; instead, women are “pushed out” when workplace structures

43. See, e.g., Payman Taci, *Is the Difference in Work Hours the Real Reason for the Gender Wage Gap?*, MEDIUM (Jan. 22, 2019), <https://towardsdatascience.com/is-the-difference-in-work-hours-the-real-reason-for-the-gender-wage-gap-interactive-infographic-6051dff3a041> (arguing the pay gap directly results from “the difference between the number of hours spent at work by women and men”).

refuse to recognize the reality of their family lives.⁴⁴ Similarly, men who “opt in” are responding to workplace structures that leave them few choices.

For men who deviate from this norm, the response can be punishing—sometimes even more punishing than for women. As Joan Williams and Stephanie Bornstein have documented, “men who dare to exercise their right to take family and medical leave to which they are legally entitled may experience stigma and career penalties at work for doing so.”⁴⁵

For me, the ability to rise in my profession while still being a wife and mother has been a direct result of the jobs that my husband and I chose. After several years of legal practice, we both left our law firms to become law professors. This career change was something we very much wanted to do professionally, but we also knew that it would provide more flexibility in our lives. Contrary to popular belief, academic positions are not stress-free. Teaching law students is difficult and much more time-consuming than rookies often realize, engaging in legal research and publishing high-quality scholarship requires time and care, and contributing to the intellectual life at a school and within a community of scholars requires constant interaction with other faculty and students, as well as travel. We have both worked throughout our careers far more than the traditional forty-hour, “full-time” workweek. Academic jobs are different from others, though: we had remarkable control over our schedules; with the exception of classes and committee meetings, we could choose when, where, and how we worked. To return to the statistics I referenced at the beginning, 5 percent of CEOs of Fortune 500 companies are women, as are 21 percent of equity partners at law firms. Nearly 40 percent of law school deans are women—including 43 percent of the deans of the very prestigious law schools represented in this joint issue. Academic culture, which values actual output over the time spent producing and has a more flexible approach to the workday, appears to result in more women in positions of leadership.

Also crucial to our mutual success has been that we *both* have flexible jobs. The picture is very different for families in which one spouse is an academic and the other has a “24/7” job. The academic’s schedule can easily be compressed so that it is treated as secondary to the lawyer or executive’s schedule, and the academic’s second shift grows. The aggregate result of this dynamic is a gender disparity in achievement in the academy, where male

44. JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 7 (2006), available at <https://perma.cc/PM29-P3F9> (“This Report argues that most mothers do not opt out; they are pushed out by workplace inflexibility, the lack of family supports, and workplace bias against mothers.”).

45. Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1331 (2008).

faculty are often supported by stay-at-home or part-time employed wives who take care of the entire second shift, but female faculty are still taking on that entire shift to help support the career of a husband who is in a less flexible profession.

Parental leave is an important piece of this puzzle, but solving the parental-leave conundrum does not solve the long-term issues in family dynamics because parental leave exists only for the first few months of an infant's life. For me, generous parental leave was critical to my ability to continue successfully toward academic tenure. The amount of time was not the only important factor. Flexibility was also important; for example, during the fall of my first pregnancy, I taught my Family Law class four days a week instead of two and finished teaching in mid-October to accommodate my due date. Also crucial was the application of the parental-leave policy to my husband, who also taught his class double time and was able to share parenting equally with me during the time when patterns of parenting behavior develop.

Yet equal parental leave has a downside that is well documented; male academics are more likely to work on research and scholarship during parental leave, using it as a respite from teaching, while female academics use it to recover from childbirth and bond with their infants.⁴⁶ This phenomenon is similar to the way in which the transformation of the coverture-era rule that wives provide services to their husbands to a gender-neutral version has had disproportionate effects on women when they are socially expected to do more at home. When social norms encourage women to take care of infants and men to get ahead in the workplace, gender-neutral parental leave policies can have gendered effects.

PLAYING WIFE AND MOM AT WORK

So far, I have been arguing that women are less likely to get “to the top” in most workplaces because the workplaces do not account for the reality of their gendered family roles at home. There is a second way in which these roles affect the workplace, one that can be even more difficult for women to navigate, because nothing we do can change how other people behave. People's experiences with women outside of work affects their attitudes about women at work. Studies have consistently shown that women are more likely to volunteer for “office housekeeping” tasks and that other employees

46. See Justin Wolfers, *A Family-Friendly Policy That's Friendliest to Male Professors*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/26/business/tenure-extension-policies-that-put-women-at-a-disadvantage.html> (“[M]en who took parental leave used the extra year to publish their research, amassing impressive publication records. But there was no parallel rise in the output of female economists.”).

are more likely to ask women to volunteer.⁴⁷ This feature of the workplace affects women regardless of their actual family circumstances. You do not have to be a wife or mom to be treated like one.

I have seen this dynamic play out in multiple workplaces throughout my career. At law schools, it tends to play out in two ways. First, female faculty disproportionately mentor and counsel students, especially about issues that go beyond academics. At every law school I have attended or taught in, there have been a handful of faculty who “everyone knows” are the go-to people for discussing personal problems. These individuals are usually women, people of color, or LGBTQ faculty—often a combination of all of the above. Students come to us with issues related directly to these identities—disclosures of sexual assault or racial harassment, for example. It is not only students who share our gender or racial identities who come to us, however—it is *all* students. Male students, too, are accustomed to getting support and nurturing from women and are quite comfortable asking for—or even demanding—it.

The problem is the students are genuinely needy, and sometimes the problems are true emergencies. No one wants to be the faculty member who turned away a suicidal student; most of us would like to be the person a student looks back on years later as having made an enormous difference to them in a time of trouble. This is not work that most of us would feel comfortable refusing, and it can be a source of meaning and satisfaction. The problem is that the work is not evenly distributed, so some faculty do more of it than others, and it is not valued institutionally. Talking with students about their personal lives does not get you promoted; publishing quality scholarship and teaching effectively in the classroom do.⁴⁸

“Big sister” or “mom” are not the only roles women are expected to play in the workplace. As Dean Laura Rosenbury has explained, during much of the twentieth century, secretaries performed the role of “office wife” for men in executive roles.⁴⁹ Today, there are more permutations of relationships at work—ciswomen who have work wives, ciswomen who have work husbands, transmen who have work wives, and on and on. But, as Dean Rosenbury notes, many of these relationships play out traditional

47. See, e.g., Linda Babcock, Maria P. Recalde, & Lise Vesterlund, *Why Women Volunteer for Tasks That Don't Lead to Promotions*, HARV. BUS. REV. (July 16, 2018), <https://hbr.org/2018/07/why-women-volunteer-for-tasks-that-dont-lead-to-promotions> (arguing that women are more likely than men to volunteer for time consuming, yet “non-promotable,” tasks).

48. See *id.* (“[I]n industry, revenue-generating tasks are more promotable than non-revenue-generating tasks; in academia, research-related tasks are more promotable than service-related tasks . . .”).

49. See Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 347 (2013) (explaining that women working as secretaries were often charged with “providing support that frequently looked like the care wives provided to their husbands at home”).

gender roles, with the employee in the position of “wife” providing emotional support, reminding the other employee of where he or she needs to be, and even looking out for the coworker’s health, by dispensing aspirin or reminding them to see the dentist.⁵⁰

None of the activities that women engage in at work are inherently bad. In fact, many are good—good for the office, good for coworkers, maybe even good for the person engaging in them because they lead to fulfillment and happiness. They do not, however, lead to promotions—at least not without all of the other achievements necessary for promotion. In many workplaces that appear to be equal, some employees are not only carrying on a second shift at home but are also expected to conform to this gendered home identity at work, caring for their coworkers and supervisors the way they care for their children at the expense of their own advancement. Men at work, meanwhile, can be oblivious to this work, the benefits they receive from it, and the toll it takes on women’s achievement.

CONCLUSION

I have two final thoughts as I think about the future careers of our sixteen editors-in-chief and the millions of other young women who hope to lead their professions someday. Their achievements to date have resulted from their talent and hard work. Their talent and hard work will of course affect their ability to lead twenty years from now, but their talent and hard work will not be enough. Until we—“we the people”—decide that the legal and social structures underlying families and the workplace need to change, the only women who will become leaders will be those who manage to slip through the cracks—the exceptions. The exceptions are women who have found partners who prioritize our career success. We have found workplaces that provide the flexibility needed to maintain and nurture relationships outside of work. We are contrarian enough in our thinking that we are willing to tolerate the daily reminders that our exceptionalism makes others uncomfortable.

If our society is to move beyond a world where women leaders are exceptions, we need to move beyond expecting women to solve the problems of workplace structure and gendered family norms. Men will have to work with women to remake institutions, often in ways that make them profoundly uncomfortable, relinquish their male privilege, and change the way they live. Men who have benefited from this system will need to understand that the choices they have made—choices made, admittedly, under structural constraints—adversely affect the women with whom they work. The first

50. *Id.* at 365.

hundred years of a world with the Nineteenth Amendment have been about women fighting for equality. In the next hundred years, we need men to take responsibility for their role in perpetuating gender hierarchies, not just at the polls, in the jury box, or even in workplaces, but in their own homes and families—the source of it all.