The Feerick Center for Social Justice and the Stein Center for Law and Ethics present

Third Annual Women's Leadership Institute

January 31, 2020 | 9 a.m. – 5:45 p.m. | Skadden Conference Center

CLE COURSE MATERIALS
1. Speaker Biographies

2. CLE Materials

Panel 1: Practice of Law as a Business

(View in document)

Vieyra, Meranda M. *When it Comes to Business Development for Young Lawyers, Motive and Mindset Matter*, Nat’l L. Rev. (2019), (View in document)

Panel 2: Cultivating On-Ramps

(View on web)


Panel 3: Women Leaders in Law: Advice and Discussion


Smithey, Joyce. *Women And The Legal Profession: Four Common Obstacles Faced By Female Lawyers*, Ms. JD and Stanford Center on the Legal Profession (2017). (View in document)

Third Annual Women’s Leadership Institute
Speaker Bios

Justice Maria Araujo Kahn, Supreme Court of Connecticut
Justice Maria Araujo Kahn was born in Angola, Africa. She emigrated to the United States at ten years of age and is fluent in Portuguese and Spanish. She graduated from New York University cum laude with a B.A. in politics in 1986 and earned her Juris Doctor from Fordham University School of Law in 1989. Justice Kahn was the first recipient of the Noreen E. McNamara Scholarship at Fordham University School of Law. Following law school, she served as law clerk to the Honorable Peter C. Dorsey, U.S. District Court Judge for the District of Connecticut. She is a member of the United States Supreme Court, United States Federal District Court for the District of Connecticut, United States Court of Appeals Second Circuit, and the Connecticut and New York State Bars.

Governor Dannel P. Malloy nominated Justice Kahn to the Supreme Court on October 4, 2017 and she was sworn in on November 1, 2017. Prior to this appointment, Justice Kahn served as a judge of the Appellate Court and as a judge of the Superior Court, where she primarily heard criminal matters.

Before becoming a judge, Justice Kahn was an Assistant U.S. Attorney in New Haven. As a federal prosecutor, Justice Kahn was responsible for complex white collar investigations and prosecutions, both civil and criminal, in the areas of health care fraud, bank fraud, bankruptcy fraud and trade secrets.

Justice Kahn has been honored on several occasions with awards including: the Department of Justice Special Achievement Awards in 1998 to 2006, and the Department of Health and Human Services, OIG, Integrity Awards. On November 3, 2017, the Portuguese Bar Association presented Justice Kahn with the “Americo Ventura Lifetime Achievement Award.”

Justice Kahn is co-chair of the Judicial Branch’s Access to Justice Commission and the Limited English Proficiency Committee. She was also a member of the Judges’ Education Committee and has taught several courses at the Connecticut Judges’ Institute. Justice Kahn is a James W. Cooper Fellow with the Connecticut Bar Foundation.

Alex Berke (’14), Employment Litigator, Berke-Weiss Law Pregnancy Project
Alex Berke is an employment litigator and provides advice and counsel on sex harassment and discrimination cases, including pregnancy, disability, race and gender discrimination. Alex also provides advice and counsel regarding employer policies, health insurance and COBRA eligibility for employees and employers. Alex spearheads Berke-Weiss Law’s Pregnancy Project, providing pregnant women and families with the necessary tools to exercise their rights during and after pregnancy. Learn more about Alex’s speaking engagements and publications below. Alex can be reached by email at alex@berkeweisslaw.com.

Alessandra Biaggi (’12), New York State Senator
Alessandra Biaggi is the Democratic New York State Senator in her home district (Bronx/Westchester), and Chair of the revived Ethics and Internal Governance Committee. The granddaughter of Italian immigrants who lived in Hunts Point, she is the fourth generation of her family to live in District 34.

Within her first two months in office, Senator Biaggi chaired the first public hearings in 27 years on sexual harassment in the workplace, and led the charge in New York to pass legislation that strengthens protections for survivors and holds employers accountable for addressing sexual misconduct. In a joint effort with her colleagues in the Democratic conference, the Senator worked to pass transformational legislation including tenant-centered housing reforms, bold climate-change initiatives, unprecedented
criminal justice reform, comprehensive workplace protections, and expansive legislation making it easier to vote.

Before launching her campaign, she served in Governor Andrew Cuomo’s Counsel’s Office focusing on the New York State’s women’s policy agenda, advocating for passage of the Reproductive Health Act and the Comprehensive Contraceptive Coverage Act. During the historic 2016 election, Alessandra was the Deputy National Operations Director for Hillary Clinton’s presidential campaign, overseeing a budget of $500 million, 38 state directors and 45 associated staff.

Her run for office was preceded by a decade of advocacy and service to the people of New York. She interned for the Kings County D.A.’s Office, the U.S. Attorney’s Office for the Southern District of New York, and was a legal fellow for New York State Homes and Community Renewal, working to ensure that families across New York State had access to affordable housing. She served as Assistant General Counsel for Governor Cuomo’s Office of Storm Recovery, working with small businesses and municipalities to rebuild New York after Hurricane Sandy. She was a 2015 New Leaders Council (NLC) fellow, sat on NLC’s Advisory Board, and is a member of The New Agenda’s Young Women Leadership Council. Alessandra attended Pelham public schools and holds degrees from New York University and Fordham Law School. She is also a graduate of the Women’s Campaign School at Yale University.

LeeAnn Black, Chief Operating Officer, Latham & Watkins
LeeAnn is the Chief Operating Officer of Latham & Watkins, a global law firm with offices in the world’s major financial and regulatory centers. For more than 20 years, she has helped lead Latham’s extraordinary growth, both in size and reputation.

LeeAnn serves on numerous Latham governance committees, including the Executive Committee, the firm’s highest management body. She is a member of the advisory boards for The Roundtable Collaborative, a group of 50 Chief Operating Officers representing law firms from around the world, and Thomson Reuters’ Transforming Women’s Leadership in the Law (TWLL) initiative. She also serves as a board director of Pro Bono Net, an organization focused on increasing access to justice, and as the chair of the board of trustees of the Chapin School, an all-girls K–12 school dedicated to academic excellence, personal integrity, and community responsibility.

LeeAnn has been selected as one of the Most Powerful and Influential Women of the Tri-State Area by the National Diversity Council, a nonprofit organization that champions diversity and inclusion. She was also named a 2017 Top 10 Legal Innovator for North America by the Financial Times and a 2018 Gold Achievement Gala honoree by the Girl Scouts of Greater New York.

Before joining Latham & Watkins, LeeAnn was a Senior Auditor with Arthur Andersen & Co.

Lindsey Boyle, Senior Manager, Hiring & Pipeline Strategies, OnRamp Fellowship
Lindsey joined Diversity Lab and the OnRamp Fellowship program in 2017 as the Senior Manager, Hiring & Pipeline Strategies, with over 10 years of experience in the legal recruiting and professional development field. At OnRamp, Lindsey is responsible for developing and maintaining strong relationships with the OnRamp Fellowship partner organizations and working closely with OnRamp candidates, fellows, and alumnæ of the program. In addition, Lindsey assists the Diversity Lab team with piloting initiatives to come out of the Diversity in Law Hackathon series.

Prior to joining OnRamp, Lindsey was a member of the legal recruiting team at Goodwin Procter LLP, where she was responsible for firm-wide relationships with law schools, including strategic outreach, designing attorney/student programming, enhancing law school relationships, and increasing the student
recruiting pipeline. She also collaborated with firm leaders on lawyer hiring strategy and helped manage the recruiting, hiring, and integration processes at the firm.

Most recently, Lindsey served as the Assistant Director for Employer Relations & Outcomes at Boston University School of Law, where she managed the relationship between the law school with employers in all sectors. She also was responsible for the school’s on- and off-campus recruitment programs along with general career-related programming and the annual résumé review and mock interview programs.

Lindsey received her B.A. from Hobart & William Smith Colleges and her law degree from Suffolk University Law School. She briefly practiced in the field of labor and employment law for the Commonwealth of Massachusetts before returning to her pre-law career (and first love), legal recruiting.

Lauren Colasacco ('10), Partner, Kirkland and Ellis
Lauren Colasacco is a corporate partner in the New York office. Lauren regularly represents private equity firms, private companies and public companies in a wide variety of mergers and acquisitions transactions, including significant leveraged buyouts, strategic mergers, carve-outs, joint ventures and other complex strategic transactions. She also counsels clients with respect to general corporate and governance matters.

Lauren earned her B.A. in Political Science and French Studies from Duke University and her J.D. from Fordham University School of Law, where she graduated magna cum laude. At Fordham Law, she received the National Association of Women Lawyers Award and was an Associate Editor of Fordham Law Review.

Susan Herman, President, American Civil Liberties Union
Susan N. Herman was elected President of the American Civil Liberties Union in 2008, after having served on the ACLU National Board of Directors, as a member of the Executive Committee, and as General Counsel. She holds a chair as Centennial Professor of Law at Brooklyn Law School, where she teaches courses in Constitutional Law and Criminal Procedure, and seminars on Law and Literature, and Terrorism and Civil Liberties.

She writes extensively on constitutional and criminal procedure topics for scholarly and other publications. Her most recent book, Taking Liberties: The War on Terror and the Erosion of American Democracy, (Oxford University Press 2011; 2014 paperback), is the winner of the 2012 Roy C. Palmer Civil Liberties Prize. Herman also participated in Supreme Court litigation, writing and collaborating on amicus curiae briefs for the ACLU on a range of constitutional criminal procedure issues, most recently in Riley v. California, 134 S. Ct. 2473 (2014).

Herman received a B.A. from Barnard College as a philosophy major, and a J.D. from New York University School of Law, where she was a Note and Comment Editor on the N.Y.U. Law Review. Before entering teaching, Professor Herman was Pro Se Law Clerk for the United States Court of Appeals for the Second Circuit, and Staff Attorney and then Associate Director of Prisoners’ Legal Services of New York.

Jennifer Jones Austin ('93), CEO and Executive Director, Federation of Protestant Welfare Agencies
Jennifer Jones Austin has more than 20 years of leadership, management and advocacy experience working for the advancement of underserved children, individuals and families.

Ms. Jones Austin is the Chief Executive Officer and Executive Director of the Federation of Protestant Welfare Agencies (FPWA), a prominent social policy and advocacy organization with 200 member
human services agencies operating throughout New York City. Prior to joining FPWA, Ms. Jones Austin served as Senior Vice President of United Way of New York City, the City of New York’s first Family Services Coordinator appointed by Mayor Bloomberg, Deputy Commissioner for the City’s Administration for Children’s Services, Civil Rights Deputy Bureau Chief for New York State Attorney General Eliot Spitzer, and Vice President for LearnNow/Edison Schools Inc.

Throughout her career, Jennifer Jones Austin has chaired and served on several influential boards, commissions and task forces. New York City Mayor Bill de Blasio appointed her as Co-Chair of his mayoral transition in 2013, a leader of his UPK Workgroup that designed the full day Universal Pre-Kindergarten Initiative, and a leader of his Jobs for New Yorkers Task Force. She was the Co-Chair of the NYC Department of Education Capacity Framework Advisory, and a member of the PlaNYC Advisory Board. She served as Chair of the City of New York Procurement Policy Board and Co-Chair of the New York State Supermarket Commission. Presently, Ms. Jones Austin serves as Board Member and Spokesperson for The National Marrow Donor Program, and Board Member of the NYC Board of Correction, the New York Blood Center, and the Fund for Public Housing. She also serves on the Human Services Council. Previous Board service includes the New York Women’s Bar Association Foundation, Children for Children, Citizens’ Committee for Children, the Icla da Silva Foundation, and the Bethany Baptist Church Child Development Center.

Ms. Jones Austin earned her law degree from Fordham University School of Law, a Master’s degree in Management and Policy from New York University Robert F. Wagner Graduate School of Public Service, and a Bachelor’s degree from Rutgers University.

**Miyoshie Lamothe-Aime, Associate, Fried Frank**
Miyoshie Lamothe-Aime is a law clerk in the Corporate Department of Fried Frank Harris Shriver & Jacobson LLP and is based in the firm’s New York office. Ms. Lamothe-Aime’s practice focuses on Mergers & Acquisitions and Private Equity transactions.

Ms. Lamothe-Aime is a recent graduate of Fordham University School of Law, Class of 2019, where she served as Stein Scholar, Editor-in-Chief of the Fordham Urban Law Journal, Captain of the Jessup International Moot Court team, and Secretary of the Black Law Students Association. She earned a Bachelor of Arts degree in International Affairs from the George Washington University’s Elliot School of International Affairs.

**Séverine Losembe ('15), Associate, Milbank**
Séverine Losembe is an associate in the New York office of Milbank and a member of the firm’s Global Project, Energy and Infrastructure Finance Group. Séverine’s practice focuses on the representation of financial institutions and sponsors in a range of US and international energy, infrastructure and mining project financings.

Séverine earned her J.D. from Fordham Law School, cum laude, where she served as President of the Black Law Student Association. She received a B.A. from Barnard College, Columbia University.

**Yarelyn Mena, Law Clerk, Brown Rudnik**
Yarelyn Mena is a recent graduate of Fordham University School of Law, '19. During her time at Fordham Law, she served as president of the Latin American Law Students Association (2018-2019), teacher's assistant in the Legal Writing Program, staff member of Fordham's Intellectual Property, Media & Entertainment Law Journal, and Legal Intern at Fordham Law’s Samuel-Glushko Intellectual Property and Information Law Clinic. As a law student, she also served as Vice-President of Pipeline Program for MetroLALSA and became an HNBA/Microsoft Intellectual Property Law Scholar. Yarelyn is currently a
first-year Associate in the Intellectual Property Litigation group at Brown Rudnick LLP. Prior to law school, Yarelyn earned a BA in psychology cum laude from Hunter College, City University of New York.

**Nalini Saxena, Founder, Elicit Consulting**

Nalini Saxena is a strategist and executive advisor. She helps entrepreneurs, individuals, and organizations break through obstacles and reveal their latent talents, express their strengths, and achieve inspiring successes. Her client list ranges from top tier global financial institutions to Shark Tank contestants. As a robust generalist, Nalini provides guidance and implementation on business strategy, financial strategy, leadership direction, management development, and communication. She has positioned small businesses to multiply their revenue by overhauling their approach to managing their business and finances. A trusted guide, she expertly identifies the challenges inhibiting her clients and strategically maps out a clear, customized path to overcome these challenges. She has positioned larger organizations to succeed against an increasingly competitive landscape by addressing culture, client relationship management, and operational efficiency. She has developed winning pitch decks that have secured millions of dollars in capital raising for her entrepreneurial clients. She has coached ambitious professionals through career transition and targeted development of both hard and soft skills.

Through Elicit™ Consulting, Nalini and her team of experts employ an evidence-based approach to delivering results. Nalini’s academic and professional backgrounds, along with her intellectual curiosity and commitment to ethics, drive this approach. Elicit is known for empowering clients through a code of strength-building, listening, partnership, and thoughtful design of custom solutions.

Nalini earned her BA in Neuroscience & Behavior from Barnard College, Columbia University and her MBA in Strategy, Leadership & Ethics, and Brand Marketing from The Fuqua School of Business, Duke University.

**Suzie Scanlon Rabinowitz ('95), Co-Founder and Managing Director, Bliss Lawyers and SRD Legal Group**

Suzie Scanlon is active in the pursuit of practicing law differently and has been working as a pioneer in the virtual law firm space for more than ten years and is an advocate for legal industry change. Suzie has co-authored a book to be released by the ABA in January 2015, entitled FINDING BLISS: Innovative Legal Models for Happy Clients & Happy Lawyers. She is a proponent of alternative legal fees and developing innovative legal solutions.

Suzie practices in the fields of commercial transactions, licensing in the technology industry and marketing material review for alternative investments. She specializes in legal process management and high-volume workflows for financial services companies. Prior to joining the virtual law firm world, she worked as a traditional lawyer at the law firms Sullivan & Cromwell and Wachtell, Lipton, Rosen & Katz. She also worked at the National Association of Securities Dealers (predecessor to FINRA) and in the New York State Executive Chamber of Governor Mario M. Cuomo as a Press Aide. Suzie earned her law degree in 1995 from Fordham Law School where she served as the Annual Survey Editor of the Fordham Law Review and was the recipient of the American Jurisprudence Award for Torts and Criminal Law.

**Geeta Tewari ('05), Director, Fordham Urban Law Center**

Geeta Tewari is the Director of the Urban Law Center at Fordham Law School, where she launched the Women in Urban Law Leadership Initiative in Spring 2019. She graduated from Cornell University with a B.A. in Government, and from Fordham University School of Law. At the Law School, she served as an editor for the Fordham International Law Journal and was granted the Archibald R. Murray Dean’s
Awards of Excellence for Outstanding Public Service. Tewari is admitted to practice in New York, New Jersey, and Washington, D.C., and has practiced with the New York City Law Department and the Washington D.C. Office of the Attorney General. Tewari also holds a Master of Fine Arts in Writing from Columbia University, where she has taught creative and expository writing, and served on the Fiction Board of the Columbia Journal of Literature and Art. Her fiction has appeared in Granta Magazine, New England Review, and other literary publications. She is a member of the New York Women Bar Association’s Advancing the Status of Women Committee, and her legal scholarship on gender equity and narrative justice is forthcoming from Michigan Journal of Race and Law and N.Y.U. Journal of Law and Business.

**Carroll Welch, Executive, Career and Leadership Coach, Carroll Welch Consulting**

Carroll Welch is a career, executive and leadership coach who supports professionals in all industries on issues involving career and leadership development, transition and reentry. Carroll also has extensive experience supporting relaunchers as they seek to return to the paid workforce after a career break, and is an Affiliate Coach with iRelaunch. Prior to becoming a coach, Carroll was a practicing employment and litigation attorney; she has also served as a director of New Directions, an attorney reentry program run for several years by Pace Law School.

Carroll received a certificate in Executive and Organizational Coaching from New York University, and is a member of the International Coach Federation and holds their Professional Certified Coach credential. She is a Forbes Coaches Council Member and Contributor and credentialed in the GetFive job search methodology platform. She received her Bachelor of Arts degree from Johns Hopkins University, and a Juris Doctor from the University of Virginia School of Law. She serves as a mentor and advisory board member for Campus Bound Scholars, a nonprofit that supports first generation college students.
Business Development 101 For Future Law Firm Leaders

Clifford Gately
Gately Consulting

Monday, December 17, 2018

Law schools are not primarily known for teaching the business of law. Similarly, CLE and other professional development programs for lawyers largely focus on the substantive practice of law rather than the set of skills it takes to build a practice or run a law firm. Future solo practitioners and law firm leaders are often left to their own devices to master skills such as accounting, human resources, practice management, realization rates, marketing and business development.

In the realm of Business Development (BD) there is an oversimplified adage that goes, “There are two kinds of lawyers: lawyers with clients; and lawyers who work for lawyers with clients.” As applied to law firms, you could say there is only one kind of law firm — a law firm with clients.

So what are some of the BD concepts that might be helpful for law firm leaders of the future?

BD and Marketing are not the same

In its 2018 Annual Marketing Partner Forum Survey, Thompson Reuters concluded that stronger BD efforts could be one way out of a flat legal market.

Back in the 1990s, when law firm marketing was building steam, the terms “Marketing” and “Business Development” were often used interchangeably. Recently, more law firms have recognized...
found that 10% of responding law firms had structurally distinct Marketing and BD departments. In the 2018 survey, that figure more than doubled to 22%.

At a basic level, “Marketing” can be defined as profile-raising activities (for a lawyer or law firm). “BD,” on the other hand, focuses on those activities that will lead to either: meaningful contact with a prospective client or obtaining additional business from an existing client. The difference between Marketing and BD is not always black & white – there are grey areas. An understanding of the interplay between the two can inform a firm on how to approach various activities. Take events for example. An event can be a pure Marketing (profile-raising) activity, or an event could have a networking component (BD). But it takes a coordinated effort to get some measureable BD impact (Return on Investment, or ROI) from an event. An event can also be a cross-selling or cross-marketing opportunity, but, again, you have to put some effort into it.

The right expenditure of time, resources and money in any of the areas above will vary from firm-to-firm.

A managing partner of a law firm recently asked me, “Will we be able to show the new business we’ve received from doing this [insert Marketing activity]?” This is a legitimate question for BD activities, but less applicable to Marketing activities because ROI can be very difficult to measure on profile-raising activities. It’s rare to be able to determine that someone hired the firm because they read an article or heard an attorney speak somewhere, but it happens.

**BD and Sales**

Another pressing question: Can you use your non-lawyer BD professionals as the law firm’s sales force?

Much of what we know today as law firm Marketing/BD came over from the consulting profession. However, the model can vary in consulting organizations. In many consulting firms the Marketing and BD groups are completely separate – with a main role of the BD group to go on sales calls to new clients or on cross-selling missions to existing clients. The jury is still out as to whether this model could be successful at law firms. What is clear is that this approach will not work if the prospect expects to be meeting with the attorney who would be doing their work. There are other issues that are law-profession specific that need to be considered before embarking on this path, such as any applicable Rules of Ethics and the principles of attorney/client privilege.

Assuming that you (in a solo practice) or the attorneys in the law firm are the sales force, then sales training may be a good investment, and an area where a BD professional could assist.
The strength of your network (individual) or contact list (law firm) is critical to business development. That network is something that an attorney should work on at every stage of his or her career. For new attorneys, your best network may be your law-school peers – especially those who you have gotten to know and who share your interests. Three main points here are:

- As you move up in your firm or company, your peers move up in their organizations too.
- Figure out who you want to spend time with professionally, and discover activities that you both enjoy.
- Networking time is your time.

A first-year associate at a firm where I worked was actively involved in a local Big Brothers Big Sisters charitable organization. This gave her the opportunity to be one of the few of the firm’s attorneys who entertained the top contacts of a major client at a Big Brothers Big Sisters event. By getting involved in an organization that she believed in, and because she is a great representative of the firm, she got to know the key contacts, and she enhanced the clients’ overall favorable impression of the firm.

Networking comes in many forms – one of which is social media. In the professional universe, and especially the legal profession, LinkedIn is the social media networking site-of-choice (see the State of Digital & Content Marketing Survey published by Greentarget and Zeughauser Group). LinkedIn has many ways to connect, and many ways to share content with your network. There are many resources to teach lawyers how to use LinkedIn, and your BD professionals would be able to help as well, but some of the basic steps are:

- Step 1: Build a strong personal profile.
- Step 2: Build your network of connections.
- Step 3: Network to other connections via your connections.
- Step 4: Share content with your connections

One note in regard to mailing lists: Remember those firm profile-raising newsletters, e-blasts and events? Those can be turned into BD tools, but you have to put in the effort. One approach is to make sure your contacts are added to the appropriate firm mailing lists. Another approach, which I call the “Solovy” approach (after the former Chairman of Jenner & Block), is to create your own lists of contacts to whom you can personally send articles, newsletters and invitations of interest.

Chart a Course: BD Time is Your Time

In 2002 the ABA Commission on Billable Hours published a report that included what they called an “Hours Expectations/Model Diet” for associates. The diet consisted of:

1. Billable client work – 1900 hours
2. Pro bono work – 100 hours
3. Service to the firm – 100 hours
4. Client Development – 75 hours
5. Training and Professional Development – 75 hours
6. Service to the Profession – 50 hours

The point here is that in the mix of the 2300 hours of billable and non-billable time represented in the ABA diet – BD time is non-billable time and it is your time.

In 2012, I interviewed incoming Chicago Bar Association president Aurora Austriaco for an article in the CBA Record magazine. For the article, I asked Austriaco about work/life balance. She said half-jokingly that there is no such thing, “But if you love what you do, you can come close, with some help along the way.”

When I talk to new associates, I tell them they owe it to themselves to take control of their career. I make the analogy that managing your career is more like captaining a sailboat than a motor boat. Or...
The same holds true for business development. You make the choices on what you do and with. The attorneys who have been the most successful in their practices, business development efforts and personal lives are the ones who have figured out how to blend all three.

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Travel Ban Update
By Jackson Lewis P.C.

Court Holds That An Employer May Rely On Employee's Promise Not To Compete
By Allen Matkins Leck Gamble Mallory & Natsis LLP

New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification
By Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
When it Comes to Business Development for Young Lawyers, Motive and Mindset Matter

Meranda M. Vieyra

Denver Legal Marketing

Monday, April 15, 2019

It’s rare that new associates spend a lot of time, or much time at all, thinking about their motive for practicing law and their personal long-term business goals. But what I’ve found over the last 10+ years as a legal marketing professional is that motive and mindset matter tremendously when it comes to the success of a young lawyer in business development. Harnessing the power of these two key factors and can make a huge impact on the trajectory of a new attorney’s career. In this article, I provide ideas to reveal the entrepreneurial side of legal practice and ways to leverage mindset and motive to create the base for a strong, lasting legal career.

Explaining Motive: The Reasons

Seems like a soul-searching question that many law students face, “Why did you go to law school?” For some lawyers that I have worked with, the answer to that question has never changed. It informs every career decision that they have made, every client matter they have taken on, and even the charitable causes that they support. For others, the answer was defined when they began law school but changed as the realities of practicing law and being able to make money with their JD degree set in. Regardless of what stage of practice a lawyer is in, motive or the reason that you practice law, should be clear to you and everyone around you. Defining your motive is a helpful step in branding your legal practice and differentiating it from everyone else. With the growing competition in law, there is a ton of choice when it comes to who people and companies buy legal services from. The motive behind what you do sets you apart from the sea of other attorneys. Examples of a clear motive would be, “I am a resource to small businesses as legal counsel, or I concentrate on helping minority owned businesses develop and grow through my corporate legal services.” Another idea would be, “I assist families in transition through my family law practice, or I protect the rights of individuals charged with crimes through my criminal law practice.” Branding your practice increases client loyalty and peer case referrals to you and in 2019, your motive for practicing law matters more than ever.

Entrepreneurial Mindset: The Actions

Lawyers that approach their personal brand and business development like it is their own little corporation succeed. Period. They retire from their legal careers with as much gusto and engagement as they began them with. These are the rainmakers and the trailblazers in law, forging their own path and defining what success means to them. So what is a business mindset? The Financial Times explains that this mindset is present in people that “… are often drawn to opportunities, innovation and new value creation. Characteristics include the ability to take calculated risks and accept the realities of change and uncertainty.”

For lawyers, a growth mindset allows them to see ahead to the future, and inspires them to build their network, relationships, and personal brand long before they have their own law firms or are partners in someone else’s. A forward-thinking, business-minded perspective means that rather than waiting to be fed by someone else, they feed themselves by having their own portable book of business. When these lawyers take any step in their career, they are prepared. They are ready for change, action, and growth because they have consistently worked a securing the right kind of clients to build a sustainable practice that is geared toward their own long-term success – wherever they might be practicing at the time.
professional associates, but it extends to friends, former teachers, co-workers, and teammates. One of the first things a young lawyer should do is take a few minutes and brainstorm a list of all the organizations and people that have been influential on their professional journey. Once you have a solid list of these contacts, make a plan to reach out to a handful every week. Develop a schedule of one-on-one lunch meetings and coffee dates, with no other reason but to catch up and cultivate the relationship. The people that you meet with should walk away understanding what type of law you practice and why. These off-the-clock meetings extend and strengthen your network as well as hone your skills of listening and building rapport which are key in business development.

Become Involved in the Community

The impact you have over the course of your career begins with the small decisions you make now about how you will spend your time and energy. Some of the most vital steps to pave the way for business opportunities later is through engaging in strategic professional experiences that support the motive and mindset behind your practice. There are only so many hours in the day and so using your community involvement as a vehicle for branding and business development is smart. Young attorneys that are savvy in this regard would choose to be on the board of a Chamber of Commerce rather than on the board of a trout fishing nonprofit (if fishing has zero to do with their motive for practicing law or does not support the networking aspects of their business mindset).

Some great activities to engage in to support your career would be:

- Joining relevant bar associations
- Participating in high-profile social events
- Engaging in volunteer work for a cause you are passionate about
- Seeking speaking and publishing opportunities in your practice area
- Applying for leadership roles in your current organizations

Your Perfect Career—In Reverse

In order to make the crucial decisions about how to begin to reach your ultimate goals, you have to know what those goals look like. Define what you want now by building a small goal statement about what your future career should hold. Thoughtful questions include:

1. What type of lawyer do I want to be known as?
2. What clients or industries am I passionate about serving?
3. What do I want to accomplish professionally?
4. How much time can I devote each week toward attaining my career goals?

Once you know what you want your final destination to be, you will be able to create a step-by-step plan regarding how to get there. You can develop a “career wish list” gleaned from information found on your mentor’s biography or from the CV of an attorney you admire. On the list, you can include the types of clients you would like to serve, results you would like to secure, awards you would like to have, and organizations you would like to participate in.

Build an Online Brand

One of the most vital elements of any good business development strategy is creating a personal brand that is connected, engaging, and present. In order to maximize the power of social media and online branding, you need a cohesive strategy for how to present your best attributes consistently and across all channels. To begin, consider what sets you apart from other lawyers in your practice area or age cohort. Define the type of work you want to do and the type of clients you want to help. Develop a “30-second elevator pitch” that succinctly describes how you are of service to the community through your law practice. Not only will this help develop a brand “voice” for your practice, but it will be a guiding mission that inspires your business development communication online and offline.

Conclusion

Developing a long-term business strategy now is the key to getting ahead in your legal career tomorrow. People have a lot of choices when it comes to legal counsel and so your motive and your mindset help you stand out. Having a clear brand attached to your practice helps to simplify business development as it is easier to vet organizations and events to participate in. Your motive and your mindset are helpful in defining what type of opportunities are best for your career. They can even help you maintain a consistent interest in your practice area when you need to push through a career lull. Creating an identity for yourself as a lawyer, and then committing to it, will help with online reputation management and offline engagement in the community. These factors will lead you to the most vital steps toward building a network of relationships that will last the duration of your career. For young lawyers, looking at your legal career as your own little business will define your contributions, will positively impact your firm and your community, and allow you to leave a legacy that you can be proud of.

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Can U.S. Companies Insure Against A Trade War?
By Gilbert LLP

The Shell Game Played with Your DNA, or 23 and Screwing Me
By Womble Bond Dickinson (US) LLP

Manufacturing in Mexico: Taking Care of Fixed Assets
By Foley & Lardner LLP

Travel Ban Update
By Jackson Lewis P.C.

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HOW TO RETURN TO LAW AFTER A CAREER BREAK

During our brief chat with Laura, we learn how she manages to balance toddlers and directorship at a renowned law firm.

Taking a hiatus from work is something that may spike apprehension amongst those who are trying to climb up their career ladder; you may find yourself contemplating, asking: will you find it difficult to settle back in, or will the workplace assume you aren’t as dedicated to your job?

And this especially rings true to new mothers. One of the reoccurring reasons why some women struggle to make partner is the fact that they may struggle to return to the rigid 9 – 5 days when they have a baby to look after post maternity leave. Or, if they have implemented a daily routine which allows them to return to work as normal, some firms may unintentionally (or intentionally) discriminate against new mothers, assuming that they may not have the time to tackle more responsibility for a promotion or they can't travel overseas as they need to look after their child.

Assumptions and stereotypes like these often prevent women from making partner as fast as their male peers.
An obvious and effective solution is flexible working and it looks like international law firm DLA Piper have a good handle on things. Speaking to Laura Ford at the Women in Law Conference 2018, she reveals that soon after her return from maternity leave she was promoted to Legal Director, and she has since made Partner. So, what is her secret?

It is almost impossible not to feel at ease around Laura’s warming presence. And it is just as impossible to imagine her crumbling under the stress the legal sector can present and the mayhem two toddler twins bring along with them. But, not a grey hair in sight (or at least that I can see), and as I learnt throughout my conversation with Laura, it seems that it could be due to her work life balance.

**How can you prepare for your first step back into law?**

I found that having a plan devised before you leave, where you set out what will happen when you are away and how you will ease back into things works well.

I work at DLA Piper and they have a fantastic maternity coaching scheme, where you work with the executive coaching consultancy to make a maternity plan. I had sessions with them before, during and after my maternity leave and one thing that I found really interesting, was that there was a lot of planning and preparation to be done before I had even left. The coaching helped me to look, not just at the period of my maternity leave, but for my return and even into the years after that. It made me think about how I wanted to operate as a lawyer and what my ambitions and targets were for the future. All this accumulated and effectively became a “maternity plan” that I put into place before I went on leave.

This was really just a form of clear communication for those I work with, too. I was obviously in touch with my partners and my colleagues, but having it all written down in a plan stating how long I anticipated being off for, the clients I had handed over and importantly, would like back (as you don’t want to lose the hard work you’ve put in over the years), was beneficial; stating what I wanted to do on my return also helped. For me, my plan was to come back full time but to work flexibly. I was fortunate because my husband took a year off to look after our children when I returned to work, which gave me the ability to be more flexible with my work and to devote more time to it, whilst still making sure I had time to see the children.

Planning in advance was key for a smooth return and my progression. The promotion window for legal directorship was coming up whilst I was off, so I made sure that it was known that I would still like to be considered for that, even though I wasn’t going to be there in person. The application wasn’t due for another 6 months, but I made sure I completed my business plan in advance.

It is all about looking into the future and really communicating to ensure that your colleagues and managers know your goals and plans. Making sure that people knew how I felt, what I wanted to do, how I was happy to be communicated with whilst I was off – I am sure lots of people don’t want to be contacted at all, but I was happy to be contacted every so often, especially for important matters – and what would happen when I returned, all helped the transition to run smoothly. Maternity can be seen as a private or sensitive topic so being open about it and communicating everything across clearly really helped to remove that aspect and keep things running efficiently.
Is it important to have a mental break during that time off, or is it more important to keep on focusing on the progression in law and working in law?

Yes, I think it is very important to have almost a complete break, certainly for the first half of the time. The reason for your time off, whatever it may be, is important; you've got to be able to focus on whatever it is that you're doing – which for me was keeping these little babies alive, happy and fed.

There does come a point where you have to get your mind moving back towards “work mode”. You don't want to get today 364 of 365 and not have thought about how you want to work, what type of work you are going to be doing and how you are going to hit the ground running. I do think preparing for your return is good, but don't do it too soon in, as you can lose the benefit of having that time off.

What can women [parents] in the legal sector do if they don't have a partner who is working flexibly?

I am back into that situation now. My husband took a year off to look after the boys and has recently returned, so we are just trying to get into the hang of working out what is best. I think the key to maintaining your work and family life is flexible or agile working. I don't have a formal flexible working arrangement, but I do work flexibly. So, sometimes I get up at 6.00am and do some work before the children get up, which can allow me to be free at the end of the day, just in case I have to leave early to collect them from nursery.

Other people work shorter days or compressed weeks, which I tried...it is really difficult to do! You have to remember to look after your own mental state, you have to have time to yourself. It is hard being a lawyer and being a mum or dad, so you need to incorporate a bit of time for yourself as well, which flexible working helps with. Having a good support network helps too. We have family who live nearby and are our safety net, but looking after twin toddlers is hard, so we try not to call on them too much!

So what can women returning from work do to ensure that they aren't perceived to be lacking in any sense, particularly if they have children?

I am lucky in that I have not experienced too many obstacles since I have come back and I think that is due both to the preparation made beforehand and the support of the firm. Having that open line of communication in order to let people know how I was willing to work, to understand what they needed from me and what I was willing to give back worked well.

I did have one particularly difficult moment with a client during a late night telephone call where one of the babies couldn't settle himself. I had to briefly cut the call to look after the baby but phoned the client back five minutes later – unfortunately the client didn't appreciate or understand that I quickly needed to tend to my child. I think you are always going to come up against something. If people aren't as lucky as I am to have colleagues and partners that are supportive and are willing to give you that flexibility, you may come across such issues with them. There may be clients who aren't used to working with people who have those kinds of requirements and you just have to take it on the chin. Whilst the client’s response was frustrating at the time I didn't let it impact me. If you are taking a call that late at night, there is obviously a problem...
are trying to solve. After calling back, we sorted everything out and still have a good working relationship. It is easier to just try and accept that it won't always be easy, but you just get on with it and try to make sure you are doing the right thing for the client, the firm and yourself.

Do you think there are stereotypes towards women in law who take maternity, compared to those who have time off for other reasons, such as a gap year?

Potentially, because someone who has taken a break for another reason does not necessarily come back with any additional requirements. If you take a year off for maternity, you come back with a one year old child and that child still needs to be looked after. You may not necessarily be able to work ordinary hours, every day, every week. Whereas the person who has gone travelling, for example, does not necessarily have that issue. So, I do think there is a risk of people with young children being treated differently, but again, it comes back to the issues of communication, being open, having a dialogue and making sure that there isn't a lacuna between what people expect of you and what you are willing to give. If you can achieve this and you are working at a firm that will give you that flexibility to allow you to work in such a way, then it shouldn't cause too many difficulties.

I think I say that from quite a privileged position of not having had those difficulties, but I have seen friends and colleagues who have experienced difficulties. It may be their own approach to work and returning, or the firm's approach towards them, but I think you put the above measures in place and try not to get bogged down in the stereotype of people thinking you are a parent and therefore you are not going to give as much as you did before. You have to prove them wrong, so you may need to work and give a little bit differently.

Do you think flexible working for everyone including men and women, would help with equality at law firms, especially higher up, when moving up towards partner, for example?

I do. I think that would really help with the stereotyping – if there is a stereotype – that new mums don’t contribute as much as new dads may do, (because for the dads, their partner may be the one at home looking after the children). I think if everybody who wanted to have the opportunity to work flexibly did so, I am sure that would help when the time comes for progression further down the line.

I, myself, am hoping to go for partnership soon and I don’t think that the way I work will impact that, as I still get what I need to do completed, I just do it in a more flexible way.

Could flexible working post maternity leave produce a stigma towards women in the workplace? Should this be made for both men and women, to ensure equality?

Yes, of course. It should be available to all. It is really important for women who have children and return to work, or for anybody who has the need, to work flexibly when they need to and to do it loudly and visibly. We have a motto in our firm which is: “leaving loudly”. If someone is going to see a school play, we believe
they should say so and not appear to be present when they are not. And that is what I try to do. I don’t try to hide the fact that I am leaving early. I will almost certainly have started a lot earlier in the day, as I still have to do my job and provide that value. I think you become a lot more efficient when you have had time off.

**How can women prepare for promotion after maternity leave?**

If you are trying to progress towards a promotion, whether it’s partnership or anything else, there are a lot of things you need to do to get there. It is not just about getting the hours in and doing a good job with the client; it’s about business development, growing the team and mentoring others, which all take time. If you have children, you are less able to use your evenings for work and so everything comes down to operating with ruthless efficiency during the day. 6.00pm – 8.00pm is sacred to me to have that time with the children, so everything gets done by 5.30 and if something spills over and I have to do it at the end of the day I don’t mind that at all as I have had that time I needed with my children.

**Working for DLA Piper you said that there was a maternity plan – do you think that should be mandatory across all law firms?**

I am not sure everybody would want to work this way. I know that many of my friends and colleagues have not appreciated the value of the coaching scheme and plan and would not want to say in advance when they expect to return and how they would like to work when they do. It is perhaps not until you undergo it yourself that you may appreciate the system in place. I am not sure it would work for this to be mandatory. The notion of flexible working is doing work when you can and what fits well with your lifestyle, and I suppose for some people what might fit in for them is the 9.00 – 5.00 process.
The Do-s and Don’t-s of a Career Break Return for Women Lawyers

11 Apr 2019

Alumna, Nikki Alderson (Jurisprudence, Balliol College) works as a specialist Corporate and Executive Coach.

The Do-s and Don’t-s of a Career Break Return for Women Lawyers

Work Life Juggle: No “one Cap fits all”

For 19 years, I worked successfully as a Criminal Barrister. In the latter 5 years of my career at The Bar, I started a family and became all too familiar with the so called “juggle” between work and family life.

I have 3 children. With my first, I returned to full-time work too soon, after just 6 months, childcare being a combination of nursery and grandparents. With my second, I increased maternity leave to 12 months. I returned when I felt ready. This time a nanny played mum whilst I paid her for the privilege of me returning to work. By child number 3, extended maternity leave soon lead to the final line in the sand for my legal career. During that time, in 2017, I started my own business as a specialist Corporate and Executive Coach, empowering female lawyers.

This introduction serves to illustrate that no “one cap fits all.” Even within the same family, circumstances change. Deciding on the right childcare options requires a combination of creativity and flexibility.

Common Challenges for Career Break Returners
I deliver Career Break Returner Coaching Packages to law firms keen to pay more than lip-service to the needs of parents returning from maternity leave.

Clients commonly experience a lack of confidence resulting from changes in:

a) the day to day work, ordinarily second nature, but which becomes more burdensome after an extended period away;

b) technology and personnel whilst away from the office;

c) their priorities concerning their next career move, how that looks, and in what direction.

I frequently hear damaging internal dialogue around not being good enough and feeling the need to prove themselves. Additionally, there are practical challenges around time management, productivity, and the need to establish clear boundaries by learning to say no.

All of these challenges are common place. Clients can be reassured that they are not alone. How to manage the challenges is another matter.

**Overcoming the Challenges**

1. Consider your childcare options. Can childcare be shared equally between parents? Does the cost of external childcare outweigh part-time working opportunities? Is Flexible Working available? What are your childcare preferences?

2. Communicate clearly with managers/leaders in your organisation, both verbally and in writing, so that they not only hear what it is you are communicating to them about back to work expectations but more importantly that they understand it.

3. Use Keep in Touch days, or a phased return, to upskill on technology and current working practices, network within your new team and gradually ease yourself back in.

4. Align yourself with, and listening to the shared experiences of, a supportive “team”: an empathetic boss or a friendly co-worker for example. This will help you realise your experiences are completely normal, not unusual and most importantly, not insurmountable.

5. Examine whether your habits and behaviours help or hinder your levels of personal confidence. Do you listen to, and are you influenced by, unhelpful negative internal chatter? Whatever the internal chatter, it is important to manage your own state to give the appearance of external control and confidence. Do you adopted a positive mind-set and use correspondingly positive, empowering language? Developing your “game-face” at work may take some conscious effort, but with practice it will soon become second nature.

**Moving Onward and Upward when the time is right**
Some career break returners want to successfully manage the day to day transition from home to working life, before ever considering putting their foot to the floor on the career progression path. At that time, nothing could be further from their minds in fact.

Others see the return to work as just the right point in time to go for it, all hands to the pump, and work towards the next promotion.

In my experience though, the vast majority of women fall into the category of those “deciding to decide”, a pool of hugely talented women who, having become mothers for the first time, are suddenly plunged into a brave new world of changed priorities – feeling in that moment that the next nativity play or sports day is far more important than moving up to the next rung on the partnership ladder- yet having no desire to give up on their future career progression. Nor should they have to.

For each of us, how we react and feel is deeply personal; there are no rights or wrongs here.

**Getting your next move right**

For those women in law “deciding to decide”:

1. Take your time

Don’t do anything in a hurry. Take your time to adjust, if that is what you need to do; the transition of returning to work cannot be under-estimated.

2. Be authentic

Look at your goals and ambitions as they are now, not as they were when you were younger and child-free. What now is your authentic path?

Of course there are additional considerations – not least an increased burden on finances if for example you are working reduced hours, earning less money, and you have increased outgoings thanks to exorbitant childcare costs.

But to use Stephen Covey’s analogy, it’s so easy to get caught up in life’s busy-ness, working hard to climb the ladder of success, only to discover that all this time the ladder has been leaning against the wrong wall. Be sure to put the ladder against the right wall before you start to climb.

3. Be honest.

After you have had children, the wall you wish to climb might or might not be the same one as you were climbing before. My over-riding advice is this: “Live a life true to yourself, not the life others expect.”
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Throughout the past year, a noisy debate has erupted in the media over the meaning of what Lisa Belkin of the *New York Times* has called the “opt-out revolution.” Recent articles in the *Wall Street Journal*, the *New York Times*, *Time*, and *Fast Company* all point to a disturbing trend—large numbers of highly qualified women dropping out of mainstream careers. These articles also speculate on what might be behind this new brain drain. Are the complex demands of modern child rearing the nub of the problem? Or should one blame the trend on a failure of female ambition?

The facts and figures in these articles are eye-catching: a survey of the class of 1981 at Stanford University showing that 57% of women graduates leave the work force; a survey of three graduating classes at Harvard Business School demonstrating that only 38% of women graduates end up in full-time careers; and a broader-gauged study of MBAs showing that one in three white women holding an MBA is not working full-time, compared with one in 20 for men with the same degree.

The stories that enliven these articles are also powerful: Brenda Barnes, the former CEO of PepsiCo, who gave up her megawatt career to spend more time with her three children; Karen Hughes, who resigned from her enormously influential job in the Bush White House to go home to Texas to better look after a needy teenage son; and a raft of less prominent women who also said goodbye to their careers. Lisa Beattie Frelinghuysen, for example—
featured in a recent 60 Minutes segment—was building a very successful career as a lawyer. She’d been president of the law review at Stanford and went to work for a prestigious law firm. She quit after she had her first baby three years later.

These stories certainly resonate, but scratch the surface and it quickly becomes clear that there is very little in the way of systematic, rigorous data about the seeming exodus. A sector here, a graduating class there, and a flood of anecdotes: No one seems to know the basic facts. Across professions and across sectors, what is the scope of this opt-out phenomenon? What proportion of professional women take off-ramps rather than continue on their chosen career paths? Are they pushed off or pulled? Which sectors of the economy are most severely affected when women leave the workforce? How many years do women tend to spend out of the workforce? When women decide to reenter, what are they looking for? How easy is it to find on-ramps? What policies and practices help women return to work?

Early in 2004, the Center for Work-Life Policy formed a private sector, multiyear task force entitled “The Hidden Brain Drain: Women and Minorities as Unrealized Assets” to answer these and other questions. In the summer of 2004, three member companies of the task force (Ernst & Young, Goldman Sachs, and Lehman Brothers) sponsored a survey specifically designed to investigate the role of off-ramps and on-ramps in the lives of highly qualified women. The survey, conducted by Harris Interactive, comprised a nationally representative group of highly qualified women, defined as those with a graduate degree, a professional degree, or a high-honors undergraduate degree. The sample size was 2,443 women. The survey focused on two age groups: older women aged 41 to 55 and younger women aged 28 to 40. We also surveyed a smaller group of highly qualified men (653) to allow us to draw comparisons.

Using the data from the survey, we’ve created a more comprehensive and nuanced portrait of women’s career paths than has been available to date. Even more important, these data suggest actions that companies can take to ensure that female potential does not go
unrealized. Given current demographic and labor market trends, it’s imperative that employers learn to reverse this brain drain. Indeed, companies that can develop policies and practices to tap into the female talent pool over the long haul will enjoy a substantial competitive advantage.

**Women Do Leave**

Many women take an off-ramp at some point on their career highway. Nearly four in ten highly qualified women (37%) report that they have left work voluntarily at some point in their careers. Among women who have children, that statistic rises to 43%.

**How Many Opt Out?**

Factors other than having children that pull women away from their jobs include the demands of caring for elderly parents or other family members (reported by 24%) and personal health issues (9%). Not surprisingly, the pull of elder care responsibilities is particularly strong for women in the 41 to 55 age group—often called the “sandwich” generation, positioned as it is between growing children and aging parents. One in three women in that bracket have left work for some period to spend time caring for family members who are not children. And lurking behind all this is the pervasiveness of a highly
traditional division of labor on the home front. In a 2001 survey conducted by the Center for Work-Life Policy, fully 40% of highly qualified women with spouses felt that their husbands create more work around the house than they perform.

### Why Do They Leave the Fast Lane?

Our survey data show that women and men take off-ramps for dramatically different reasons. While men leave the workforce mainly to reposition themselves for a career change, the majority of women off-ramp to attend to responsibilities at home.

#### Top five reasons women leave the fast lane

- Family time: 44%
- Earn a degree, other training: 23%
- Work not enjoyable/satisfying: 17%
- Moved away: 17%
- Change careers: 16%

#### Top five reasons men leave the fast lane

- Change careers: 29%
- Earn a degree, other training: 25%
- Work not enjoyable/satisfying: 24%
- Not interested in field: 18%
- Family time: 12%

### Why Do They Leave the Fast Lane?

Alongside these “pull” factors are a series of “push” factors—that is, features of the job or workplace that make women head for the door. Seventeen percent of women say they took an off-ramp, at least in part, because their jobs were not satisfying or meaningful. Overall, understimulation and lack of opportunity seem to be larger problems than overwork. Only 6% of women stopped working because the work itself was too demanding. In business sectors, the survey results suggest that push factors are particularly powerful—indeed, in these sectors, unlike, say, in medicine or teaching, they outweigh pull factors. Of course, in the hurly-burly world of everyday life, most women are dealing with a combination of push and pull factors—and one often serves to intensify the other. When women feel hemmed in by rigid policies or a glass ceiling, for example, they are much more likely to respond to the pull of family.
It’s important to note that, however pulled or pushed, only a relatively privileged group of women have the option of not working. Most women cannot quit their careers unless their spouses earn considerable incomes. Fully 32% of the women surveyed cite the fact that their spouses’ income “was sufficient for our family to live on one income” as a reason contributing to their decision to off-ramp.

Contrast this with the experience of highly qualified men, only 24% of whom have taken off-ramps (with no statistical difference between those who are fathers and those who are not). When men leave the workforce, they do it for different reasons. Child-care and elder-care responsibilities are much less important; only 12% of men cite these factors as compared with 44% of women. Instead, on the pull side, they cite switching careers (29%), obtaining additional training (25%), or starting a business (12%) as important reasons for taking time out. For highly qualified men, off-ramping seems to be about strategic repositioning in their careers—a far cry from the dominant concerns of their female peers.

For many women in our study, the decision to off-ramp is a tough one. These women have invested heavily in their education and training. They have spent years accumulating the skills and credentials necessary for successful careers. Most are not eager to toss that painstaking effort aside.

**Lost on Reentry**

Among women who take off-ramps, the overwhelming majority have every intention of returning to the workforce—and seemingly little idea of just how difficult that will prove. Women, like lawyer Lisa Beattie Frelinghuysen from the *60 Minutes* segment, who happily give up their careers to have children are the exception rather than the rule. In our research, we find that most highly qualified women who are currently off-ramped (93%) want to return to their careers.

Many of these women have financial reasons for wanting to get back to work. Nearly half (46%) cite “having their own independent source of income” as an important propelling factor. Women who participated in focus groups conducted as part of our research talked about their discomfort with “dependence.” However good their marriages, many disliked needing to ask for money. Not being able to splurge on some small extravagance or make
their own philanthropic choices without clearing it with their husbands did not sit well with them. It’s also true that a significant proportion of women currently seeking on-ramps are facing troubling shortfalls in family income: 38% cite “household income no longer sufficient for family needs” and 24% cite “partner’s income no longer sufficient for family needs.” Given what has happened to the cost of homes (up 38% over the past five years), the cost of college education (up 40% over the past decade), and the cost of health insurance (up 49% since 2000), it’s easy to see why many professional families find it hard to manage on one income.

But financial pressure does not tell the whole story. Many of these women find deep pleasure in their chosen careers and want to reconnect with something they love. Forty-three percent cite the “enjoyment and satisfaction” they derive from their careers as an important reason to return—among teachers this figure rises to 54% and among doctors it rises to 70%. A further 16% want to “regain power and status in their profession.” In our focus groups, women talked eloquently about how work gives shape and structure to their lives, boosts confidence and self-esteem, and confers status and standing in their communities. For many off-rampers, their professional identities remain their primary identities, despite the fact that they have taken time out.

Perhaps most interesting, 24% of the women currently looking for on-ramps are motivated by “a desire to give something back to society” and are seeking jobs that allow them to contribute to their communities in some way. In our focus groups, off-ramped women talked about how their time at home had changed their aspirations. Whether they had gotten involved in protecting the wetlands, supporting the local library, or rebuilding a playground, they felt newly connected to the importance of what one woman called “the work of care.”

Unfortunately, only 74% of off-ramped women who want to rejoin the ranks of the employed manage to do so, according to our survey. And among these, only 40% return to full-time, professional jobs. Many (24%) take part-time jobs, and some (9%) become self-employed. The implication is clear: Off-ramps are around every curve in the road, but once a woman has taken one, on-ramps are few and far between—and extremely costly.
The Penalties of Time Out

Women off-ramp for surprisingly short periods of time—on average, 2.2 years. In business sectors, off-rampers average even shorter periods of time out (1.2 years). However, even these relatively short career interruptions entail heavy financial penalties. Our data show that women lose an average of 18% of their earning power when they take an off-ramp. In business sectors, penalties are particularly draconian: In these fields, women’s earning power dips an average of 28% when they take time out. The longer you spend out, the more severe the penalty becomes. Across sectors, women lose a staggering 37% of their earning power when they spend three or more years out of the workforce.

The High Cost of Time Out

Though the average amount of time that women take off from their careers is surprisingly short (less than three years), the salary penalty for doing so is severe. Women who return to the workforce after time out earn significantly less than their peers who remained in their jobs.

The High Cost of Time Out

Naomi, 34, is a case in point. In an interview, this part-time working mother was open about her anxieties: “Every day, I think about what I am going to do when I want to return to work full-time. I worry about whether I will be employable—will anyone even look at my résumé?” This is despite an MBA and substantial work experience.
Three years ago, Naomi felt she had no choice but to quit her lucrative position in market research. She had just had a child, and returning to full-time work after the standard maternity leave proved to be well-nigh impossible. Her 55-hour week combined with her husband’s 80-hour week didn’t leave enough time to raise a healthy child—let alone care for a child who was prone to illness, as theirs was. When her employer denied her request to work reduced hours, Naomi quit.

After nine months at home, Naomi did find some flexible work—but it came at a high price. Her new freelance job as a consultant to an advertising agency barely covered the cost of her son’s day care. She now earns a third of what she did three years ago. What plagues Naomi the most about her situation is her anxiety about the future. “Will my skills become obsolete? Will I be able to support myself and my son if something should happen to my husband?”

The scholarly literature shows that Naomi’s experience is not unusual. Economist Jane Waldfogel has analyzed the pattern of earnings over the life span. When women enter the workforce in their early and mid twenties they earn nearly as much as men do. For a few years, they almost keep pace. For example, at ages 25 to 29, they earn 87% of the male wage. However, when women start having children, their earnings fall way behind those of men. By the time they reach the 40-to-44 age group, women earn a mere 71% of the male wage. In the words of MIT economist Lester Thurow, “These are the prime years for establishing a successful career. These are the years when hard work has the maximum payoff. They are also the prime years for launching a family. Women who leave the job market during those years may find that they never catch up.”

**Taking the Scenic Route**

A majority (58%) of highly qualified women describe their careers as “nonlinear”—which is to say, they do not follow the conventional trajectory long established by successful men. That ladder of success features a steep gradient in one’s 30s and steady progress thereafter. In contrast, these women report that their “career paths have not followed a progression through the hierarchy of an industry.”
Some of this nonlinearity is the result of taking off-ramps. But there are many other ways in which women ease out of the professional fast lane. Our survey reveals that 16% of highly qualified women work part-time. Such arrangements are more prevalent in the legal and medical professions, where 23% and 20% of female professionals work less than full-time, than in the business sector, where only 8% of women work part-time. Another common work-life strategy is telecommuting; 8% of highly qualified women work exclusively from home, and another 25% work partly from home.

Looking back over their careers, 36% of highly qualified women say they have worked part-time for some period of time as part of a strategy to balance work and personal life. Twenty-five percent say they have reduced the number of work hours within a full-time job, and 16% say they have declined a promotion. A significant proportion (38%) say they have deliberately chosen a position with fewer responsibilities and lower compensation than they were qualified for, in order to fulfill responsibilities at home.

**Downsizing Ambition**

Given the tour of women’s careers we’ve just taken, is it any surprise that women find it difficult to claim or sustain ambition? The survey shows that while almost half of the men consider themselves extremely or very ambitious, only about a third of the women do. (The proportion rises among women in business and the professions of law and medicine; there, 43% and 51%, respectively, consider themselves very ambitious.) In a similar vein, only 15% of highly qualified women (and 27% in the business sector) single out “a powerful position” as an important career goal; in fact, this goal ranked lowest in women’s priorities in every sector we surveyed.

Far more important to these women are other items on the workplace wish list: the ability to associate with people they respect (82%); the freedom to “be themselves” at work (79%); and the opportunity to be flexible with their schedules (64%). Fully 61% of women consider it extremely or very important to have the opportunity to collaborate with others and work as part of a team. A majority (56%) believe it is very important for them to be able to give back to the community through their work. And 51% find “recognition from my company” either extremely or very important.
These top priorities constitute a departure from the traditional male take on ambition. Moreover, further analysis points to a disturbing age gap. In the business sector, 53% of younger women (ages 28 to 40) own up to being very ambitious, as contrasted with only 37% of older women. This makes sense in light of Anna Fels’s groundbreaking work on women and ambition. In a 2004 HBR article, Fels argues convincingly that ambition stands on two legs—mastery and recognition. To hold onto their dreams, not only must women attain the necessary skills and experience, they must also have their achievements appropriately recognized. To the extent the latter is missing in female careers, ambition is undermined. A vicious cycle emerges: As women’s ambitions stall, they are perceived as less committed, they no longer get the best assignments, and this lowers their ambitions further.

In our focus groups, we heard the disappointment—and discouragement—of women who had reached senior levels in corporations only to find the glass ceiling still in place, despite years of diversity initiatives. These women feel that they are languishing and have not been given either the opportunities or the recognition that would allow them to realize their full potential. Many feel handicapped in the attainment of their goals. The result is the vicious cycle that Fels describes: a “downsizing” of women’s ambition that becomes a self-fulfilling prophecy. And the discrepancy in ambition levels between men and women has an insidious side effect in that it results in insufficient role models for younger women.

**Reversing the Brain Drain**

These, then, are the hard facts. With them in hand, we move from anecdotes to data—and, more important, to a different, richer analytical understanding of the problem. In the structural issue of off-ramps and on-ramps, we see the mechanism derailing the careers of highly qualified women and also the focal point for making positive change. What are the implications for corporate America? One thing at least seems clear: Employers can no longer pretend that treating women as “men in skirts” will fix their retention problems. Like it or not, large numbers of highly qualified, committed women need to take time out. The trick is to help them maintain connections that will allow them to come back from that time without being marginalized for the rest of their careers.
How Ernst & Young Keeps Women on the Path to Partnership

In the mid-1990s, turnover among female employees at Ernst & Young was much higher than it was among male peers. Company leaders knew something was seriously wrong; for many years, its entering classes of young auditors had been made up of nearly equal numbers of men and women—yet it was still the case that only a tiny percentage of its partnership was female. This was a major problem. Turnover in client-serving roles meant lost continuity on work assignments. And on top of losing talent that the firm had invested in training, E&Y was incurring costs averaging 150% of a departing employee’s annual salary just to fill the vacant position.

E&Y set a new course, marked by several important features outlined here. Since E&Y began this work, the percentage of women partners has more than tripled to 12% and the downward trend in retention of women at every level has been reversed. E&Y now has four women on the management board, and many more women are in key operating and client serving roles. Among its women partners, 10% work on a flexible schedule and more than 20 have been promoted to partner while working a reduced schedule. In 2004, 22% of new partners were women.

The Johnson & Johnson family of companies has seen the increased loyalty and productivity that can result from such arrangements. We recently held a focus group with 12 part-time managers at these companies and found a level of commitment that was palpable. The women had logged histories with J&J that ranged from eight to 19 years and spoke of the corporation with great affection. All had a focus on productivity and pushed themselves to deliver at the same level they had achieved before switching to part-time. One woman, a 15-year J&J veteran, was particularly eloquent in her gratitude to the corporation. She had had her first child at age 40 and, like so many new mothers, felt torn apart by the conflicting demands of home and work. In her words, “I thought I only had two choices—work full-time or leave—and I didn’t want either. J&J’s reduced-hour option has been a savior.” All the women in the room were clear on one point: They would have quit had part-time jobs not been available.

At Pfizer, the deal is sweetened further for part-time workers; field sales professionals in the company’s Vista Rx division are given access to the same benefits and training as full-time employees but work 60% of the hours (with a corresponding difference in base pay). Many opt for a three-day workweek; others structure their working day around children’s school hours. These 230
Focus
Regional pilot projects targeted five areas for improvement: Palo Alto and San Jose focused on life balance, Minneapolis on mentoring, New Jersey on flexible work arrangements, Boston on women networking in the business community, and Washington, DC, on women networking inside E&Y. Successful solutions were rolled out across the firm.

Committed Leadership
Philip Laskawy, E&Y’s chairman from 1994 to 2001, made it a priority to retain and promote women. He convened a diversity task force of partners to focus on the problem and created an Office of Retention. Laskawy’s successor, Jim Turley, deepened the focus on diversity by rolling out a People First strategy.

Policies
Ernst & Young equipped all its people for telework and made it policy that flexible work schedules would not affect anyone’s opportunity for advancement. The new premise was that all jobs could be done flexibly.

New Roles
E&Y’s Center for the New Workforce dedicates its staff of seven to developing and advancing women into leadership roles. A strategy team of three professionals addresses the firm’s flexibility goals for both men and women.

...employees—93% of whom are working mothers—remain eligible for promotion and may return to full-time status at their discretion.

Provide flexibility in the day.
Some women don’t require reduced work hours; they merely need flexibility in when, where, and how they do their work. Even parents who employ nannies or have children in day care, for example, must make time for teacher conferences, medical appointments, volunteering, child-related errands—not to mention the days the nanny calls in sick or the day care center is closed. Someone caring for an invalid or a fragile elderly person may likewise have many hours of potentially productive time in a day yet not be able to stray far from home.

For these and other reasons, almost two-thirds (64%) of the women we surveyed cite flexible work arrangements as being either extremely or very important to them. In fact, by a considerable margin, highly qualified women find flexibility more important than compensation; only 42% say that “earning a lot of money” is an important motivator. In our focus groups, we heard women use terms like “nirvana” and “the golden ring” to describe employment arrangements that allow them to flex their workdays, their workweeks, and their careers. A senior
Also, certain partners are designated as “career watchers” and track individual women’s progress, in particular, monitoring the caliber of the projects and clients to which they are assigned.

Learning Resources
All employees can use E&Y’s Achieving Flexibility Web site to learn about flexible work arrangements. They can track how certain FWAs were negotiated and structured and can use the contact information provided in the database to ask those employees questions about how it is (or isn’t) working.

Peer Networking
Professional Women’s Networks are active in 41 offices, and they focus on building the skills, confidence, leadership opportunities, and networks necessary for women to be successful. A three-day Women’s Leadership Conference is held every 18 months. The most recent was attended by more than 425 women partners, principals, and directors.

Accountability
The annual People Point survey allows employees to rate managers on how well they foster an inclusive, flexible work environment. Managers are also evaluated on metrics like number of women serving key accounts, in key leadership jobs, and in the partner pipeline.

Create reduced-hour jobs.

eyel employee who recently joined Lehman Brothers’ equity division is an example. She had been working at another financial services company when a Lehman recruiter called. “The person who had been in the job previously was working one day a week from home, so they offered that opportunity to me. Though I was content in my current job,” she told us, “that intriguing possibility made me reevaluate. In the end, I took the job at Lehman. Working from home one day a week was a huge lure.”

Provide flexibility in the arc of a career.
Booz Allen Hamilton, the management and technology consulting firm, recognized that it isn’t simply a workday, or a workweek, that needs to be made more flexible. It’s the entire arc of a career.

Management consulting as a profession loses twice as many women as men in the middle reaches of career ladders. A big part of the problem is that, perhaps more than in any other business sector, it is driven by an up-or-out ethos; client-serving professionals must progress steadily or fall by the wayside. The strongest contenders make partner through a relentless winnowing process. While many firms take care to make the separations as painless as possible (the chaff, after all, tends to land in organizations that might employ their services), there are clear limits to their
The most obvious way to stay connected is to offer women with demanding lives a way to keep a hand in their chosen field, short of full-time involvement. Our survey found that, in business sectors, fully 89% of women believe that access to reduced-hour jobs is important. Across all sectors, the figure is 82%.

patience. Typically, if a valued professional is unable to keep pace with the road warrior lifestyle, the best she can hope for is reassignment to a staff job.

Over the past year, Booz Allen has initiated a “ramp up, ramp down” flexible program to allow professionals to balance work and life and still do the client work they find most interesting. The key to the program is Booz Allen’s effort to “unbundle” standard consulting projects and identify chunks that can be done by telecommuting or shorts stints in the office. Participating professionals are either regular employees or alumni that sign standard employment contracts and are activated as needed. For the professional, it’s a way to take on a manageable amount of the kind of work they do best. For Booz Allen, it’s a way to maintain ties to consultants who have already proved their merit in a challenging profession. Since many of these talented women will eventually return to full-time consulting employment, Booz Allen wants to be their employer of choice—and to keep their skills sharp in the meantime.

When asked how the program is being received, DeAnne Aguirre, a vice president at Booz Allen who was involved in its design (and who is also a member of our task force), had an instant reaction: “I think it’s instilled new hope—a lot of young women I work with no longer feel that they will have to sacrifice some precious part of themselves.” Aguirre explains that trade-offs are inevitable, but at Booz Allen an off-ramping decision doesn’t have to be a devastating one anymore. “Flex careers are bound to be slower than conventional ones, but in ten years’ time you probably won’t remember the precise year you made partner. The point here is to remain on track and vitally connected.”

**Remove the stigma.**

Making flexible arrangements succeed over the long term is hard work. It means crafting an imaginative set of policies, but even more important, it means eliminating the stigma that is often attached to such nonstandard work arrangements. As many as 35% of the women we surveyed report various aspects of their organizations’ cultures that effectively penalize
people who take advantage of work-life policies. Telecommuting appears to be most stigmatized, with 39% of women reporting some form of tacit resistance to it, followed by job sharing and part-time work. Of flexible work arrangements in general, 21% report that “there is an unspoken rule at my workplace that people who use these options will not be promoted.” Parental leave policies get more respect—though even here, 19% of women report cultural or attitudinal barriers to taking the time off that they are entitled to. In environments where flexible work arrangements are tacitly deemed illegitimate, many women would rather resign than request them.

Interestingly, when it comes to taking advantage of work-life policies, men encounter even more stigma. For example, 48% of the men we surveyed perceived job sharing as illegitimate in their workplace culture—even when it’s part of official policy.

Transformation of the corporate culture seems to be a prerequisite for success on the work-life front. Those people at or near the top of an organization need to have that “eureka” moment, when they not only understand the business imperative for imaginative work-life policies but are prepared to embrace them, and in so doing remove the stigma. In the words of Dessa Bokides, treasurer at Pitney Bowes, “Only a leader’s devotion to these issues will give others permission to transform conventional career paths.”

**Stop burning bridges.**
One particularly dramatic finding of our survey deserves special mention: Only 5% of highly qualified women looking for on-ramps are interested in rejoining the companies they left. In business sectors, that percentage is zero. If ever there was a danger signal for corporations, this is it.

**Only 5% of highly qualified women looking for on-ramps are interested in rejoining the companies they left. In business sectors, that percentage is zero.**
The finding implies that the vast majority of off-ramped women, at the moment they left their careers, felt ill-used—or at least underutilized and unappreciated—by their employers. We can only speculate as to why this was. In some cases, perhaps, the situation ended badly; a woman, attempting impossible juggling feats, started dropping balls. Or an employer, embittered by the loss of too many “star” women, lets this one go much too easily.

It’s understandable for managers to assume that women leave mainly for “pull” reasons and that there’s no point in trying to keep them. Indeed, when family overload and the traditional division of labor place unmanageable demands on a working woman, it does appear that quitting has much more to do with what’s going on at home than what’s going on at work. However, it is important to realize that even when pull factors seem to be dominant, push factors are also in play. Most off-ramping decisions are conditioned by policies, practices, and attitudes at work. Recognition, flexibility, and the opportunity to telecommute—especially when endorsed by the corporate culture—can make a huge difference.

The point is, managers will not stay in a departing employee’s good graces unless they take the time to explore the reasons for off-ramping and are able and willing to offer options short of total severance. If a company wants future access to this talent, it will need to go beyond the perfunctory exit interview and, at the very least, impart the message that the door is open. Better still, it will maintain a connection with off-ramped employees through a formal alumni program.

**Provide outlets for altruism.**

Imaginative attachment policies notwithstanding, some women have no interest in returning to their old organizations because their desire to work in their former field has waned. Recall the focus group participants who spoke of a deepened desire to give back to the community after taking a hiatus from work. Remember, too, that women in business sectors are pushed off track more by dissatisfaction with work than pulled by external demands. Our data suggest that fully 52% of women with MBAs in the business sector cite the fact that they do not find their careers “either satisfying or enjoyable” as an important reason for why they left work. Perhaps not surprisingly, then, a majority (54%) of the
women looking for on-ramps want to change their profession or field. And in most of those cases, it’s a woman who formerly worked in the corporate sphere hoping to move into the not-for-profit sector.

Employers would be well advised to recognize and harness the altruism of these women. Supporting female professionals in their advocacy and public service efforts serves to win their energy and loyalty. Companies may also be able to redirect women’s desire to give back to the community by asking them to become involved in mentoring and formal women’s networks within the company.

**Nurture ambition.**
Finally, if women are to sustain their passion for work and their competitive edge—whether or not they take formal time out—they must keep ambition alive. Our findings point to an urgent need to implement mentoring and networking programs that help women expand and sustain their professional aspirations. Companies like American Express, GE, Goldman Sachs, Johnson & Johnson, Lehman Brothers, and Time Warner are developing “old girls networks” that build skills, contacts, and confidence. They link women to inside power brokers and to outside business players and effectively inculcate those precious rainmaking skills.

Networks (with fund-raising and friend-raising functions) can enhance client connections. But they also play another, critical role. They provide the infrastructure within which women can earn recognition, as well as a safe platform from which to blow one’s own horn without being perceived as too pushy. In the words of Patricia Fili-Krushel, executive vice president of Time Warner, “Company-sponsored women’s networks encourage women to cultivate both sides of the power equation. Women hone their own leadership abilities but also learn to use power on behalf of others. Both skill sets help us increase our pipeline of talented women.”

**Adopt an On-Ramp**
As we write this, market and economic factors, both cyclical and structural, are aligned in ways guaranteed to make talent constraints and skill shortages huge issues again. Unemployment is down and labor markets are beginning to tighten, just as the baby-bust
generation is about to hit “prime time” and the number of workers between the ages of 35 to 45 is shrinking. Immigration levels are stable, so there’s little chance of relief there. Likewise, productivity improvements are flattening. The phenomenon that bailed us out of our last big labor crunch—the entry for the first time of millions of women into the labor force—is not available to us again. Add it all up, and CEOs are back to wondering how they will find enough high-caliber talent to drive growth.

There is a winning strategy. It revolves around the retention and reattachment of highly qualified women. America these days has a large and impressive pool of female talent. Fifty-eight percent of college graduates are now women, and nearly half of all professional and graduate degrees are earned by women. Even more important, the incremental additions to the talent pool will be disproportionately female, according to figures released by the U.S. Department of Education. The number of women with graduate and professional degrees is projected to grow by 16% over the next decade, while the number of men with these degrees is projected to grow by a mere 1.3%. Companies are beginning to pay attention to these figures. As Melinda Wolfe, head of global leadership and diversity at Goldman Sachs, recently pointed out, “A large part of the potential talent pool consists of females and historically underrepresented groups. With the professional labor market tightening, it is in our direct interest to give serious attention to these matters of retention and reattachment.”

In short, the talent is there; the challenge is to create the circumstances that allow businesses to take advantage of it over the long run. To tap this all-important resource, companies must understand the complexities of women’s nonlinear careers and be prepared to support rather than punish those who take alternate routes.

The complete statistical findings from this research project, and additional commentary and company examples, are available in an HBR research report entitled “The Hidden Brain Drain: Off-Ramps and On-Ramps in Women’s Careers” (see www.womenscareersreport.hbr.org).

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Sylvia Ann Hewlett is an economist and the CEO of Hewlett Consulting Partners. She is also the founder and Chair Emeritus of the Center for Talent Innovation. She is the author of fourteen critically acclaimed books, including *Off-Ramps and On-Ramps; Forget a Mentor, Find a Sponsor;* and *Executive Presence.* Her latest book is *The Sponsor Effect.*

Carolyn Buck Luce is executive in residence at Center for Talent Innovation and senior managing director at Hewlett Consulting Partners. She is an adjunct professor at Columbia’s Graduate School of International and Public Affairs and was previously the Global Pharmaceutical Sector Leader at Ernst & Young LLP.

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The Maternal Dilemma

Noya Rimalt

University of Haifa

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INTRODUCTION

The Family and Medical Leave Act (FMLA) aims to protect the right to be free from gender-based discrimination in the workplace . . . .

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. "By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that all women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."1

In recent decades many Western countries promoted significant reforms in parental policies, largely characterized by a shift from traditional mother-oriented protections to gender-neutral supports.2 As part of this trend the U.S. Congress enacted the Family and Medical Leave Act (FMLA) in 1993.3 The FMLA provides working parents irrespective of gender up to twelve weeks of unpaid leave per year to care for a newborn baby or a sick child. Its motivation was gender-equity concerns, on the assumption that parental policies affording men the same parental benefits as those traditionally reserved for women could effectively encourage them to assume more caretaking responsibilities and relieve the burdens and costs of motherhood. Gender-neutral leave policies were thus perceived essential for undermining the gendered division of parental work at home by encouraging men to step in; this would combat the gender stereotype that women are mothers first and workers second, and it would remove a major barrier to gender equality in the workplace. Chief Justice Rehnquist highlighted the significance of these goals in Nevada v. Hibbs when affirming the constitutionality of the FMLA on equal protection grounds.

This Article questions the sufficiency of contemporary parental policies in undermining the gendered division of carework. It reveals that while gender-neutral parental reforms are firmly in place in the statute books, in reality, parenting and

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2 See infra subpart I.B.
caretaking at home are still predominantly maternal. Despite the optimistic expectations that accompanied the enactment of gender-neutral leave legislation such as the FMLA, and the provision of equal care opportunities for men, a marked gap separates the law’s target of equal parenting from the persistence of a maternal reality in most families. Moreover, because women remain responsible for family caregiving much more than men, the same old problems persist. The stereotype that women are less competent workers continues to thrive, and gender bias and discrimination still shape women’s experiences in the workplace. Despite the formal legal insistence on gender neutrality and similar treatment in the allocation of leave benefits, women are still singled out as “different” and the goal of reducing employers’ incentives to engage in discrimination against them is far from being accomplished. This discriminatory reality is often masked by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual products of contemporary parental policies. Gendered patterns of care and work are thus legitimized as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice largely shape these preferences.

The Article suggests naming this problem “the maternal dilemma” and calls for reevaluation of current policy solutions designed to address it. It adds a comparative analysis, with a specific focus on the telling example of Israel, to illustrate that the maternal dilemma is not a unique American problem, with its very “thin” model of parental supports, restricted to narrow and primarily negative protections. The maternal dilemma prevails also under more progressive regimes of parental policies that provide additional incentives for men to assume greater caretaking responsibilities at home. This insight is particularly intriguing as scholars often criticize the narrow American scheme of parental benefits for its inability to encourage more men to share caretaking responsibilities. Advocates of gender equality have thus argued for a more generous regime of parental benefits, such as paid leave, as a means to undermine the gendered division of domestic care-work. But the comparative analysis rebuts these arguments and casts doubt on the sufficiency of these moves in addressing maternal patterns of care and promoting significant changes in the family.

Building on comparative lessons as well as on the scope and significance of the maternal dilemma in the American con-

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4 See infra notes 128–29, 260–62 and accompanying text.
text, the Article argues that in their efforts to recruit men to the task of caretaking at home, feminists, legislators, and policy makers have neglected an additional and equally important set of issues relating to the structures and forces that shape women's decision to remain the primary caretakers at home. Restoring the focus to women and addressing their specific needs and concerns are thus crucial for moving forward. Naming this problem the maternal dilemma serves as a reminder of where the core of the problem is; it also signals that the path to gender equality might require more than gender-neutrality and similar treatment.

The Article proceeds in five parts. Part I contextualizes the American move away from traditional maternal regimes to gender-neutral parental entitlements in recent decades, by juxtaposing these developments in the United States to similar changes in Israel. This Part discusses and explains the different social and legal factors that have contributed to the evolution of the very scanty American regime of parental supports that is restricted to narrow and primarily negative protections, in contrast to its much more progressive Israeli counterpart. As opposed to the United States, which is the only industrialized country that does not provide its working parents federally paid parental leave, Israel has embraced a relatively comprehensive and progressive legal scheme of parental entitlements in the last three decades. The Israeli scheme seems to address many of the deficiencies of contemporary American family policies and therefore represents what many American advocates of gender equality aspire to: a comprehensive gender-neutral system of family supports that guarantee paid parental leave, and also allocate other gender-neutral entitlements such as the right of working parents to a shorter workday or to a paid leave to care for a sick child. Yet while existing parental supports for working parents in the United States and Israel differ significantly in scope, their legislative history reveals a similar focus on men's parental choices and a commitment to affect these choices by allocating gender-neutral parental protections and benefits. More precisely, policy makers and legislators in both countries have chiefly explored legal measures that could target and affect men's parental choices; the underlying assump-

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6 See infra note 32.
tion is that change can be accomplished once men start utilizing their parental benefits.

Part II analyzes comparative data of the scope and significance of contemporary maternal patterns of care in Israel and the United States. It highlights parallel patterns in the two countries and reveals that a significantly more generous system of parental supports, like that embraced by the Israeli legislature, has by no means undermined gendered patterns of care at home. In fact, seen against the legal benefits and protections that fathers officially enjoy in Israel, the maternal dilemma is far more pronounced.

Part III exemplifies how the existing gendered reality in which American women continue to be the primary caretakers at home is often disguised by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual products of contemporary parental policies. These narratives are shown to date back to the legislative deliberations over the FMLA. Its enactment was accompanied by optimistic predictions regarding its likely positive role in encouraging rising numbers of men to gradually assume more caretaking responsibilities at home. Over the years, and despite past and present data that could cast doubt on these expectations, the image of the FMLA as an important agent of change in the family has been promoted by legislators, commentators, and the media. These narratives often blur the line between egalitarian parenting as an ideal and its actual realization in real life. They also mask the deeper gendered structures and forces that still perpetuate a reality of gender inequality and deflect public attention from the larger legal changes that must be made.

Part IV explores the current implications of the maternal dilemma through the lens of a recent employment discrimination case: EEOC v. Bloomberg L.P. This Part shows that despite the existence of gender-neutral leave policies at Bloomberg, gendered patterns of care and work among the company's employees persist. It also exemplifies how this gendered reality sustains the same old stereotypes about the unique role of motherhood in women's lives, ultimately rationalizing gender-discriminatory employment decisions.

Part V analyzes Nevada Department of Human Resources v. Hibbs against two other cases: California Federal Savings and Loan Ass'n v. Guerra and a recent Israeli Labor Court decision

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State of Israel v. Dan Bahat. In reference to this analysis this Part suggests restoring arguments of gender difference. It highlights the intriguing relationship between the 1987 Cal Fed v. Guerra and the recent case of Dan Bahat in challenging the conventional wisdom that gender neutrality and similar treatment of men and women should be the sole legal means for achieving gender equality. This Part explains the particular significance of the Israeli Bahat case in challenging global trends in the context of parental policies and argues that without naming it specifically, Bahat puts the maternal dilemma on the table for the first time, and develops a more comprehensive framework for rethinking the scope and substance of legal measures in the family and work context. This Part draws on the central holding of Bahat to explore additional directions to address the dilemma. In deliberating these issues the Article suggests acknowledging that gendered patterns of care-work at home are not simply the product of women's subordination. They also reflect the complex relationship between women's disempowering experience in the labor market and the historical and contemporary significance of motherhood in their lives. Women, and not only men, should thus be offered incentives to change and exchange their roles in the household.

I
FROM MOTHERHOOD TO PARENTHOOD: A COMPARATIVE PERSPECTIVE

A. Maternal Domains

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth, and the care and feeding of the child in the early months of its life.

Until the mid-1970s all Western countries confined their parental policies to mothers. While these maternal legal regimes varied from one country to another, they were similarly

10 File No. 361/08 Nat'l Labor Court, (Apr. 18, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
fed by stereotypical assumptions about the appropriate maternal role of women in society, stemming from the physical fact of pregnancy and childbearing. These assumptions reproduced and thereby legitimated a traditional vision that all women need to be mothers and that all children need their mothers. Accordingly, childcare was perceived as the primary responsibility of women, and if paid employment was taken up, it must take second place to the woman’s responsibilities within the home. This vision that is usually labeled the “ideology of separate spheres” was reflected in court decisions and legislative debates at the time, constructing a normative model of women and gender differences resting on the perceived natural, universal, and unchanging nature of the maternal role. As Judge Haynsworth, quoted above, explained in *Cohen v. Chesterfield County School Board*: “How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course.” Based on arguments of gender difference, the court thus upheld the constitutionality of a regulation that required pregnant teachers to go on unpaid maternity leave at the end of their fifth month and allowed reemployment the next school year upon submission of a medical certificate from the teacher’s physician. The court further clarified: “No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood.”

Along the same ideological lines, the Israeli legislature endorsed a strict prohibition against night work for women. Rationalizing the significance of such a law, one member of the Israeli parliament (Knesset) of the ruling labor party explained:

The male worker who comes home after a night shift can rest during the day, sleep and prepare for his next night shift the following day. The woman who comes home after a night

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15 *Cohen*, 474 F.2d at 398.

16 See id. at 399.

17 Id. at 397.

shift has to take care of the children, clean the house, cook and then go back to work.\textsuperscript{19}

These manifestations of an entrenched ideology of motherhood provided the normative frameworks wherein maternal regimes were first established and later legitimized in both countries. Yet, due to markedly distinct economic, social, and cultural factors, these regimes evolved differently in Israel and the United States and therefore varied in scope and content. In Israel, established in 1948, demographic concerns over the small size of the Jewish population, coupled with a state interest in women's employment in the early days of statehood, led to the enactment of a set of laws designed at once to enhance women's productive and reproductive roles.\textsuperscript{20} Besides being seen as contributing to meeting the dire need for workers in the state-building project in the 1950s, Israeli women were perceived by the founding generation first and foremost as wives and mothers whose primary task was to bear and rear children.\textsuperscript{21} These perceptions were nurtured primarily by the existing national ethos inherent in the founding of the State of Israel: the rejuvenation of the Jewish people in their homeland.\textsuperscript{22} The perception of women as child bearers and mothers was designated a central role in the realization of that vision. A strong legal infrastructure was thus created to ensure that women would be able to combine paid work and reproduction.\textsuperscript{23} Moreover, in its early years, Israel was striving to establish itself as a welfare state.\textsuperscript{24} Legislation ranging from paid sick leave to maximum hours was enacted and provided a comprehensive network of workers' protections that further assisted working women in their dual task.\textsuperscript{25} This pro-welfare

\textsuperscript{19} DK (1963) 2256 (Isr.) (statement of MK Victor Shem Tov). This comment was made in response to a rare legislative initiative that proposed to alter the absolute prohibition on night work for women and to create some exceptions to this rule in 1963.


\textsuperscript{22} Rimalt, supra note 20, at 340.


\textsuperscript{24} See generally Ruth Halperin-Kaddari, \texti{Women in Israel: A State of Their Own} 98–106 (2004) (providing a detailed discussion of how Israel's welfare state relates to women in the family and in the workforce).

\textsuperscript{25} See, \textit{e.g.}, Sick Pay Law, 5736-1976, SH No. 814 p. 206 (Isr.) (instituting sick leave under Israeli law).
orientation of the young state also facilitated the development of gender-specific benefits and protections for working mothers.

In 1954, the Knesset enacted the Employment of Women Law. It accorded only women many benefits and protections to accommodate maternity with workplace requirements. A pregnant worker was given the right to a twelve-week paid maternity leave. The employer was prohibited from employing her during that period, or from dismissing her, and she was given the right to payment in lieu of salary from the National Insurance Institute. After her maternity leave, the mother was given the right to take up to a year's leave without pay, or to resign with entitlement to severance pay. Special accommodations for working mothers were also added to various collective agreements that provided that women could use part of their own sick leave to care for children and work-reduced hours if they had two children or more under a certain age. In formatting these benefits, Israel became one of the leading countries in the Western world with regard to the scope of its parental entitlements for working mothers. At the same time,

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26 Employment of Women Law, 5714-1954, SH No. 160 p. 154 (Isr.).
27 Id. § 6.
28 Id. §§ 6, 8, 9.
29 Id. § 7.
30 Severance Pay Law, 5723-1963, SH No. 404 p. 136 § 7 (Isr.).
31 See, e.g., Lilach Lurie, Do Unions Promote Gender Equality?, 22 DUKE J. GENDER L. & POL'Y 89, 102 (2014) (discussing the nature and scope of parental rights in various collective agreements and explaining that each agreement has a different age requirement for children for the purpose of exercising these rights. For instance, as part of the doctor's collective agreement parents can work reduced hours if they have two children younger than twelve.); see also Ifat Matzner-Heruti, Dare to Care: The Complicated Case of Working Fathers Alleging Sex and Parental Discrimination, 23 J.L. & POL'Y 1, 26–28 (2014) (discussing fathers' objections to these women-only benefits).
32 In formatting its maternal policies Israel followed the Swedish model that started to develop at the beginning of the twentieth century. Sweden introduced a mandatory unpaid leave of four weeks after giving birth for women engaged in industrial occupations as early as 1900. In 1912, this maternity leave was extended to six weeks. Up until the 1930s these policies were justified primarily as an attempt to lower infant mortality by fostering breast feeding. Elizabeth Jelin, Gender and the Family in Public Policy: A Comparative View of Argentina and Sweden, in GLOBAL PERSPECTIVES ON GENDER EQUALITY: REVERSING THE GAZE 40, 50–51 (Naila Kabeer, Agneta Stark & Edda Magnus eds., 2008). In 1931, the first Swedish maternal insurance was introduced providing working mothers of newborn children with compensation for one month's loss of income. In 1938, employers were forbidden from dismissing female workers because of their pregnancy and in 1955, the maternity leave provision was extended to six months' leave: half paid and half unpaid. In the following years a growing public focus on the possibilities for caring for children at home led to several extensions of the parental leave period. In 1963, the six months maternity leave became fully paid.
these special accommodations were accompanied by some specific restrictions on women's employment such as preventing women from working at night and denying pregnant women the option of working overtime. The outcome was the establishment of a legal infrastructure, which on the one hand facilitated the integration of motherhood and paid work, and on the other hand perpetuated the stereotyping of women as primary homemakers and secondary employees.

In the United States, as opposed to Israel, maternity leave and job protection for working mothers was not a pertinent legislative concern throughout most of the twentieth century. Historically, public policies were structured around the assumption that men were regularly employed breadwinners on whose earnings women depended. Relative to this assumption was the normative idea that women should stay at home and shoulder all domestic responsibilities including childcare. In addition, employer opposition to labor regulation and to social insurance plans has a long history in the United States. The result is a nation with extremely underdeveloped social provisions. These factors can explain the almost absolute lack of positive benefits or protections for working mothers on the state or federal level in the relevant era. While as early as the 1950s, Israeli women were provided financial and legal means to pursue the double task of motherhood and paid employment, American mothers were largely discouraged from labor market participation. Moreover, when some work-related

The leave period was extended to seven months in 1975, nine months in 1978, twelve months in 1980, and fifteen months in 1989. Anders Chronholm, Sweden: Individualization or Free Choice in Parental Leave?, in THE POLITICS OF PARENTAL LEAVE POLICIES 227, 228–33 (Sheila Kamerman & Peter Moss eds., 2009). Later on, further governmental concerns such as pro-natalist considerations, a desire to protect and promote the family, and a decision to improve the participation of women in education and the labor market shaped the development of additional maternal legislation. Haas, supra note 12, at 377–85.

33 See Employment of Women Law, § 10(a); Eisenstadt, supra note 18, at 368.

34 See generally ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 56–63 (2001) (discussing the influence that this assumption had on depression-era employment policies).

35 Though the breadwinner/homemaker model never reflected a universal reality in America, it described most middle-class and some working-class families in the 1950s and 1960s. See Jane Lewis, The Decline of the Male Breadwinner Model: Implications for Work and Care, 8 SOC. POL. 152, 153 (2001).


37 Stetson, supra note 13, at 408–09.
benefits initially developed in the United States in the post-war era, it was in response to men's needs and concerns as workers. In the 1940s, several American states started to provide wage replacement for sickness or disability in the form of insurance. When these programs were established there were no parallel benefits for disabilities associated with pregnancy or childbirth. As a result, the first set of maternity leave-related policies to emerge in the late 1960s, as more women joined the workforce, were created as part of temporary disability insurance laws that protected employees from income loss in the event of a temporary medical disability. New mothers were granted leave corresponding to the benefits that other employees received for temporary illness or disability. Yet these programs were not common. In 1969, only five states provided such maternity benefits to working mothers, while many others excluded pregnancy and childbirth-related disabilities from their insurance programs. Another set of policies prevalent in the United States in the 1960s and early 1970s burdened working women with pregnancy-related restrictions. One clear example is school boards' policies that forced pregnant teachers to take unpaid maternity leave several months before the expected day of childbirth and prevented them from returning to work immediately after.

38 Id. at 410-11.

39 Dorothy McBride Stetson notes in this context that Rhode Island was the first state to provide temporary disability insurance (TDI) for workers. Rhode Island's law, passed in 1942, covered pregnancy as a disability. However, as many women claimed pregnancy related benefits, costs grew and the legislature decided to exclude pregnancy from coverage. Based on this experience, other states excluded pregnancy from the outset. Id. at 411. These states included California, which enacted its TDI law in 1971, New Jersey, in 1962, New York, in 1965, and Washington, in 1949. Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1985) [hereinafter W. Williams].


42 Supra note 39 and accompanying text; see also Geduldig v. Aiello, 417 U.S. 484, 486 (1974) (discussing California's disability insurance system that excluded pregnancy related disabilities from coverage).

43 Susan Deller Ross, Legal Aspects of Parental Leave: At the Crossroads, in PARENTAL LEAVE AND CHILD CARE, supra note 12, at 93, 94. School boards' opposition to the presence of visibly pregnant women in classrooms rested on health-related as well as moral considerations. They feared a potential injury to mother or child and also that a pregnant teacher's mind would not be on her work or that she could not meet the physical demands of teaching. In addition, they feared that the sight of pregnant women would unfavorably influence students. These rules were eventually struck down by the Supreme Court in Cleveland Board of
In sum, a relatively “thin” and restrictive set of social policies in the US created a maternal regime which denied pregnant women job security and health insurance on the one hand and positively undermined their ability to work before or after childbirth on the other. This regime can explain the relatively low American rate of labor participation of mothers with very young children in the 1960s and early 1970s.44

B. From Motherhood to Parenthood

In the 1970s growing concern with issues related to equal opportunity for women stimulated a reevaluation of the policy of protective legislation and special benefits for working mothers in various Western countries. Advocates of gender equality argued that mother-oriented measures were a major hindrance to women’s integration and advancement in the workforce, as they encouraged maternal patterns of care at home and perpetuated gender stereotypes.45 In 1974, Sweden was the first Western country to start a process of transition toward more gender-neutral parental leave policies replacing the maternity leave policy with a parental insurance system.46 Other Nordic countries soon followed with comparable reforms.47 These typically focused on parental leave, and allowed

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45 See, e.g., W. Williams, supra note 39, at 331 (explaining that “[t]he goal of the feminist legal movement that began in the early seventies...was never the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”).

46 Haas, supra note 12, at 383; Anders Chronholm, supra note 32, at 227.

47 See, e.g., Thorgerdur Einarsdottir & Gyda Margarét Pétursdóttir, Iceland: from Reluctance to Fast-Track Engineering, in THE POLITICS OF PARENTAL LEAVE POLICIES, supra note 32, at 157, 165 (detailing Iceland’s transition towards more gender-neutral parental leave policies).
men to take part of the leave after the birth of a child.\textsuperscript{48} The assumption was that a legal structure that gave either parent her or his portion of parental leave would eventually lead to more equal sharing of childcare responsibilities at home, hence to greater gender equality in the workplace.

Inspired by these reforms and motivated by similar gender equality concerns, advocates for gender equality in Israel started to push for a dual process of replacing maternal rights with parental rights and abolishing specific legal restrictions on women's employment.\textsuperscript{49} In 1986, the absolute prohibition on night work for women was abolished, and in 1988, the Knesset passed legislation which started the process of converting various maternal rights into parental rights.\textsuperscript{50} Subsequent legal reforms took place in the following decade.\textsuperscript{51} As part of this process old legislation was amended and new legislation was formulated. The right to sick leave to care for a sick child, to resign with severance pay in order to care for a baby, and to unpaid leave after the termination of the three-month maternity leave were all converted into parental rights.\textsuperscript{52} The formula was that rights not exploited by the mother would devolve to the father. This reform gave parents for the first time the option to choose who would take advantage of these rights. In addition, new legislation provided all employees irrespective of gender the right to sick leave to care for a seriously ill parent.\textsuperscript{53} In 1997, the maternity leave provision was also amended to allow the couple to decide who would take the second half of the paid maternity leave; two years later this move was supplemented by the extension of maternity leave from 12 to 14 weeks. Recently, the period of paid leave was extended to 15 weeks and the law now allows new fathers to


\textsuperscript{49} \textsc{Halperin-Kaddari}, supra note 24, at 36; Dafna N. Izraeli, \textit{Women and Work: From Collective to Career}, in \textsc{Calling the Equality Bluff: Women in Israel} 165, 175 (Barbara Swirsky & Marilyn P. Safrir eds., 1991).

\textsuperscript{50} \textsc{Halperin-Kaddari}, supra note 24, at 36.

\textsuperscript{51} \textit{Id.} at 36–37, 120–21.

\textsuperscript{52} The Equal Employment Opportunity Law, 5748-1988, SH No. 1240 p. 38 §§ 4, 22, 23 (Isr.); Sick Pay Law (Absence Due to a Sick Child), 5753-1993, SH No. 1427 p. 134 (Isr.).

\textsuperscript{53} Sick Pay Law (Absence Due to a Sick Parent), 5754-1993, SH No. 1442 p. 33 (Isr.).
take one week of the leave together with the mother.\textsuperscript{54} A similar reform in the late 1990s awarded the father or the mother paid parental leave in the case of adoption of a child.\textsuperscript{55} Furthermore, the Israeli legislature included a prohibition against discrimination based on workers' status as parents in the Equal Employment Opportunity Law.\textsuperscript{56}

The United States took a path significantly different from Israel's when reforming its maternal regimes. Rather than embracing the scheme of positive parental benefits and protections for both parents, such as paid parental leave, the United States adopted a narrow disability model as part of the effort to undermine the maternal stereotype of women and their traditional image as caregivers at home. First, in 1978, as part of the Pregnancy Discrimination Act (PDA),\textsuperscript{57} pregnant workers were guaranteed the same treatment as other disabled workers, and discrimination based on pregnancy, childbirth, or related medical conditions was defined as a form of sex discrimination. This move was supplemented in 1993 with the passage of the FMLA,\textsuperscript{58} which mandates up to twelve weeks of unpaid leave per year for childbearing or family care over a twelve-month period for eligible employees.\textsuperscript{59}

\textsuperscript{54} Today, the first 6 weeks of the paid leave are reserved to the women for the purpose of physical recovery from childbirth. The remaining 9 weeks can be taken by either parent. The period of paid leave can be supplemented by a period of 11 weeks of unpaid leave that either parent can take. Employment of Women Law, 5714-1954, SH No. 160 p. 154 § 6 (Isr.). To be eligible for paid leave fathers must take at least one week of leave. Like women they are paid based on their actual salary and are fully reimbursed for any loss of income during the leave. Social Security Law, 5755-1995, SH No. 1522 p. 210 § 49(c)(3), 50(a)(1) (Isr.). In addition, men can use up to seven days of their sick leave as an additional period of leave for purposes related with their spouse's pregnancy or childbirth. Sick Pay Law (Absence Due to a Pregnancy and Childbirth of a Spouse) 5760-2000, SH No. 1744 p. 222 § 1 (Isr.); see also MATERNITY LEAVE, ALL-RIGHTS http://www.kolzchut.org.il/en/Maternity_Leave [https://perma.cc/DD3S-QYBE].

\textsuperscript{55} Originally granted to only women, the relevant provision was amended in 1998 to replace the maternal oriented benefit with a gender-neutral arrangement that enabled the adoptive parents to decide how they divide the leave between the two of them. Employment of Women Law (Amendment No. 15), 5758-1998, SH No. 1650 p. 114 (Isr.).

\textsuperscript{56} The Equal Employment Opportunity Law, 5748-1988, SH No. 1240 p. 38 § 2 (Isr.)


\textsuperscript{59} Eligible employees are defined as those who worked at least one year for their current employer, and who worked for at least 1,250 hours during the previous twelve months, and who worked for a business employing 50 or more employees. The minimum hours provision effectively excludes from coverage part time workers. For critical analysis of the limited coverage of the FMLA, see
This "thin" federal model of gender-neutral parental benefits and protections stands in sharp contrast to its Israeli counterpart. As aforesaid, countries like Israel, which on account of a diverse set of concerns were trying to encourage childbirth and women's employment at the same time, had a head start in adopting positive maternal supports that enabled women to combine paid work with active motherhood. When these legal structures were replaced by a gender-neutral set of entitlements, the outcome was a legal regime that provided fairly generous benefits and protections to both working parents. But in the United States in the 1950s and 1960s, a common expectation of women, especially middle-class women, was that they would leave work on becoming pregnant. Maternal policies that evolved in the relevant period reflected this reality. These policies denied pregnant women financial benefits that were otherwise available to disabled workers or actively pushed them out of paid work. Against this narrow and restrictive maternal regime, advocates of gender equality were pushing for its reform in the early 1970s, and this led to the adoption of a gender-neutral parental regime that was significantly limited compared with its Israeli counterpart. Moreover, in the United States, advocates for gender equality were also demanding basic protections for pregnant women that were already well established in other countries, such as job security or wage replacement for temporary work absences due to pregnancy and childbirth. Strategic choices made in this context contributed to the formation of unique legal structures unparalleled in other countries. One important example is the comparison of pregnancy to disability and the formation of a legal framework that ties parental leave to sick leave and mandates similar benefits in both contexts.

In the early 1970s, several U.S. states provided a disability insurance system for private employees temporarily disabled


60 See Joan C. Williams et al., "Opt Out" or Pushed Out?: How the Press Covers Work/Family Conflict, THE CENTER FOR WORKLIFE LAW (2006) [hereinafter "Opt Out" or Pushed Out?], http://www.worklifelaw.org/pubs/OptOut-PushedOut.pdf [https://perma.cc/PQ3L-3Y9C] (describing the workforce of the 1950s as one "in which male breadwinners were married to housewives who took care of home and children").

61 See Julie C. Suk, Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict, 110 COLUM. L. REV 1, 10 (2010) (discussing the history of pregnancy and childbirth related rights in the United States and judicial and legislative efforts to expand these rights.).
due to illness or injury.62 These schemes were initially established with a primary focus on male employees' health needs, excluded disabilities attributed to pregnancies, and were basically the only insurance plans available to female employees at that time. Under these circumstances, a theory that pregnancy was the same as other temporary medical conditions that disabled employees was seen as an effective argument in establishing a legal claim of sex-based discrimination and in winning pregnant women a benefit already recognized for other workers.63 Initially the efforts to extend existing temporary disabilities insurance plans to cover work absences due to pregnancy focused on litigation.64 However, these efforts failed when the Court rejected discrimination claims in this context. In 1974, the Supreme Court concluded in Geduldig v. Aiello65 that discrimination against pregnancy and childbirth under a state insurance disability plan was not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.66 Two years later the Court applied this reasoning to the Civil Rights Act of 1964, ruling in Gilbert67 that the exclusion of pregnancy from a private employer's disability plan did not violate Title VII. As a result, reform efforts were channeled to the legislative arena.

In 1978, Congress overruled Gilbert by passing the Pregnancy Discrimination Act (PDA).68 The PDA amended Title VII to define sex-based discrimination as including discrimination "on the basis of pregnancy, childbirth, or related medical conditions."69 It also specifically required that "women affected by pregnancy, childbirth, or related medical conditions shall be

62 KLEIN, supra note 36, at 5.
63 The idea that under an equality model pregnancy should be treated neither worse nor better than other physical conditions that affect one's ability to work was initially formulated as a policy recommendation by President Johnson's Citizen's Advisory Council on the Status of Women in 1970. Two years later, the EEOC issued guidelines heavily influenced by this concept. See W. Williams, supra note 39, at 332-36.
64 For instance, in 1971, Women's Bureau Director Elizabeth Duncan Koontz argued: "It seems certain that the courts, after full consideration, will adopt the obvious conclusion that pregnancy is a temporary disability and that women are entitled to the same autonomy and economic benefits in dealing with it that employees have in dealing with other temporary disabilities." Elizabeth Duncan Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L.F. 480, 501 (1971); see also W. Williams, supra note 39, at 335.
66 Id. at 485.
69 Id.
treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."70 The concept that pregnancy was the same as any temporary disability thus became an official legal framework. Once embedded in legal thinking, it also influenced the subsequent development of parental leave legislation in the next decade and a half.

In 1993, eight years after it first considered a bill requiring employers to provide parental leave, Congress enacted the FMLA. At its core the FMLA requires employers to render employees a limited amount of unpaid leave when necessary to accommodate personal illness or family caregiving responsibilities.71 The leave afforded under the FMLA has three important characteristics: it is gender-neutral; it provides similar treatment to sick leave and to parental leave; and it is unpaid.

The decision to embrace a gender-neutral scheme was based on similar rationales that triggered the transition from maternity leave to gender-neutral parental leave in countries such as Israel. The legislative record reveals that Congress, just like the Knesset, was concerned that laws focused on motherhood would trigger discrimination against women in hiring and promotion based on gender-role expectations about work/family obligations.72 Congress also worried that non-

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70 Id.


72 See H.R. REP. No. 103-8, pt. 2, at 14 (1993) ("While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping . . . ."). When Congress eventually enacted the FMLA in 1993, its text made clear that the gender neutrality of the leave was a key element in the legislative effort to combat gender-based discrimination in the workplace. Specifically the Act determines that a key finding that triggered its enactment was Congress's acknowledgement that: "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." FMLA, 29 U.S.C. § 2601 (a)(5). It also adds that in response to this finding, one of the Act's goal is to minimize "the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." FMLA, 29 U.S.C. § 2601(b)(4); see also Matzner-Heruti, supra note 31, at 484 (quoting a Member of the Knesset as supporting the introduction of paternity leave laws in order to help women to "return to work" and "make progress at work"); Robert C. Post & Revah B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943, 2016 (2003) (pointing out that states which offered extended maternity leave but no paternity leave "offered a de facto
neutral laws would discourage men from sharing greater childcare responsibilities with their female partners.\footnote{See H.R. REP. No. 103-8, pt. 2, at 14 (1993) ("[A] policy that affords women employment leave to provide family care while denying such leave to men . . . impedes the ability of men to share greater responsibilities in providing immediate physical and emotional care for their families.").} Feminist groups and activists involved behind the scenes in promoting this bill shared these concerns and insisted on the equal treatment principle: that the right to leave be granted to fathers as well as mothers.\footnote{See RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 39 (Touchstone ed., 1996).} Gender neutrality and the similar treatment of men and women were thus central to Congress’s purpose of achieving gender equality. It left a deep imprint on the statute that was ultimately enacted in a manner that resembles the formation of comparable legislation in other countries.

At the same time, linking the treatment of parental leave to sick leave and settling for unpaid leave for all workers is a unique American development. The FMLA was inspired by the PDA legacy, namely that family leave and medical leave should be treated as one legal unit that cannot be disaggregated. In addition, many feminist activists and scholars around this time had become concerned about the wisdom of applying gender-specific measures to regulate parental leave entitlements. A case working its way through the federal court system in the early 1980s divided the feminist community.\footnote{See Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987); Ross, supra note 43, at 96.} At issue was whether the State of California could require employers to give only women four months leave for childbirth without violating the PDA.\footnote{See Guerra, 479 U.S. at 275.} Critics of the California statute argued that the PDA should be interpreted to require that employers treat pregnant women the same as comparably disabled workers, assuming that this equation was the best formula for protecting women from discrimination in the workplace.\footnote{See Brief for the National Organization for Women (NOW) et al. as Amici Curiae Supporting Neither Party at 12–13, Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987) (No. 85-494).} They feared that a gender-specific measure in the context of pregnancy and childbirth would perpetuate the stereotype of women as less dedicated workers. Although the Supreme Court eventually upheld
the gender-specific statute,\textsuperscript{78} the equal treatment position played a significant part in shaping the final scope of the FMLA. Feminist groups and activists involved in promoting this legislation insisted that in addition to both parents enjoying an equal right to parental leave, the law had to apply to medical situations.\textsuperscript{79} In their view the medical element was a crucial addition because it made the legislation truly gender-neutral and immune to gender stereotypes.\textsuperscript{80} This position played a prominent part in the genesis of the combined medical and parental gender-neutral provisions of the FMLA. Hence, the strategic linkage between pregnancy and disability that facilitated the enactment of the PDA in the 1970s later provided the normative framework for the issue of parental leave, leading to the creation of a simultaneous federal entitlement to (unpaid) parental and sick leave.

As a result of the pregnancy-disability correlation and the allocation of similar entitlements to the two types of leave, the estimated overall cost of the new legislation was high and the decision to restrict the proposed benefit to unpaid leave was reinforced.\textsuperscript{81} These monetary concerns also played a significant role in subsequent years in undermining efforts to reform the FMLA and to provide paid family and medical leave.\textsuperscript{82}

In addition, the FMLA was constructed in the setting of an employment culture in which models of parental leave that already existed were usually restricted to unpaid leave.\textsuperscript{83} Only two percent of American workers were entitled to paid leave in 1989 and this leave was typically restricted to a few days.\textsuperscript{84} By contrast, countries like Israel promoted the shift from strictly maternal regimes to gender-neutral parental policies at a time

\textsuperscript{78} See Guerra, 479 U.S. at 292.

\textsuperscript{79} See ELVING, supra note 74, at 39.

\textsuperscript{80} See id.

\textsuperscript{81} See MARY FRANCES BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER 162-64 (1993) (discussing cost concerns raised by small businesses resulting in restrictions on leave for medical care and birth and raising of the employer exemption from fifteen to fifty employees); ELVING, supra note 74, at 30 (documenting that proponents of the Family Employment Security Act, a precursor to the FMLA, decided early on not to push for a paid leave because it seemed to be a political impossibility).

\textsuperscript{82} See Suk, supra note 61, at 17-24 (documenting various legislative efforts to reform the FMLA and to add paid leave).

\textsuperscript{83} Cf. Arielle Horman Grill, The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?, 17 COMP. LAB. L.J. 373, 374–75 (1996) (discussing the scope and nature of maternity and paternity leave policies in the United States in the late 1980s and noting that most of these policies provided unpaid leave).

\textsuperscript{84} Id. at 375.
when paid maternity leave was an already established and deeply accepted idea. This significant difference made the establishment of paid parental leave in these countries a natural move, taken for granted by all sides of the political spectrum.

Nevertheless, when the FMLA was enacted, expectations for social change in the division of childcare at home as a direct result of legal reform were high. The vision of men assuming greater caretaking responsibilities at home was not perceived as utopian. Instead, it was assumed that the provision of a gender-neutral leave will encourage "fathers and mothers . . . to participate in early childrearing and the care of family members who have serious health conditions." The congressional record reveals that the discriminatory nature of existing maternal schemes and the lack of formal opportunities for men to enjoy paternity leave were identified as the main barrier stopping men from taking parental leave. When some opponents expressed concerns that the bill "may lead to discrimination against younger women of childbearing age" who are "most likely to take advantage of this mandate," proponents refuted these claims:

The act does not just apply to women, but to men and women, to fathers, as well as to mothers, to sons as well as to daughters. So to say that women will not be hired by business is a specious argument, unless you assume that men are not caring parents and men are not loving sons. I believe that they are.

The underlying assumption was clear: working fathers wished for parental leave to care for a newborn or a sick child but were not given a legal right to it, or were deterred from taking advantage of existing policies by workplace practices that discriminated against such fathers. Hence the legal move of equalizing the availability of parental leave for both sexes was portrayed as responding to an existing and pressing social

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85 See Post & Siegel, supra note 72, at 1987–89.
87 Bureau of Labor Statistics figures, issued in 1990 with data from 1989, indicated that 37% of full-time employees working in private business with more than 100 workers were covered by unpaid maternity leave policies, while only 18% were covered by unpaid paternity leave policies. S. REP. No. 103–3, at 14–15 (1993). Congress also heard testimony that "[w]here child-care leave policies do exist, men, both in the public and in private sectors, receive notoriously discriminatory treatment in their requests for such leave." Post & Siegel, supra note 72, at 2016 n.228; see H.R. REP. No. 103–8, pt. 2, at 14.
need, opening up the way for male workers to share caretaking tasks at home.

This optimistic perception of the FMLA's supposed role in promoting gender equality was shared by commentators as well. Susan Deller Ross for instance, argued in the early 1990s when earlier versions of the FMLA were still being debated in Congress:

The federal FMLA has some significant strengths that should be discussed—strengths derived from its equal-treatment approach to the problems of both medical disability and parenting. . . . It helps to set the stage for a more complete integration of fathers at home by allowing them substantial time off to care for seriously ill children and their own parents as well as for newborns. . . . And because the FMLA provides medical leave that equal numbers of men and women will take, and family leave that a significant number of men will take, it also eliminates the incentive that special-treatment, female-only, state laws give employers not to hire women.90

Similar expectations accompanied the enactment of the corresponding parental legislation in Israel.91 Indeed, significant differences appeared in the scope and substance of parental policies developed in the two countries in the 1990s. Nevertheless, the assumption that the availability of gender-neutral parental leave would soon change gendered patterns of care at home by encouraging men to share caretaking tasks was a common theme that served as the central rationale for promoting these policies.

However, recent data clearly indicate that these expectations remain remote from reality. The next Part discusses the gap between these optimistic assumptions and the gender division of care-work at home that still persists.

90 Ross, supra note 43, at 104 (emphasis added) [citations omitted].
91 In 1996, when the legislature debated the proposal to transform maternity leave to parental leave, MK Abraham Poraz, who initiated this proposal, highlighted the relationship between his proposal and current reality, explaining: "I think that in our society there is a growing willingness of men to take care of babies. . . . Today men can derive great joy from taking a leave to care for the new born." DK (1996) 3785 (Isr.). In subsequent years, other proponents of this legal shift further stressed its significance in responding to a changing reality in which men desire to stay at home. MK Gozanski noted: "I think the principle here is very important—to provide both partners the opportunity to be equally responsible for the new born." Moreover, taking on the theme that portrays equal parenting as something that is relevant to current reality she added: "men's desire to stay at home and care for the home seems to me like a positive refreshing change." DK (2001) 5394 (Isr.).
II
THE PERSISTENCE OF MOTHERHOOD

In 2012, the United States Department of Labor's Chief Evaluation Office, continuing the work of the Commission on Family and Medical Leave, published the third in a series of surveys on the impact of the FMLA on both the rate and type of employee leave-taking and on employers. Similar surveys were conducted in 1995 and 2000, and together they provide a highly detailed picture of leave-taking patterns that have developed since the enactment of the FMLA. The overall picture that emerges from two decades of experience with the FMLA is that the Act exerted a significant effect on employers, encouraging addition to or extension of leave available to fathers, which only a minority of companies provided prior to its enactment. The first years of the FMLA were especially transformative in this context. At the same time, the Act did relatively little to change the gender-based allocations of caregiving and leave-taking that were solidly established before its enactment. Empirical data available prior to the enactment of the FMLA demonstrated that even when employers offered new fathers job-guaranteed leave of several weeks, under state parental leave statutes, the average they took was three to five days. Working mothers however had almost always taken time off from work for childbirth and new parenting, averaging 12.6 weeks even in the absence of mandatory leave policies.

93 Id. at i. In 1995, the Commission on Family and Medical Leave commissioned two surveys: an employee survey and an establishment survey. The results of both were presented with other Commission findings. COMM’N ON FAMILY & MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES passim (1996).
95 The 1995 survey found that only 30% provided policies comparable to the FMLA voluntarily prior to its enactment. KLERMAN, supra note 92, at 1.
96 In the years following the enactment of the FMLA, two-thirds of employers covered by the Act changed some aspect of their family or medical leave policies to come into compliance with the Act’s requirements. See THE 2000 SURVEY REPORT, supra note 94. At the same time, as of 2001, the FMLA only covered 60% of American workers and 6% of the work establishments, leaving 40% of workers without any federal parental leave support. See Anthony, supra note 59, at 474–75.
98 Id.
Similar gendered patterns of leave-taking are still evident today. The 2012 FMLA final report reveals that of all female employees, 3.9% took leave by reason of having a new child and 3.5% took a leave by reason of taking care of a family member's health condition (spouse, child, or parent).99 The corresponding numbers for male employees are 2.5% and 2%.100 While these numbers show some gender difference, they mask a much greater disparity that can be traced in supplementary data on length of parental leave by gender. These data indicate that the vast majority of male parental leave-takers (70%) take leave for parental reasons for a negligible period of zero to ten days.101 Female employees on the other hand tend to take much longer leaves for parental purposes. 38% percent of female employees (as opposed to 6% of male employees) take leave of more than 60 days for parental reasons, and a further 18% (as opposed to 9% of men) take leave of 41 to 60 days.102 Hence, two decades of a federally guaranteed right to a gender-neutral parental leave have not changed traditional leave-taking patterns, wherein working women take relatively long leaves for parental reasons while men take negligible leaves.103

These gendered patterns of parental leave-taking shed light on a broader picture of important gender role differences in the family and societal attitudes to women's tendencies as primary caretakers. A recent analysis of time-use data among working parents with children under the age of eighteen still shows a significant gender-based difference in the amount of time spent with children on a weekly basis.104 The time parents spend on housework varies by gender as well. Mothers spend eighteen hours weekly doing household chores while the average weekly housework hours for men is ten.105 This descriptive fact—that women do much more child-care and family work—is nurtured and reinforced by stereotypical normative judgments that still

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99 Klerman, supra note 92, at 138.
100 Id. at 138.
101 Id. at 140–41.
102 In addition, 18% of females versus 9% of males take a leave of forty-one to sixty days. Id. at 141–42.
104 Kim Parker & Wendy Wang, Pew Research Ctr., Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family 6 (2013) (The exact figures for 2011 are 13.5 hours per week spent with children for mothers, as opposed to 7.3 hours for fathers.).
105 The exact figures are 45% of mothers and 41% of fathers. Id.
persist. Around forty percent of parents—mothers and fathers alike—believe "the best thing for a young child is to have a mother who works part time." One third of adults think "it’s best for young children if their mothers do not to work at all outside of the home." Relatively few adults (16%) say that having a mother who works full time is best for children. As for what working parents of young children value most in a job, it turns out that “a high-paying job” is fathers’ central concern, while working mothers rate “having a flexible schedule” as their first priority. These attitudes about parenthood and work appear to contribute to a gendered reality of labor-force participation. Recent data indicates that only 69.9% of mothers with children participate in the labor force, as opposed to 92.8% of fathers. The least likely to work outside the home are women with children younger than one year, and the most traditional pattern of “he earns she cares” is apparent among married-couple families with at least one child younger than six. Labor-force participation statistics also reveal that 63.9% of those working part-time are women, and it is more likely that their decision to work that way is related to childcare problems or family obligations, in contrast to male part-time workers, whose main reason for working part-time is related to their own health issues. There is also a clear correlation of women’s fertility and child-rearing years with their patterns of employment. Unemployment rates for mothers are highest among those of children younger than three. Finally, of all age groups, women aged twenty-five to fifty-four are the ones most likely to work part time. Gendered patterns of familial work and paid work are thus most pronounced in parents of children younger than eighteen. Mothers remain much more likely than fathers to take parental leave, to work part

106 Id. at 5. The authors explain that the term ‘young children’ applies to children younger than 18. Id. at 1 n.1.
107 Id. at 2.
108 Id.
109 Id. at 1.
111 Id. In 37.2% of these families the father is employed and the mother is not.
114 Full-Time and Part-Time Employment, supra note 112.
time, and to make different professional concessions in an effort to adapt their professional work to their parental responsibilities. Consequently, a mother with children younger than eighteen earns less than seventy-five cents for every dollar that fathers make.\(^{115}\) The wage gap between fathers and mothers is larger than the wage gap between men and women at large.\(^{116}\) It also increases with age and education.\(^{117}\) Moreover, the fact that women continue to be the primary caretakers at home apparently contributes to the ongoing gender segregation of the workplace: 74.6\% of those employed in the traditional pink-collar industries of educational and health services are still women.\(^{118}\)

In Israel, despite its far more comprehensive system of parental supports, a very similar picture emerges with regard to the persistence of maternal patterns of care. The formal shift from paid maternity leave to paid gender-neutral parental leave has not at all undermined the unequal division of care-work in the family. Practically, parental leave continues to be maternity leave: fathers take parental leave only at a very negligible rate. Moreover, as time goes by, we see no change whatsoever in the number of women exercising this benefit, in contrast to the number of men. For example, in 1999—the first full year in which men and women could share parental leave—only 218

\(^{115}\) \textit{Working Mothers}, supra note 113 (The exact wage gap for mothers and fathers is 25.3 cents.).

\(^{116}\) Id. (The exact wage gap for men and women at large is 17.9 cents.).


men did so compared to 65,963 women: a mere one-third of one percent.\textsuperscript{119} Roughly the same figure holds for 2016: 520 men in contrast to 126,266 women, which is a negligible rate of four men to every one thousand women.\textsuperscript{120} Official data also reveal that 34\% of working women who give birth extend their maternity leave beyond the paid weeks and take an additional lengthy unpaid leave from several months to a year.\textsuperscript{121} The legal extension of paid parental leave from twelve to fourteen weeks in 2000 intensified this dynamic, causing a greater number of women not to go back to work immediately after the end of the paid leave.\textsuperscript{122} Working mothers are also more than twice as likely as working fathers to take leave of absence from work to care for a sick child.\textsuperscript{123} Finally, the vast majority of families in Israel (73\%) report that most or all household chores are performed by women.\textsuperscript{124}

These patterns of leave-taking explain the low labor force participation rates of women with young children.\textsuperscript{125} The vast majority of women of fertility age (thirty-five to forty-four) who do not work outside the home report that the reason is to take

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\textsuperscript{119} TAMI ELIAV, SOC. SEC. INST., ADMIN. OF RESEARCH \& PLANNING, MATERNITY BENEFITS COLLECTORS IN 1996–1999 at 9, 17 (2001) (Isr.).
\textsuperscript{120} CHANTEL WASSERSTEIN, SOC. SEC. INST., ADMIN. OF RESEARCH \& PLANNING, RECIPIENTS OF MATERNITY BENEFITS IN 2016 at 10–12 (2017) (Isr.). As the first six weeks of leave are reserved for the mother for the purpose of physical recovery from childbirth, the father can take up to nine weeks of paid leave. Like women, men are fully reimbursed for any loss of income during the leave. See supra note 54.
\textsuperscript{121} CHANTAL WASSERSTEIN \& ESTER TOLEDANO, SOC. SEC. INST., ADMIN. OF RESEARCH \& PLANNING, THE OCCUPATIONAL BEHAVIOR OF POSTPARTUM WOMEN FOLLOWING THE EXTENSION OF THE MATERNITY LEAVE at 3 (2014) (Isr.). In the period of five years from 2006 to 2010, 66.4\% of the women went back to work right after the end of the paid maternity leave, 25.5\% went back to work within the first 12 months after the maternity leave, and 8.1\% didn't go back to work until after the first year after the maternity leave. In 2017, the period of paid leave was extended once again and it is now 15 weeks long. See supra note 54 and accompanying text.
\textsuperscript{122} WASSERSTEIN \& TOLEDANO, supra note 121, at 3. In 2006, 71.4\% of women returned to work immediately after the end of the paid leave. In 2010, this number decreased to 61\%.
\textsuperscript{123} OSNAT PICHTELBERG-BARMETZ \& MEIRAV GREENSTIEN, THE MINISTRY OF INDUS., COMMERCE \& LABOR, RESEARCH \& ECON., PARENTS’ ABSENCE FROM WORK DUE TO CHILDREN’S ILLNESS 14 (2013).
\textsuperscript{125} Only 60\% of females with children aged zero to one and 68\% of females with children aged two to five are employed. See PETER MOSS, INT’L NETWORK ON LEAVE POLICIES \& RESEARCH, 11TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2015 at 9 (2015), http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2015_full_review3_final_8july.pdf [https://perma.cc/6PFB-7N4C]. The equivalent figure for American women is 54\% and 74\%. Id.
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care of the family and children. Relevant data also indicate that mothers of young children, just like their American counterparts, tend to work part time in much greater numbers than men, and that their career choices are much more affected by familial considerations.

In sum, however parenting is defined, women in both countries still do much more than men, with legal reforms in this area having surprisingly little impact in undermining traditional gendered patterns of care-work and paid work. To be clear, generous systems of benefits and protections for working parents such as the Israeli system have some obvious positive consequences for women's employment: they encourage mothers' participation in the labor market and provide job security that women lack in countries like the United States that has a relatively poor system of supports. However, with regard to the persistence of maternal patterns of care, the United States barely differs from countries like Israel, with significantly different and far more progressive parental policies. In fact, seen against the legal support that fathers officially enjoy in Israel, the maternal dilemma in Israel is far more pronounced.

This insight is particularly revealing as scholars often criticize the narrow American scheme of parental benefits for its insufficient encouragement of more men to share caretaking responsibilities. This scholarship stresses the fact that the United States is the only industrialized country that does not provide its working parents federally paid parental leave.

The exact figure is 74.4%. RUTH HAPERIN-KADDARI ET AL., RACKMAN CTR. FOR THE ADVANCEMENT OF THE STATUS OF WOMEN, WOMEN AND FAMILY IN ISRAEL, BI-ANNUAL STATISTICAL REPORT 122 (2014).

31.7% of women with children aged 0-5 (in contrast to 6% of men) work between 20 to 34 hours per week and additional 31.8% (in contrast to 18.8% of men) work between thirty-five to forty-two hours per week. 19.2% of women of all ages who work part time report that they do so because of family and household concerns. The corresponding figure for men is 0.9%. Interestingly the percentage of women who work part time due to maternal and household tasks increases over the years rather than decreases. Id. at 128, 144-45.

See, e.g., Bartel et al., supra note 103, at 5 ("Currently, all industrialized countries other than the United States have some kind of national paid parental leave policy."); OECD Family database, supra note 5, at 3, 7 (indicating that the United States is the only country without paid leave entitlements available to mothers or fathers). Only a few states have started introducing statewide paid parental leave in recent years, among those are California (2004), Washington (2007), New Jersey (2008) and Rhode Island (2013). According to a recent study these new policies are not sufficient to meet the needs of working parents. Stated reasons are short leave periods (4-6 weeks), insufficient financial compensation, lack of job security during leave taking, and overwhelming complexity of the parental leave system. Jay L. Zagorsky, Diverging Trends in US Maternity and
When the persistence of maternal patterns of care is discussed it is therefore attributed to the uniquely "thin" American parental regime. Commentators and advocates for gender equality argue in favor of a much more generous regime of positive gender-neutral parental benefits and protections such as paid leave. Yet as this Part reveals, the comparative analysis casts doubt on the sufficiency of these moves in addressing maternal patterns of care and promoting significant changes in the family.

The following Part highlights that despite the magnitude of the maternal dilemma, images of change and progress continue to feed the legal discourse and media images of working parents. The depth of the problem is disguised, and the line between equal parenthood as a desired social and legal goal and its actual realization is blurred.

III
THE RISE OF THE GENDER-NEUTRAL PARENT

A. The FMLA as an Agent of Change

In the years that followed the enactment of the FMLA, its image as an agent of social change was embraced by both commentators and the Court. The FMLA was described as "a


129 For some representative examples of this diverse body of literature, see Joanna L. Grossman, Job Security Without Equality: The Family and Medical Leave Act of 1993, 15 WASH. U. J.L. & POL’Y 17, 61–62 (2004) (arguing that paid leave programs have the potential of affirmatively pressing men “into service” as once leave is paid, the primary disincentives for men disappear); Grill, supra note 83, at 383–90 (discussing barriers to paid leave in United States); Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. REV. 1, 62–68, 93–96 (2000) (advocating for organizational incentives that can successfully encourage men to take leave such as reward programs for employers that support family leave among their employees or mandatory paternity leave); Angie K. Young, Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children, 5 MICH. J. GENDER & L. 113, 143–44 (1998) (noting the lack of incentive in the FMLA for men to take parental leave); Emily A. Hayes, Note, Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993, 42 WM. & MARY L. REV. 1507, 1536–37 (2001) (pointing to European systems as potential models for paid leave); Mary Kane, Paternity Leave Gains Acceptance in Work World: New Dads Take Time to Bond with Babies, TIMES-PICAYUNE, June 16, 2002, at 1 (noting a long term trend in which more firms offer paid paternity leave and more men take advantage of it).
far-reaching statutory reform of the workplace,"130 "vindicating equal citizenship values,"131 and a vivid implication of the fact that "the days of Ozzie and Harriet are over."132 In Nevada Department of Human Resources v. Hibbs,133 the Court affirmed the constitutionality of the FMLA on equal protection grounds and further strengthened the vision of the Act's contribution to gender equality.134

William Hibbs was an employee in a unit of Nevada's state government. He sought unpaid leave from his job to care for his ailing wife. Nevada granted him the leave under both the FMLA and a "catastrophic leave" policy, but later fired him. Hibbs sued under the FMLA, but Nevada argued for dismissal on the grounds that the sovereign immunity provided by the Eleventh Amendment precluded Hibbs's action.135 The Court rejected Nevada's claim and upheld Hibbs's right to sue his employer for the alleged violation of the FMLA.136 Justice Rehnquist, writing the opinion of the Court, determined that Congress acted within its Section Five power when it enacted the family-leave provisions of the Act, since these provisions were an appropriate response to a history of state-sponsored gender discrimination.137 He explained that prior to the enactment of the FMLA, men were denied parental accommodations that were given to women or were discouraged from taking parental leave.138 This suggested that the fact that the Act mandated caretaking leave on gender-neutral grounds removed the primary barrier to an equal share of parental responsibilities between fathers and mothers.

Feminist scholars portrayed the Court decision in Hibbs as sending a clear message that "[p]roviding men with family leave" can "change underlying gendered patterns of family

130 Post & Siegel, supra note 72, at 2008.
131 Id. at 2019.
132 Id. at 2020.
133 538 U.S. 721, 725, 734–35 (2003) (upholding provisions of the Family and Medical Leave Act of 1993 as a valid exercise of Congress's section 5 power of the Fourteenth Amendment and concluding that states can be sued for monetary damages in federal court for violating the family care provisions of the FMLA).
134 See id. at 738 (noting that "in light of the evidence before Congress, a statute mirroring Title VII, the simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all.").
135 See id. at 725.
136 See id.
137 See id. at 735.
138 See id. at 736.
care," further enhancing the image of the FMLA as a significant agent of change. That this case involved a man who took family leave to care for his ailing wife contributed to the image of a changing reality induced by the Act, in which traditional gender roles gradually disappear and men in ever greater numbers engage in care-work at home. Rehnquist was complimented for understanding the significance of the FMLA in undermining gender-role stereotypes. The majority opinion was described as a "radical" decision that is "helping people envision transformative change: a society where the 'breadwinner' and the 'primary caregiver' models are discarded in favor of a model in which both parents are equally involved in care work and market work . . . ." More broadly, the present era in which Court decisions like Hibbs are delivered was referred to as "a time when modest but increasing numbers of men are more deeply engaged in day-to-day domestic labor . . . ." The Hibbs decision was also heralded in gender-neutral terms as an important addition to a growing body of case law, in which parents sue employers for family responsibility discrimination.

These images of a growing number of men engaged in the daily tasks of parenthood at home represent well-intentioned feminist attempts to reaffirm the significance of the gender-neutrality of the FMLA in changing the allocation of care-work within the family and promoting gender equality. Moreover, the enactment of the FMLA seemed to have generated a broader shift in legal discourse. As part of this shift, gender-neutral talk that focuses on "working parents" and on "family responsibilities" dominates the discussion of the work-family conflict and highlights its contemporary relevance to both men and women. Although empirical data suggest that this conflict is still primarily maternal, as women's market-work is far more affected by their primary role as caregivers at home, legal dis-

140 See Reva B. Siegel, "You've Come a Long Way, Baby": Rehnquist's New Approach to Pregnancy Discrimination in Hibbs, 58 Stan. L. Rev. 1871, 1886 (2006) (noting that "Hibbs is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes.").
141 Mezey & Pillard, supra note 139, at 231.
142 Joan C. Williams, Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case, 73 U. Cin. L. Rev. 365, 381 (2004) [hereinafter C. Williams, Hibbs as a Federalism Case].
143 Mezey & Pillard, supra note 139, at 234.
144 C. Williams, Hibbs as a Federalism Case, supra note 142, at 366.
course often emphasizes the emergence of egalitarian patterns of parenting in an attempt to sustain the significance of the FMLA as an agent of change.

This shift in legal discourse is also exemplified by the emergence of a relatively new legal theory of discrimination on the basis of sex: Family Responsibilities Discrimination (FRD).

B. The Theory of FRD and the Rise of the Gender-Neutral Parent

The legal theory of discrimination based on family responsibilities draws on the claim that when an employee, male or female, is treated adversely because of his or her family responsibilities, such practices can constitute family responsibility discrimination (FRD) in violation of Title VII. Despite its gender-neutral framing, as applicable to all workers with caretaking responsibilities, in practice this theory primarily protects working mothers and mothers-to-be. The most comprehensive analysis of FRD lawsuits from 1971 to 2004 found that women filed the overwhelming majority (92.27%).\(^{145}\) This is not surprising in light of data discussed in the foregoing Part indicating that American women are still the primary caregivers at home.\(^{146}\) Indeed, the growing numbers of FRD cases since the early 1990s clearly correlate with the percentage of mothers in the labor force.\(^{147}\) Nevertheless, the fact that in practice the concept of FRD is primarily relevant to working mothers is often disguised by the gender-neutral conceptualization of this legal framework, and by a growing body of literature that stresses the significance of FRD for working parents irrespective of gender.

The concept of FRD has its origins in a 1971 Supreme Court case holding that an employer could incur Title VII liability by rejecting female job applicants because they had pre-school-age children.\(^{148}\) The theory was developed in the influential work of Joan Williams that highlights the relation


\(^{146}\) See supra Part II.

\(^{147}\) See Still, supra note 145, at 15.

\(^{148}\) Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding that Title VII does not permit employers, in the absence of business necessity, to have "one hiring policy for women and another for men—each having pre-school-age children").
between work–family conflict and sex discrimination. In 2007, the EEOC recognized the relationship between discrimination based on family responsibilities and sex discrimination, when the Agency issued an Enforcement Guidance on *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.*

Initially, Williams developed what she termed the “maternal wall” theory, which focused on the discrimination against women with young children in the workplace. The argument was that the maternal wall applies to cases where employers presume that a mother, particularly the mother of a young child, will have more family responsibilities than other workers and will prioritize those responsibilities over her work. Based on the simple fact of motherhood, rather than work performance, women with young children are then passed over for promotions and other opportunities. In later years, this argument was expanded to apply to all instances where family caregivers irrespective of gender were discriminated against on the job. The EEOC official guidelines, which recognized the maternal wall theory, defined the problem as “the disparate treatment of workers with caregiving responsibilities.” They clarified that the adverse treatment of an employee with family responsibilities amounts to sex discrimination when the employer resorts to gender stereotypes about caregivers.

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151 See Unbending Gender, supra note 149, at 69–70.

152 See id. at 70.

153 EEOC, Enforcement Guidance, supra note 150, at 2.

154 Specifically the guidelines explain: “Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping . . . Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work. Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.” Id.; see Joan C. Williams & Steph-
The rhetorical shift from the terminology of a maternal wall theory to that of a FRD theory is of course necessary and reasonable in light of legal developments. The FMLA enables both men and women to take family leave to care for a newborn child or a sick family member. Antidiscrimination law dictates that employers apply the same standards to fathers and mothers. Therefore, both genders should be protected from discrimination when exercising leave benefits. Indeed, several men who experienced discrimination as a result of their efforts to take family leave have filed suits in recent years. William Hibbs, who requested family leave to care for his ailing wife, is one prominent example. Two other important examples that are often mentioned in this context are Schultz v. Advocate Health and Hospitals Corp. and Knussman v. Maryland. Schultz involved a maintenance employee of a hospital who was fired from his job after taking leave to care for his aging parents. Knussman involved a Maryland state trooper whose request for parental leave to care for his newborn child was denied on account of his supervisor’s view that caring for a newborn is a woman’s job. All three became high-profile cases. Hibbs’s trial led to a Supreme Court precedent that affirmed the constitutionality of the FMLA on equal protection grounds. Schultz’s family leave suit drew a record-high award of $11.65 million. Knussman has become the symbol of a new generation of fathers who struggle to assume more caregiving responsibilities. In legal scholarship, these cases are often cited as


156 272 F.3d 625 (4th Cir. 2001).
157  See Joan C. Williams & Consuelo A. Pinto, Family Responsibilities Discrimination: Don’t Get Caught Off Guard, 22 LAB. L. 293, 323 (2007).
158  In its decision, the court relied on evidence that Knussman’s supervisor told him that “God made women to have babies and unless [he] could have a baby, there is no way [he] could be primary care [giver].” Knussman, 272 F.3d at 629–30. His supervisor also stated that Knussman’s wife had to be either “in a coma or dead” before he could “qualify as the primary caregiver.” Id. at 630. He was ultimately awarded $40,000 in damages along with over $625,000 in attorney’s fees and costs.
161  For instance the EEOC guidelines refer to Knussman in support of the proposition that men with caregiving responsibilities just like women may encounter the maternal wall through employer stereotyping. EEOC, ENFORCEMENT GUIDANCE, supra note 150. Similarly, Joan Williams and Stephanie Bornstein cite
clearly illustrating that men and women are now suing successfully for discrimination on the basis of caregiving responsibilities. These cases in addition to a few others have also been linked to broader societal changes, where "younger generations of men are less interested in sacrificing involvement in their families' lives for their careers." However, these cases are the exception and not the rule. As maternal patterns of care persist, women continue to be the great majority of plaintiffs in FRD cases. It is also important to note that both Hibbs and Schultz involved care of a spouse or an aging parent, not young children. This distinction is significant as the care of aging parents or an ailing spouse is often a onetime episode, while the care of young children is an ongoing burden that can affect the life of a working parent for many years. The only comprehensive survey of FRD cases mentions the total of 43 cases of men suing for family responsibilities discrimination in the last four decades. The survey provides no details of these cases and it is impossible to know how many of them concern fathers seeking parental leave as opposed to husbands or sons seeking family medical leave. However, the fact that Knussman, in addition to very few other cases, serves as the reference in legal scholarship to propositions regarding the stereotypical barriers experienced by working fathers attempting to do more care-work at home can indicate that such cases are rare.

Knussman as illustrating that "[w]hen FRD litigation is viewed as a whole, it includes not only mothers . . . but also fathers who were denied parental leave to which they were entitled." See Williams & Bornstein, supra note 154, at 1347.

For references to Hibbs, see C. Williams, Hibbs as a Federalism Case, supra note 142; Joan C. Williams & Holly Cohen Cooper, The Public Policy of Motherhood, 60 J. SOC. ISSUES 849, 859 (2004); see also Matzner-Heruti, supra note 31, at 41–44; Kristin M. Malone, Using Financial Incentives to Achieve the Normative Goals of the FMLA, 90 TEX. L. REV. 1307, 1314 (2012). For references to Schultz, see Williams & Bornstein, supra note 154, at 1311–13; Williams & Cohen Cooper, supra note 162, at 861; Williams & Segal, supra note 149, at 146. For references to Knussman, see Malone, supra note 162, at 1314; Matzner-Heruti, supra note 31, at 38–41; Suk, supra note 61, at 15; Williams & Bornstein, supra note 154, at 1311; Williams & Cohen Cooper, supra note 162, at 861; Williams & Segal, supra note 149, at 146–47.

Still, supra note 154, at 1313.

The problem then is not that the theory of FRD accounts for the grievances of the few fathers who suffered discrimination when attempting to take leave to care for a newborn or a sick child. Instead, the overemphasis on the significance of these cases as reflecting a broader societal change constitutes the problem. Policy makers and scholars often acknowledge that women continue to be most families' primary caregivers. But concomitant references to what is depicted as a new trend of families, where women are "increasingly relying on fathers as primary childcare providers"\textsuperscript{166} undermine the significance of this gendered reality within the family by creating an image of a substantial ongoing social change. Just as the FMLA enactment was justified and promoted by rhetoric stressing its relevance to a changing reality in which men increasingly assume caretaking responsibilities, similar images feed arguments in favor of further developing the theory of FRD. These images justly portray the FMLA, as well as the evolution of FRD case law, as important legal developments for promoting gender equality. At the same time, the portrayal of these developments as responding to family responsibility issues, which men and women now equally confront, masks a very clear gendered reality behind a veil of gender-neutrality. It blurs the line between egalitarian parenting as an ideal and its actualization in real life. Consequently, the deeper gendered structures and forces that perpetuate a reality of gender inequality are disguised, and public attention is deflected from the larger legal changes that must be made.

C. Media Images of Egalitarian Parenting and the Emerging Paradigm of Choice

Contemporary legal images of emerging egalitarian patterns of parenting are often nurtured by popular media depictions of modern families in the twenty-first century. Shared parenting or even reversed gender roles in caretaking are presented as the new characteristics of a growing number of these families. Images of families in which "Mom and Dad Share It All,"\textsuperscript{167} or "stay-at-home husbands"\textsuperscript{168} mind the kids while their fast-track wives go to work, contribute to the vision of an egalitarian revolution in the family.

\textsuperscript{166} EEOC, ENFORCEMENT GUIDANCE, \textit{supra} note 150.
\textsuperscript{167} Lisa Belkin, \textit{When Mom and Dad Share It All}, N.Y. TIMES, June 15, 2008, at 44.
\textsuperscript{168} \textit{Id.}; see also Betsy Morris, \textit{Trophy Husbands}, \textit{FORTUNE}, Oct. 14, 2002, at 79.
Another intriguing theme that shapes public images of modern parenthood is “maternal choices.” Popular media depictions of high achieving women choosing to return home as a result of changing preferences can be traced back to the 1980s. However, in recent years these images have reemerged with a pseudo feminist twist. One notable example is Lisa Belkin’s piece in the New York Times several years ago entitled The Opt-Out Revolution. It featured high-achieving, college-educated women who chose motherhood over a professional career. The article depicted these measures as a proactive revolution, the product of women’s relative empowerment and newly attained freedom to make these decisions. “Why don’t women run the world?” the article asked. Its answer: “Maybe it’s because they don’t want to.” The article provoked unprecedented commentary and critique. Some questioned Belkin’s depiction of the phenomenon as a real trend, and argued that at-home moms in fact formed a distinct minority; others questioned more broadly the basic thesis of the opt-out revolution. However, Belkin’s piece succeeded in defining the terms of the debate. “Opting out” remains a powerful

172 For instance, Joan Williams and others argued that the media discourse of opting out mainly focuses on highly educated women, who make up only 8% of the female workforce. Relying on relevant data they noted that only 5% of women regard opting out as an active choice while most working women (86%) report that they end up staying at home due to being pushed out in connection with incompatibility of work and family life. “Opt Out” or Pushed Out?, supra note 60, at 10–11.
173 Belkin’s piece was criticized on three primary grounds. First, it was argued that in most instances women are actually pushed of the workplace. Second, Belkin’s piece was criticized for its focus on highly educated professional women and its implicit assumption that all women share the same work-family conflicts. Finally, Belkin’s piece was criticized for its failure to consider the significance of class and race in affecting women’s participation in the workplace. See, e.g., E.J. Graff, The Opt-Out Myth, 45 COLUM. JOURNALISM REV. 51, 52-54 (2007) (critiquing Belkin’s article on a variety of grounds). For a collection of critical essays that question the basic thesis of Belkin’s piece, see generally Bernie D. Jones, supra note 171.
174 A recent Harvard Business School study notes that Belkin’s piece “added the term 'opt out' to the 'cultural lexicon.'” Robin J. Ely, Pamela Stone & Colleen Ammerman, Rethink What You “Know” About High-Achieving Women, HARV. BUS. REV., Dec. 2014, at 100, 103. One example of the manner in which Belkin’s terminology continues to define the terms of the debate is Joni Hersch’s recent study that embraces the term “opting out” to describe working patterns among
image of professional women going home;\textsuperscript{175} it contributes to the image of a new phenomenon, distinct from the past traditional and discriminatory gendered division of care-work at home.\textsuperscript{176}

Interestingly, the theme of motherhood as a new choice that women can now make can be logically linked to the theme of egalitarian parenting. If the image of a growing number of men shouldering care-work at home is portrayed in legal and popular discourse as representing a noteworthy contemporary social trend, presumably assuming more or fewer parental responsibilities is now a matter of individual choice, shaped exclusively by lifestyle preferences.\textsuperscript{177} Sure enough, Belkin’s influential piece was supplemented several years later by another portrayal of modern parenthood: \textit{When Mom and Dad Share It All}.\textsuperscript{178} This piece implicitly connected women’s new possibilities for parental choices to an emerging reality of gender equality. This link between emerging patterns of egalitarian parenting and motherhood as a choice can be traced in legal scholarship as well.\textsuperscript{179} Hence, what is in fact a reflection of old gendered structures that were not undermined by legal reforms is now re-conceptualized as a new product of a liber-


\textsuperscript{175} Ten years after the publication of Lisa Belkin’s piece, Judith Warner wrote a follow up article on the “opt-out generation” reporting that now these women want to be “back in” the labor market, thus affirming the original “opt-out” depiction of the relevant trend. Judith Warner, \textit{The Opt-Out Generation Wants Back In}, N.Y. TIMES, (Aug. 7, 2013). http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html [https://perma.cc/ECC7-XT7A].

\textsuperscript{176} Nancy Levit notes in this context that that “press-constructed narratives have enormous staying power” in part because most Americans rely on popular media as their main source of information. Nancy Levit, \textit{Reshaping The Narrative Debate}, 34 SEATTLE U. L. REV. 751, 760, 764 (2011).

\textsuperscript{177} In criticizing the choice narrative that underlies the “opt-out” characterization of some women leaving the labor market, Nancy Levit explains that “the opt-out story locates the solution to the work-family debate in individual choice. Individual women can ‘choose’ to resolve the tensions between work and family by just electing to stay home with the kids. It is a resolution that is not desired by most women, won’t work for many women, and one that completely omits institutional and social responsibility for the architecture of the workplace.” \textit{Id.} at 763.

\textsuperscript{178} Belkin, supra note 167.

\textsuperscript{179} One notable example is Naomi Mezey and Cornelia Pillard’s article \textit{Against the New Maternalism} in which the authors criticize various mother groups for embracing traditional concepts of motherhood “and not parenthood or caregiving” despite the fact that these groups “understand that women can, to a significant extent, choose or eschew those roles.” This critique is articulated in light of what the authors describe as a changing reality in which “modest but increasing numbers of men are more deeply engaged in day-to-day domestic labor, and there is, broadly speaking, a much less rigidly gendered allocation of the actual, pervasive work of parenting.” Mezey & Pillard, supra note 139, at 233–34.
ated world in which women can now freely choose to assume more caretaking responsibilities than their male partners. This theme of choice-based motherhood supplements the theme of egalitarian parenthood in disguising the magnitude of the maternal dilemma and the social and economic structures that still perpetuate a reality of gender inequality within the family. Moreover, if the rise of egalitarian and choice-based patterns of parenting is presented as an important characteristic of a growing number of families, the image of existing legal mechanisms such as the FMLA as important agents of change is implicitly strengthened, and the need for further legal reforms is thereby disguised.

The next Part analyzes a recent employment discrimination case that provides an important illustration of the manner in which unequal patterns of care-work at home continue to shape and affect mothers' participation in the workplace. This case also reveals the discriminatory consequences for women when gendered patterns of care and work are portrayed as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice shape these preferences.

IV

EEOC v. BLOOMBERG: GENDER DISCRIMINATION UNDER THE GUISE OF GENDER-NEUTRALITY AND THE PARADIGM OF INDIVIDUAL CHOICE

In 2007, the EEOC filed a wide-ranging lawsuit against Bloomberg, the financial news and information company. The EEOC accused Bloomberg of engaging in a pattern or practice of discrimination against pregnant employees or those who had recently returned from maternity leave, and generally fomenting a culture of discrimination against mothers. The EEOC alleged that Bloomberg reduced pregnant women’s or mothers’ pay, demoted them in title or in number of directly reporting employees, reduced their responsibilities, excluded them from management meetings, and subjected them to stereotypes about female caregivers. This high-profile case, which involved a class action as well as individual claims of discrimination and retaliation, never went to trial. In a series of decisions in the course of seven years, Judge Preska of the

181 See id. at 3.
182 Id.

For the purposes of this Article, I focus primarily on the court decision in the class action suit,\footnote{See generally \textit{Bloomberg}, 778 F. Supp. 2d 458.} as well as its decision in one of the individual lawsuits: that of Jill Patricot, who was one of six Bloomberg employees who joined the EEOC gender discrimination suit on their own behalf.\footnote{\textit{Bloomberg}, 967 F. Supp. 2d 816 (dismissing claims of all plaintiff-intervenors except Jill Patricot); \textit{Bloomberg}, 29 F. Supp. 3d 334 (evaluating Jill Patricot's claims).} I argue that, analyzed together, both lawsuits offer important insights into dilemmas of gender inequality in the workplace that result from the fact that, despite parental policies' gender neutrality, women continue to be the primary caretakers at home and gender-role stereotypes flourish. The court neglected to recognize these dilemmas because it was captured by images that portrayed contemporary parenthood as a domain of equality and individual choice, thus masking the discriminatory consequences for women when unequal patterns of care-work at home shape mothers' participation in the workplace, especially in male-dominated environments.
In support of its claim that Bloomberg discriminated against new mothers, the EEOC submitted evidence that pregnant women and mothers who had recently returned from maternity leave incurred statistically significant lower base pay rate changes and were given smaller grants than other employees with the same company tenure, job tenure, and pre-Bloomberg experience. Nonetheless, the court determined that this was not a valid comparison because women who took maternity leave should be compared to other employees who took a long leave of absence from work—60 days or longer—for whatever reason. The court explained that this latter group of employees “serve[d] as the closest comparators to the Class Members” because “[l]ike women who took maternity leave, they have been continuously absent from work for an extended period of time.” 186

Once the judicial focus shifted from employees with similar credentials to employees who took long leaves for whatever reason, Bloomberg’s statistical evidence indicated that everyone at Bloomberg who took a long leave for whatever reason, experienced lower compensation growth than did non-leave or short-leave takers with the same tenure and experience. 187 Based on this, the court concluded:

Bloomberg’s standard operating procedure was to treat pregnant employees who took leave similarly to any employee who took significant time away from work for whatever reason. The law does not create liability for making that business decision. 188

In justifying this conclusion, the court added that the “Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees . . . .” 189

Setting aside the question whether reducing leave takers’ pay did not constitute retaliation for exercising rights afforded under the FMLA, 190 the primary dilemma in this case was ap-

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186 Bloomberg, 778 F. Supp. 2d at 481–82.
187 Specifically Bloomberg’s expert concluded that there was “no statistical evidence that Class Members’ level of responsibility . . . decreased to any significant degree as compared to other employees when taking time on leave into account.” Id. at 482.
188 Id. at 486.
189 Id. at 473 (quoting Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994)).
190 The Court decision in Bloomberg refrains from discussing this issue, and it is unclear whether the EEOC raised this legal question at all. For a case in which
parently not how new mothers were treated while on maternity leave. A close reading of the relevant facts reveals that an important feature of women's employment that triggered the unfavorable treatment of new mothers was not necessarily their maternity leave but their requesting, on returning to work after the birth of a child, flexible schedules in an attempt to combine family and professional work.

Jill Patricot exemplified these dynamics, showing how pregnancy, childbirth, and motherhood affected working women's lives completely differently from their male counterparts' and the professional consequences of these gender differences. Patricot was hired by Bloomberg in 1998.191 For seven years she worked ten or eleven hours a day.192 In 2004 she became pregnant with her first child. She took five months' maternity leave, and, upon her return, she left the office every day at approximately 4:45 PM but was always available by phone.193 Her supervisors soon became worried and approached her about her hours. She was asked to stay until 5:30 PM at least two days a week, but she refused.194 In an attempt to satisfy the requirement for longer hours, Patricot offered to arrive at the office an hour early, but Bloomberg refused to make the necessary arrangements to accommodate this change in the regular working schedule.195 This resulted in her demotion from Head of Global Data to Data Analyst.196 Patricot took a second maternity leave in 2006. When she returned to work she asked the Head of Sales for the North and South Americas whether any Team Leader positions were available and was told

this legal argument was made and discussed, see Ayanna v. Dechert, LLP, 914 F. Supp. 2d 51, 54–56 (D. Mass. 2012) (discussing a male attorney's claim that his law firm retaliated against him for taking FMLA leave by withholding work assignments, thus decreasing his billable hours for the year, and, ultimately, terminating him on the ground that his billable hours were too low). See also Joan C. Williams, Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism, 63 Hastings L.J. 1267, 1294–95 (2011) (arguing that employers violate the FMLA's prohibition on retaliation by acting on the assumption that employees who take leave under the FMLA are less productive when they return to work compared to employees who did not take leave).

192 See id. at 839.
193 See id. at 838–39, 844.
194 Id. at 839–40.
195 The court notes in this context that because "Patricot's supervisees in the New York office generally started at 8:00 A.M., . . . the Company wanted to limit supervisory coverage to when it was necessary." Id. at 840. (citations omitted). Apparently, employees' parental needs were not defined as "necessary" under this policy; indeed, Patricot "could not name any Global Data manager" who came to work an hour earlier. Id.
196 See id.
there were none; but over the next three years, 39 non-managerial employees, including some who once reported to Patricot, were promoted to Team Leaders. Patricot began her third maternity leave in 2008; in 2009 she resigned from Bloomberg while still on leave.

Patricot’s experience at Bloomberg implies that leave in itself was not the decisive factor in the company’s personnel decisions. She was demoted as a result of her refusal to stay at the office later than 4:45 PM after her return from maternity leave. From Bloomberg’s perspective, what clearly made her a less dedicated worker was her decision to spend fewer hours at the office, not the leave she took. Setting new mothers beside other employees who took long leave from work for whatever reason was therefore not the only—and certainly not the most compelling—comparison. New mothers should have been compared with new fathers who demanded flexible schedules to accommodate their new parental responsibilities. However, the demand for flexible schedules seems to have been strictly a women’s issue. One can only assume that in most instances new fathers at Bloomberg did not need or request flexible schedules because their female partners attended to the needs of their newborns, enabling the men to raise children without

197 See id. at 840-41.
199 Interestingly, the EEOC made a similar argument in an attempt to discredit Bloomberg’s expert evidence that compared long leave takers in general to women who took maternity leave as irrelevant. The EEOC asserted that “its claim is really about Bloomberg’s animus toward pregnancy and mothers in general, not about the treatment of maternity leave takers.” However, Judge Preska determined that this argument was “not persuasive” because the EEOC’s complaint makes mothers “who took maternity leave the centerpiece” of its claims. Therefore, she concluded that by showing “that its regular practice was to treat women who took maternity leave the same as others who took similar amounts of leave for non-pregnancy related reasons,” Bloomberg proved “that it did not engage [in] a pattern or practice of discrimination as alleged by the EEOC.” EEOC v. Bloomberg L.P., 778 F. Supp. 2d 458, 484 (S.D.N.Y. 2011).
200 The experiences of the other women who intervened in the EEOC lawsuit reveal similar patterns in which pregnancy or the birth of child often led a female employee to request flexible working schedules. For instance, Tanys Lancaster “requested to work seven hours per day, instead of the customary ten, per her doctor’s recommendation” after she became pregnant. Bloomberg, 967 F. Supp. 2d at 853. Monica Prestia “began experiencing medical problems related to her pregnancy in May 2005.” She indicated to a representative in Human Resources that “she would need to take intermittent leave one to two days per week . . . until the birth of her child and that her workload must be shortened . . . to fit shorter work days because she could not work five days a week” for ten hours. Id. at 868. Similarly, Maria Mandalakis met with a representative from HR in 2008 “to discuss Bloomberg’s hours in light of the fact that she had a son with special needs who required therapy.” At the end of 2008 she started to work from home one day a week. Id. at 879.
an appreciable career interruption. Moreover, these gendered patterns of work are particularly intriguing in light of other noticeable gender differences among Bloomberg employees.

Relevant data provided by Bloomberg in response to the EEOC request indicated that patterns of parental leave-taking among Bloomberg employees were highly gendered. During the class action period, 665 maternity leaves were taken by 512 women (some took more than one maternity leave). Bloomberg offered twelve weeks of paid parental leave and four additional weeks of unpaid leave for all of its employees in its U.S. offices who were primary caregivers, but apparently only, or mostly, its female employees used this benefit.

Hence, gender differences among Bloomberg employees started to develop once female employees became pregnant. When new mothers returned to work after maternity leave, these differences grew more pronounced. Female professionals, such as Jill Patricot, Tanys Lancaster, Monica Prestia, and Maria Mandalakis, who regularly worked long hours and excelled in their jobs, could no longer work ten or eleven hours a day once they became pregnant or gave birth. Pregnancy-related health complications and gendered patterns of care-work within the family that developed following the birth of a child, led to disability and maternity leaves that only female employees took and to requests for flexible schedules made by mothers. In this respect, the birth of a child had long-term

201 A recent Harvard Business School study affirms this assumption. The study surveyed three generations of Harvard Business School graduates—primarily MBAs. The study reveals that a strong majority of men who participated in the survey expected to be in a “traditional” partnership, in which their career would take precedence. They also expected their female partners to take primary responsibility for child care. Both of these expectations were met and exceeded. See Ely et al., supra note 174, at 106-07.

202 See Bloomberg, 778 F. Supp. 2d at 482.

203 Id. at 464.

204 Id.

205 See supra note 200 and accompanying text.

effects on the working patterns of new mothers—in contrast to new fathers. Gendered patterns of care-work within the family that developed following the birth of a child led new mothers who returned from maternity leave to require flexible schedules that would accommodate their new and distinct maternal roles. As a result, this group of women was singled out as less productive and less dedicated. Consequences in terms of pay reduction or job demotion immediately followed.

The court decision in EEOC v. Bloomberg did not dispute these facts. However, it masked their gendered significance by embracing two supplementary themes: gender-neutrality and individual choice. The court first portrayed current tensions between family and work—what Judge Preska terms the desire for a "work-life balance"\textsuperscript{207}—as a gender-neutral dilemma that dominates the life of all working parents—men and women alike. Focusing on Bloomberg's work environment, Judge Preska noted that "[o]ne manager stated that 'everyone at Bloomberg has . . . a work/life balance issue because [everyone] work[s] very hard.'"\textsuperscript{208} The suggestion was that Bloomberg's policies are equally onerous for all parents of young children. Indeed, the court concluded that "men and women have complained about their ability to balance family life and their workload at Bloomberg."\textsuperscript{209} Judge Preska also implied that the distinction between "employees who take off long periods of time in order to raise children and those who . . . are able to raise them without an appreciable career interruption" was gender-neutral, and therefore a policy may discriminate between these two groups of (gender-neutral) employees.\textsuperscript{210}

Prestia was hired by Bloomberg in 1997. She became pregnant in February 2005. Prestia began experiencing medical problems related to her pregnancy in May 2005. Her doctor placed her on complete bed rest beginning September 2005, so she began paid maternity leave on September 1 and returned from leave on February 21, 2006. \textit{Id.} at 868–69. Maria Mandalakis, who joined Bloomberg in 1998, became pregnant in 2003 and took a five-month maternity leave. She became pregnant with her second child in December 2004. She took intermittent leave for six months due to medical complications and then another six months of maternity leave. In 2007, she took two intermittent leave periods to care for her son. \textit{Id.} at 877–79. Finally, Marina Kushnir, another plaintiff-intervenor began working for Bloomberg in 2000. She began her first maternity leave in August 2005 and returned to work about five months later. Her second maternity leave lasted from September 2007 to April 2008. \textit{Id.} at 887–89.

\textsuperscript{207} Bloomberg, 778 F. Supp. 2d at 485.
\textsuperscript{208} \textit{Id.} at 463.
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.} at 482. Specifically, she determined that "[a] policy may discriminate between those employees who take off long periods of time in order to raise children and those who . . . are able to raise them without an appreciable career interruption."
At the same time, because the gendered significance of working patterns among Bloomberg employees could not be completely ignored, the court eventually supplemented the equal treatment and gender neutrality reasoning with a logic of individual choice. The court explained that by taking maternity leave or demanding flexible schedules, working mothers indicate that they “choose to attend to family obligations over work obligations”—willingly placing themselves in a disadvantaged position as compared with other, more dedicated (male), workers:

In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. . . . To be sure, women need to take leave to bear a child. And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. . . . Employment consequences for making choices that elevate non-work activities (for whatever reason) over work activities are not illegal. . . . A female employee is free to choose to dedicate herself to the company at any cost, and, so far as this record suggests, she will rise in this organization accordingly.211

According to this narrative, current gendered patterns of care and work among Bloomberg employees reflect the individual lifestyle preferences of women who decide “to attend to family obligations over work obligations.” The underlying presumption is that working women who take maternity leave or request a flexible schedule at work signal that they value their motherhood more than they value their professional work. In this respect the theme of “choice” powerfully supplements the theme of “equal treatment” and “gender neutrality” by justifying the adverse treatment of mothers as such, irrespective of any group of comparators. It enables the court to conclude that mothers at Bloomberg simply chose to be lesser workers by elevating their family responsibilities over their work responsibilities. In an attempt to specifically demonstrate how new mothers neglect their professional responsibilities, the court further explains that long hours and physical presence in the office are key for meeting Bloomberg’s “very high standards” of “hard work, cooperation, loyalty up and down, [and] customer service.”212 This perceived gender-neutral standard

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211 Id. at 485-86.
212 Id. at 463 (citations omitted).
for evaluating loyalty, productivity, and dedication at work is then applied specifically to mothers: "[i]n terms of career-specific factors only, women who take maternity leave, work fewer hours, and demand more scheduling flexibility likely are at a disadvantage in a demanding culture like Bloomberg's."213

In essence then, Judge Preska determines that commitment and performance should be measured by the number of hours you spend at your workplace and that mothers' own choices to work fewer hours and their demands of flexible schedules necessarily make them less dedicated workers, thereby justifying Bloomberg's practices of reducing their pay and demoting them in title and status. Indeed, if women are given all the options, just like their male counterparts, and they still insist on choosing motherhood over work, there can be no inference of discrimination.

However, some significant facts in this case cast doubt on this apparently objective judgment regarding the necessary relationship between flexible schedules and the portrayal of new mothers as less committed and productive employees. These facts imply that under the guise of impartial standards, the court resorts to old stereotypes to justify the employment discrimination of mothers. Jill Patricot provides again a telling example in this context. As described above, for years she would work ten or eleven hours a day. After returning from maternity leave she started leaving the office no later than 4:45 PM, but was always available by phone. Her supervisor, who told Patricot prior to her taking maternity leave that she was doing a "fabulous" and "great" job, soon approached her about her hours and argued that she was setting "a bad example on the floor."214 Patricot was asked to work until 5:30 PM at least a couple of days a week. In an attempt to satisfy the requirement for longer hours, Patricot offered to arrive at the office an hour early, but Bloomberg refused to make the necessary arrangements to accommodate this change in the regular working schedule.215 Her refusal to remain in the office until 5:30 PM on a regular basis resulted in her demotion to Data Analyst. In defending this step, Bloomberg asserted that the nature of her original role as Head of Global Data required her physical presence in the New York office.216 Bloomberg also argued that in her absence, Patricot's subordinates were forced to approach

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213 Id. at 486.
215 Supra note 195 and accompanying text.
others for guidance. However, nothing in the record corroborated these claims. Patricot testified that she was never informed about her subordinates looking for her as the reason why she needed to stay later than 4:45 PM.\textsuperscript{217} Relevant evidence also indicated that Patricot’s first and second successors worked in Bloomberg’s Princeton office and visited the New York office only several times a month. In fact, the court corroborated Patricot’s assertion of “a double standard” by determining that, even when Patricot’s successors visited the New York office, they hardly stayed past 4:45 PM, and, despite this conduct, Patricot’s successors were never confronted by Bloomberg about the time they did not spend in the office where their subordinates worked.\textsuperscript{218} Moreover, the company’s concern with Patricot’s hours seems to have originated from long hours being the norm in Bloomberg, unrelated to any specific indication that she actually neglected her professional responsibilities as a result of her becoming a mother. In fact, there was no indication that Patricot’s request for a flexible schedule reflected her choice “to attend to family obligations over work obligations,”\textsuperscript{219} but precisely the opposite. Patricot contended that she was always available to her subordinates by phone even after she physically left the office and was never informed that her subordinates were looking for her.\textsuperscript{220} “As a result of her resignation, Patricot forfeited a guaranteed bonus of about $150,000,” and was also unsuccessful in applying for positions at several other companies.\textsuperscript{221} Eventually, she remained the last plaintiff in this wide-ranging lawsuit after all other claims were dismissed. Her discrimination and retaliation claims with respect to the events subsequent to her return from maternity leave initially survived summary judgment, leaving her the only plaintiff able to continue pursuing damages. However, her lawsuit too was eventually dismissed because she failed to mitigate damages by voluntarily resigning from Bloomberg, not because the court rejected the substance of her allegations regarding her demotion from Head of Global Data to Data Analyst.\textsuperscript{222}

Patricot’s trials at Bloomberg can thus challenge the general pronouncements of the court regarding the necessary relationship between workers’ flexible schedules and their lesser

\begin{footnotes}
\item[217] Id. at 844.
\item[218] Id. at 844–46.
\item[220] Bloomberg, 967 F. Supp. 2d at 844.
\item[222] See supra note 183.
\end{footnotes}
dedication and productivity. These trials also hint that the court's pronouncements amount to no more than a stereotyped judgment of working mothers. Moreover, the stereotype that "women tend to choose to attend to family obligations over work obligations . . . more often than men" appears to underlie Bloomberg's decision to demote Patricot simply because she refused to stay longer hours in the office, effectively subjecting her to adverse treatment compared with her male counterparts.223

The reflection of this stereotyped judgment of working mothers as less competent workers in the court decision in EEOC v. Bloomberg is particularly revealing. Women have long been subjected to stereotypes that depicted mothers as inherently less competent workers. Stemming from beliefs about motherhood as women's natural destiny, these stereotypes have justified restrictions on women's employment and exclusion from the public sphere.224 As discussed in subpart I.B, the feminist desire to undermine these stereotypes was the primary motivation for the enactment of gender-neutral parental legislation such as the FMLA. This desire also explains the feminist resistance to any gender-specific measures in this context. Feminists argued, and still do, that the sex-neutrality of the law of parenting is one of the most valuable achievements of the feminist movement.225 It encourages men to assume more caretaking responsibilities and promotes a more egalitarian division of care-work at home, which can undermine traditional stereotypes of women as lesser workers. Hibbs affirms these convictions. However, if, despite the law's gender-neutrality, maternal patterns of care persist, this gendered reality can sustain the same old stereotypes about the unique role of motherhood in women's lives. The court decision in EEOC v. Bloomberg exemplifies this problematic process. It highlights how, despite the existence of gender-neutral leave policies at Bloomberg, gendered patterns of care and work among the company's employees persist, and also how the court relies on this gendered reality to conclude that

223 Bloomberg, 778 F. Supp. 2d at 485-86.
224 Supra notes 11-17 and accompanying text. In a recent Supreme Court decision, Justice Ginsburg explained the origin and harmful consequences of legislation that relies on stereotypes about women's domestic roles. See Sessions v. Morales-Santana, 137 S. Ct. 1678, 1691-98 (2017) (Ginsburg, J.) (invalidating on equal protection grounds a gender-based distinction that favors the mother in the law governing acquisition of U.S. citizenship by a child born abroad).
225 See, e.g., Mezey & Pillard, supra note 139, at 230 (characterizing "[t]he official de-linking of presumptive parenting roles from a parent's sex" as "hard won and valuable"); see also Morales-Santana, 137 S. Ct. at 1691-98.
mothers have been justly singled out as less productive workers, ultimately rationalizing gender-discriminatory employment policies.

V

FROM HIBBS BACK TO CAL FED: RESTORING ARGUMENTS OF GENDER DIFFERENCE

A. From Cal Fed to Hibbs

In 1987 the Supreme Court issued its decision in the case of California Federal Savings & Loan Association v. Guerra ("Cal Fed"). This case involved a California law that required employers to provide female employees an unpaid pregnancy disability leave of up to four months and reinstatement against what appeared to be the mandate of the PDA to treat pregnancy no differently from any other disability. An employer charged with violating this state law raised the claim of federal preemption, arguing that a law that was designed to benefit only pregnant workers discriminated against men and therefore violated Title VII. The issue presented by Cal Fed split the feminist community and triggered an intense dispute among theorists and activists, reviving the debate between guardians of gender neutrality and those endorsing protective legislation for women in the context of pregnancy and childbirth. The former position that was based on arguments of equal treatment was embraced by numerous groups, including the National Organization of Women. Briefs filed in Cal Fed by a consortium of groups and individuals led by the National Organization of Women, argued that state legislative efforts to provide special benefits to pregnant workers constituted protective legislation that was adverse to the interests of women in equal treatment with men because any distinction based on pregnancy would perpetuate the negative stereotypes long used to disadvantage women. These groups thus agreed that the state statute was in conflict with the provisions of the PDA, which mandated equal treatment, but added that the Court could interpret this statute so as to make its terms consistent with Title VII by ordering that their benefits be extended to all

227 Id. at 275-77.
228 See id. at 279.
229 W. Williams, supra note 39, at 328, 351-52 (labeling the debate "The Equal Treatment/Special Treatment Debate").
230 Brief for the National Organization for Women, supra note 77, at 14-17.
disabled workers. Only one group, led by the Equal Rights Advocates, joined the California Department of Fair Employment and Housing, a defendant in Cal Fed, in arguing that the state law was consistent with the PDA in that both state and federal laws were designed to provide equal employment opportunities to pregnant women. Equal Rights Advocates and its allies believed that the PDA left the state free to enact additional measures to place pregnant workers on an equal basis with all other workers.

Justice Marshall, delivering the opinion of the Court, embraced the latter position, and concluded that the California law was not preempted by Title VII as amended by the PDA because it was not inconsistent with the purposes of the federal statute. Specifically, the Court explained that both statutes were designed "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." The Court cited, with agreement, the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop[—]not a ceiling above which they may not rise." It added that, "[b]y taking pregnancy into account, California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." Moreover, the Court rejected arguments that any type of preferential treatment for pregnant employees reflected stereotypical notions about pregnancy and the abilities of pregnant workers; it explained that special treatment could sometimes "achieve equality of employment opportunities" for women and "remove barriers that had operated in the past to favor men. In reference to the specific legislation, the Court noted that the California statute was "narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions" and concluded:

231 Id. at 20.
234 Id. at 280 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).
235 Id. at 289 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).
236 Id. at 288–89 (citations omitted).
Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work." 237

The Court opinion in *Cal Fed* is particularly important because it challenges the conventional assumption that gender neutrality and similar treatment of men and women should be the sole legal means for achieving gender equality. A decade after this assumption shaped the formation of the PDA, the Court declared that gender-specific legal measures were not necessarily discriminatory and that the PDA did not prohibit accommodating the different needs of women on account of pregnancy and childbirth. The Court distinguished different treatment of pregnant women based on sex-role stereotypes about their abilities from different treatment that was designed to equalize a discriminatory reality and promote equal opportunities for women. It was thus able to define the California statute as falling within the latter category.

*Cal Fed* has never been officially overruled. Yet, its central holding has been effectively undermined by two subsequent legal developments: the enactment of the FMLA and the Court's decision in *Nevada Department of Human Resources v. Hibbs*. When enacting the FMLA, Congress reaffirmed the principle that gender equality was best achieved when similar-treatment and gender-neutrality set the standard for allocating pregnancy and childbirth-related benefits. Parental leave was thus linked to sick leave and both were guaranteed in identical terms. *Hibbs* provided the Court an opportunity to interpret the FMLA and its significance from a gender-equality perspective. As explained in subpart III.A, Justice Rehnquist, who wrote the Court's opinion, surprised many when he affirmed the constitutionality of the FMLA as a valid exercise of Congress's equal protection power and concluded that the law aimed "to protect the right to be free from gender-based discrimination." 238 Commentators characterized his opinion as "remarkable" 239 and "pathbreaking." 240 Some speculated that Rehnquist's own family circumstances might have been a factor that moved him to a sympathetic understanding of the

237 Id. at 290-91.
238 Nevada Dept of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); see also supra notes 139-44 and accompanying text (discussing reactions from commentators to Hibbs decision).
239 C. Williams, Hibbs as a Federalism Case, supra note 142, at 365.
240 Siegel, supra note 140, at 1872-73.
FMLA. Yet, when compared with the Court decision in Cal Fed, Rehnquist's opinion seems less surprising. Chief Justice Rehnquist joined the dissent in Cal Fed. Rejecting Marshall's expansive interpretation of the PDA, the dissent determined that the PDA "leaves no room for preferential treatment of pregnant workers." The dissenting justices White, Rehnquist, and Powell therefore concluded that the California law purported to authorize employers to commit an unfair employment practice forbidden by Title VII, rejecting the argument that the preferential treatment provision "can be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers." Hibbs, as opposed to Cal Fed, did not challenge special treatment legislation; it dealt with and affirmed the constitutionality of equal treatment legislation. However, in emphasizing the significance of the equal-treatment and gender-neutrality standards of the FMLA for the provision of leave benefits, Rehnquist implicitly rejected the central holding of Cal Fed. As previously discussed, he reviewed the legislative history of the FMLA and explained that what triggered the enactment of this federal legislation was the preferential treatment of women in many state laws that discriminated against men in the allocation of parental leave benefits. Rehnquist further noted that many of these laws and policies offered women "extended 'maternity' leave that far exceeded the typical 4–to 8-week period of physical disability due to pregnancy and childbirth." He concluded that all these practices reflected the "pervasive sex-role stereotype that caring for family members is women's work" and were therefore justly perceived by Congress as violating the prohibition on sex stereotyping. In reaching this conclusion, he failed to mention Cal Fed or recognize that a four-month pregnancy disability leave available only for women was affirmed by the Court as a valid exercise of state power that promoted the Title VII ban on sex-based discrimination. However, his broad proposition that extending special leave benefits to women necessarily constituted gender-based

241 See Linda Greenhouse, Ideas & Trends: Evolving Opinions; Heartfelt Words From the Rehnquist Court, N.Y. TIMES (July 6, 2003), http://www.nytimes.com/2003/07/06/weekinreview/ideas-trends-evolving-opinions-heartfelt-words-from-the-rehnquist-court.html [https://perma.cc/6MHE-PJBT]; see also C. Williams, Hibbs as a Federalism Case, supra note 142, at 374–75 (noting that Justice Rehnquist "has had ample opportunity to experience first-hand various kinds of family caregiving").
243 Id. at 298 n.1.
245 Id. at 731.
discrimination clearly undermines Cal Fed's more nuanced holding that different treatment can sometimes have the impact of equalizing a discriminatory reality and promoting equal opportunities for women. The Court opinion in Hibbs also narrows significantly Cal Fed's definition of a reasonable pregnancy disability leave by restricting this period to 4 to 8 weeks. Hence, notwithstanding Hibb's significance in upholding the constitutionality of the FMLA on equal protection grounds, it is important to acknowledge that this ruling implicitly revives and resettles the equal treatment/special treatment debate by giving priority to the former.

B. Restoring Female-Specific Entitlements

Hibbs does not stand alone in its uncompromising commitment to similar treatment and gender neutrality. Several years earlier, the Israeli Labor Court had engaged in similar rhetoric affirming men's right to enjoy the same parental benefits as those historically reserved for women. In the case of Menachem Yahav, an attorney working for the police and father of three young children, the court adopted a broad interpretation of existing legislation to determine that the right to a shorter workday originally reserved for female employees should be extended to men as well.246 Highlighting the centrality of the anti-stereotyping principle in shaping the gender-neutrality principle in the allocation of parental benefits, the Court explained: "We again point out that as more men undertake the care of children [this] will expand the circle of women working in senior positions, which will eventually reduce or even cancel the stereotype of the past where the woman's main role is caring for and raising children."247

Four years later, in a similar case, the Labor Court reached the same conclusion.248 This time however the court did not stop at affirming the principle of gender-neutrality on anti-stereotyping grounds but proceeded to explain how these gender-neutral measures already facilitated a changing reality in which egalitarian patterns of child care at home were gradually becoming the norm:

In the last quarter of the 20th century the perception of equality in society has changed . . . and now prevails the concept of shared parental responsibility, that both parents

246 File No. 31993/96 District Court of Labor (Tel Aviv) Yahav v. State of Israel (Nov. 25, 1999), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
247 Id. at 9.
are jointly responsible for household management and the care of the family. This imposes an additional burden on both [parents'] shoulders [and it adds] to the burden of being employed, but this burden should be smaller [now] as it is divided between two people and is not the sole responsibility of the woman.\textsuperscript{249}

The current image of parenthood that is "divided between two people and is not the sole responsibility of the woman" might have been inspired by yet another father demanding his equal parental benefits in court.\textsuperscript{250} However, just as in the United States, these few cases are the exception, not the norm.

Against these cases, a more recent Labor Court decision marks an intriguing change. \textit{State of Israel v. Dan Bahat}\textsuperscript{251} concerned a collective bargaining agreement provision entitling working mothers and fathers to a shortened workday. However, if they decided to stay more hours at work, only mothers would be "compensated" with a supplement to their salary. The plaintiff, Dan Bahat, a father working as a state attorney, claimed that although he stayed beyond the shortened workday, he did not receive extra payment, whereas his female colleagues in the same situation were entitled to it. The Regional Labor Court decided in favor of the plaintiff and concluded that not paying fathers for extra hours, while paying mothers for them, constituted prohibited discrimination against fathers.\textsuperscript{252} On appeal, the National Labor Court disagreed and reversed the lower court's holding.\textsuperscript{253} The Court determined that the bonus could be perceived as an affirmative action for women, designed to give them additional incentives to work longer hours and equalize their status at work to men's status. The

\textsuperscript{249} Id. at 353–54.
\textsuperscript{250} Interestingly, in a recent Supreme Court case that held that daycare expenses should be deductible for tax purposes, the Israeli Court embraced a similar rhetoric, emphasizing the relevance of its holding to a changing reality in which working mothers and fathers now share the burden of care-work at home. While the specific lawsuit was filed by a female private lawyer arguing that without proper care-arrangements for her children she could not earn a living, the Court emphasized the importance of phrasing the dilemma in gender-neutral terms explaining: "No need to say much about it, many spouses are sharing now work together in raising their children much more than before, so that the man's share in the family care and the ramifications of it on the ability to work outside the home . . . is almost equal in many cases to that of the woman." File No. 4243/08 Court of Civil Appeals, Israel IRS v. Perri 1, 41 (Apr. 30, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

\textsuperscript{251} File No. 361/08 Nat'l Labor Court, State of Israel v. Bahat (Apr. 18, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

\textsuperscript{252} File No. 2456/03 Court of Appeals (Tel Aviv), Bahat v. State of Israel (May 5, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

\textsuperscript{253} File No. 361/08 Nat'l Labor Court, State of Israel v. Bahat.
primary rationale for this intriguing decision was the Court’s sheer acknowledgment that a working father like Dan Bahat who “comes home early to take care of his kids while the mother remains at work”\textsuperscript{254} is the exception and not the norm. The Court also highlighted the relation of gender-based employment discrimination to women’s still being the primary caretakers at home. It referred to data indicating that women in the public sector still earned far less than men for comparable work and were often restricted to lower management jobs. The Court noted that differentiating fathers from mothers as to the right of receiving a bonus for spending longer hours at work was desirable legal policy because it had the potential of promoting female employees’ status and income. According to the Court, fathers did not need a comparable incentive, because they already worked longer hours than women and spent less time at home. Drawing a distinction between the right to a shorter working day for parents of young children and monetary benefits for those who decided to forgo this benefit and work full time, the Court explained that only the former encouraged men to spend more time with their children, thereby advancing the goal of undermining the unequal division of care-work at home. If fathers received such a monetary benefit, they would choose to stay longer at work, which would result in their spouses having even greater responsibility to care for their children. In sum, the Court perceived retaining the “mothers only” benefit as a desirable policy of affirmative action for women that accorded with the principle of gender equality.

\textit{Bahat} is an intriguing decision because it continues and further develops \textit{Cal Fed}'s different-treatment approach in two important respects. First, it outlines a more complex perception of gender difference that justifies setting gender neutrality and similar treatment aside. While \textit{Cal Fed} was formally restricted to “the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions,”\textsuperscript{255} \textit{Bahat} recognized the unequal social reality in which women continue to be the primary caretakers at home, and are consequently discriminated against at work, as a relevant factor of gender difference that cannot be sufficiently addressed by gender-neutral legal tools. Without naming it specifically, \textit{Bahat} places the maternal dilemma on the table for the first time and develops a more comprehensive framework for rethinking the scope

\textsuperscript{254} Id. at 21 (section 27 to the majority opinion).

and substance of legal measures in the context of family and work. Second, in addressing the maternal dilemma, the Israeli Court implicitly replaces Cal Fed's terminology of "special treatment" with the term "affirmative action," which in the Court's opinion indicates that a gender-specific entitlement that focuses on women's (and not men's) needs and concerns can be a crucial supplementary positive measure for undermining a persistent gendered reality and promoting gender equality.  

Moreover, Bahat challenges contemporary global trends in the context of parental policies by shifting the focus from men back to women. Aiming to impel men to assume greater care responsibilities at home, countries like Sweden have taken their gender-neutral parental leave schemes one step farther already two decades ago. Realizing that most caregiving and childrearing is still done by women, and acknowledging the adverse effect of these patterns on workforce equality, Sweden has formulated policies wherein, beyond paid gender-neutral parental leave (usually taken by women), they offer fathers additional state-paid paternal leave for a designated period; these policies are usually referred to as "daddy quotas." Sweden has also introduced a "gender equality

256 Cf. id. at 284 (characterizing California's approach to pregnancy discrimination as a "special treatment approach").

257 See, e.g., Andrea Rangecroft, Where New Dads Are Encouraged to Take Months Off Work, BBC (Jan. 6, 2016), http://www.bbc.com/news/magazine-35225982 [https://perma.cc/K6WE-XSVC]. The first father's month was introduced in 1995. A second father's month was introduced in 2002. Until 2016, Sweden offered a paid parental leave of 480 days, sixty days reserved each for the mother and the father. See Anders Chronholm, supra note 32, at 227, 234. A third month dedicated only to fathers was recently introduced in 2016, reserving 90 days out of 480 paternal leave days solely for the father, while establishing the same right to mothers in line with principles of equal treatment. If a father (or a mother) does not take the designated leave of 90 days, such entitlement is lost. Rangecroft, supra note 257; see also 10 Things That Make Sweden Family Friendly, SWEDEN (Mar. 10, 2017), https://sweden.se/society/10-things-that-make-sweden-family-friendly/ [https://perma.cc/PT5V-FL81].

258 For instance, Norway reserves ten weeks for fathers, ten weeks for mothers (in addition to three weeks before giving birth), and the rest of the remaining of 26 or 36 weeks of parental leave can be divided individually. See Paternal Quota (Paternal Leave), Maternal Quota and Shared Period, NAV (Feb. 11, 2017), https://www.nav.no/en/Home/Benefits+and+Services/Relatert+formasjon/paternal-quota-paternity-leave-maternal-quota-and-shared-period [https://perma.cc/JH8Q-CA86]. Iceland initiated a tripartite model with designated leave for mothers and fathers and an additional leave for the family to determine its taker. Thórgerdur Einarsdóttir & Gyda Margret Petursdóttir, Iceland: From Reluctance to Fast-Track Engineering, in THE POLITICS OF PARENTAL LEAVE POLICIES, supra note 32, at 159. Finland provides twelve extra bonus days to fathers who take at least two

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"bonus" as an economic incentive for families to divide their parental leave more equally. These reforms in family policies place daddy quotas at the forefront of leave policies that seek to encourage equal sharing of child care between men and women. In line with these models, scholars have called for the adoption of similar incentives for men in the United States. In addition to paid leave, daddy quotas are now perceived as a potential solution to the persistence of maternal patterns of care at home. As part of this male-centered focus, the literature often explores the question of why men do not take parental leave and evaluates suggested measures in light of their potential impact on men's parental choices.

However, on closer scrutiny it is apparent that even in countries with daddy quotas the overall picture regarding the maternal dilemma is mixed. Daddy quota measures clearly


See, e.g., Haas, supra note 12, at 376 (showing how the Swedish parental leave system tries to undermine the traditional role of women as the main caretakers of children and suggesting this approach as a legislative model also for the U.S.).


See, e.g., Grossman, supra note 129, at 34–36 (exploring why men are discouraged from taking paternity leave); Haas, supra note 12, at 391–99 (discussing "potential barriers to fathers' involvement in child care").
increase men’s parental leave take-up rates, but women still take most of the leave. In general, fathers usually take the minimum time designated specifically to them. With respect to leave in Norway, two scholars recently observed that “in low it is in the form of long leave for mother, short leave for dad.” Comparative research also casts doubt on the long-term effects of fathers’ parental leave-taking and suggests that the gendered division of care-work and household work has not changed in a fundamental way as a result of fathers taking some parental leave. Consequently, women’s participation in the labor market is still shaped by maternal patterns at

263 For instance, a recent country report on Sweden indicates that in 2016, mothers took on average 89 days of parental leave and fathers took only 39 days. While the proportion of total parental leave days used by men slowly increases it is still low. In 2016, 74% of all parental leave days used that year were taken by women. The report also reveals that Swedish mothers of children born in 2008 took on average three times more days of parental leave than fathers during the eight years they could use the leave (342 days compared to 106 days). For parents of young children born in 2013, only 14.1% of couples were sharing leave relatively equally (60% mothers and 40% fathers). Moreover, Swedish fathers are also more likely to take parental leave for the first child. As the family grows, father’s take-up rates of parental leave thus decrease. See Sweden: Country Note, supra note 259, at 397–98. In Norway, relevant data from 2011 indicates that only 10% of fathers took a parental leave that was longer than the father’s quota. Moreover, with the reduction of the length of the father’s quota in 2014, father’s average take-up rates also decreased. See Berit Brandth & Elin Kvande, Norway: Country Note in 13th INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2017, supra note 259, at 304, 310; see also Carmen Castro-Garcia & Maria Pazos-Moran, Parental Leave Policy and Gender Equality in Europe, 22 FEMINIST ECON. 51, 60–64 (2016) (summarizing data from twenty-one European countries); Anders Chronholm, supra note 32, at 227 (summarizing Swedish data); Ann-Zoé Duvander & Mats Johansson, What are the Effects of Reforms Promoting Fathers’ Parental Leave Use?, 22 J. EUR. SOC. POLY 319, 322 (2012) (summarizing Swedish data); John Ekberg, Rickard Eriksson & Guido Friebel, Parental Leave—A Policy Evaluation of the Swedish “Daddy-Month” Reform, 97 J. PUB. ECON. 131, 139 (2013) (same).


265 Brandth & Kvande, supra note 48, at 204. Similarly, in Germany, relevant data for 2012 reveal that on average the length of paid leave for mothers with partners also taking parental leave amounted to eleven months (out of a total paid leave of twelve months). Mareike Bunning, What Happens After the 'Daddy Months'? Fathers' Involvement in Paid Work, Childcare, and Housework After Taking Parental Leave in Germany, 31 EUR. SOC. REV. 738, 740 (2015).

266 For instance, in 2016, Swedish mothers took 62% of all days used for temporary leave to care for a sick child. Sweden: Country Note, supra note 259, at 398; see also Ekberg et al., supra note 263, at 140–43; Schober, supra note 259, at 3–4.
home, and the goal of obtaining gender equality is far from being achieved.267

Against this across-the-board policy focus on influencing men's parental choices, and in light of its limited implications for gender equality, Bahat restores the focus on women. It suggests that, in addition to motivating men to assume greater responsibilities at home, it is important to explore the structures and forces that shape women's decisions to remain the primary caretakers at home. Yet Bahat does not delve into these issues; while acknowledging the problematic persistence of maternal patterns at home, the Court's opinion is restricted to upholding the specific affirmative action monetary benefit. It thus leaves open the questions of how and why women contribute to this gendered reality, and what additional (women-oriented) measures are necessary in order to advance change in this context.

267 Part-time work among women in the Nordic countries still rates very high. A 2015 report indicates that the number of women working part-time in Norway amounted to 36%. In Sweden the respective number was 31%, in Denmark 29%, and in Iceland 26%. In comparison, the highest percentage for men working part-time was 10% in Norway. See Alma Wennemo Lanniger & Marianna Sundström, Part-Time Work in the Nordic Region I, NIKK, NORDIC INFO. ON GENDER (2014), http://www.nikk.no/wp-content/uploads/NIKKpub_deltid1_temanord.pdf [https://perma.cc/53G8-MCGH]. The main reason for part-time work among women is still family responsibility. In 2007, 36% of women working part-time in Iceland and 56% in Denmark attested to this fact. In 2012, 30% of part-time working women in Norway as well as 48% in Finland gave the same reason. In Sweden women earn 87% of what men earn, suggesting that women work for free after 4 PM (of a regular eight-hour working day). See SWEDEN AND GENDER EQUALITY, https://sweden.se/society/sweden-gender-equality/ [https://perma.cc/9BLR-26KK]. In Finland the percentage is 82%, in Norway 83%, in Iceland 87%, and in Denmark as well as in Germany 78%. Global Gender Gap Report 2017, WORLD ECONOMIC FORUM, http://reports.weforum.org/global-gender-gap-report-2017/western-europe/ [https://perma.cc/JX7L-55V2]. The pay gap is especially large among women with children in all respective countries. Similarly, occupational gender segregation prevails. In Norway, for example, relevant data for 2009 show that men were represented in twice as many occupations than women. In Sweden, out of 355 occupational categories only 72 were gender balanced. Women tend to be concentrated in the health industry as well as in the education sector. In all Nordic countries 43% of the employed women concentrated in these two occupations. See NORDEN, NORDIC GENDER EQUALITY IN FIGURES 2015 (2015), http://norden.diva-portal.org/smash/get/diva2:790696/FULLTEXT02.pdf [https://perma.cc/3KUA-3Y5M]; see also Swedish Occupational Register With Statistics 2007, STATISTICS SWEDEN (Mar. 5, 2009, 9:30 AM), http://www.scb.se/en_/Finding-statistics/Statistics-by-subject-area/Labour-market/Employment-and-working-hours/The-Swedish-Occupational-Register-with-statistics/Aktuell-Pong/59071/Behallare-for-Press/The-Swedish-occupational-register-with-statistics1/ [https://perma.cc/ZWA9-NYGD] (tracking sex segregation in the labor market from 2002 to 2007).
C. The Empowerment of Motherhood

In her book *The Myth of Motherhood*, the French philosopher Elisabeth Badinter reviews child-rearing practices in France over the past 300 years. She concludes that maternal love is an essentially conditional sentiment largely contingent on women's interests and the cultural milieu. Against patterns of maternal neglect and indifference that were prevalent in the seventeenth century and were accompanied by high infant mortality rates, she identifies the rise of the "new mother" in the eighteenth century, when baby and child were gradually becoming the center of the mother's attention. She explains that once the survival of children had become a priority problem for the ruling class due to demographic concerns, women for once became "men's partners in a serious undertaking." Women, more precisely mothers and wives, were thus "promoted to the level of 'those in positions of responsibility.'" Influential philosophical works of the era such as *Emile* written by Jean-Jacques Rousseau in 1762 nurtured these perceptions and contributed to the rise of a new image of ideal motherhood. Most intriguing in Badinter's analysis is the argument that embracing this new ideal of a mother who breastfeeds and dedicates herself completely to her children actually served women's interests. It was dictated by the hope of "playing a more gratifying role within the family unit and society at large." Rousseau promised nursing mothers great bonuses including "a solid and constant attachment on the part of their husband." Indeed, "[t]he good mother was reassured that her husband would be . . . more

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269 Id. at 61-64. There seems to be no doubt that mothers in the past reacted differently towards their children from mothers today. Children, if they survived, did not stay long with their parents. They were sent away early to other households as servants or apprentices. Infants were not considered important because chances were high that they would not survive anyway. In one of the early works on the average family in Western society, historian Edward Shorter argues that the fact that mothers in the past did not care about their children led to high infant mortality rates, thus drawing a link between the lack of maternal love and high death rates among infants and children. See Edward Shorter, *The Making of the Modern Family* 203 (1975).

270 Badinter, supra note 268, at 168-80.

271 See id. at 120-31, 150.

272 Id. at 150-51.

273 Id. at 151.

274 See generally Jean-Jacques Rousseau, *Emile, or On Education* (1762).

275 See Badinter, supra note 268, at 180-82.

276 Id. at 168.

277 Id. at 162 (quoting Rousseau, supra note 274, at 258).
faithful and that their union would be more tender”; she was also promised “the esteem and the respect of the public.” Without affirming any real equality between men and women, the eighteenth century’s societal quest for a more protective and caring motherhood narrowed the gap between husbands and wives; reconstructed women’s identities; and gave them a sense of empowerment, control, and influence over men, children, and society at large. Moreover, Badinter adds that something else had “changed profoundly”: “when [women] could not assume their [maternal] duties, they believed themselves guilty.” Hence, empowerment and guilt were inseparable aspects of the social endeavor designed to reconstruct women’s identities as mothers.

Badinter’s historical analysis brings to the surface the often neglected aspect of empowerment that is integral to the work of motherhood. Women’s work within the family—more particularly mother’s work—is more often referred to as a domain of gender inequality and subordination. However, if modern motherhood was initially shaped in an era in which women have been denied other sources of power, eighteenth-century writings that aimed at recruiting women to the task of active motherhood and stressed its benefits not only established a disciplinary and subordinating regime for women but also made the household a potential source of women’s power. Moreover, in light of women’s continued inferiority in the labor market and the persistence of gender discrimination and lack of equal employment opportunities, maternal work may still be a significant source of power, control, and self-esteem in women’s lives, counter to workplace disempower-

278 Id.
279 Id. at 163 (quoting Rousseau, supra note 274, at 259).
280 Id. at 201. Badinter concludes in this context that “[i]n this sense Rousseau had won a very significant battle. Guilt had invaded women’s hearts.” Id.
281 For one exception, see Naomi Cahn, The Power of Caretaking, 12 Yale J.L. & Feminism 177, 190–92 (2000) (noting that women also gained respect and authority from increased household responsibilities).
283 The historian Nancy Cott reaches a similar conclusion by arguing that, as the domestic sphere became increasingly important in the late eighteenth century, it preserved for women “the avenues of domestic influence, religious morality, and child nurture.” Nancy F. Cott, The Bonds of Womanhood: “Woman’s Sphere” in New England, 1780–1835 at 200 (1997).
284 For a personal narrative exploring the gratifying aspects of motherhood written by a woman who gave up her full time job once she became a mother, see generally Iris Krasnow, Surrendering to Motherhood: Losing Your Mind, Finding Your Soul (1997).
ment. As a result, women are more likely than men to structure their lives to accommodate childcare, especially if they are still socially constructed to feel more responsible for their children and therefore guilty if they cannot assume their duties.

D. The Disempowerment of the Labor Market

A 2015 Bloomberg Businessweek survey that tracked MBA graduates from 2007 to 2009 found that women with the same educational achievements as their male counterparts ended up making less money, managing a smaller amount of people, and being less satisfied with their career development. The survey, which evaluated answers from MBAs at more than 2,500 companies, showed the consistency of the gender gap across most businesses. Income inequities were particularly significant among graduates of elite programs. Large year-end bonuses that men received significantly contributed to the pay gap. The survey's authors suggest that a possible reason for the pay gap is the lesser likelihood for women to be bosses. Indeed, in the business world, women make up only five percent of S&P 500 CEOs. The Bloomberg survey also found that male MBA graduates tended to settle in professions that

285 Natalie Kitroeff & Jonathan Rodkin, The Real Payoff from an MBA Is Different for Men and Women, BLOOMBERG BUSINESSWEEK (Oct. 20, 2015), https://www.bloomberg.com/news/articles/2015-10-20/the-real-cost-of-an-mba-is-different-for-men-and-women [https://perma.cc/WHS6-9NRQ]. This survey was based on 12,773 responses from MBAs working in a variety of industries. The survey reveals that the salary of women and men starting their post-MBA careers is rather similar: $98,000 for women and $105,000 for men. However after five to seven years the difference grew to men earning a median of $175,000 and women, a median of $140,000. Id. This means that after five to seven years employers paid women 80% of what men with the same degree earned.

286 Id.

287 Id.

288 Id.

289 Id. For instance, women in the survey said they were responsible for a median of three employees while men on average reported managing five. In addition, 27% of women said they had no direct or indirect reports, as opposed to 20% of men. Id.

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paid more, but even women who went into high-paying fields were underpaid by comparison. Among those who wrote these smaller paychecks for women were some of the country’s top MBA employers. The survey also found close correlation between pay and fulfillment among both genders; those stating the highest levels of satisfaction were consequently also the top (male) earners.

The Bloomberg Businessweek survey did not ask the polled alumni whether they had children, so the authors could not infer parenthood’s impact on earning power. Nevertheless, they noted that a higher percentage of women participating in the survey were unemployed. They also cited data from a Harvard Business School study showing that a much higher percentage of female MBA alumni took a leave in order to take care of children. Referring to “experts” who indicated that taking time off from work to care for children could “stall salary growth,” they also quoted the Dean of Michigan Ross School of Business: “When you return, you don’t get paid at the same level as your peers . . . . It’s not gender-based. It would happen to anyone who stopped out, but women stop out a lot more.” The survey’s implicit suggestion is clear: women choose motherhood over career, and this factor can explain the persistence of a significant gender gap in top management even among high achieving men and women. This assumption is particularly revealing because it echoes Judge Preska’s general propositions in EEOC v. Bloomberg regarding women’s lesser commitment to their workplace. As previously discussed, the judge’s belief that women’s primary career obstacle is themselves, provided the normative framework within which she interpreted and justified the statistical data that revealed that mothers at Bloomberg earned less than other employees with the same credentials:

291 Among the alums in the survey, 43% of men worked in the five most lucrative industries, such as real estate and consulting, as opposed to 32% of women. Kitroeff & Rodkin, supra note 285.
292 In finance, on average, women earned $53,200 less than men. This gender-based difference in earning could be found in other job categories as well, such as marketing at a bank, where women earned $7,000 less than men or among investment bankers, where women earned $115,000 less than men. Id.
293 For instance, “Google paid the 21 female alums [that were] surveyed a median of $36,000 less than the 68 male alums.” Similarly, the 14 women surveyed at Bank of America “made a median of $61,000 less than the 81 men at the company.” Id.
294 Id.
295 Id. The exact figures are 6% of women versus 1.4% of men.
296 Id. The exact figures are 28% of women versus 2% of men.
297 Id.
In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. Employment consequences for making choices that elevate non-work activities (for whatever reason) over work activities are not illegal.\footnote{EEOC v. Bloomberg L.P., 778 F. Supp. 2d 458, 485–86 (S.D.N.Y. 2011).}

The assumption that high-potential women are apt to discard their career after parenthood is widespread. As discussed earlier, it is reflected in the narrative of choice that depicts these women as opting out.\footnote{See supra notes 169–77 and accompanying text.} A recent Harvard Business School survey of 25,000 of its graduates found that 73 percent of men and 85 percent of women thought “that ‘prioritizing family over work’ [was] the number one barrier to women’s career advancement.”\footnote{Ely et al., supra note 174, at 104.} The study explored the validity of this belief and concluded that it was misguided.\footnote{See id. at 104–05.} Analyzing relevant data, the study found that only a small proportion of HBS alumnae had left their jobs to care for children. Moreover, most of these women gave up their jobs “reluctantly and as a last resort,” after “find[ing] themselves in unfulfilling roles with dim prospects for advancement.”\footnote{Id. at 105.} Finally, the study concluded that such career decisions could not account for the fact that women were less likely to be in senior management.\footnote{Id. at 106.} Although more women than men were likely to make professional decisions to accommodate family responsibilities, none of these factors explained the gender gap in senior positions.\footnote{Id. at 105–06.}

The study also examined “whether simply being a parent,” aside from any career decisions made to accommodate family responsibilities, made a difference and concluded that it did not.\footnote{Id. at 105–06.} HBS female alumnae attained senior management positions at lower rates than men irrespective of parenthood-related factors.

The Harvard study refrains from delving deeper into why women are less likely to be in top management. It implies that the misguided assumption that mothers value career less than
men raises another obstacle to women’s progress in the workplace. But it leaves this issue to future studies, concluding only that “the conventional wisdom doesn’t tell the full story.”

Personal accounts of high achieving women shed further light on this issue and provide some necessary insights for uncovering the full story. One intriguing example is the personal account of Maureen Sherry, a former managing director at Bear Stearns Investment Bank and author of the recently published novel *Opening Belle*, in which she describes the many indignities suffered by Wall Street executive Isabelle “Belle” McElroy. While Belle’s on-the-job trials are fictional, many of them were inspired by Sherry’s real-life experience and by stories other women shared with her. Writing in the *New York Times*, Sherry explained:

> Many women have shared their stories with me, and they go far beyond exclusion from meetings and golf courses. There was the young banker who was groped publicly to settle a bet about whether her breasts were real, and the senior deal makers who found out their pay was a fraction of their male counterparts.

As to her own experience, Sherry recalled returning from maternity leave to find a co-worker poaching her client accounts, heading to the nurse’s office with a breast pump while hearing the “moo” sounds that traders made, and an incident in which a colleague, on a dare, drank a shot of the breast milk that she had stored in the office fridge. She also remembered “the guy known for dropping Band-Aids on women’s desks when the trading floor was cold because he didn’t ‘want to be distracted,’” as well as the many times she witnessed a female co-worker formulate an idea in a meeting, only to see a man get credit for the same idea at a later stage.

These personal accounts provide an important framework for revisiting Jill Patricot’s claims of gender discrimination and retaliation against Bloomberg. Recall that Patricot was one of six female employees who joined the *EEOC* suit as intervening plaintiffs. She remained the last plaintiff in this once wide-

307 *Id.* at 106.

308 *See generally* MAUREEN SHERRY, *OPENING BELLE* (2016).


310 *Id.*

311 *Id.*
ranging lawsuit after all other claims had been denied.312 Hers was ultimately denied as well, when the court determined that she was not entitled to post-resignation back pay because she failed to mitigate her damages by voluntarily resigning from Bloomberg. Her discrimination allegations regarding her demotion to Data Analyst and compensation decrease did survive summary judgment; still, the court determined that Patricot had "to attack her discrimination within the context of her existing employment at Bloomberg."313 Because Patricot chose to resign, the court concluded, "the law does not allow her to recover post-resignation backpay."314

True, Patricot eventually chose to resign from Bloomberg. However, it is important to acknowledge her experiences at Bloomberg prior to her resignation and also to relate these experiences to those of other high-achieving women such as Maureen Sherry. In her lawsuit, Patricot recalled being denied her own desk and telephone upon returning from her second maternity leave, allegedly in retaliation against her for filing a discrimination charge with the EEOC.315 The court dismissed the significance of this event by embracing Bloomberg's assertion that "standing alone, the denial of one's own desk and telephone line has never been held to be a retaliatory adverse action."316 Similarly the court denied the magnitude of her mistreatment by senior management between the time she filed her discrimination charge in 2006 and her resignation in 2009. Patricot argued that senior managers, who were initially friendly and responsive to her, started to ignore her after her pregnancy—passing her in the hallways on several occasions while avoiding eye contact with her altogether.317 However, the court concluded that these incidents amounted to no more than "petty slights, minor annoyances, and simple lack of good manners."318 Patricot also recalled that a week after filing her complaint to the Human Resources department at Bloomberg, her supervisor Beth Mazzeo showed up unannounced at Patricot's office. Mazzeo turned her head and ignored Patricot whenever they passed each other in the hallway. She also sat next to Patricot throughout the entire next day in "a clear at-

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312 See supra note 183.
314 Id. at 345.
316 Id.
317 Id. (citations omitted).
318 Id. (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).
tempt to intimidate and harass Patricot."\textsuperscript{319} While such behavior, if true, is childish and reflects poor leadership skills," the court determined, "it is yet another example of behavior best dealt with by a general civility code within the workplace."\textsuperscript{320} The court reached the same conclusion with regard to an event in which Patricot's boss publicly "yelled at her on the sales floor."\textsuperscript{321} Summarizing the significance of all these events, Judge Preska determined that, while "Patricot subjectively perceived her workplace to be abusive, [she did] not demonstrate that the few isolated events alleged in her complaint are 'severe or pervasive enough to create an objectively hostile or abusive work environment.'"\textsuperscript{322}

This final conclusion is dubious. The sequence of events described by Patricot appears to constitute a pattern rather than a "few isolated events." Its magnitude in terms of creating hostile or abusive work environment should also be measured against Patricot's discriminatory demotion and resultant compensation decrease that predated the alleged events. Moreover, can the issue of hostile work environment at Bloomberg be determined without reference to the experiences of its other female employees? As part of the class action lawsuit, the EEOC presented several statements from upper management as evidence of Bloomberg's bias, negative stereotypes, and disregard for women.\textsuperscript{323} According to these allegations, the Head of News said that "half these [expletive] people take the [maternity] leave and they don't even come back. It's like stealing money from Mike Bloomberg's wallet. It's theft. They should be arrested."\textsuperscript{324} Upon receiving a complaint by a female employee in 2003 regarding these negative comments expressed by the Head of the News Division on women not returning to the company after having taken paid maternity leave, the CEO

\begin{footnotes}
\footnote{319}{\textit{Id.} at 847-48 (citations omitted).}
\footnote{320}{\textit{Id.} at 848.}
\footnote{321}{See \textit{Id.} As a result of this incident, "Patricot became so distraught that it was necessary for two of her colleagues to walk her off the floor." EEOC, v. Bloomberg L.P., 29 F. Supp. 3d 334, 337 (S.D.N.Y. 2014). She contended that they took her to the company nurse. \textit{Id.} at 337 n.3.}
\footnote{322}{\textit{Bloomberg}, 967 F. Supp. 2d at 849 (quoting Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004)).}
\footnote{324}{Williams, \textit{supra} note 190, at 1289-90 (citing EEOC's Memorandum of Law in Opposition to Defendant Bloomberg L.P.'s Motion for Summary Judgment as to EEOC's Pattern-or-Practice Claim at 4, EEOC v. Bloomberg L.P., 778 F. Supp. 2d 458 (S.D.N.Y. 2011) (No. 07-8383)).}
\end{footnotes}
said, "Well, is every [expletive] woman in the company having a baby or going to have a baby?"  

The court dismissed most of these statements as inadmissible hearsay and concluded that the few admissible comments could not make up a pattern or practice claim in a company with 10,000 employees and more than 600 women who took maternity leave in the relevant period. Nevertheless, even if the admissible comments from a handful of Bloomberg managers are insufficient to demonstrate a policy of discrimination at Bloomberg, they still provide crucial insights for uncovering the "full story" that the Harvard study searches for. They supplement the trials of Maureen Sherry and Jill Patricot in exemplifying how high achieving women are disempowered and humiliated in the workplace and consequently leave as a last resort. They also explain another key finding of the Harvard study regarding a gender gap in career satisfaction. While male and female MBAs start their career with similar expectations as to what they value and hope for in their lives and careers, their ability to realize these goals has played out very differently according to gender. More than half (50% to 60%) of men across three generations reported very high levels of satisfaction with regard to their experiences of meaningful work, professional accomplishments, opportunities for career growth, and compatibility of work and personal life. In contrast, less than half of the women (40% to 50%) expressed similar levels of satisfaction concerning the same parameters. In light of these data it is possible to see why even high-achieving women can still perceive motherhood as an empowering domain in which they find satisfaction, control, and self-esteem. Drawing a link between women's disempowering experiences in the labor market and the power of motherhood thus adds a cru-

325 Bloom, 778 F. Supp. 2d at 479.  
326 See id.  
327 Ely et al., supra note 174, at 106; see also supra note 201 and accompanying text (describing Harvard study as it relates to Bloomberg case).  
328 Ely et al., supra note 174, at 103.  
329 The recent rise in allegations of sexual harassment in the workplace (Hollywood and beyond) clearly highlights another set of obstacles that women still face in the workplace. In a recently conducted study by ABC News, 68% of women reported that they experienced unwanted sexual advances in the workplace, and 75% experienced them by someone in a higher position of power. Gary Langer, Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds, ABC NEWS (Oct. 17, 2017), http://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721 [https://perma.cc/M6DH-D847]. The general numbers cut across all industries, with only slight variations. Alanna Vagianos, 1 In 3 Women Has Been Sexually Harassed at Work, According to Survey, HUFFINGTON POST (Feb. 19, 2015), https://
cial aspect to thinking about the maternal dilemma and reevaluating the sufficiency of current policy solutions.

E. Domesticating the Workplace, Dignifying Women's Work

Contemplating the gap between the law's ideal of equal parenting and the persistence of maternal reality in most families, which lies at the core of the maternal dilemma, we should recognize the many ways women and men still differ in needs and concerns. More precisely, it is time to acknowledge the significance and implications of gender differences in both the public and the domestic sphere. In the male dominated work environment of many businesses, women still feel "less worthy, less valued, [and] less important." Moreover, in that culture, organized around male norms of behavior and ways of doing things, women have fewer opportunities for career advancement. The built-in systems for advancement that work for men do not work for women. Against this reality, gender difference at home persists as the role of motherhood remains rewarding and meaningful and a source of power and control. Hence, gendered patterns of care-work at home are not simply the product of women's subordination in the domestic sphere. They also reflect the complex relation of women's disempowering experience in the labor market with the historical and contemporary significance of motherhood in their lives. Consequently, gender-neutral policy solutions that focus on encouraging men to assume more caretaking responsibilities at home are not sufficient. Some of the attention should be diverted to women's (different) professional and parental needs and to thinking about how to encourage women to enable men to fulfill a more significant role in the household.

330 Deborah Anthony has noted in this context that "[o]ne need not hold that the 'differences' between women and men are innate or biological to take this approach; whatever their original source, our social norms make those differences real, and legal policy must take account of them to be truly effective." Anthony, supra note 59, at 481.

331 Rosabeth Moss Kanter & Jane Roessner, Deloitte & Touche (A): A Hole in the Pipeline, HARV. BUS. SCHOOL 6 (May 2, 2003). Kanter and Roessner discuss the findings of a task force that was appointed in the early 1990s by accounting firm Deloitte & Touche's Board. The task force was charged with the mission of finding out why women were leaving the firm at a faster rate than men and developing recommendations to reverse the trend. The final report identified three primary obstacles to the advancement and retention of women: male-dominated work environment, lack of opportunities for career advancement, and insufficient work-life balance. Id. at 4–6.
In diverting the focus from men to women, the goal is to establish alternative sources of power for women in the public sphere and to restructure the workplace to accommodate women's current (different) parental needs. If mothering (and maternal guilt) still plays a critical role in women's lives maybe the choices that confront women should not be reduced to opting out to care for children or relinquishing motherhood for professional work.\textsuperscript{332} A third option can be domesticating the workplace so that parental work is not confined to the domestic sphere. Domesticating the workplace entails going beyond allowing a more reasonable work-life balance in the form of flexible hours, part time work, or telecommuting.\textsuperscript{333} It also requires enabling parents to exercise some of their parental tasks at work. For instance, a nursery in the workplace that allows parents, more especially mothers, to take young children with them to work, to be able to breastfeed them while at work, or to spend some time with them, can relieve the struggle of having to choose between family and work.\textsuperscript{334} In addition to telecommuting, which enables workers to take work home, taking parenthood to work should also be made possible in order to incentivize women to depart the domestic sphere without conceding the benefits of motherhood and without feeling guilty for not attending to their children's needs.\textsuperscript{335}

\textsuperscript{332} For a similar argument with regard to Israel's parental policies, see NOYA RIMALT, LEGAL FEMINISM FROM THEORY TO PRACTICE: THE STRUGGLE FOR GENDER EQUALITY IN ISRAEL AND THE U.S. 183--88 (2010).

\textsuperscript{333} For a brief review of such suggestions for workplace reforms, see Cahn, supra note 281, at 217--19.

\textsuperscript{334} Interestingly, childcare became an important issue to employers during World War II, when women had to work in the factories to replace the men who were off to war. Stimulated by federal legislation that gave matching funds to day care centers, many employers sponsored on-site nurseries to care for the children of their female employees. These centers closed when the war ended and male workers resumed their place in the factories. See SHEILA B. KAMERMAN & ALFRED J. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 190 (1987); Erica B. Grubb, Day-Care Regulation: Legal and Policy Issues, 25 SANTA CLARA L. REV. 303, 312 (1985).

\textsuperscript{335} For some initial initiatives and existing measures in this context, see RACHEL CONNELLY, DEBORAH S. DEGRAFF & RACHEL A. WILLIS, KIDS AT WORK: THE VALUE OF EMPLOYER-SPONSORED ON-SITE CHILD CARE CENTERS 4--9 (2004) (offering quantitative and qualitative arguments for the benefits of on-site childcare for employees); CATHERINE HEIN & NAOMI CASSIRER, WORKPLACE SOLUTIONS FOR CHILD-CARE 93--128 (2010) (evaluating various solutions to accommodating parenthood at the workplace); Lisa Belkin, Bringing Baby to Work, N.Y. TIMES (Oct. 30 2008), https://parenting.blogs.nytimes.com/2008/10/30/bringing-baby-to-work/ [https://perma.cc/GGY2-43SB] (interview with the founder of the Parenting in the Workplace Institute, which "helps companies design programs that allow workers to bring new babies to the office regularly").
Still, women's professional work has to be dignified; they have to be provided a supportive environment in which they might get ahead and realize that their work counts and contributes. Affirmative gender-specific measures in terms of financial incentives such as the one discussed and affirmed in \textit{Bahat}—the Israeli case—might be crucial in turning the workplace into an empowering domain for women. Moreover, building on \textit{Bahat}'s broader rationale, affirmative action plans for promoting women to top management positions could be similarly justified on gender-equality grounds. While gender-neutral parental entitlements as well as daddy quotas remain a valid and important legal tool for encouraging men to assume more caretaking responsibilities, it is equally crucial to address women's parental choices and to undermine the structures and forces that shape those choices and cater to a reality of gender inequality. The ultimate goal should be to have an inclusive policy that represents the needs of both men and women and takes realistic account of their divergent positions in society.

\textbf{CONCLUSION}

When enacting the FMLA and setting a minimum standard of family leave for all eligible employees, Congress was particularly cautious about attacking the stereotype that all women are responsible for family caregiving. As Justice Rehnquist explained in \textit{Nevada v. Hibbs}, the goal was to encourage men to assume more caretaking responsibilities at home, thus reducing employers' incentives to discriminate against women by basing hiring and promotion decisions on the stereotype of women as mothers. Indeed, the likely contribution of the gender-neutral parental leave legislation to the promotion of gender equality in the division of care-work at home, hence to equal employment opportunities for women, was part of the official FMLA narrative. It was meant to strengthen the expectation of a transformative era, when "a significant number of men"\textsuperscript{336} would take family leave.

However, more than twenty years after the enactment of this law, women remain the primary caretakers at home. They are still singled out as different, and gender stereotypes of women as less competent workers flourish, nurturing a reality of gender discrimination in the workplace. This discriminatory reality is often masked by legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual

\textsuperscript{336} Ross, \textit{supra} note 43, at 104.
products of contemporary parental policies. Gendered patterns of care and work are thus legitimized as reflecting the individual lifestyle preferences of both women and men in a world in which equality and choice shape these preferences.

This Article has suggested naming this problem the maternal dilemma and has called for acknowledging the gap between law's ideal of equal parenting and the persistence of maternal patterns of care at home. It has revealed that the expansion of traditional mother-oriented protections to gender-neutral parental benefits, designed to encourage men to assume more caretaking responsibilities at home, have not been effective in undermining the unequal division of care-work at home, irrespective of how generous these supports are. The American model of very narrow parental supports thus resembles the far more progressive Israeli model in terms of the scope and significance of the maternal dilemma. Similarly, even in countries that put extra pressure on men to participate equally in the division of domestic labor by mandating leave, women still take most of the leave and are more likely to adjust their working routine to accommodate childcare.

The magnitude and persistence of the maternal dilemma calls for a reevaluation of current policy solutions that focus primarily on recruiting men to engage in caretaking at home as a means of undermining the gendered division of parental work, thus removing a significant barrier to gender equality in the workplace. Focusing on reshaping men's parental choices has made feminists, legislators, and policy makers neglect another, no less important, set of questions about the structures and forces that shape women's decision to remain the primary caretakers at home. Shifting the focus back to women and addressing their specific needs and concerns is thus crucial for moving forward. A first step in this direction is naming the problem "the maternal dilemma." It serves as a reminder of where the core of the problem lies; it also implies that the path to gender equality entails more than gender-neutrality and similar treatment.
Women Lawyers: Forget Your Job and Focus on Your Career

BY RACHELLE J. CANTER ON MARCH 14, 2016

While the title of this article overstates the case, it attempts to redress a major problem and imbalance that interferes with career success: namely, that many women lawyers pour everything into their jobs to the exclusion of managing their careers. I have worked with hundreds of women lawyers in virtually every specialty, level and geography, and I have personally out-placed scores of women who mistakenly assumed that keeping their heads down and working hard would be enough to assure their success and security.

Like all lawyers, women lawyers face demanding, time-consuming jobs. For many, they must also juggle primary family responsibilities. Add to this the well-documented lack of a level playing field—for example, the higher level of scrutiny and the narrower band of acceptable behavior experienced by women—and it's easy to see why women mistakenly believe that outworking their male competition is a simple but effective strategy.

The strategy is simple, but ineffective. Career management is the individual's responsibility, and only her priority. Many of my clients have not lost their jobs, but are dissatisfied with their practices or career progress. They are frustrated by their options. For example, some started in a practice area due to firm needs, not personal interest, but stayed stuck because of continuing firm needs, inertia or uncertainty about how to make a change. What can a busy woman do?

The purpose of this article is not to scold or blame women, but rather to point out some career management actions that are not time-consuming, but can have an important impact on career
satisfaction, success and longevity. Here are three simple steps you can take this week to improve your career:

**Create a simple career plan.**

When I advocate creating a career plan in speeches, the audience looks at me as if to say, "Do you honestly think I have time to analyze my career and put together a plan? I haven't completed my business development plan for the firm yet. How can I possibly find time to do a career plan?"

Here is the secret to doing a career plan this week: take five minutes to write three lines on a piece of paper: my long-term career goal, how I want to improve my skills/experiences to advance toward the long-term goal in the next year, and how I want to improve in the next three years.

Five minutes to create this quick-and-dirty career plan will put you way ahead of most people who have no plan at all. You are free to change it as time passes, but the important thing is that a simple plan like this can guide your career choices and activities. Working hard is no guarantee that you will end up qualified to do the work you want to do. A plan guides you in choosing assignments to volunteer for, new activities to take on, or additional training. This five-minute investment can yield big results.

For example, Hillary was a senior associate in the commercial litigation practice of a big firm, working for a notoriously difficult partner who delegated most of his work to her, and then took credit for it. He minimized her contact with clients, because it might be obvious who had done the work and knew the details of client cases.

She was burned out and trapped. By putting together a career plan, she identified her long-term goal as in-house counsel, and ultimately general counsel. She recognized that in-house litigation jobs are not plentiful, and since she had neither a litigation specialty nor an industry specialty, she set out to gain transactional experience by volunteering to help out on deals, spending extra time without getting billing credit to learn new skills. She also decided to volunteer for compliance cases, building on her prior audit experience before her legal career. The result? An in-house job she loves.

**Ask someone who does something well.**

Career books and media stories constantly tout the importance of building your network and your skills. How is this possible with high billable targets and other job pressures? Using the simple step strategy, identify one thing you don't do very well, such as learning to please multiple demanding partners, including how to prioritize and push back when necessary.

Find someone who does this well, and take her or him to lunch. Be prepared with a concise description of the problem and past failures. Ask for specific advice about how to handle the problem gracefully but firmly, and how to avoid problems. People are flattered by being recognized for their excellence and asked for their advice. Finish by asking how you can return the favor. You may even ask for a follow up lunch in three months. Whether one lunch or two, this is a valuable way to gain important information and to simultaneously build a relationship.

**Pursue feedback, especially negative feedback.**

Law firms are notoriously terrible when it comes to feedback, whether formal or informal. I have read many performance reviews, and they are vague and utterly lacking in useful information about the problem or how to resolve it. Informal feedback tends to be infrequent and often comes in the form of angry rants with little to no follow up.

When a firm calls to ask for my help for an attorney they are terminating, I typically ask the reason and whether the attorney had received prior feedback about the problem. Usually there is a long pause, so I know that whatever follows, the answer is no, they didn't get prior feedback. Often with female associates, I hear, "She just wasn't partnership material," without further elaboration, despite my questions.

Here is how you can get the feedback you need before performance or style issues become problems. You must ask for feedback, and you must keep asking. Get in the habit, at a minimum, of asking for feedback on
your performance at the end of a deal or case. If you can ask for feedback each week, that is even better. We know that more frequent, more specific, more behavioral, and more detailed feedback is better.

Be matter of fact in requesting feedback if you want honest and useful information. Any defensiveness, hostility, emotionality, or other reaction will cause the feedback-giver to shut up. Just the facts. Be concise, ask specific questions so you understand the feedback and how to use it, thank the person and let both of you get back to work.

Don't be satisfied with a “fine” or “pretty good.” And really pursue negative feedback – what could I have done better? What did not work so well? What should I do differently and how would you advise me to do it differently? Get specific about what went wrong and how to correct it, then implement the suggestions and follow up with the feedback giver for their evaluation.

Making routine and matter of fact requests for feedback over time elicits increasingly candid and useful feedback. Women are especially likely not to hear negative feedback. I remember a senior woman executive relating a conversation with her CEO, who refused to give feedback to another woman executive who was in trouble, because, he said, he was afraid she would cry. Though this may be an extreme reaction, evidence shows that women do not get the quantity or quality of feedback that their male colleagues do. Unless you ask.

Don't think that no news is good news. I outplaced a brilliant young lawyer who lost her job because she misunderstood the unspoken interpersonal and communication demands of the role. The powerful partner who had long been her champion was frustrated and disappointed by her response when he asked for her evaluation of courses of action for clients.

He expected her to give the pros and cons of each alternative, followed by her recommendation. He found her even-handed review of the alternatives without a recommendation to be a sign of weakness. So did clients.

She lost the confidence of the partner and the clients, and before long, she lost her job. Unfortunately, the partner never articulated this to her. By the time a woman partner pointed out her mistake, it was too late. While the partner was at fault, the associate was the one out of a job. Had she asked for feedback, and kept pressing for constructive feedback on what she could do better, her once-promising career would not have been derailed.

Women lawyers have little time and demanding jobs, but career satisfaction and security can be greatly enhanced by following these three simple steps, none of which are time-intensive. To paraphrase a public service announcement from years ago, the career you (create and) save will be your own!

About the Author

Rachelle J. Canter is the principal of RJC Associates, which provides leadership, career, organization, and team development services to executives, attorneys and other professionals. She can be reached at rjc@rjcassociates.net.

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We say we live in a modern society, but gender inequality is still evident in several professions, including law. According to data published by the American Bar Association’s Market Research Department in April 2016, women comprised only 36 percent of legal professionals in the country. Though the number of women is growing in private law firms as well as the judiciary, they don’t have equal access to senior positions. The working environment and office hours in most law firms are still more suitable to male lawyers compared to their female counterparts.

Women entering the legal profession have to face a multitude of obstacles to pursue a successful career. “Three issues continue to be the biggest obstacles to a woman’s advancement in the legal profession. They are traditional sexual stereotypes, inflexible workplace structures, and inadequate access to mentoring,” says Deborah Rhode, Ernest W.
McFarland Professor of Law, Stanford University (California). Women also have to face problems such as inequality in pay and sexual harassment in the workplace.

There has never been a better time to be a woman contemplating a career in law.

With firms pushing for gender parity – or even a greater number of female recruits – at graduate entry, and a range of support in place to develop those women as they progress through their careers, the legal sector looks a world apart from the place in which some of the more experienced women I coach had to carve out their careers.

Although the majority of firms finally appear to have ‘got’ the importance of ensuring women are well-represented at partner level through the talent pipeline, it doesn’t mean that the path to fulfilling their career ambitions will be an easy one.

The facts, if anything, still point to a different experience. At the top of the profession, analysis by the likes of The Lawyer shows an enduring deficit of women at partner level.

Meanwhile, according to recent research we conducted among young female lawyers, although they are entering the
profession in increasing numbers, many are also deciding it is
not the place where they want to commit themselves for the
long term – particularly as the issue of family and children
becomes a more important consideration.

There is no doubt that law firms have a part to play in shifting
a culture where there is – obstinately and inexplicably in
some areas – still a resistance to efforts which ensure
women are proactively encouraged and supported through
their careers.

But young women must accept they too have a role to play to
at the beginning, and in the early years of their careers, if
they are to succeed later on.

Based on my experience of coaching women here are the
critical areas they should focus on:

- **Building a good network** – career progression is still
driven as much by relationships as talent, for men and for
women. Investing in building connections with clients,
peers in other law firms and, critically, internally in your
own firm is one of the most important tasks for a
prospective lawyer. Your network represents the people
who will follow and support you through your career so
build a good one.

- **Become a specialist** – masters of specific knowledge
areas are always in demand and a career in law is one
place which lends itself to developing niche specialism.
Being a specialist gives you a highly marketable point of
difference which will help you move from firm to firm and
ensure you are in demand through your career.

- **Don’t sleepwalk into motherhood** – at the start of your
career you may think you can have it all. But the long
working hours of a lawyer, combined with a commute, a
working partner and children mean that for many couples,
one person has to stop working. Think about how you
want to balance work, life and family and make sure that
as your career progresses you are taking control of your
choices and that you don’t become a stay-at-home-mum
by default.

- **Do your due diligence on every firm you join** – There are
plenty of progressive law firms out there. These are the
ones who have a rising proportion of female partners,
have specific policies and support for women around the
maternity transition, and, critically have a culture which
supports flexible working. Researching what it is really like
to work for your prospective employer is the best way of
pinning down whether it is a firm which stifles or nurtures female talent.

A final piece of advice for young women is to remember they don’t need to emulate the behaviours of the men around them to be successful.

Women bring a distinctive set of skills and way of thinking to the workplace as managers, leaders and peers whose value, in a man’s world, is increasingly recognised to the people who matter most to law firms: their clients.

Emma Spitz has over twelve years experience advising city law firms and coaching female lawyers on their career development.

Related links

- Women in law: The critical career factors to focus on
- Women in Law

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