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# The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?

Jane R. Bambauer\* & Tauhidur Rahman\*\*

*Thirty percent of female lawyers leave their careers. The same is true for female doctors. Over time, an increasing number of married professionals have recreated traditional gender roles, and society has lost a tremendous amount of training and well-boned talent as a result. Neither workplace discrimination nor family obligations can fully and satisfactorily explain the trend. Both of those theories assume that women take a more dependent and vulnerable position in the household because of constraints, but in one important respect, men are more constrained than women, and they are better off for it: to maintain social status, men have to work. Women do not.*

*This Article advances a theory and corroborating evidence that the cultural acceptance of female underemployment is a privilege in the abstract, but a curse in practice. Even under the best conditions, the early stages of professional careers involve mistakes, mismatches, and disappointments. An opportunity to escape the stress of the public sphere by focusing on the family may have great appeal in the short run even though the long-run consequences are severe. Asymmetric cultural acceptance creates an easy off-ramp for females, to nearly everybody's detriment.*

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## INTRODUCTION

Women have made impressive gains in the labor market since World War II.<sup>1</sup> Before 1947, very few married women worked fulltime.<sup>2</sup> Today, the majority

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1. Female fulltime employment grew from 33.9% in 1950 to 57% in 2013. Cynthia Hess et al., *The Status of Women in the States: 2015*, INST. FOR WOMEN'S POL'Y RES. 53 (2015), <http://statusofwomendata.org/wp-content/uploads/2015/02/Status-of-Women-in-the-States-2015-Full-National-Report.pdf> [<https://perma.cc/G6W4-LU99>]. And this trend was *most strong* for the most educated women and the women who married high-earning husbands. Ellen R. McGrattan & Richard Rogerson, *Changes in the Distribution of Family Hours Worked Since 1950*, in FRONTIERS OF FAMILY ECON. 115 (Peter Rupert ed., 2008); Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 21913, 2016) [hereinafter Blau & Kahn, *The Gender Wage Gap*], <http://www.nber.org/papers/w21913> [<https://perma.cc/R5N9-DK2W>].

2. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1.

do.<sup>3</sup> American families seemed to be on an irreversible cultural path toward gender parity in which men and women both invested in their own careers. Claudia Goldin called it “the quiet revolution.”<sup>4</sup>

The revolution was led by educated women who married high-earning men.<sup>5</sup> Elites, it seems, were the most interested and the most capable of striving for a two-earner marital partnership.<sup>6</sup> This is not surprising; well-educated women are, after all, in the best position to claim high salaries, secure high-status jobs, and to marry successful partners. These power couples can easily outsource a lot of the cooking, housekeeping, and childcare work that could cause tension and zero-sum bargaining in other households. But things have started to change.

Today, we are in the midst of a “quiet resignation.” The cultural pressure that drove many women to proudly invest in their careers has subsided.<sup>7</sup> The most talented and privileged women are returning to the home in staggering numbers after short stints in the white-collar workforce. When the most privileged women leave the public sphere, it causes a cascade of other social problems.<sup>8</sup> The wage gap has stopped closing.<sup>9</sup> Desegregation within college majors (where men tend to focus on the more lucrative STEM fields while women tend to major in the liberal

3. Female fulltime employment grew from 33.9% in 1950 to 57% in 2013. Hess et al., *supra* note 1.

4. Claudia Goldin, *The Quiet Revolution that Transformed Women’s Employment, Education, and Family*, (Nat’l Bureau of Econ. Research, Working Paper No. 11953, 2006) [hereinafter Goldin, *Quiet Revolution*], <http://www.nber.org/papers/w11953> [<https://perma.cc/NZ65-L9NH>], reprinted in 96 AM. ECON. ASS’N PAPERS & PROC. 1 (2006); see also Claudia Goldin, *Career and Family: College Women Look to the Past*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 20 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997); CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN (Robert W. Fogel & Clayne L. Pope eds., 1990). Many readers will be familiar with Claudia Goldin’s empirical work on discrimination including the now famous orchestra study demonstrating that blind orchestra auditions—which forced musicians to audition behind a screen—helped women improve their outcomes. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

5. McGrattan & Rogerson, *supra* note 1, at 115; Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 12.

6. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1.

7. Claudia Goldin herself considered the evidence available ten years ago to see whether labor participation had stalled or reached some sort of natural equilibrium. She found some evidence that the revolution was continuing, though, since women in their thirties were more likely to have young kids than women in earlier generations (whose kids would have been older), and therefore what looked like a plateau may actually be a shift in the timing of family-related disruption. Goldin, *Quiet Revolution*, *supra* note 4, at 24–26, 33. (“[W]as Ely correct in asserting that ‘Revolutions do not go backward?’ There is little evidence that this one has, at least for now.”).

8. See *infra* Part IV.

9. Casey B. Mulligan & Yona Rubinstein, *Selection, Investment, and Women’s Relative Wages Over Time*, 123 Q.J. ECON. 1061, 1062–63 (2008). Wage inequality within gender caused talented women, with greater earnings potential, to enter the workforce in greater numbers. Thus, the shrinking of the wage gap between 1970s and 1990s may be illusory, as the ranks of working women were joined by more talented and ambitious women during this time.

arts) has not improved in decades.<sup>10</sup> And boardrooms and law firm partnerships, suffering from an alleged “pipeline problem,” are still dominated by men.<sup>11</sup>

This Article grounds the discussion of professional career abandonment in hard facts, and then explains the phenomenon. We present a mix of new and existing evidence showing that women in the best position to advance gender equality—who are trained in law, medicine, and business—are leaving the fulltime workforce at very high rates. About 30% of female lawyers are unemployed or under-employed<sup>12</sup> during prime career-building years—ages 35–40.<sup>13</sup> These are the worst years to drop out of the labor market, just when the fruits of all the training and hard work are nearly ready for harvest. Despite the time and effort spent completing exhausting educational programs, these women wind up in households that conform to all the hallmarks of traditional gender roles.

Two theories dominate the literature on gender gaps in the legal field.<sup>14</sup> First, discrimination may explain some of the gender gap in labor participation. Since women experience and expect unfair treatment at hiring, promotion, salary negotiations,<sup>15</sup> and case assignment, they may value their careers less than similarly qualified men. This theory puts the blame on employers for failing to correct for explicit and implicit biases that have long plagued the workplace. The second explanation is self-selection.<sup>16</sup> For cultural, biological, and path-dependent

10. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 15–16.

11. Lauren Stiller Rikleen, *Solving the Law Firm Gender Gap Problem*, HARV. BUS. REV. (Aug. 20, 2013), <https://hbr.org/2013/08/solving-the-law-firm-gender-gap> [<https://perma.cc/XXL6-WBAN>] (rejecting the theory that the gap in law firm partnership is explained by women voluntarily leaving the pipeline).

12. We use the term “underemployed” to mean working fewer than twenty hours per week. We justify our focus on this metric *infra* in Part I.

13. We focus on lawyers because the data is more suitable for our analyses. The performance of lawyers can be quantified to some degree (hours billed, revenue generated) and, therefore, it allows us to better identify how much of the gender gaps in earnings or career trajectory can be attributed to performance gaps, and how much cannot. See Ghazala Azmat & Rosa Ferrer, *Gender Gaps in Performance: Evidence from Young Lawyers*, 125 J. POL. ECON. 1306 (2017).

14. Other theories that get much less attention in the context of lawyers include differences in performance, differences in the taste for competition, see Uri Gneezy et al., *Performance in Competitive Environments: Gender Differences*, 118 Q.J. ECON. 1049 (2003); Muriel Niederle, *Gender* (Nat’l Bureau of Econ. Research, Working Paper No. 20788, 2014), <http://www.nber.org/papers/w20788> [<https://perma.cc/58GX-4T8X>], reprinted in 2 HANDBOOK OF EXPERIMENTAL ECONOMICS 483 (John Kagel & Alvin E. Roth eds., 2015), and long-term cultural commitments to gender equality, see Esther Duflo, *Women Empowerment and Economic Development*, 50 J. ECON. LITERATURE 1051, 1051 (2012).

15. There is, of course, a gender dimension to negotiations. Women do not negotiate as much as men, partly because women are by nature or socialized to be more egalitarian. Catherine Eckel et al., *Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?*, 24 NEGOT. J. 429 (2008).

16. Also known as the “Opting Out” phenomenon. Nicole M. Fortin, *Gender Role Attitudes and Women’s Labor Market Participation: Opting-Out, AIDS, and the Persistent Appeal of Housewifery*, 117 ANNALS ECON. & STAT. 379 (2015).

reasons, women simply prefer to leave their careers and to use their talents raising children and performing volunteer services.<sup>17</sup>

Both discrimination and self-selection theories have empirical support, and we think it's obvious that both are operating to some degree. The relative effects of each are hard to determine, and even the best data sources can be cherry-picked to promote one explanation or the other. The law and policy literature has compulsively focused on untangling the proportional share of responsibility between discrimination and self-selection so that an appropriate level of blame and legal intervention can be directed at employers. For the most part, scholars who study gender gaps treat voluntary decisions to leave the labor market as a matter of each person's prerogative.<sup>18</sup> Self-selection, in other words, is treated as a non-problem so long as women leave their careers for some reason—any reason—other than discriminatory treatment at work. But there is good reason to believe that attempts to settle the debate between discrimination and self-selection shroud a more direct, more powerful influence on female labor participation.

This Article highlights the power of asymmetrical cultural pressures that shape the trajectories of men and women. Single professionals must invest in work for practical reasons—unless they are independently wealthy, they have no other option to achieve financial security and social status. But married men and women make decisions under very different social pressure. Men are expected to participate in the labor market for most of their lives, and the pressure comes from outside and inside the home. Women, by contrast, are given much more leniency to divest from their careers. Progressives and conservatives alike give women the authority to opt out of the workforce, and encourage their spouses to respect and support their choices.<sup>19</sup>

This cultural acceptance for female underemployment is meant to be a privilege—something that expands the option set for women. But in practice, it is a trap. Culture interacts with other layers of pressure and influence to create a one-way valve that takes women out of the workforce. Consider how this cultural asymmetry combines with marriage, work experience, and family.

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17. We refer to this as self-selection rather than family or child-rearing responsibility because, except in unusual cases, there is no necessity for a parent to stay home to care for children when the mother is professionally trained.

18. See Azmat & Ferrer, *supra* note 13.

19. For example, Aishwarya Rai, the former Miss World, one of the leading actors of Bollywood, and a goodwill ambassador of the United Nations, stated: "The housewives are the biggest CEOs in the country and they should be given utmost respect and appreciation in the country. I doff my hat off with full respect and appreciation to all the housewives of the country and the world[.]" Pranita Chaubey, *Aishwarya Rai Bachchan Says 'Housewives Are the Biggest CEOs in India'*, NDTV.COM (Aug. 04, 2018), <https://www.ndtv.com/entertainment/aishwarya-rai-bachchan-says-housewives-are-the-biggest-ceos-in-india-1895040?pfrom=home-lateststories> [<https://perma.cc/8FGF-4UCQ>]. The mores are different in matrilineal societies, where female underemployment would presumably be less tolerated. Uri Gneezy et al., *Gender Differences in Competition: Evidence from a Matrilineal and a Patriarchal Society*, 77 *ECONOMETRICA* 1637 (2009).

Marriage creates the opportunity for career divestment. Professionally trained women are typically married to men who also have high earnings potential.<sup>20</sup> Assortative mating creates an opportunity for either one of the partners to stop working for a prolonged period of time while still enjoying a high quality of life.<sup>21</sup>

Meanwhile, the labor market is a slog. In due time it will be kind to most professionals—both lucrative and personally rewarding. But professional careers often begin with some challenging years, requiring newcomers to manage stress and disappointment as they figure out their niche.<sup>22</sup> That's the best-case scenario. In addition to the strain of mismatched jobs, inconsistent performance, abusive bosses, and random bad luck that all young professionals have to navigate, young female professionals have additional stress and discouragement from discriminatory treatment. And of course, they are also biologically destined to manage the mother of all career setbacks—pregnancy and early infant care—which affects the productivity of even the most devoted careerist. Thus, while many young professionals face some early career turmoil that causes them to question their path and devotion to working, women face disproportionately more of these moments.

Finally, the influence of family. When young children are in a household, the domestic sphere is much more demanding on professional parents' time—usually more demanding than either of the parents had anticipated.<sup>23</sup> Even with the aid of daycare, nannies, housekeepers, and other paid help, the household still requires active management of one of the parents. All this typically hits at a time when professionals are in the middle of their career marathons, and when success in the labor market rewards the people who can double-down their investment in work. How will professional couples respond to the domestic demands, to the vacuum at home? One parent cannot divest from their careers without losing their status in society and, often, the respect of their spouse. The other can.

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20. Throughout this article, we focus on opposite-sex relationships. In the future, we may have enough data to be able to reexamine these trends with more nuance by including studies of same-sex couplings and transgender professionals. We suspect that the results we present *infra* in Part I are *underestimates* of the trends we discuss because an unknown portion of female graduates are in same-sex relationships where home-market divisions of labor may be less likely to occur.

21. This Article focuses on heterosexual couples partly out of necessity (many of the datasets we rely on do not have sufficient numbers of same-sex-professional couples to make comparative analyses). Moreover, since the majority of female JD holders are heterosexual, the dynamics of their households will have greater explanatory power for the statistical trends we are trying to explain. Still, we hope in future work we can work with more comprehensive data and provide more detailed analyses that do not rely on these heteronormative assumptions.

22. Job satisfaction increases with time. *See, e.g.,* Arne L. Kalleberg & Karyn A. Loscocco, *Aging, Values, and Rewards: Explaining Age Differences in Job Satisfaction*, 48 AM. SOC. REV. 78 (1983).

23. Ilyana Kuziemko et al., *The Mommy Effect: Do Women Anticipate the Employment Effects of Motherhood?* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 24740, 2018).

While it's true that workplace gender discrimination and pregnancy have differential effects on men and women, obsessive focus on both of those factors obscures the profound impact of culture. Highly trained professionals of both genders will frequently have an unpleasant period at work, and will also recognize that their young children require a good deal of time and attention. Women will tend to approach marital bargains and household decision-making with a very different set of preferences than their husbands because there is no cultural counterpressure to rebut the push out of the workforce and the pull into the home.

While societal expectations will push men to meet the challenges of early career bobbles with resilience and problem-solving, married women will have too many options. They will have an all-too-appealing opportunity to leave the labor market. This option affords women short-term relief from a bad work situation and medium-term satisfaction as they nurture young children, but it deprives them from fully realizing their long-term career potential.<sup>24</sup> It also causes externalities to their children and coworkers, and it perpetuates the (accurate) stereotype that women are less likely to remain in their jobs.<sup>25</sup> While economists describe gender gaps in terms of constrained options for women,<sup>26</sup> in one important respect, men are more constrained than women, and they are better off for it. To maintain social status, men have to work. Women do not.

The career trajectory of one of the authors, Jane Bambauer, illustrates our theory. One year out of law school, Jane was unhappy with her work at a boutique litigation firm. The hours were long and often spent concentrating on problems that were dull (albeit important to the case). Just when the dissatisfaction became particularly acute, Jane also experienced sexual harassment. If Jane were married to another professional, she would have quit and turned her attention to family. But for being single, she would have become part of the 30% of female JD-holders who leave full-time employment. Lacking that option, Jane regrouped for a few weeks and redirected her energy toward a job that better matched her interests and values.

Thus, it is with the sincerity that comes from personal experience that we assure readers our theory is not intended to place fault on any individual woman or family that winds up recreating traditional gender roles. Work can be unfair and inhospitable. But the amount of talent lost to the culturally-assisted exit ramp is unacceptable. Future generations of lawyers should be making work-related decisions and spousal bargains under a different set of norms in which parents understand that the public and the family lose out when a mother with marketable skills leaves the workforce.

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24. See *infra* Part IV.C.

25. The externalities and “internalities” are considered at length *infra* Part IV.

26. See, e.g., Kai Liu, *Explaining the Gender Wage Gap: Estimates from a Dynamic Model of Job Changes and Hours Changes*, 7 *QUANTITATIVE ECON.* 411 (2016) (analyzing constraints that limit women's hourly wages).



Our cultural acceptance theory diverges from most of the existing literature in three ways. First, it is unabashedly pro-work. We define gender gaps in labor participation (particularly in the high-paying, high status professions) as a social problem that deserves a remedy. This is not to say that every person should try to maximize earnings. To the contrary, the most satisfying careers are often the ones that make conscious trade-offs between income and interests, and between work and leisure/family time. But for reasons we elaborate, leaving the labor force is usually a bad deal for the professionals who do so, for the firms that trained them, and for the children who are the intended beneficiaries of the sacrifice.

Second, and relatedly, the cultural acceptance theory merges the discrimination and self-selection theories by reducing the importance of whether exit was voluntary. A commitment to gender parity demands some scrutiny when women routinely volunteer to take a more dependent, vulnerable position in a household after attaining advanced degrees and on-the-job professional training.

Third, the perverse cultural acceptance theory calls for significantly different policy interventions than the discrimination and self-selection theories. Employment law that minimizes discrimination and reduces the disruption from childbearing is valuable, but employers are not wholly responsible for attitudes about labor supply and childcare. We propose some changes to tax and disability law that can help promote an expectation for both parents in a two-parent household to maintain their careers. But lasting change will require the help of cultural leaders and role models as much or more than public law. We offer some recommendations for law schools and firms to help generate discussion, awareness, and more informed decision-making among junior attorneys.

The Article proceeds in five parts. Part I presents the data on female underemployment across multiple professions, with particular focus on lawyers. Part II describes and critiques the standard explanations for female career detachment—discrimination and self-selection. Part III describes our theory of perverse cultural acceptance and provides the existing evidence. Part IV makes the normative case that underemployment by highly trained married women is problematic not merely for aesthetic or symbolic reasons but because it has repercussions for women, for their families, and for society. Part V sketches some pragmatic policy proposals (both legal and non-legal) that can help balance out the asymmetric cultural pressure placed on male and female professionals.

### I. FEMALE UNDEREMPLOYMENT

Over the last fifty years, women have been closing the gap between their earnings and their husbands'.<sup>27</sup> This work was spearheaded by well-educated women who were drawn to the challenges and rewards of a professional work

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27. Casey B. Mulligan & Yona Rubinstein, *The Closing of the Gender Gap as a Roy Model Illusion* 3 fig.1 (Nat'l Bureau of Econ. Research, Working Paper No. 10892, 2004).

life.<sup>28</sup> But today, married women with professional degrees are *less* invested in work than their less educated counterparts. These professional women overcame whatever obstacles were in the way and made it to the launching pad for financial independence and professional status only to abandon the project at the proof-of-concept stage.

This Part presents evidence of the quiet trend among elite women to leave their careers. It also discusses why we focus on under-employed lawyers as key indicators. Later parts will go on to explain the trend.

#### A. Description

A large number of highly skilled females are underemployed—that is, they work fewer than twenty hours or are not working at all. As Figures 1–3 show, the rate of underemployment is consistent across disciplines (law, medicine, and business) and has been increasing since 1993. We recommend particular focus on the 36–40 age bands. These are prime years in which career investments start to mature, but many professional women in this age range are not fully participating in the labor market.<sup>29</sup> For lawyers, 28.5%–30.1% of women in this age band are underemployed compared to less than 4% of men.<sup>30</sup>

**Figure 1.**

Proportion of Female JDs Who Are Underemployed  
(unemployed or working fewer than twenty hours)

	ALL	< 30	31–35	36–40	41–45	46–50	51–60
1993 (874)	25.3%	18.7%	26.4%	29.7%	21.3%	18.2%	21.1%
2003 (997)	24.3%	16.6%	21.3%	30.1%	27.2%	21.6%	19.1%
2010 (1,079)	29.1%	24.4%	17.8%	28.5%	36.9%	31.2%	26.9%

Source: National Survey of College Graduates 1993, 2003, and 2010

**Figure 2.**

Proportion of Female MDs Who Are Underemployed  
(unemployed or working fewer than twenty hours)

	ALL	< 30	31–35	36–40	41–45	46–50	51–60
1993 (1,448)	24.2%	12.4%	19.2%	27.3%	21.9%	16.1%	18.8%
2003 (1,263)	26.8%	17.0%	17.3%	29.9%	25.2%	25.9%	22.0%
2010 (824)	31.4%	4.9%	24.0%	24.4%	38.1%	24.2%	34.3%

Source: National Survey of College Graduates

28. *Id.*

29. For the purposes of this paper, we use “professional” to mean graduates of a professional-postbaccalaureate-degree program holding a JD, MD, or MBA.

30. Across the three survey years, the percentage of underemployed men with JDs ranged from 3.4%–3.7%. Men with MDs and MBAs in the ages 36–40 were somewhat more likely to be underemployed than lawyers. The range of underemployment for male MDs and MBAs was 2.8%–12% and 5.4%–10.1%, respectively.

**Figure 3.**  
Proportion of Female MBAs Who Are Underemployed  
(unemployed or working fewer than twenty hours)

	ALL	< 30	31–35	36–40	41–45	46–50	51–60
1993 (1,470)	24.1%	13.5%	22.8%	28.5%	19.0%	20.9%	25.8%
2003 (1,622)	26.0%	15.1%	22.0%	28.7%	26.9%	23.9%	23.7%
2010 (1,497)	28.2%	17.0%	17.3%	25.2%	32.9%	27.8%	29.5%

Source: National Survey of College Graduates

Other, more specialized data sets corroborate these findings. In fact, the rate of underemployment may be higher, ironically, for women who attend the most prestigious graduate programs. Figure 4 shows the results of an alumni survey from Harvard Law School. Less than 60% of female alumnae who were fifteen years out of law school were working in full-time positions.<sup>31</sup>

**Figure 4.**  
Proportion of Harvard Law School Alumni Who Are Underemployed

Graduating Year	Men	Women	% Respondents Who Are Female
1975 (35 years out)	22.4%	38.1%	16%
1985 (25 years out)	9.4%	33.2%	43%
1995 (15 years out)	5.1%	40.3%	46%
2000 (10 years out)	5.7%	25%	53%

Source: 2010 Survey of Harvard Law School graduates reporting either working part-time or not working at all.

Data from another top-ranked law school, the University of Michigan, shows similar patterns. Ken Dau-Schmidt's research on Michigan law alumni has found that more than a third of female alums take time off of full-time work for childcare (beyond maternity leave) and that the *average* length of the leave is nearly five years.<sup>32</sup> This average length of leave has increased over time.<sup>33</sup> (By

31. DAVID B. WILKINS ET AL., THE WOMEN AND MEN OF HARVARD LAW SCHOOL: PRELIMINARY RESULTS FROM THE HLS CAREER STUDY 24 tbl.5.1 (2015). Results from a class of graduates from the University of Virginia School of Law are very similar. See John Monahan & Jeffrey Swanson, *Lawyers at Mid-Career: A 20-Year Longitudinal Study of Job and Life Satisfaction*, 6 J. EMPIRICAL LEGAL STUD. 451 (2009).

32. Kenneth Dau-Schmidt et al., *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 72 (2009) [hereinafter Dau-Schmidt et al., *Men and Women of*

comparison, only 22 of the 672 male alums in the survey data took any time off for child care.<sup>34</sup>) This is consistent with broader trends in the career attachment of college-educated married mothers.<sup>35</sup>

These trends are particularly odd because they have occurred during a time that income inequality increased in the United States. It is easier than ever for high-skill graduates of elite law schools to command incomes that more than cover the cost of relatively low-skill childcare services.<sup>36</sup> At least some of the slump in career attachment may be explained by selection effects. As college education has become more popular among women, it has made the pool of college-educated women more representative of women as a whole rather than a specialized set of career-oriented women.<sup>37</sup> Although there have been pushes by scholars and lawmakers to encourage men to take more time off for childcare,<sup>38</sup> the gender gap in labor participation will not be closed by men. While a greater portion of male attorneys take childcare leave today (3.2%) compared to the 1980s (0.8%), the percentage of female attorneys who take childcare leave has increased even more, from 31.9% to 39.6%.<sup>39</sup> These long child-rearing leaves have lasting effects on the careers of the people (mostly women) who take them.<sup>40</sup>

### B. Parameters

Before we launch into explaining female underemployment, we should clarify why we focus on lawyers rather than other professions, and on underemployment rather than other indicators of gender inequality.

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*the Bar*]. These average lengths of leaves are much larger than the average leave times of college-educated women in the data that Claudia Goldin studied in the *Quiet Revolution* paper. Women in the “College and Beyond” dataset who were fifteen years out of college spent just 1.55 years out of work (2.08 years for women with children). Goldin, *Quiet Revolution*, *supra* note 4, at 28–29.

33. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 75.

34. *Id.* at 72.

35. Labor participation peaked in 1997 with approximately 70% working in some capacity. By 2005, the participation rate among college-educated married mothers dropped to approximately 60%. Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, 130 MONTHLY LAB. REV. 9, 13 tbl.3 (2007).

36. Cf. David H. Autor et al., *Trends in U.S. Wage Inequality: Revising the Revisionists*, 90 REV. ECON. & STAT. 300 (2008); Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 12. Technology also creates market substitutes for the domestic work of wives, and it also makes the trend hard to explain using a pure-rational-economic-actor model. Jeremy Greenwood et al., *Engines of Liberation*, 72 REV. ECON. STUD. 109 (2005).

37. Cohany & Sok, *supra* note 35, at 14 tbl.4.

38. Martin Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1048–49 (1994).

39. Kenneth Dau-Schmidt et al., *The Kid Factor*, AM. LAW. (Apr. 1, 2008) [hereinafter Dau-Schmidt et al., *The Kid Factor*], <https://www.law.com/americanlawyer/almID/900005507498/> [https://perma.cc/FYD5-78BY]. Moreover, the duration of childcare leave that women take has also increased over the same period from forty-six to fifty-seven months. *Id.*

40. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 74–75. Their data show that the drop-in hours worked comes mostly from women who have kids and have taken some time off for childcare. See *infra* Part III.D.

Our focus on lawyers is mostly opportunistic. Between the various law school alumni surveys and largescale data collection efforts by the American Bar Foundation,<sup>41</sup> longitudinal data is available for lawyers in a richer and greater variety than it is for other professions. For lawyers in firms, we have decent measures of job performance—billable hours and client acquisition—which allow us to better control our analyses. The legal profession has some fortuitous advantages for our study, too. Lawyers seem to be good representatives of professions as a whole, as Figures 1–3 show that the underemployment trends are very similar to doctors and business school graduates. Law schools also have nearly perfect gender balance in their student bodies,<sup>42</sup> so women seem to be roughly as interested in law as men, and there are lots of female alums to study. But as the gender balance in law school cohorts equalized, career attachment has decreased.

Finally, we believe underemployment is one of the best ways to detect obstructions to the flourishing of the female professional labor market. Since most scholars use gender disparities in wages or in labor participation (that is, employment at all) to study gender gaps, our choice merits some explanation.

Wages are often used because they are so granular and can reveal even small gender disparities, but the advantages that come from this granularity are outweighed by the disadvantages. Wages are an inadequate proxy for career satisfaction. They fail to account for psychic income that can come from status, public service, independence, and flexible schedules. This is important because multiple studies show that female professionals (lawyers in particular) are more motivated by social and personal factors in a job and less motivated by financial rewards.<sup>43</sup> Thus, a female lawyer may be maximizing career satisfaction without maximizing her income. The same is true of achieving partnership at a large firm,

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41. See American Bar Foundation, *After the JD*, <http://www.americanbarfoundation.org/research/project/118> [<https://perma.cc/RE3Y-V4VF>] (last visited Feb. 2, 2020) (describing longitudinal surveys of lawyers).

42. “Between 1970 and 2000, the proportion of first-year law students who were female went from 8% to 49%.” Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 50; see also Goldin, *Quiet Revolution*, *supra* note 4, at 19 (“[O]ne in twenty entering law students was a woman [in the 1960s], two out of five were in 1980, and parity was reached in the early 2000s.”).

43. Sherwin Rosen, *The Theory of Equalizing Differences*, in 1 HANDBOOK OF LABOR ECONOMICS 641, 641–42, 670 (Orley C. Ashenfelter & Richard Layard eds., 1986) (demonstrating men and women place different values on temporal flexibility, and some sectors and firms have severe costs for providing it); Dau-Schmidt, *Men and Women of the Bar*, *supra* note 32, at 124 (stating that career satisfaction is correlated with satisfaction in achieving a work/family balance, which is antithetical to the most high-paying-partnership-track jobs); Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q.J. ECON. 1067, 1067–68 (2007); Lee F. Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443, 455–56 tbl.2 (1991); Goldin, *Quiet Revolution*, *supra* note 4, at 39 fig.6 (showing that men weigh financial success as a personal satisfaction factor much more heavily than women, although the differential has decreased over time).

which typically requires working long hours and deprioritizing other parts of one's life.<sup>44</sup>

The wage gap between men and women is complicated by other sorts of selection effects as well. There is wage inequality within the profession, as some subfields of law command much higher prices than others.<sup>45</sup> There are also selection bias issues that apply to women since so many leave the labor force. It is not clear which direction this bias runs, either. The women who do work may be the ones who can command high salaries relative to those who do not work (in which case the wage gap is under-estimated.) On the other hand, perhaps the higher a woman's potential wages, the more likely she will be to marry somebody with similarly high earning potential, thereby eliminating the need to work<sup>46</sup> (in which case the wage gap is over-estimated.) For all these reasons, women may have career preferences that are more elastic than men when it comes to income.<sup>47</sup> Since women and men attach different weight to wages, and since there is no single threshold of income that would mark the bounds of a meaningful career, wages are not good indicia of career investment.

Some studies of gender gaps use employment in any form as the key outcome measure, but this sets the bar too low. Part-time and seasonal work keep people paid, but professionally trained women who take these types of jobs are not really participating in the labor market as professionals.<sup>48</sup>

In contrast to wages and employment, we feel more confident about the meaning of underemployment. When the highly-educated work fewer than twenty

44. “[O]ver and above the long hours, what disproportionately affects women with family responsibilities is the unpredictability of the work. This unpredictability . . . is more difficult to handle if one has child care or other family responsibilities.” David Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1677 n.286 (1998).

45. Francine D. Blau & Lawrence M. Kahn, *The Gender Earnings Gap: Some International Evidence*, (Nat'l Bureau of Econ. Research, Working Paper No. 4224, 1992); Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 19; *see also* GITA Z. WILDER, GENDER AND THE LEGAL PROFESSION, WOMEN IN THE PROFESSION: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY, AN AFTER THE JD MONOGRAPH 37 (2007) (showing that fewer women work in private law firms where salaries and hours are higher, and women are overrepresented in public interest, nonprofits, and public defender offices); Jeffrey E. Stake et al., *Income and Career Satisfaction in the Legal Profession: Survey Data from Indiana Law School Graduates*, 4 J. EMPIRICAL LEGAL STUD. 939 (2007).

46. On the link between potential earnings and marital working arrangements, see Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 12–13.

47. For example, women in the public interest and public defense sectors liked their jobs more than men in the same areas. Deborah Cantrell et al., *Walking the Path of the Law: How Yale Law School Graduates Navigate Career Choices* 49–50 (Univ. of Colo. Law Sch. Legal Studies Research, Paper No. 07-28, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1026618](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026618) [<https://perma.cc/H7TR-DRBY>]. Then again, they may be married to men who make a large income, so they can do good and live well at the same time. *See* our discussion of assortative mating *infra* Part III.C.

48. *See, e.g.*, JAY SHAMBAUGH ET AL., LESSONS FROM THE RISE OF WOMEN'S LABOR FORCE PARTICIPATION IN JAPAN 1 fig.1, 7–8 fig.7 (2017). This study focuses on employment in any form, and shows that the United States now lags behind Japan in female labor participation. *Id.* at 1 fig.1. However, Japan's gains seem to consist of seasonal and part-time work, and work of lesser quality (e.g. non-leadership roles). *See id.* at 7 fig.7 and accompanying text.

hours per week (and are healthy and otherwise capable of working), they have evidently deprioritized their careers.

## II. POPULAR DIAGNOSES

Classical economics, popular media, and sociology literature would suggest the gender gap in professional labor participation is no mystery. Systemic discrimination and bias are responsible for some of the gap, and the rest is explained by gender differences in childcare.<sup>49</sup> Most of the research energy is therefore spent on disambiguating the two and determining the share of responsibility for each.

### A. Discrimination

If professional women are not treated as well by their employer as similarly talented men, the differences in treatment and compensation can cause women to value their careers less over time. The After the JD study of lawyers was designed to facilitate research on workplace bias by asking survey respondents about experiences that directly or indirectly relate to gender discrimination.<sup>50</sup> Early in their careers, women report more experiences than men in every form. Figure 5 shows our tabulation of the proportion of females and males reporting each form of adverse and potentially discriminatory treatment.

**Figure 5.**  
Proportion of Female and Male Attorneys Reporting Experience  
with Each Form of Adverse Action

	Women	Men
Experienced demeaning comments	20%	7%
Missed out on a desirable assignment	12%	8%
Client requested someone else	11%	9%
Colleague/supervisor requested someone else	6%	6%
Partner discounted hours	12%	11%
N	555	732

49. There is a third explanation that is sometimes obliquely suggested in research—that women perform differently and less productively than men. This may be caused by women being less competitive, on average, than men and less likely to network with high value clients. Juliet R. Aiken & Milton C. Regan, Jr., *Gendered Pathways: Choice, Constraint, and Women's Job Movements in the Legal Profession*, in *DIVERSITY IN PRACTICE: RACE, GENDER, AND CLASS IN LEGAL AND PROFESSIONAL CAREERS* (Spencer Headworth et al. eds. 2016) (citing Elizabeth Ziewacz, *Can the Glass Ceiling be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971 (1996)). We do not have sufficient reason to think genuine differences in skill is a significant factor in the gender gap for underemployment, so we will not explore this explanation. Our regressions do control for pre-labor market indicators of skill, such as law school grades and crude measures of law school quality, as well as new client revenue. These controls still leave some of the outcomes we studied with statistically significant gender differences.

50. WILDER, *supra* note 45.

Source: After the JD Wave I. These figures are limited to the subsample of respondents in private practice who had complete information for the variables we used as controls in the regressions described in Subpart D.

Female lawyers are also less satisfied with compensation, opportunities for advancement, and the diversity of the workplace.<sup>51</sup> They are less committed to their employers, too. (That is, they are more likely to report that they do not intend to stay with their current employers for five years.<sup>52</sup>) Female attorneys may be less attached to their current employers because of their experiences of discriminatory treatment. However, another possibility is that causality runs the other way: women may start their careers less interested in, and satisfied by, market labor than men on average. This initial lack of interest could create productivity gaps and subsequent differences in treatment by supervisors and clients. To the extent a lack of interest or effort is voluntary, economists often characterize it as a form of self-selection.

### B. *Self-Selection*

Naive estimates of gender gaps that do not control for productivity tend to exaggerate the gap. More precisely, they tend to give the impression that a gap in wages or promotion is attributable entirely to explicit and implicit bias. But there are documented productivity differences between male and female employees.<sup>53</sup> For example, in 2010, working women earned 79 cents for every male dollar. However, when controls are included to account for sectors and performance, the gap persists but is closed to 91 cents for every dollar.<sup>54</sup> The main reason the controlled and uncontrolled figures are so different is that women are disproportionately more likely to want to spend more time during the week with their children.<sup>55</sup> They are also disproportionately more likely to actively avoid environments that pit workers into competition with one another.<sup>56</sup> As a result,

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51. *Id.* at 4.

52. *Id.*

53. Azmat & Ferrer, *supra* note 13, at 1306; Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 67 fig.2.

54. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 67 fig.2. In 2010, the naïve figure would be seventy-nine cents for the male dollar, but with simple human capital and professional sector adjustments the ratio rises to 91.6%.

55. Women are also more likely to care for aging parents. However, this is partially (though not entirely) explained by the fact that adult children are more likely to care for aging parents of the same gender, and a substantial majority of elderly parents requiring care are women. Gary R. Lee et al., *Gender Differences in Parent Care: Demographic Factors and Same-Gender Preferences*, 48 J. GERONTOLOGY 9 (1993).

56. Andrew McGee et al., *Performance, Pay, Competitiveness, and the Gender Wage Gap: Evidence from the United States*, 128 ECON. LETTERS 35 (2015); Niederle & Vesterlund, *supra* note 43, at 1067; Jeffrey A. Flory et al., *Do Competitive Work Places Deter Female Workers? A Large-Scale Natural Field Experiment on Gender Differences in Job-Entry Decisions* 1, 2, 5–6 (Nat'l Bureau of Econ. Research, Working Paper No. 16546, 2010) (showing a very interesting experiment using online job postings).



women structure their careers around child-rearing or pursue jobs in sectors that are less stressful but, not coincidentally, lower-paid.

The legal sector is affected by these gender differences in family orientation and competitiveness. After the JD survey respondents who worked in law firm settings reported differences in the number of hours worked (45 on average for women compared to 50 for men), the number of clients brought in (4.5 for women and 9.3 for men), and new client revenues generated (\$21,000 for women and \$56,000 for men).<sup>57</sup> And studies of alumni data from Indiana University and University of Michigan law schools have concluded that gender differences in income are not significant after accounting for billable hours and other performance metrics.<sup>58</sup>

Even these results, though, may be biased if the researchers do not have good information about what came first—the difference in treatment or the difference in productivity. It is at least plausible that women will have more interest in doing childcare and less interest in working longer hours if they receive less praise and fewer financial rewards than men for comparable work. Thus, distributing blame for the gender gap between the two theories—discrimination and self-selection—has become a preoccupation for scholars studying gender and the workplace.

From the wide range of evidence available today, two things are clear. First, both discrimination and self-selection (that is, voluntary exit) have significant explanatory power. And second, the available data resources can be cherry-picked to promote one theory or discredit another. This gives partisans on both sides of the employment discrimination debate the opportunity to arm their arguments with data, and it makes reasoned policymaking more difficult. For example, those who doubt the influence of discrimination might too easily find comfort in the findings of Ken Dau-Schmidt and his coauthors who report regression analyses showing that gender wage gaps in the legal sector go away almost entirely when controls are included for childcare (regardless of gender).<sup>59</sup> Their findings suggest that men and women are equally disadvantaged for using their time on family, but women make this choice more often than men do.<sup>60</sup> Ghazala Azmat and Rosa Ferrer used a different dataset to find similar results, concluding that a large portion of the wage gap between female and male lawyers can be explained through differences in performance.<sup>61</sup>

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57. WILDER, *supra* note 45, at 14, 17 tbl.7.

58. Stake et al., *supra* note 45, at 939, 960–62 tbl.10 & tbl.11; Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 68, 128.

59. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32.

60. *Id.* at 128 (“[O]ur means and regression analysis suggest that . . . the impact of lower income is disproportionately borne by women who do childcare, who suffer a disadvantage similar to that of men who do childcare. In our regression analysis only women who have done childcare show a significantly negative impact on income, and that impact is similar, and perhaps even less, than the negative impact on income suffered by men who have done childcare.”).

61. Azmat & Ferrer, *supra* note 13, at 1315–16 (using the second wave of the After the JD

While these authors provide new insights on the relationship between the gender gap at work and the dynamics of childcare, regressions with controls for time spent child-rearing cannot disprove the influence of discrimination on female careers, even if women often do spend less time working. Women who have experienced a wage penalty or some other adverse event early in their careers may rationally decide to spend more time on childcare down the road, particularly if their household does not *need* the second income.<sup>62</sup> Indeed, Dau-Schmidt's study provides some superficial evidence that discrimination could precede the investment in childcare: childless men and women spend nearly identical amounts of time at work, averaging over 1200 hours a year. But childless men are paid on average \$178,753 for their work while women are paid only \$152,488.<sup>63</sup> This wage gap could be explained by other factors—for example, differences in employer type or in subfield specialties—but it demands an explanation other than self-selection based on childcare. Without more, the authors' conclusions that “[t]he overall picture that emerges from our analysis is one of great heterogeneity in career experience not only between the genders but within each gender, according to whether a person decides to commit his or her time and energies to family or career” is unconvincing.<sup>64</sup> We are not confident that a person's decision to commit her time and energies to family over career is an exogenous event, made free from gender differences within the career. And as the tables in the last section show, we cannot agree that there is “great heterogeneity” among male lawyers' decisions to invest in career or family. They decide, overwhelmingly, to invest in their careers.

### C. Disambiguating the Two Leading Theories

For policy debates, discrimination and self-selection are treated as dueling diagnoses. We cannot identify the hallmarks of an equitable labor market without first having a working understanding of the extent to which women's career decisions are the product of discrimination or of free will.

In a recent *New York Times Magazine* article, Sally Blount, dean of the Kellogg School of Management at Northwestern, shared her perspective on the glass ceiling.<sup>65</sup> She explained that half of the women who earn an M.B.A. drop out of the full-time labor force within ten years. But while this partially explains the

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data, and finding that performance explains most of the wage gap when hours billed and new client revenues are included in the regressions).

62. Longitudinal data could better get at this by allowing for a time-series analysis. See JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* 50–51 (2002) (providing a discussion of time-series analysis).

63. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 145 tbl.D17(15).

64. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 129.

65. Susan Chira, *Why Women Aren't C.E.O.s, According to Women Who Almost Were: It's Not a Pipeline Problem. It's About Loneliness, Competition, and Deeply Rooted Barriers*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/sunday-review/women-ceos-glass-ceiling.html> [<https://perma.cc/685X-J7XH>].

trouble of achieving balanced representation in board rooms and among corporate officers, she also believes the few women who remain in the pipeline are more likely than men to be overlooked for promotion.<sup>66</sup> In the legal field, the partnership gap is likely to be the product of a similar mix of discrimination and self-selection. Surveys of female attorneys consistently find that an unsupportive work environment and a wish to spend more time with family are the two most cited reasons that women leave law firm employment.<sup>67</sup> If policymakers want to design new policies to address the gender imbalance, it would seem we must first untangle these phenomena and figure out their relative contributions.

This is exceedingly difficult to do well. Ronit Dinovitzer is a leading voice in the effort. Her careful work has shown first that, with appropriate controls for practice settings, geography, and educational credentials, the wage gap between men and women is 5.2%.<sup>68</sup> (Even without controls, the gap is only 6.3% during the early stages of a career<sup>69</sup>—much smaller than “78 cents for every dollar” statistic.<sup>70</sup>) Dinovitzer concludes that based on her own research and a range of other studies, actual differences in skill and human capital can explain at most half of the gender gap in earnings. For the earliest stages of a career, that percentage is smaller.<sup>71</sup> The rest of the gap is unexplained. It could be that implicit bias or overt

66. *Id.*; see also Mulligan & Rubinstein, *supra* note 27, at 2 (“[T]he apparent gender equality is not real in the sense that the average woman’s earnings potential has not caught up with that of the average man.”). According to the authors, the apparent gender equality is caused by women with lower earning potential staying out of the labor market. *Id.*

67. TERESA M. BOYER ET AL., THE CTR. FOR WOMEN AND WORK, NEW JERSEY COUNCIL ON GENDER PARITY IN LABOR & EDUC., LEGAL TALENT AT THE CROSSROADS: WHY NEW JERSEY WOMEN LAWYERS LEAVE THEIR LAW FIRMS AND WHY THEY CHOOSE TO STAY 3 tbl.2, 13 tbl.3 (2008) (showing the top reasons given when women leave law firms are “unsupportive work environment” followed by desire for better work-life balance; furthermore, most were responsible for family care, and most had flexible work arrangements to make more time for family); see also MONA HARRINGTON & HELEN HSI, WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP: A REPORT OF MIT WORKPLACE CENTER SURVEYS ON COMPARATIVE CAREER DECISIONS AND ATTRITION RATES OF WOMEN AND MEN IN MASSACHUSETTS LAW FIRMS 13 chart2(a) and (b) (2007) (showing that female respondents list work-life balance as the main reason for leaving a firm).

68. Ronit Dinovitzer et al., *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOC. FORCES 819, 835, 836 (2009).

69. *Id.* at 834.

70. Karin Agness Lips, *Don’t Buy Into the Gender Pay Gap Myth*, FORBES (Apr. 12, 2016), <https://www.forbes.com/sites/karinagness/2016/04/12/dont-buy-into-the-gender-pay-gap-myth/> [<https://perma.cc/54JV-A4SM>] (quoting a White House report released during President Obama’s administration).

71. Dinovitzer, *supra* note 68, at 824. Marini and Fan find that human capital can explain only 30% of the gap. Margaret M. Marini & Pi-Ling Fan, *The Gender Gap in Earnings at Career Entry*, 62 AM. SOC. REV. 588 (1997); see also David Card et al., *Bargaining, Sorting, and the Gender Wage Gap: Quantifying the Impact of Firms on the Relative Pay of Women* 1, 3 (Nat’l Bureau of Econ. Research, Working Paper No. 21403, 2015) (using “sorting” and “bargaining” channels to understand whether the wage gap is better explained by differences in productivity or by differences in the negotiation power, the authors find that sorting is 3 times more important than the bargaining effect—explaining 15% of the wage gap to 5% of the gap, respectively, but the bargaining effect is still significant; women receive only 90% of the wage premium that men do at the firms that have the resources to bargain for better workers).

discrimination cause women's work to be undervalued, and starts a vicious cycle when they are slotted into certain tasks and given less access to clients.<sup>72</sup> "Women's career choices are circumscribed by the social practices of the workplace. Lawyers routinely given more complex cases may have more opportunities to put in hours, irrespective of their personal preferences for work."<sup>73</sup> In fact, even when women self-select out of the labor force before applying for a job at a firm (or even before going to law school), that decision could be tainted by an expectation that employment is grueling because of discrimination.<sup>74</sup>

Discrimination requires further disambiguation, as there are at least two styles, each with different policy implications. "Taste-based" discrimination occurs when employers or supervisors make decisions under the influence of abstract assumptions or untested biases about a subgroup, whether the biases are conscious or not. These biases might best be addressed through cultural debate, social pressure, and penalizing civil lawsuits. It could also be addressed through solutions that blind the employer to gender (as in the famous symphony audition study<sup>75</sup>) or that provide the employer with better, de-biasing information about the applicants' past performance. Experimental research has shown that employers tend to be persuaded by certain types of puffery that men engage in more often than women, but that they correct their biases if they have accurate past performance information.<sup>76</sup>

"Statistical" discrimination, by contrast, involves decisions under the influence of rational predications based on past observed differences between two subgroups. Female professionals are vulnerable to this because, regardless of any individual's attachment to her career, an employer will infer that she is at greater risk of leaving full-time work than an equivalent male employee.<sup>77</sup>

In truth, statistical and taste-based discrimination are not always distinct.<sup>78</sup> Female professionals could be at risk of statistical discrimination by one employer who is acting against a backdrop of taste-based discrimination by other employers. If an employer knows that women are systematically discriminated against by other firms, he may take advantage of the weaker bargaining position that this

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72. Dinovitzer, *supra* note 68, at 824–25.

73. *Id.* at 825.

74. See Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 37.

75. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

76. Iris Bohnet et al., *When Performance Trumps Gender Bias: Joint vs. Separate Evaluation*, 62 MGMT. SCIENCE 1225 (2015); Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 33.

77. We discuss this at length *infra* Part IV.

78. And even when they are distinct, the distinction is hard to detect. John A. List & Imran Rasul, *Field Experiments in Labor Economics*, in 4A HANDBOOK OF LABOR ECONOMICS 103, 169–70 (Orley Ashenfelter & David Card eds., 2011) (describing the difficulty disambiguating these two forms of discrimination).

employee will have as compared to similar men.<sup>79</sup> And recent research on grocery store clerks in France showed that a handful of managers who have strong implicit biases against minorities can cause system-wide effects on hiring and promotion decisions.<sup>80</sup> When a biased manager supervises minority employees, the manager is less likely to interact with the employee and less likely to apply subtle pressure to be productive.<sup>81</sup> As a result, minority employees' performance declines during shifts with the biased managers (and only during those shifts; during other shifts, their performance is better than average.)<sup>82</sup> These findings suggest that the grocery chains unwittingly apply heightened standards when hiring minority applicants—that is, they hire applicants who would outperform white employees if they had attentive management the entire time.

Because of the fluidity between statistical and taste-based discrimination, differentiating between the two may not be worth the effort when policymakers are tackling female underemployment. But the differences between discrimination of all forms and self-selection are very meaningful. The degree to which lawmakers can assign fault to employers will depend very much on whether female employees are nudged out of the workforce by inhospitable working conditions or willingly leave on their own accord.

#### *D. Reader Beware*

The topic of female labor participation among lawyers and other professionals attracts many talented and honest scholars. This project has benefited a good deal from their work. But we have also seen that the data used to assess gender equity can be exploited to support whatever outcome fits the authors' prior beliefs. Because this topic falls near the core of ideological debates about identity politics and family structure, we wanted to alert readers that data-driven studies come in varying degrees of quality and objectivity.

Our first-hand experience preparing tables for this article convinced us that the data are ripe for cherry-picking. Consider, for example, the responses to survey questions that indirectly asked attorneys about their experience with potential hardship or discrimination. During the first wave of the After the JD study, respondents were asked about their experience with demeaning comments, with missing out on plum assignments, with clients or colleagues requesting a different associate to work on a case, and with a partner discounting the hours that were ultimately billed to a client.<sup>83</sup> Female and male attorneys practicing in law firm settings appeared to have different experiences, as a group, for all but

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79. Alan Manning, *Imperfect Competition in the Labor Market*, in 4B HANDBOOK OF LABOR ECONOMICS 973 (Orley Ashenfelter & David Card eds., 2011).

80. Dylan Glover et al., *Discrimination as a Self-Fulfilling Prophecy: Evidence from French Grocery Stores*, 132 Q.J. ECON. 1219, 1219 (2017).

81. *Id.*

82. *Id.*

83. WILDER, *supra* note 45.

one of these measures of hardship.<sup>84</sup> These raw figures, presented without controls, would suggest that discrimination is rampant and may be the principle problem that must be solved in order to reduce gender disparities. But some of these negative experiences could be the result of actual differences in work performance. A partner who discounts hours, for example, may do so for discriminatory reasons, or she may do so for appropriate reasons related to the quality of an associate's work.

When we use logistic regressions to control for performance-related factors (such as the number of hours worked or the grades received in law school), two of the gender gaps remain statistically significant—experiencing demeaning comments, and missing out on a desirable assignment. One could argue that these two outcome measures are the most susceptible to differences in subjective perceptions. We think that associates typically have the same standards for what it means to get a “desirable assignment” or “demeaning comment,” but reasonable minds could differ on this.

The more important point for our purposes is that an author who has strong feelings about the cause of gender disparities in the professional workplace could select the discrimination measures that support his case and ignore the others. A partisan who believes employers are guilty of severe workplace injustice could focus on the reported experiences of demeaning comments or the greater likelihood that men are assigned to desirable assignments even after controlling for performance measures to the extent possible, and could ignore the other measures that show that partners are no more likely to discount female associates' hours than males'. A partisan who believes employers are unfairly maligned and are mostly free from bias could do just the opposite.

For reasons we explain in the next Part, our project does not depend on a careful untangling of the self-selection and discrimination effects. Although workplace discrimination has a different moral valence than self-selection, both occur within a cultural climate that has a powerful impact on career decisions.

### III. CULTURAL ACCEPTANCE OF FEMALE UNDEREMPLOYMENT

To understand the dynamics of gender in the workforce, researchers have understandably focused their attention on the workforce itself, scrutinizing how employers treat female employees. Researchers look for evidence of employment discrimination because it is presumed to be the sole source of pathology when a woman leaves her career. The voluntariness and propriety of a decision to leave the workforce are only challenged to the extent that it was made in the shadow of discriminatory treatment at work.<sup>85</sup> This is misguided. While experiences at work

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84. See *supra* Figure 5 on p. 114.

85. The voluntariness of opting out is occasionally questioned, but usually only insofar as it may be influenced by employer discrimination. See, e.g., WILKINS ET AL., *supra* note 31, at 56 (characterizing decisions as being either voluntary or made in the shadow of discrimination).

certainly have an influence on a person's choices, the choices are also shaped by cultural and family pressures, and these are exerted differently on women.

This Part begins by identifying the layers of pressure and influence that professionals are likely to encounter during the career-building years, and then explores these layers one at a time. It then shows that culture is extremely important. Female career abandonment is socially accepted outside the home and quietly encouraged inside of it. When we consider how culture interacts with other layers of influence that shape the career trajectories of men and women, it becomes clear that acceptance of female underemployment puts professional women at a disadvantage because it fails to give women a counterpressure when early career problems or the demands of raising children make work most difficult.

#### *A. Layers of Influence*

Social conservatives and third wave feminists rarely see the world the same way, but they find common ground in their acceptance (or sometimes glorification) of the female homemaker. To put it crudely, when a woman voluntarily chooses to run a household rather than to work for an income, conservatives might celebrate the *outcome* of the choice while liberals celebrate the *process* of the choice.

Sociologists and economists have offered sophisticated accounts for why women often choose not to work. They usually boil down to differences in the utility functions of men and women.<sup>86</sup> People have different levels of labor force "attachment" (as it is sometimes called in the economics literature<sup>87</sup>) depending on context and on the person's individual, idiosyncratic preferences.<sup>88</sup> Women's labor force attachment could be distributed differently from men's for a wide range of reasons, even if they are equally capable as men in work settings. If utility functions or background circumstances are different for men and women, then gender differences in the division of labor are not necessarily in conflict with

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86. Fortin, *supra* note 16. George Akerlof and Rachel Kranton have theorized that group-based identity and social expectations should affect the utility functions of individuals. George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 718–21 (2000).

87. See, e.g., Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 11, 18–19; see also Susan B. Carter & Elizabeth Savoca, *Gender Differences in Learning and Earning in Nineteenth-Century America: The Role of Expected Job and Career Attachment*, 28 EXPLORATIONS ECON. HIST. 323, 324 (1991). Career attachment is also captured in the concept of "identity," and the extent to which a career is more important, and marriage is less important, to it. See Goldin, *Quiet Revolution*, *supra* note 4, at 20–22.

88. Another framing that this same explanation has taken is that "women value pay less than men do." Aiken & Regan, Jr., *supra* note 49, at 305. But if men could marry women who were socially pressured to be the bread-earner, and if they could escape the social pressures themselves, perhaps men would "value pay" less, too.

women's rights and presumptions of equal competence. Acceptance of a woman's freely chosen path is a cherished tenet of the new face of feminism.<sup>89</sup>

Yet the utility function explanation is no explanation at all. *Why* do women, as a group, have lower labor force attachment? *Why* do they get comparatively less utility from work, and comparatively more utility from homemaking, than men do? When the literature focuses on preferences, it makes no attempt to illuminate the reasons for gender differences and might even steer readers to assume that the differences are the result of biology or improbable randomness.

There is good reason to suspect that the “follow your bliss” attitude affects the shape of females' utility curves. The presumption that women's work choices should be accepted by family and society without the disciplining power of cultural pressure is bound to affect a married woman's attachment to work. After all, she can leave work without the social stigma and family turmoil that her husband would face. Of course, social pressure is not the *only* reason to work; income and status are important reasons as well, and work is usually the only viable way for unmarried women to achieve these. But within marriages where both spouses are able to draw an income that could sustain the family's budget and lifestyle on its own, men face serious social disapproval for career exit, and women do not.<sup>90</sup> Thus, chalking up gender gaps to differences in preferences restates the problem instead of explaining it.<sup>91</sup>

There are a few other signs—a few other cracks in the façade—that suggest cultural acceptance may hold a paradox at its core. Consider the population we focus on in this study: female attorneys. These women have excelled in school during most of their education years, attained a professional degree (often taking out large loans to do so), and have even sat for licensing exams.<sup>92</sup> Unless this was all an elaborate signaling device for the marriage market (something we consider but largely reject later in this Part), we know that the female lawyers who abandon their careers have underused their training and talents.

Perhaps the greatest clue that there is something amiss in the broad consensus that women's choices to stay home should be accepted and respected is that it is premised on free and independent choices.<sup>93</sup> This is out of sync with the

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89. Fortin, *supra* note 16, at 383 (describing a rejection, over time, of the assumption that a career woman identity should supplant and replace the traditional identities as wife and mother).

90. We document the evidence for differing social expectations *infra* Part III.C.

91. Fortin, *supra* note 16. A number of recent papers have exploited cultural differences in gender role attitudes to show that they have some explanatory power towards women's work decisions across ethnic groups in the United States. See Raquel Fernandez & Alessandra Fogli, *Culture: An Empirical Investigation of Beliefs, Work, and Fertility*, 1 AM. ECON. J. MACROECONOMICS 146 (2009); Nicole M. Fortin, *Gender Role Attitudes and the Labour-Market Outcomes of Women Across OECD Countries*, 21 OXFORD REV. ECON. POL'Y 416 (2005).

92. The After the JD data include only licensed attorneys. However, the NSCG data used for the tables in Part I include all degree-holders without regard for licensing.

93. When researchers do question the decision of a woman to assume childcare as a free choice, they describe career exit fatalistically, as if the women are coerced to handle childcare by their spouses. See, e.g., Aiken & Regan, Jr., *supra* note 49, at 304 (“[F]emale movement within or departure



trend in academic research to challenge any theory that relies excessively on free will without accounting for heuristics, bias, and social construction.

Decisions related to careers and families are especially prone to unconscious influence. Children absorb the culture and expectations of their households, and then replicate them to varying degrees. For example, recent research has found that girls raised in high-income households trail further behind their male peers in math scores than girls in middle and low income households.<sup>94</sup> In other words, the gender gap is larger for wealthier students. Parents in these high-income households report that they hold more egalitarian views than other parents do. But despite their views, high-income households are more likely to model traditional gender roles with the father working and the mother raising children.<sup>95</sup> What daughters observe seems to be more influential than what they hear. Early deficiencies in mathematics are likely to have long-term effects on these daughters' careers, including whether they maintain careers at all. Nobody should confuse the final destination with a wholly agentic choice.

Academics are usually sensitive to the social shaping of preferences. When they accept uncritically a trend among women to voluntarily leave the workforce and live in financial dependence, they are probably making an unstated calculation. Growing up female already comes with myriad hardships, so plopping on an additional serving of shame and social stigma if she winds up living a stereotype seems cruel. Acceptance of the caretaker mother seems like the more humane response. Acceptance gives women more options—society will support them whether they pursue careers or stay within the traditional sphere of the home. How can more options be worse than fewer options?

An option to stay at home may be a privilege. But in practice, it is a trap. By making the exit option easier, cultural acceptance robs women who are well-suited to professional careers of the resilience and grit that help them succeed.<sup>96</sup>

The next sections lay out the case that cultural acceptance is a significant driver of female underemployment. Briefly, our theory is summarized with the pair of tables presented in Figure 6. Without a strong cultural nudge toward work,

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from the legal profession is frequently attributed to the heavier burden women bear in family and childcare responsibilities . . .”).

94. Claire C. Miller & Kevin Quealy, *Where Boys Outperform Girls in Math: Rich, White and Suburban Districts*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/interactive/2018/06/13/upshot/boys-girls-math-reading-tests.html> [<https://perma.cc/998T-2UDY>].

95. *Id.* Gender gaps in mathematical confidence were even greater than the gaps in actual performance. The parent-reported observations and expectations for high-income households also revealed a gender gap, but the parent reports did not correlate with actual mathematical performance of the children. Sarah T. Lubienski et al., *Girls' and Boys' Mathematics Achievement, Affect, and Experiences: Findings from ECLS-K*, 44 J. RES. MATHEMATICS EDUC. 634, 639 (2013); see also JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS 98–99 (2014) (describing how higher SES individuals report that they support gender parity, but a substantial portion live with traditional gender roles); DAN CLAWSON & NAOMI GERSTEL, UNEQUAL TIME (2015) (showing that lower SES households are bucking the traditional gender roles more often, out of necessity).

96. See *infra* Part IV.B.

women are more likely to bump off the career track when inhospitable work conditions or the stress of raising young children make work difficult. This influence on career trajectories comes not only outside the home but also within it; when young children enter the lives of a professional couple, the male spouses are unwilling to let their careers get dislodged. If the vacuum at home pulls one of the professional spouses away from the labor market, it will be the woman. (Yes, pun intended.) Since significant gaps in work history are penalized in the labor market (for both rational and irrational reasons), women who take long breaks from their careers are unlikely to find rewarding and meaningful work when the demands of child-rearing subside. Much of their investment in education and training is lost, just as their husbands and peers begin to reap great benefits from their professional careers.

**Figure 6.**

Layers of Pressure in the Early Careers of Married (Opposite-Sex)  
Men and Women

Early Career	Married Men	Married Women
Culture	Strong push to work	Neutral
The Labor Market	Weak push home	Firm push home
Children/Family	Strong pull home	Strong pull home
Spouse	Strong push to work	Gentle pull home

### B. Cultural Acceptance

When highly educated women leave the workforce and become financially dependent on their husbands, the arrangement is accepted and often supported throughout society. Women who start with a life plan of investing in a career can switch to an investment in family at any time by taking on the traditional gender role.<sup>97</sup> Male spouses cannot become financially dependent on their wives without causing strain in the marriage and attracting social stigma, so there are significant differences in the pressure that applies to men and women.<sup>98</sup>

This cultural asymmetry is reflected in opinion surveys and manifested in the bargains made within marriages.<sup>99</sup> The vast majority of women do not accept

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97. It is worth noting that what is now considered “traditional” marriage is actually a modern invention. Prior to the twentieth century, women outside the highest social classes worked, and marriage was often a business venture as much as it was a love relationship. See generally STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* (2006).

98. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 62 (explaining that choices are influenced by differences in personal characteristics and social expectations between men and women).

99. It is also reflected in conduct, decisions, and reactions outside of the marriage, of course. Friends, employers, and the government contribute to the cultural pressure as well.

underemployed husbands.<sup>100</sup> Men and women both regard male earning capacity as the critical component of their status,<sup>101</sup> and this is as true for lawyers as it is general society. Data on the University of Michigan Law School alumni demonstrate the importance of male income to female lawyers: while male graduates' spouses had an annual income of \$41,000 on average, female graduates' spouses pulled an average income of \$146,000.<sup>102</sup>

Why don't high-earning men marry women who are not only well-educated but also committed to their careers? We briefly explore two potential explanations. The more controversial of the two could be called the "hoodwinking" hypothesis. Perhaps some well-educated women are exploiting cultural attitudes so they can leave the stressful experience of market labor to their husbands while they spend time on children and leisure. This explanation assumes that men would prefer a second income, but are foreclosed from negotiating with their wives because of prevailing cultural norms to accept a woman's decision to quit working.

A recent *New York Times Magazine* article explored this possibility. A therapist described her experience observing an engaged couple during the moment when the wife-to-be announced to her fiancé that she quit her job to plan their wedding full time. "An excruciating silence ensued. Something had to be said, and I was rooting for the man to say it: *Why didn't you talk about it with me?* Instead, he remained quiet."<sup>103</sup> An anonymous editorial published in *The Guardian* tells a similar story. It's titled *A Letter to . . . My Wife, Who Won't Get a Job While I Work Myself to Death*, and it begins "I remember the thrill of first seeing you at law school orientation."<sup>104</sup> A psychologist named Marty Nemko regularly sees clients and writes publicly about what he calls the "refuse-to-work" syndrome,<sup>105</sup> and Ali Wong also jokes about this dynamic in her breakout Netflix special, *Baby Cobra*.<sup>106</sup>

100. Lucía Artazcoz et al., *Unemployment and Mental Health: Understanding the Interactions Among Gender, Family Roles, and Social Class*, 94 AM. J. PUB. HEALTH 82, 87 (2004); Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 266 (2004). Moreover, women who are married to unemployed men are much more likely to be unemployed themselves. Shirley Dex et al., *Cross-National Comparisons of the Labour Force Participation of Women Married to Unemployed Men*, 47 OXFORD ECON. PAPERS 611, 611 (1995).

101. CARBONE & CAHN, *supra* note 95, at 98 (citing KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 164 (2009)) (explaining that men and women regard male earning capacity as critical to male status and well-being).

102. Dau-Schmidt et al., *The Kid Factor*, *supra* note 39 (stating that male alums of the University of Michigan School of Law marry women who earn on average \$41,231 while female alums marry men who earn on average \$145,994).

103. Daphne de Marneffe, *The Secret to a Happy Marriage Is Knowing How to Fight*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/opinion/sunday/engagement-marriage-conflict.html> [<https://perma.cc/X6TU-Q87X>].

104. *A Letter to . . . My Wife, Who Won't Get a Job While I Work Myself to Death: The Letter You Always Wanted to Write*, THE GUARDIAN (July 2, 2016), <https://www.theguardian.com/lifeandstyle/2016/jul/02/a-letter-to-my-wife-who-wont-get-a-job-while-i-work-myself-to-death> [<https://perma.cc/PCR5-Y9Z8>].

105. Marty Nemko, *Addressing Refuse-to-Work Syndrome: A Person, Supported by You, Refuses to Bring in Income. What to Do?*, PSYCHOL. TODAY (Sept. 6, 2015), <https://>

We are not aware of systematic research that tests this hoodwinking hypothesis, but we cannot rule it out. After all, the decision to quit working often precedes family formation. Linda Hirshman interviewed a sample of highly educated stay-at-home brides whose weddings were announced in *the New York Times* about their indifference to work. She concluded that:

this isn't only about day care. Half my *Times* brides quit *before* the first baby came. In interviews, at least half of them expressed a hope never to work again. None had realistic plans to work. More importantly, when they quit, they were already alienated from their work or at least not committed to a life of work.<sup>107</sup>

On a more anecdotal note, when one of us (Jane) has talked to lawyers about our research, she has occasionally heard confessions from male lawyers who married women that they had hoped would be devoted to their careers, but who shifted to full-time child-rearing without an open and honest discussion.

Another form of indirect evidence comes from Google's autocomplete algorithm, which reveals the secrets that people share with the search bar.<sup>108</sup> When a person starts to type "I don't want my wife to" into the Google search bar, the fifth most common completion is "be a stay at home mom."

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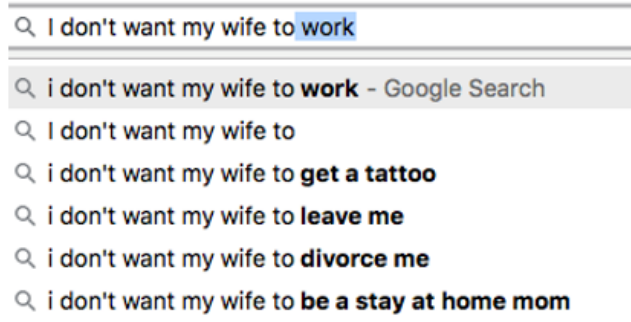
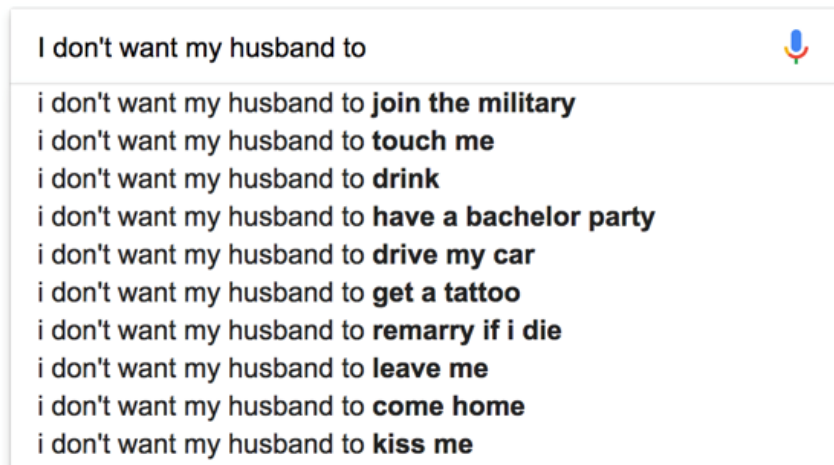
www.psychologytoday.com/us/blog/how-do-life/201509/addressing-refuse-work-syndrome [https://perma.cc/7UHP-6KQ4]; Marty Nemko, *The Real Reason So Few Women Are in the Boardroom*, MARTY NEMKO, [http://www.martynemko.com/articles/real-reason-so-few-women-are-in-boardroom\\_id1225](http://www.martynemko.com/articles/real-reason-so-few-women-are-in-boardroom_id1225) [https://perma.cc/HU6V-HNQJ] (last visited Feb. 2, 2020).

106. ALI WONG: BABY COBRA (Comedy Dynamics & New Wave Entertainment May 5, 2016).

107. Linda Hirshman, *Homeward Bound*, AM. PROSPECT (Nov. 21, 2005) [hereinafter Hirshman, *Homeward Bound*], <https://prospect.org/article/homeward-bound-d2/> [https://perma.cc/4EFJ-P6TC]. See generally LINDA HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD (2006). Attorneys are similar: the gender gap in employment status begins *before* lawyers have kids. WILKINS ET AL., *supra* note 31, at 59 (stating that 88% of men with no kids work fulltime while only 74% of women with no kids work fulltime).

108. Google's auto-fill and trends data is facilitating a wide range of interesting research. See generally SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE (2017).

**Figure 7.**  
 Google's Auto-fill Responses to "I don't want my husband to \_\_\_" and "I don't want my wife to \_\_\_"



However, even if this explains a portion of the traditional-looking marriages of female professionals, we do not believe this is the principal explanation. A larger portion of marriages that use the traditional division of labor is explained by genuine traditional attitudes. Indeed, even using the crude Google auto-fill experiment as evidence, the most popular search that began "I don't want my wife to \_\_\_" ended with the word "work."

Indeed, there is abundant evidence that many Americans of both genders prefer to structure their marriages around traditional gender roles. The General Social Survey has been tracking American attitudes about gender roles since the 1970s, and the attitudes of young adults (age 18–25) show a distinct increase in support for traditional gender roles. The proportion of young men who agreed with the statement, “It is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family” has increased from a low of 20% in the mid-nineties to 48% in 2014.<sup>109</sup> And a recent PEW study finds that fewer than half of the surveyed Americans thought that more egalitarian gender roles make it easier for marriages to be successful, for men or women to lead satisfying lives, and for parents to raise children.<sup>110</sup>

These findings suggest that hoodwinking, to the extent it occurs, is not the largest driver of cultural attitudes. Many men and women are still proponents of traditional gender roles. Given the widely-held beliefs about marital success, many households that can afford to replicate traditional gender roles will do so. And since marriages are formed within educational classes, households with a highly educated female will often be the ones that can afford to live comfortably on one income.<sup>111</sup>

By this account, most of the couples that use stereotypical gendered divisions of labor do so with the blessing of both spouses. While most professionally trained men and women state that they prefer gender parity in both the public and the home spheres, a sizeable portion of them reveal their preferences to recreate the traditional household.<sup>112</sup> A strong streak of traditionalism also helps explain why there is not an epidemic of bitterness and regret among underemployed female lawyers who invested significant time and money in legal training.<sup>113</sup> Even if it was not conscious, many of these women (and the men who married them) used education to show that they will be great mothers rather than great earners. In an article titled *Will Women Marry Down?*, Kay Hymowitz explains that “[e]ducated men and women are drawn to spouses they think will help them produce the children likely to thrive in the contemporary knowledge-based economy. That means high IQ, ambitious, and organized kids

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109. Stephanie Coontz, *Do Millennial Men Want Stay-at-Home Wives?*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/sunday/do-millennial-men-want-stay-at-home-wives.html> [<https://perma.cc/8CYD-A8H4>] (74% of women age 18–25 disagreed with the statement).

110. Juliana Horowitz et al., *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RES. CTR. REP. (2017). The report focuses on the differences between Democrats and Republicans, but the more surprising results in our opinions are how similar Democrats and Republicans feel about gender roles. Even among Democrat or left-leaning respondents, fewer than half thought gender parity has made it easier for marriages to succeed, for men to lead satisfying lives, or for parents to raise children, and only a bare majority (58%) thought gender parity made it easier for women to lead satisfying lives. *Id.*

111. See Goldin, *Quiet Revolution*, *supra* note 4.

112. CARBONE & CAHN, *supra* note 95, at 98–99.

113. That said, there is some regret. See *infra* Part III.C.4. on attempts at reentry.

who will do their homework and take lots of AP courses.”<sup>114</sup> The law degree was not a waste if it served as a sorting device on the marriage market.

There is also some evidence that women who start with stronger career attachment could lose some of their focus when their husbands shirk the family responsibilities. Dual-earner households show this pattern as much as traditional households: when children arrive, the lengths of working mothers’ leave times increase while the lengths of working fathers’ *decreases*.<sup>115</sup> This is so even for couples where both parents originally wanted to stay focused on their careers. In Dau-Schmidt’s study of Michigan Law graduates, a subset of graduates who had children intended to keep working at the regular pace without taking time off for childcare outside childbirth leave.<sup>116</sup> But women in this group nevertheless reduced their annual hours, suggesting family obligations were intruding in their careers. Men in this group increased their annual hours, perhaps to make a push just before or just after partnership, perhaps to make up for the lost income from their spouses,<sup>117</sup> or perhaps to take refuge away from the chaos at home.

These differences in trajectories may be subtle, and may sometimes operate outside of conscious awareness. In a recent study that used detailed time use reports, Claire Kamp Dush found that highly educated dual-earner couples typically split household chores equally before having their first child. After the first child arrived, though, both partners *thought* they were splitting the workload equally, but in fact mothers did the lion’s share of new chores.<sup>118</sup> Professional parents fall into an unconscious dance that relieves men of their household responsibilities while simultaneously keeping up an illusion to outsiders, to each other, and to themselves that the responsibilities are split fairly.

Similarly, couples unconsciously organize their lives so that the father’s identity as the career leader is not threatened by the wife’s success. An interesting

114. Kay Hymowitz, *Will Women Marry Down?*, DAILY CALLER (Apr. 18, 2011), <https://dailycaller.com/2011/04/18/will-women-marry-down/> [https://perma.cc/5FDV-2G4N].

115. Goldin, *Quiet Revolution*, *supra* note 4, at 29 (showing as *supra* the number of children increases, so does women’s leave times while men’s leave times decrease.).

116. *Id.*; Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 71.

117. Raj Chetty & Adam Szeidl, *Consumption Commitments and Risk Preferences*, 122 Q. J. ECON. 831 (2007), makes two points that lend support to “income offset response” explanation. First:

Many households have “consumption commitments” that are costly to adjust when shocks such as job loss or illness occur. For example, most homeowners do not move during unemployment spells and have a commitment to make mortgage payments. Consumption of many other durable goods (vehicles, furniture) and services (insurance, utilities) may also be difficult to adjust. Data on household consumption behavior show that more than 50 percent of the average household’s budget is fixed over moderate income shocks . . .

*Id.* at 831. Second, households abandon commitments when large shocks occur, mitigating their welfare cost. They show that “[f]ollowing ‘small’ unemployment shocks (wage income loss in year of unemployment between 0 and 33 percent), many households leave housing fixed while cutting food consumption significantly. However, households are more likely to reoptimize on both food and housing in response to ‘large’ shocks (wage loss greater than 33 percent).” *Id.* at 834.

118. Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAM. 662, 673–74 (2015).

2015 study used individuals' predicted incomes (based on pre-marital factors like education) to examine marriage patterns. If a woman's income is predicted to surpass a man's, the chance that the two will marry decreases.<sup>119</sup> If they *do* marry, the wife is more likely to leave the labor force than she would if she had married a man with higher earning potential.<sup>120</sup> And if she *does* work, her income is likely to be lower than predicted.<sup>121</sup> And if she *does* earn more than her husband, she is likely to do *even more* of the nonmarket house and family work.<sup>122</sup> That is, the gap in house work that is omnipresent across all types of marriages is even *worse* when wives outearn their husbands.<sup>123</sup>

These are some of the dynamics that led Linda Hirshman to declare that the "real glass ceiling is at home." Women who rationalize their decisions to devalue or leave a career as a choice to invest in family are, in Hirshman's estimation, concealing a "crucial reality":

the belief that women are responsible for child-rearing and homemaking was largely untouched by decades of workplace feminism. Add to this the good evidence that the upper-class workplace has become more demanding and then mix in the successful conservative cultural campaign to reinforce traditional gender roles and you've got a perfect recipe for feminism's stall.<sup>124</sup>

A blurry line separates acceptance of female home-making and the expectation of it.

Cultural acceptance of a woman's decision to leave work will wreak havoc on female professionals as a group because the exit option will be attractive during periods of short-term stress, and because the decision to leave is hard to reverse. Men are much less vulnerable because they receive consistent positive pressure to stay in the workforce.

### *C. The Dynamic Influence of Work, Family, and Culture*

No two stories of female career abandonment are exactly the same, of course, but we hypothesize that the asymmetric cultural expectations combine with other well-known phenomena to lead to female career attrition.

119. Marianne Bertrand et al., *Gender Identity and Relative Income Within Households*, 130 Q.J. ECON. 571 (2015).

120. *Id.* at 596.

121. *Id.*

122. *Id.* at 605–06.

123. *Id.* at 607. Women still do more housework (even when they earn more than their husbands). Daniel Schneider, *Market Earnings and Household Work: New Tests of Gender Performance Theory*, 73 J. MARRIAGE & FAM. 845, 845 (2011).

124. Hirshman, *Homeward Bound*, *supra* note 107; *see also* Karen Rinaldi, *Motherhood Isn't Sacrifice, It's Selfishness*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/opinion/sunday/motherhood-family-sexism-sacrifice.html> [<https://perma.cc/MZ5M-ETUV>] ("Fathers are rarely, if ever, spoken about in the same way that mothers are. It's culturally acceptable for men to have children *and* professional identities without having to choose between the two. These unspoken biases run deep.").



Here's the rough chronology:

**1. Assortative Mating.**

Professionally trained women marry men with high earnings potential. These couples have fewer financial constraints than others, giving the household the option of running off of just a single income.

**2. Career Setbacks.**

The path to a rewarding career is almost always pocked with disappointments and challenges, particularly during the early stages. The greatest setback of all occurs when home responsibilities are drastically expanded to include childcare or the care of aging parents. These experiences would make exit appealing for all professionals in the short-run, regardless of gender, while the family works toward a new equilibrium. Women have additional hardships from workplace discrimination, harassment, and the demands of childbearing (as opposed to childrearing).

**3. Exercising the Exit Option.**

When male spouses encounter a career setback, whether related to children or to some other factor, they generally cannot or will not switch to a domestic role. They face pressure within and outside the marriage to maintain a career. Females who start with a career strategy, by contrast, can switch to a traditional domestic strategy at any time. Their male spouses may subtly encourage them to do so, so that the growing demands at home can be attended to without the male having to divert energy away from his own career.

**4. Difficult Reentry.**

If a person leaves the labor force, they generally cannot switch back to a career strategy without significant penalties to their careers. This is so for both men and women. In practice, the penalty more often applies to women because women take lengthy leaves from the labor market more often.

None of these are surprising or controversial on their own, but they combine to create a one-way valve that siphons women off the career path. In a follow-up paper, we are directly testing our theory using the 2008 recession as a quasi-experiment.<sup>125</sup> For the rest of this Part, we will provide the extant evidence that supports each step of this chronology.

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125. During the recession, the legal industry was hit particularly hard. Some large law firms had to lay off associates or delay the start of their terms, and the firms typically made their decisions based on seniority. Because the After the JD study tracked lawyers through the recession, we use a difference-in-difference analysis to see whether women who were laid off during this period were even more likely to abandon their careers (as compared to the men who were laid off) than the women who were not laid off.

### 1. Assortative Mating

Highly educated people tend to marry each other. People at every level of education (but especially those with post-graduate degrees) tend to marry within their education class.<sup>126</sup> Thus, when female lawyers marry, they marry other professionals with high earnings potential. This places lawyers in households where each spouse could earn enough to support the other. Since the second income is not a financial necessity, elite couples have the luxury of dropping one of the incomes.

There was a time when selective mating was counter-intuitive. In Gary Becker's *Treatise on the Family*, Becker predicted that women with advanced degrees would be penalized in the marriage market. He predicted that the most desirable husbands would prefer inter-household specialization and search for a partner with less education who would focus on raising children. This theory failed to predict American trends. Over the intervening decades, families at all income levels have found ways to outsource childcare to the market or to grandparents so that mothers can work. As June Carbone and Naomi Cahn put it in their book *Marriage Markets*, the professional man is marrying the highly educated woman "because, not in spite, of the fact she is likely to earn as much as he does."<sup>127</sup>

But Becker's theory is not totally obsolete. In Asian countries, his predictions have been accurate. Educated women in China must choose between a domestic married life or life as a "Gold Miss"—a single woman with an income.<sup>128</sup> So it may be the United States that is unusual in failing to conform to Becker's hypothesis.

But Carbone and Cahn somewhat overstate the case against Becker's theory, even for the experience of American women. While it's true that hypereducated women are married at high rates, the marriages of the educated class actually contain two camps. A majority of educated partners form the power couples that Carbone and Cahn focus on, but a significant minority practice the polite

126. Jeremy Greenwood et al., *Marry Your Like: Assortative Mating and Income Inequality* (Nat'l Bureau of Econ. Research, Working Paper No. 19829, 2014); Philip Cohen, *College Graduates Marry Other College Graduates Most of the Time*, THE ATLANTIC (Apr. 4, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/college-graduates-marry-other-college-graduates-most-of-the-time/274654/> [<https://perma.cc/VXR3-PAPH>] (stating that individuals with post-graduate degrees usually marry others with post-graduate degrees). Because higher levels of education correlate with higher income, selective mating is partly responsible for the growing levels of household income inequality. *Id.*

127. CARBONE & CAHN, *supra* note 95, at 33; see also Marianne Bertrand et al., *Social Norms, Labor Market Opportunities, and the Marriage Gap for Skilled Women* 3–4 (IZA Institute of Labor Econ., Discussion Paper No. 11382, 2016) ("Because skilled women have higher wages, they provide less of that [(i.e., children)] public good relative to unskilled women. This makes them less attractive potential partners in the marriage market . . . However, when the wife's market wage . . . is high enough, she becomes increasingly more attractive relative to a non-working woman.").

128. See generally Jisoo Hwang, *Housewife, "Gold Miss," and Equal: The Evolution of Educated Women's Role in Asia and the U.S.*, 29 J. POPULATION ECON. 529 (2016).

traditionalism that this article has focused on.<sup>129</sup> Indeed, from some angles, it looks like marriage is positively hazardous for career-oriented women.<sup>130</sup> Generally, individuals are more likely to work if they have greater skill and earning potential, regardless of gender.<sup>131</sup> But when two people marry, the absolute earnings potential of each person loses significance and their relative earning potential, compared to their spouse, has outsize influence on work and family decisions.<sup>132</sup>

The data on lawyers fits this story—female lawyers marry professional men with high earning potential.<sup>133</sup> (The converse is less true—male JDs often marry spouses with high earning potential, but not as consistently as female JDs do.) Thus, within the marriages of female JDs, work is not strictly necessary for any one spouse.

So, we accept Carbone and Cahn’s repudiation of Becker’s theory with a refinement. We agree that American women with advanced degrees who have the greatest earnings potential are at an *advantage* in the marriage market, not a disadvantage as Becker had predicted. However, in part because they have married well-educated men, there is a very good chance that these same women will forego the earnings they could have earned.

## 2. Career Setbacks

Under the best of circumstances, the rewards of labor market work follow periods of stress, depletion, and disappointment.<sup>134</sup> Lawyers and other professionals often have to wade through a grueling period—times when jobs need to be changed, abusive bosses need to be navigated, and when long hours need to be plodded through. Those who persevere hone new skills to help them identify early signs of bad colleagues and poor workplace values, and they learn to better capitalize on their skills. Sally Blount, the dean of the Kellogg School of Management at Northwestern University, refers to this phase as the “mid-career marathon” preceding senior leadership.<sup>135</sup> The trouble is, the mid-career marathon often coincides with family formation. Just when young professionals would

129. Polite because these households often report beliefs in favor of gender equity. *See generally* Miller & Quealy, *supra* note 94.

130. Mulligan & Rubinstein, *supra* note 9.

131. *Id.*

132. *Id.* This is so because even if they have the capacity to earn more than most women, the more relevant factor is the earning potential of their husbands.

133. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 58–60.

134. On average, job satisfaction improves with time. Mary Holland Benin & Barbara Cable Nienstedt, *Happiness in Single- and Dual-Earner Families: The Effects of Marital Happiness, Job Satisfaction, and Life Cycle*, 47 J. MARRIAGE & FAM. 975, 976 (1985).

135. Sally Blount, *Getting Women into the C-Suite Means Keeping Them in the Talent Pipeline*, KELLOGG INSIGHT (Mar. 10, 2017), <https://insight.kellogg.northwestern.edu/article/getting-more-women-into-the-c-suite-means-keeping-them-in-the-talent-pipeline> [https://perma.cc/S6ZW-K3KN]. Like us, Blount is concerned about the impulse for women to abandon the quest during the last mile.

otherwise be pushing themselves up the last hill to partnership or to a good lateral opportunity, they start having to pull all-nighters with colicky infants.

Balancing work with child-rearing is of course the monumental stressor for professional parents. Even with the help of nannies, daycare centers, and after school programs, family responsibilities still disrupt professional careers. When we talked to friends and colleagues about this project, we heard a hundred polite versions of “it’s the family, stupid!”<sup>136</sup> This is, in essence, the self-selection explanation for female underemployment—women bow out to raise children. But why do female lawyers and other professional women who have previously invested so much in their careers wind up so frequently taking on more childcare work than they have to, and more than their spouses?<sup>137</sup>

One explanation is that professional mothers experience more career problems than their male or childless female counterparts. Childbearing, recuperation, and early infant care causes unavoidable disruptions for the professional woman. And of course, workplace bias or sex discrimination may also intensify around the time of pregnancy and further demoralize the professional mother.<sup>138</sup>

Given all this, an exit option will be enticing to every professional at some point.

### 3. *Exercising the Exit Option*

Pushing through the inevitable career bumps and difficult child-rearing years requires fortitude and spousal support, and both are strengthened when work is understood to be a practical necessity. Conversely, ambition is lost when work is optional for both financial security and for social approval. Many professionals experience low periods when they fantasize about quitting, or actually do it. But

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136. We are riffing on Bill Clinton’s famous line “It’s the economy, stupid!” See *supra* note 13. Although the CPS does not include measures of overwork or stress, in a study by the Families and Work Institute entitled “Overwork in America” (Executive Summary, 2004), women reported feeling overworked somewhat more often than men. See also Cohany & Sok, *supra* note 29, at 12. The second potential factor in the decline in labor force activity among college-educated mothers of infants that can be supported with CPS data is related to job demands. Women aged 25 and older with at least a bachelor’s degree who worked full time have a relatively lengthy workweek, averaging 42.2 hours in 2005. Within this group, the workweek was particularly long for women with a professional or doctoral degree—about 45 hours. These relatively heavy work hours, on average, may give highly educated women an incentive to step back from the work force once they become mothers.

137. Moreover, kids cannot explain the entire gender gap. Just like the *New York Times* brides that Linda Hirshman interviewed, for lawyers, the gap in employment status begins *before* professional couples start to have kids. Hirshman, *Homeward Bound*, *supra* note 107; see also WILKINS ET AL., *supra* note 31, at 54–59.

138. Discriminatory treatment need not take the form of demotions or firings to cause stress; demoralization and distrust are natural consequences of subtle discrimination. See Chira, *supra* note 65 (“When women act forcefully, research suggests, men are more likely to react badly. A Lean In/McKinsey & Company survey in 2016 of 132 companies and 34,000 employees found that women who negotiated for promotions were 30 percent more likely than men to be labeled intimidating, bossy or aggressive.”).

men and single women cannot quit for long before their identity, financial security, and social capital are drained. Married women can.

Michigan Law School's alumni survey data show that a large portion of female graduates from this prestigious school leave the workforce after marriage.<sup>139</sup> As a group, these women are slightly different from their peers. They tend to be less compulsive about work than the women who stay in the workforce.<sup>140</sup> They also tend to be less compassionate (according to self-reporting).<sup>141</sup> And as a group, they have slightly higher LSAT and law school grades than women who do not take time away from work to perform full-time child care.<sup>142</sup> It would be plausible that these women have done "better" in the marriage market by marrying husbands with even higher incomes than their working female peers, and that this might explain their exit from work. But aggregate data suggests that at least on average, the spouses of women who work earn about the same as the spouses of women who do not work.<sup>143</sup> So while there may be some preexisting differences between these two groups of highly trained women—some predilection toward work for one group or away from it for the other—they are similar enough to suggest that the differences in their outcomes are not entirely or even primarily the result of greater family demands or fewer work opportunities.

We suspect that the decisions for some women to leave their careers while others do not—seemingly random from the outside—are explained by unobservable expectations that form in the home. Some spouses have low expectations for their wives' careers and high expectations for their wives' executive management of the household.<sup>144</sup> This reflects or is at least reinforced by cultural expectations; because wives *can* quit their jobs, some husbands subtly pressure their wives to do so. These couples rationalize the decision to switch from a two-earner to one-earner household with the help of fallacies and old wives' tales, like the belief that dual-earner families only make sense if the cost of childcare is less than the income of the lowest wage-earner.<sup>145</sup>

Once a professional woman leaves work for a significant amount of time, she is unlikely to reverse course, particularly if work was unpleasant at the time she left the labor force.

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139. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 58–60.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 59.

144. See Chetty & Szeidl, *supra* note 117 and accompanying text, for the discussion of different amounts of time spent on household chores.

145. See, e.g., Donna Ferguson, *The Want-to-Work Mothers Trapped at Home by Prohibitive Cost of Childcare*, THE GUARDIAN (Oct. 5, 2015), <https://www.theguardian.com/money/2015/oct/05/childcare-expensive-mothers-want-work-trapped-home> [<https://perma.cc/C6Q3-5979>].

#### 4. *Difficult Reentry*

A decision to leave fulltime work is difficult to reverse. Income and status in professional settings is not a linear function of time.<sup>146</sup> Leaves take a toll on a person's professional development and earning potential. Some employers may over-react to parental leaves by overestimating the transaction costs of getting the employee back up to speed, but a good portion of the penalty faced by returning employees is economically rational. When a lawyer leaves work for a few years and then returns, he will be more than a few years behind his peers when he returns. His knowledge will be somewhat outdated and his skills will be rusty. Getting back to where he was when he left off will take time and attention.

This is well-documented in the legal field where firms highly value consistent availability so that communication within a legal team is not disrupted. The effect applies as readily to men who take time out of their careers for childcare as it does to women.<sup>147</sup> Of course, since women are disproportionately likely to take time out of their careers, they face a disproportionate share of the costs for attempted reentry. In a survey of women who left work to care for family, Sylvia Hewlett found that two-thirds of the women wanted to work full-time and were finding it difficult to regain their footing.<sup>148</sup> Even when women can reenter the workforce, the costs of their time off are dramatic because they are cumulative. Taking one year out of a legal career comes with an 8% reduction in salary, and that drag goes on *forever*.<sup>149</sup> As compared to what these professionals would be making without a prolonged period of under- or un-employment, the income differential is large and persistent.<sup>150</sup>

Trained lawyers typically earn at least as much as they would have to pay for early childcare, but even if they did not, it would be foolish to stop a career for purely financial reasons. Thus, the popular rationalization for leaving work because childcare would eat most of the lower-earning spouse's income may be a

146. The relationship between income and time off is highly non-linear. Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009), <http://www.nber.org/papers/w14681.pdf> [<https://perma.cc/UGX7-JHKN>].

147. Dau-Schmidt et al., *The Kid Factor*, *supra* note 39 ("Both men and women who take time away from paid work to care for children are less likely to enter private practice, less likely to stay in private practice, and less likely to become a partner if they do stay.").

148. SYLVIA A. HEWLETT ET AL., *THE HIDDEN BRAIN DRAIN: OFF-RAMPS AND ON-RAMPS IN WOMEN'S CAREERS* (2005) (stating that 66% of women who have off-ramped want to work full-time and find reentry difficult).

149. Mary C. Noonan et al., *Pay Differences Among the Highly Trained: Cohort Differences in the Male-Female Earnings Gap in Lawyers' Salaries* 21 (Nat'l Poverty Ctr., Working Paper Series #03-1, 2003); Sarah Kliff, *The Truth About the Gender Wage Gap*, VOX.COM (Sept. 8, 2017), <https://www.vox.com/2017/9/8/16268362/gender-wage-gap-explained> [<https://perma.cc/TD34-LPFF>].

150. Bertrand et al., *supra* note 146, at abstract ("Although male and female MBAs have nearly identical (labor) incomes at the outset of their careers, their earnings soon diverge, with the male annual earnings advantage reaching almost 60 log points at ten to 16 years after MBA completion.").

product of culture rather than logic. (These rationalizations occasionally occur in the academic literature, too.<sup>151</sup>)

High reentry costs complete the trap of the easy exit. Researchers and public commenters have overlooked the link between asymmetric cultural acceptance and these other well-documented labor trends. We identify some of the perverse effects of asymmetric cultural attitudes in the next Part.

#### IV. THE PROBLEM OF CULTURAL ACCEPTANCE

There is no reason to care about labor participation for its own sake. If leaving market work to run a household is the best option for the women who choose to do it, and if it's not harmful to their spouses, their children, or for society at large, then there's little reason for concern.

In this Part, we will argue that female underemployment is in fact a major social problem, and should be understood as such. For some readers, it will be self-evident that underemployment, especially by lawyers and other professionals, is a loss to society as proven talents and leadership capacity are lost. Women make up over half the world's population, yet their contribution to economic growth is far below their potential.<sup>152</sup> Gross domestic product is lower (billions of dollars lower, by some estimates<sup>153</sup>) because women do not fully participate in the market. The impact on GDP by underemployed professionals is pronounced because their potential earnings in the market are much greater than the market value of the childcare they do at home. These losses to the marketplace have effects on personal happiness, too. Contrary to the "Easterlin hypothesis" (which predicted that personal happiness plateaus at a certain level of income and financial stability), evidence from multiple sources suggests there does not appear to be any level of income above which subjective happiness stagnates.<sup>154</sup>

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151. Aiken & Regan, *supra* note 49, at 304 (citing Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32 and Monahan & Swanson, *supra* note 31).

152. There is an increasing body of evidence on the economic gains that could be realized if the gender gap in economic participation is closed. See David Dollar & Roberta Gatti, *Gender Inequality, Income, and Growth: Are Good Times Good for Women?* (World Bank Development Research Group on Gender and Development, Working Paper No. 1, 1999); Boileau Loko & Mame A. Diouf, *Revisiting the Determinants of Productivity Growth: What's New?* 12–13 (Int'l Monetary Fund, Working Paper 09/225, 2009). Up to 27 percent losses in GDP per capita can be attributed to gender gaps in the labor market. David Cuberes & Marc Teignier, *Gender Gaps in the Labor Market and Aggregate Productivity* 14, 18–19 (Sheffield Econ. Research Paper Series, No. 2012017, 2012). According to Aguirre (2012), for example, by closing the gender gap in the labor force participation rate in the US, the country's GDP could be increased by five percent. In particular, with the rapidly aging population of the US, economic growth could be boosted by improving women's work participation, which would mitigate the impact of the shrinking workforce.

153. Shuhei Nishitateno & Masato Shikata, *Has Improved Daycare Accessibility Increased Japan's Maternal Employment Rate? Municipal Evidence from 2000-2010*, 44 J. JAPANESE & INT'L ECON. 67 (2017).

154. See generally Betsey Stevenson & Justin Wolfers, *Subjective Well-Being and Income: Is There Any Evidence of Satiation?*, BROOKINGS INST., Apr. 16, 2013.

Another standard indicator of economic health is the gender wage gap. While a portion of this gap may be explained by discrimination, female underemployment exacerbates the gap. When mothers leave the labor market, fathers are under increased pressure to succeed in their careers, and often live up to the challenge by increasing productivity.<sup>155</sup> David Wilkin's study of Harvard Law School graduates found that female graduates are more likely to reduce hours or leave the work force after having children while male graduates work more hours.<sup>156</sup>

Nevertheless, some could argue that our baseline expectations are off. If professionally trained women choose to leave the workforce without obvious signs of regret, are not they revealing a preference for domestic labor over market labor? Should we not just adjust our expectations about gender parity in the labor market to reflect the reality that a large proportion of women in fact prefer to spend their time on childcare and managing the house?

This Part explains why underemployment is problematic in terms of both internalities and externalities. For the former, there is reason to believe that the professional women who leave their careers are not serving their best interests. For the latter, female professionals' exit from the workplace imposes costs on other people—on their children (particularly their female children), on their former work colleagues, and on other women who are just beginning their careers.

#### A. Internalities

Women who leave their careers become dependent on their husbands. Their husbands may be very supportive and may avoid doing anything to exploit the arrangement, but the dependence is undeniable.

On the surface, this dependence does not seem to bother those who experience it. Female lawyers who take time out of their careers for childcare, many of whom never fully return, report some of the highest levels of career satisfaction.<sup>157</sup> (By contrast, men who take time out for child care report some of the lowest.)<sup>158</sup> Yet these findings conflict with other studies showing that both men and women understand that a spouse who takes a care-taking role within a

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155. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 25 n.47; Neil H. Buchanan, *Why Do Women Lawyers Earn Less than Men? Parenthood and Gender in a Survey of Law School Graduates* 31 (Geo. Wash. U. L. Sch. Pub. L. & Legal Theory Res., Paper No. 449, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1280464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280464) [<https://perma.cc/3NK9-KUAR>] (speculating that fathers may feel obligated to raise incomes so they can care for children).

156. WILKINS ET AL., *supra* note 31, at 55 (discussing how females were more likely to work part time or leave the workforce after having a child, whereas men responded by working more hours).

157. Dau-Schmidt, Galanter, Mukhopadhaya, and Hull find that women who take time off for childcare (who often stay under-employed) report higher overall career satisfaction than other lawyers, even after controlling for things like income. Dau-Schmidt et al., *Men and Women of the Bar*, *supra* note 32, at 126.

158. *Id.*



household is in a more vulnerable position.<sup>159</sup> They also conflict with findings that female lawyers have very similar levels of job satisfaction to male lawyers when they are working.<sup>160</sup> We suspect that surveys asking about career satisfaction may be measuring two different things: women may respond to the question by reflecting on whether their careers leave enough flexibility for other things, including child-rearing, while men reflect on their career success independent from the trade-offs it may demand from other parts of his life.<sup>161</sup>

We have little doubt that children cause a seismic shift in preferences for some highly trained professionals, and that some once-career-oriented people may discover that they are actually much more satisfied running a household. But the fact that this preference reversal occurs only in women is suspicious and deserves skeptical probing.

Also, notwithstanding the results of self-reported surveys, we suspect there are some difficult-to-measure losses to the marriages and self-esteem of women who leave their careers. As Carbone and Cahn put it, “marriages are happy when *neither* spouse cleans the toilet.”<sup>162</sup>

In any case, professionally trained women are mismatched for domestic work. They have undergone massive effort and costs to obtain professional training and build their human capital within a highly specialized field. A non-working lawyer will see her professional skills and financial self-sufficiency depreciate after a short time.<sup>163</sup> Perhaps the easiest way to understand the

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159. CARBONE & CAHN, *supra* note 95, at 120 (discussing how both men and women see the care-taking role as a vulnerable position). Another piece of evidence that financial dependence is correlated, at least, with a submissive position within the home—a study of women in the military found that unemployed husbands were much more likely to be physically abused than employed husbands. John H. Newby et al., *Spousal Aggression by U.S. Army Female Soldiers Toward Employed and Unemployed Civilian Husbands*, 73 AM. J. ORTHOPSYCHIATRY 288, 291 (2010).

160. Aiken & Regan, *supra* note 49, at 305 (citing multiple studies).

161. A traditional division of labor may have costs to the husbands, too. Without a second income, husbands may take on more work and forego restorative family and leisure time. Among men who are married to wives with advanced degrees, those whose wives are not working full time earn more than those whose wives are working full time. Mulligan & Rubinstein, *supra* note 27, at 18 fig.6. Of course, the causal arrow could go in the other direction if a man’s high earnings prompt the household to take on a traditional division of labor since they can afford to lose one of the salaries. At least one influential study suggests that the earner who stays in market labor increases their efforts when the household loses a source of income. Chetty & Szeidl, *supra* note 117, at 863.

162. CARBONE & CAHN, *supra* note 95, at 100 (emphasis added); *see also* ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPY, HEALTHY, AND THRIVING* (1998) (concluding that the conventional wisdom that working wives are overwrought and poor mothers is incorrect; but the book has less to say for our purposes because the authors study exclusively middle-class and working-class dual earner couples); Benin & Nienstedt, *supra* note 134, at 976 (the bulk of research, at the time, indicated that working women are generally more satisfied with their lives. Note, however, that their study and the studies they cite relate to married women of all educational backgrounds. Their study found that the best-fitting models did not need an education control, but we cannot rule out that highly educated women respond differently to not being in the workforce).

163. Benin & Nienstedt, *supra* 134, at 976 (stating that for non-working wives, the *primary* source of life satisfaction is financial satisfaction, meaning that these wives are not in control of the

externalities is to compare the options of women who leave their careers with those of women who do not have a significant gap in work experience. Let us revisit the pressures operating on professional men and women, this time by comparing the pressures in the early career years to the state of affairs during mid-career years, when legal work is more enjoyable or at least better compensated, and when children are in school and require less attention.

**Figure 8.**

Layers of Pressure in the Early Careers of Married (Opposite-Sex)  
Men and Women

**Early Career**

(reproduced for the purpose of comparison)

	<b>Married Men</b>	<b>Married Women</b>
<b>Culture</b>	Strong push to work	Neutral
<b>The Labor Market</b>	Weak push home	Firm push home
<b>Children/Family</b>	Strong pull home	Strong pull home
<b>Spouse</b>	Strong push to work	Gentle pull home

**Mid-Career**

	<b>Married Men</b>	<b>Married Women With a Labor Gap</b>	<b>Married Women Without a Labor Gap</b>
<b>Culture</b>	Strong push to work	Neutral	Neutral
<b>Labor Market</b>	Strong pull to work	Firm push home	Strong pull to work
<b>Children/Family</b>	Weak pull home	Weak pull home	Weak pull home
<b>Spouse</b>	Strong push to work	Weak push to work	Strong push to work

By mid-career, married women who avoid a work gap are poised to stay in the labor market for the long haul. Work is more rewarding, and work-life balance is finally achievable. Women with a large gap in work experience will either trail behind where they would have been in the labor market or will have to find a different meaningful use of their time.

*B. Externalities in the Home*

Professional women who take time out of their careers for the sake of family are presumably sacrificing their earning power in order to invest in the wellbeing

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most important element for their own happiness).

of their children. They act on the belief that a mother can provide focused, customized care that exceeds the quality of daycare and early childhood education programs. And this may be so, particularly when children are very young. A secure attachment to at least one parent who is sensitive and responsive to the child's stress is very important for later cognitive and behavioral development.<sup>164</sup> Highly educated women are also likely to have cognitive skills that translate to other things, including teaching their children. But there is little evidence that children get a lot from their mother's sacrifices. In fact, observational data suggests children may be *worse* off during grade school, on average, when mothers stayed home with them after the first year of life.<sup>165</sup>

We are not convinced that these studies can adequately control for selection effects (families who have a caretaking mother are not likely to be the same in unobservable ways to families with a working mother), and the results seem to be driven by lower-income families since upper-class children appear to receive a mild developmental benefit when a mother stays home.<sup>166</sup>

Thus, for lawyers, it is not clear whether daycare has a net positive or net negative effect on test scores and behavior during elementary school. But whatever the sign, these effects are dwarfed by the effects of enculturating children to expect women to tend exclusively to family responsibilities. If parents care about the cognitive and behavioral skills of their children because they hope the skills will translate into successful careers and egalitarian marriages, they should prefer their children to observe a working mother. Several studies, with a wide range of study designs, find that parents' working patterns provide a strong model for their children. When a mother stays home, both boys and girls are more likely to internalize that women should stay home.<sup>167</sup> The parents may even

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164. See generally Marianne S. De Wolff & Marinus H. van Ijzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, 68 CHILD DEV. 571 (1997).

165. The American Psychological Association published a report with the rather drab title "Maternal Work Early in the Lives of Children and Its Distal Associations with Achievement and Behavior Problems: A Meta-Analysis." The report combined findings from sixty-nine well-controlled studies on the effect of maternal employment during the early years of a child's development on that child's educational achievement and behavior problems later in life. Altogether, the body of studies suggest that the long-term effects of maternal work are ambiguous and small in scale. "Maternal employment during Years 2 and 3 was associated with higher achievement. Some moderator analyses indicated negative effects of employment for middle-class and 2-parent families and for very early employment (child's first year)." Rachel G. Lucas-Thompson et al., *Maternal Work Early in the Lives of Children and Its Distal Associations with Achievement and Behavior Problems: A Meta-Analysis*, 136 PSYCHOL. BULL. 915, 938 (2010).

166. *Id.* at 929–30.

167. *Id.* at 917 ("[F]rom a psychological perspective, working mothers provide a role model for competence and success, among other attributes, which particularly benefits daughters" (citations omitted)). Mothers' parenting, too, may be affected in positive ways, such as setting independence as a goal for their daughters. *Id.* (citing L. W. HOFFMAN & L. M. YOUNGBLADE, *MOTHERS AT WORK: EFFECTS ON CHILDREN'S WELL-BEING* (1999)); see also Kathleen L. McGinn et al., *Learning from Mum: Cross-National Evidence Linking Maternal Employment and Adult Children's Outcomes*, 33 WORK, EMP. AND SOC'Y 374, 387 (2018). See generally Alyssa Croft et al., *The Second Shift Reflected in the Second Generation: Do Parents' Gender Roles at Home Predict Children's Aspirations?*, 25

unintentionally treat their female children differently from their male children.<sup>168</sup> This can be overcome to some extent through conscious efforts of the parents to avoid espousing gender stereotypes,<sup>169</sup> but the message is stronger when the mother is working. As Francis Vella put it, “females’ attitudes towards working women are developed in their youth and result in substantial reductions in their human capital investment, labor supply and rates of return to education.”<sup>170</sup>

A traditional division of labor has intergenerational effects. It may sap daughters of some of the ambition and imagination they would otherwise apply to their careers. It may deprive their sons of the expectation that their spouse will contribute financially. And it may deprive the women their sons will marry of a more equitable division of child-rearing responsibilities.<sup>171</sup>

### C. Externalities at Work

When professional women leave the workforce in large numbers, the aggregate effect of their decisions have an impact on the careers of other women. The current gender gaps in career attachment are so large that even well-designed antidiscrimination laws may not be able to overcome statistical discrimination. Given the employment trends, employers could anticipate that an entry-level female associate will under-invest in her career compared to a male peer. This has nothing to do with hostility or presumptions of inferiority; given the high cost of

PSYCHOL. SCI. 1418 (2014); Raquel Fernandez et al., *Mothers and Sons: Preference Formation and Female Labor Force Dynamics*, 119 Q.J. ECON. 1249 (2004) (using a natural experiment design based on the rollout of the World War II draft); Fernandez & Fogli, *supra* note 91 (using first generation daughters of immigrants to compare female work trends by using country of parents’ origin as a proxy for cultural beliefs about the role of women in society and finding that culture had great explanatory power after controlling for covariants like education and spousal characteristics); Francis Vella, *Gender Roles and Human Capital Investment: The Relationship Between Traditional Attitudes and Female Labour Market Performance*, 61 ECONOMICA 191 (1994).

168. Miller & Quealy, *supra* note 94 (“There is also a theory that high-earning families invest more in sons, because men in this socioeconomic group earn more than women, while low-earning families invest more in daughters, because working-class women have more job opportunities than men.”).

169. Diva Dhar et al., *Intergenerational Transmission of Gender Attitudes: Evidence from India*, 55 J. DEV. STUD. 2572, 2574, 2582–84 (2019) [hereinafter Dhar et al., *Intergenerational Transmission of Gender Attitudes: Evidence from India*], <http://faculty.wcas.northwestern.edu/~sjv340/igt.pdf> [<https://perma.cc/E9J5-2RWS>] (finding parents, and especially mothers, have more influence over their children’s gender attitudes than peers do); Tauhidur Rahman & Wenjun Wu, *Gender Attitudes and Intergenerational Coresidence: Evidence from East Asia* (2018) (working paper available from the authors upon request). For evidence that gender attitudes can be shaped through discussions outside the home, see Diva Dhar et al., *Reshaping Adolescents’ Gender Attitudes: Evidence from a School-Based Experiment in India* (Nat’l Bureau of Econ. Research, Working Paper No. 25331, 2018) [hereinafter Dhar et al., *Reshaping Adolescents’ Gender Attitudes: Evidence from a School-Based Experiment in India*], [http://faculty.wcas.northwestern.edu/~sjv340/reshaping\\_gender\\_attitudes.pdf](http://faculty.wcas.northwestern.edu/~sjv340/reshaping_gender_attitudes.pdf) [<https://perma.cc/XZ6S-8L4S>].

170. Vella, *supra* note 167, at 191. Men’s gender attitudes, and what they search for in wives, are affected by the economic participation (or not) of their mothers, too. Hwang, *supra* note 128, at 536–46 (noting that mother’s education also has a large effect).

171. Fernandez et al., *supra* note 167; McGinn et al., *supra* note 167.

replacing an attorney (estimated to be at least \$200,000 for law firms<sup>172</sup>), firms may estimate that women will be less profitable than men. Indeed, John List and Imran Rasul use this precise example to define statistical discrimination:

The underlying premise implicit in this line of work (statistical discrimination theory) is that employers have incomplete information and use observables to guide their behavior. For example, if they believe that women might be more likely to take time out of the labor force, employers with high adjustment costs might avoid those expected to have higher attrition rates. Firms then have an incentive to use gender to “statistically discriminate” among workers if gender is correlated with attrition.<sup>173</sup>

Antidiscrimination law cannot close this gap. The instruments of enforcement for such laws (penalizing companies that engage in discrimination) will be ineffective and counterproductive. First, after hiring women, firms will underinvest in them if they are likely to leave before the firm can recoup their training costs.<sup>174</sup> These differences in investment will be hard to detect. Second, even if they could be detected, strict enforcement will have other unintended consequences. Mutual trust and respect among colleagues will suffer if employers are compelled to ignore accurate predictions that women will leave, particularly at law firms where lawyers must rely on their colleagues for cases that require a combination of expertise and efforts.

Given the strong market incentive for firms to engage in some amount of statistical discrimination, career abandonment imposes externalities on the next wave of female law students and junior associates. While this argument highlights the context under which statistical discrimination occurs, it cannot remove the moral problems involved when stereotypes (even accurate ones) are applied to new employees. Moreover, statistical discrimination only partly explains gender gaps in market outcomes. The gender gap in wages and on-the-job opportunities cannot be explained even after controlling for higher rates of female attrition.<sup>175</sup> But moral considerations aside, statistical discrimination will be hard for supervisors to resist if attrition rates are bad enough.

Next, consider the effects of career abandonment by women under conditions where employers are in compliance with antidiscrimination laws. When

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172. N.J. COUNCIL ON GENDER PARITY IN LABOR & EDUC., *supra* note 67, at 1 (finding firms incur costs of \$200,000–\$500,000 to replace a single attorney, and costlier if the lawyer didn’t get to the point of profitability before leaving the firm).

173. List & Rasul, *supra* note 78, at 157.

174. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1315–23 (2007) (finding motherhood penalty and no fatherhood penalty); Anne Beeson Royalty, *The Effects of Job Turnover on the Training of Men and Women*, 49 INDUS. & LAB. REL. REV. 506 (1996); Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 19 (explaining that firms may rationally be reluctant to hire women or to invest in firm-specific training since women have less labor force attachment than men in the same positions).

175. Royalty, *supra* note 174. Note, though, that much of the wage/training gap is left unexplained even after controlling for higher rates of attrition.

employees leave their jobs during a training phase, before providing a net benefit to the firm, the firm bears the attrition and training costs. For many lines of work this training phase is short, but for the legal profession, the breakeven point occurs only after several years of on-the-job training.<sup>176</sup> Employees who leave the job before the breakeven point are effectively subsidized by the employees who stay. This cross-subsidy is substantial when the attrition rate for female employees is high. It is also regressive, given the fact that the associates who leave their careers are typically married to even higher-earning men. So even in the best-case scenario where discrimination does not occur, professionals who slide into a traditional division of labor will impose costs on their former colleagues.

These externalities, too, should not be overstated. Attrition is a part of business. Professionals who leave their firms for a lateral opportunity at another firm are also leaving their colleagues in the lurch. Arguably, the firms should prefer to train somebody who will waste the training by leaving the labor force than to train somebody who will take their skills to a competitor. And a collection of anecdotes and experiments suggest that firms in various fields that encourage more balance between work and other parts of life get more efficient and creative work out of their employees.<sup>177</sup> For these reasons, we suggest changes in the workplace that can help improve how firms value their female professional workers and that increase women's attachment and satisfaction at work. But under the influence of cultural acceptance for female underemployment, these changes alone will not eliminate the gender gap in attrition.

Finally, female attrition from positions of power affects firm governance and market innovation. Companies with female managers are better positioned to serve markets that have a large proportion of female consumers, and more gender-diverse corporate boards seems to reduce the share of short-sighted high-risk financial decisions.<sup>178</sup>

Given the range of social consequences, female attrition from the professional labor force (even attrition that is voluntary) should be seen as a challenge, deserving concerted efforts to reverse.

One last point deserves special attention before this Article moves on to consider interventions: our theory about the powerful negative effects of cultural

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176. N.J. COUNCIL ON GENDER PARITY IN LABOR & EDUC., *supra* note 67, at 1, 41 n.3.

177. Charlotte Graham-McLay, *A 4-Day Workweek? A Test Run Shows a Surprising Result*, N.Y. TIMES (July 19, 2018), [https://www.nytimes.com/2018/07/19/world/asia/four-day-workweek-new-zealand.html?utm\\_source=hackernewsletter&utm\\_medium=email&utm\\_term=working](https://www.nytimes.com/2018/07/19/world/asia/four-day-workweek-new-zealand.html?utm_source=hackernewsletter&utm_medium=email&utm_term=working) [<https://perma.cc/3NZ8-MADS>]; *see also* Kliff, *supra* note 149.

178. *See* CTR. FOR ADVANCED HUMAN RES. STUDIES, RE-EXAMINING THE FEMALE PATH TO LEADERSHIP POSITIONS IN BUSINESS 16 (2011); COMM. FOR ECON. DEV., FULFILLING THE PROMISE: HOW MORE WOMEN ON CORPORATE BOARDS WOULD MAKE AMERICA AND AMERICAN COMPANIES MORE COMPETITIVE 16 (2012); ORG. FOR ECON. COOPERATION & DEV., CLOSING THE GENDER GAP: ACT NOW (2012); Press Release, Lord Davies of Abersoch, *Women on Boards 2013: Two Years On* (Apr 10, 2013), <https://www.gov.uk/government/news/women-on-boards-2013-two-years-on> [<https://perma.cc/8W5A-6UES>].

acceptance is not intended to be an indictment of women, individually or collectively, who have left their professional careers. To the contrary, all but the most resolved careerists have a good chance of falling into the dynamics we have described. Rather, we hope that our work will direct attention to the unintended consequences of asymmetric social pressure and cultural attitudes. Women who are under-employed are no more responsible for culture than the rest of us. Moreover, to the extent cultural expectations can be changed, the adjustments require more support for women not only in the workforce, but at school and home as well, as we discuss in the next Part.

#### V. POLICY INTERVENTIONS

The perverse cultural acceptance theory differs from other gender gap explanations—choice and discrimination—because it precedes them, and permeates the context for them. Cultural acceptance feeds into workplace discrimination, and it also greases the rails leading back into the home. Even the scholars who have challenged the idea that women voluntarily choose to prioritize childcare over work have challenged it on the basis of constrained choices. They have reasoned that the costs of outsourcing care and the unwillingness of their partners to help have put women in the position of having fewer options than their husbands. This is not quite correct. While there is ample evidence that women often have to make choices between options that have less favorable terms than similar men, in one very important respect men's options are *more* constrained than women. They cannot leave their careers behind. If they do, their social status and identity suffer terribly.

If women were under the same cultural pressure as men to participate in the labor market (with reasonable accommodations, of course, for childbearing), female underemployment, particularly among professionally trained women, would be reduced. The extent of gender discrimination in the marketplace would also be lower. The social landscape in which children are raised would be different, too—more conducive to ambitious girls and domestically cooperative boys.<sup>179</sup> Thus, highly skilled, professionally trained women should be encouraged, expected, and even pressured to work, even if it means a generation will have to navigate the trenches of work-place sexism and marital conflict before the work-life balance gets easier.

Of course, this is much easier said than done. The policy interventions that have the best chance of changing culture around gender inequalities are very different from the ones that typically dominate the gender gap literature. Until recently, most research and policy design assumed that culture norms would

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179. Of course, there is a long-standing debate in social science about the extent to which gender differences are the result of nature or nurture. Some research suggests that gender differences in competitiveness are related to the environment in which a child grows up. See *generally* Gneezy et al., *supra* note 19.

remain constant for the foreseeable future. Indeed, given the consensus that family decisions on how to split the domestic and market labor should not be second-guessed, there has not been as much research as there could be on how culture is formed and is changed.<sup>180</sup> The proposals we present here are thus, by necessity, preliminary. But gender norms can and do change.<sup>181</sup>

We have forced ourselves to sketch only the ideas that seem politically and practically feasible within a generation. As we will show, there are many promising, low-cost options that steer well clear of government re-education programs. Indeed, we hope this Article is itself part of the solution; after all, the most reliable way to change public attitudes is to facilitate discussion and disseminate information.<sup>182</sup> By offering a different frame for understanding gender gaps, this paper is both a diagnosis and a treatment.

This Part lays out the ideas we think are most likely to succeed. We break them into categories related to discourse, public law, and voluntary employment policies. Before we launch into proposals, it's worth reflecting on what we count as success. Parents of both sexes must devote time for taking care of children, aging parents, their houses, and themselves. Households must make decisions through constrained optimization of lots of varying goals. No professional—whether female or not—needs to throw herself onto the altar of the competitive marketplace by focusing on work to the detriment of all other life objectives. We have focused in the Article on underemployment (fewer than 20 hours a week) because it is a low bar to clear for any JD-holder.<sup>183</sup> That is, full employment using our definition is an eminently attainable goal for all law school

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180. See generally Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 2 (“The formation of norms and attitudes thus in our view is a potentially fruitful area of research that has received relatively little attention by economists.”). Economists have theorized and tested models for the origins of cultural norms, which could be useful for policy interventions. See Alberto Alesina et al., *On the Origins of Gender Roles: Women and the Plough*, 128 Q.J. ECON. 469 (2013); Roland Bénabou & Jean Tirole, *Mindful Economics: The Production, Consumption, and Value of Beliefs*, 30 J. ECON. PERSP. 141 (2016); Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001); Nathan Nunn, *Culture and the Historical Process*, 27 ECON. HIST. DEVELOPING REGIONS 108 (2012); Paola Giuliano & Nathan Nunn, *Understanding Cultural Persistence and Change* (Nat’l Bureau of Econ. Research, Working Paper No. 23617, 2019), <https://scholar.harvard.edu/nunn/publications/understanding-cultural-persistence-and-change> [<https://perma.cc/CT54-LBCR>].

181. Taking the effect of cultural and gender norms into account can lead to better policy design. WORLD BANK GRP., WORLD DEVELOPMENT REPORT 2015: MIND, SOCIETY, AND BEHAVIOR 42–58 (2015).

182. Elizabeth Levy Paluck & Donald P. Green, *Deference, Dissent, and Dispute Resolution: An Experimental Intervention Using Mass Media to Change Norms and Behavior in Rwanda*, 103 AM. POL. SCI. REV. 622, 637 (2009); Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 ANN. REV. PSYCHOL. 339, 354 (2009).

183. Indeed, this Article has consciously avoided perpetuating the advice from Sheryl Sandberg’s *Lean In* book because there is reason to believe that women are properly calculating and managing their options at work. See Christine L. Exley et al., *Knowing When to Ask: The Cost of Leaning In* 24 (Nat’l Bureau of Econ. Research, Working Paper No. 22961, 2016).



graduates. High status women can tap into their reserves of talent and energy to succeed by this modest career standard, and still have plenty of time to devote to domestic and personal activities.

*A. Discursive Interventions*

The most enduring cultural shifts occur after discourse has the chance to erode old expectations and builds up new ones. Public and private conversations can change even the most hardened attitudes like a river on stone. To improve gender parity in both the public and private sphere, cultural expectations around work must become more even across the sexes.

Men devote themselves to work because their social status depends on it. Some public intellectuals have tackled the asymmetry in cultural acceptance by arguing that men should be encouraged to shift some of their efforts to the domestic sphere, or toward communal work.<sup>184</sup> But the asymmetry should also be tackled by going the other way. For the sake of both gender parity and general social welfare, every highly educated person's social status should depend, to a large extent, on their contributions to the public sphere. Everybody with the skill and training to craft a career should do it.<sup>185</sup>

Within a generation or two, American society could transform the expectations around work and family so that service in the market and to the public are as important to women's identities as to men's. We now have a better understanding than we once did about how gender norms are formed, and so policy interventions can be designed around an evidence base that makes it more likely to succeed.<sup>186</sup>

On a voluntary basis, we believe there are at least three natural sites where these conversations should be actively facilitated: grade schools, universities, and firms. Although childhood years are the more formative for the sake of culture, colleges, graduate programs, and firms have the advantage of addressing a selective audience—this is where the most ambitious women will be—during an important period of development for career attachment. Law schools and law firms can immediately begin by simply laying out the facts about career abandonment that we present in Part I and inviting discussion.<sup>187</sup>

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184. See, e.g., Alyssa Croft et al., *An Underexamined Inequality: Cultural and Psychological Barriers to Men's Engagement with Communal Roles*, 19 PERSONALITY & SOC. PSYCH. REV. 343, 347 (2015).

185. Amy Wrzesniewski & Jane E. Dutton, *Crafting a Job: Revisioning Employees as Active Crafters of Their Work*, 26 ACAD. MGMT. REV. 179 (2001).

186. See generally Dhar et al., *Intergenerational Transmission of Gender Attitudes: Evidence from India*, *supra* note 169; Dhar et al., *Reshaping Adolescents' Gender Attitudes: Evidence from a School-Based Experiment in India*, *supra* note 169; Rahman & Wu, *supra* note 169.

187. When we presented our tables at a World Bank Economic Development Conference last November, the slides elicited gasps of shock, even to our audience of economists well-steeped in gender gap research.

A good conversation in law schools or law firm orientations will also include a discussion about realistic expectations about the early grueling years of professional careers—what Sally Blount called the “Mid-career Marathon years.”<sup>188</sup> Women should start their careers with the expectation that work-related stressors need to be managed and navigated around. Men as a group take for granted that workplace stressors are in fact manageable and navigable, but women as a group do not perceive work stress the same way. Women are more likely to believe that they are not in control of their fate.<sup>189</sup> The difference in perspective may be biologically hardwired to some degree, but women also consistently receive messages that encourage hopelessness. Young female attorneys are advised early in their careers to seek “work-life balance,” implying that the delayed gratification appropriate for male peers is not appropriate for women. For female professionals, the “life” part of work-life balance depends on reducing work.<sup>190</sup> And the rhetoric around workplace discrimination can sometimes provoke an undue sense of helplessness and despair as well.

Schools and firms should also become aware and wary of institutional messages that reinforce asymmetric gender expectations. Career development officers should avoid stressing the importance of “work-life balance” to female students.<sup>191</sup> Instead, they should discuss the challenges of raising family, protecting personal time, and thriving at work with all students in the same way. Law schools should debunk the perceived conflict between family and work by discussing the best evidence on childcare and the financial costs of outsourcing much of the domestic labor. (On average, dual-earner couples spend about 20% of income on daycare center costs in the U.S., and the percentage is presumably smaller for professionals.<sup>192</sup>) Law school programming should also explicitly discuss the benefits of dual-earner households on the aspirations of children (especially daughters) and the societal benefits of keeping very talented women in the workforce. These messages are potent and low cost. And they may eventually inure to the school’s benefit when a larger proportion of female graduates can become donors.

### B. Legal Interventions

Public law often undermines gender equity and reinforces gender roles, too. The marriage bonuses and penalties imbedded in the income tax are a good example. Compared to two single people earning the same incomes, the U.S. tax

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188. Blount, *supra* note 135.

189. Blau & Kahn, *The Gender Wage Gap*, *supra* note 1, at 36.

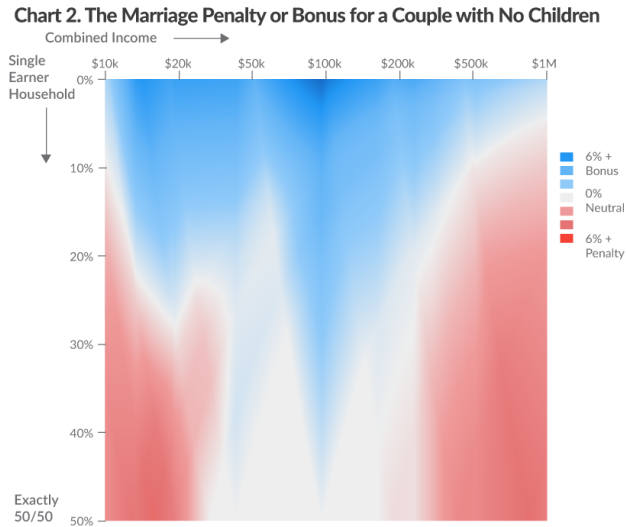
190. N.J. COUNCIL ON GENDER PARITY IN LABOR & EDUC., *supra* note 67 (explaining that young female attorneys are advised to “seek work-life balance”).

191. *Id.* (explaining that young female attorneys are advised to “seek work-life balance.”)

192. The costs are significantly defrayed through tax credits, too. Herwig Immervoll, “*Can Parents Afford to Work?*”: *Childcare Costs, Tax-Benefit Policies, and Work Incentives*, OECD SOC. POLY DIVISION PRESENTATION SLIDE 12 (Jan. 16, 2006), <http://www.oecd.org/els/soc/35969537.pdf> [<https://perma.cc/LFG6-N8T5>].

code penalizes married couples who contribute equal amounts of income to the household, and it rewards married couples who rely entirely on the income of one spouse. The charts prepared by the Tax Foundation, appearing in Figure 9, show the extent of these penalties and bonuses by income and proportional share. For the purposes of our discussion about female professionals, the right-hand side of the charts are most relevant. The blue top of the chart shows that households relying mostly or entirely on one earner (usually male) pay fewer taxes than two similar single people would, and the pink bottom shows that dual-earning couples who bring in the same amount pay the same or more tax than two single people. The penalties and bonuses are especially large when children come into the picture.

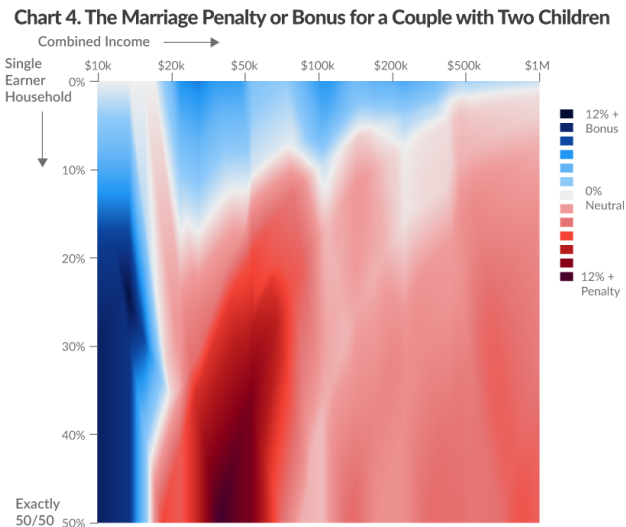
**Figure 9.**  
**Marriage Bonuses and Penalties by Household Income and Proportional Earning**



Note: This models the effects of the individual income tax, the Earned Income Tax Credit, the Alternative Minimum Tax, payroll taxes, standard deductions and personal exemptions (and their phase out), and all three filing statuses (single, married, and Head of Household).

Source: Tax Foundation and CBPP Calculations.

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TAX FOUNDATION @TaxFoundation



Note: This models the effects of the individual income tax, the Child Tax Credit, the Earned Income Tax Credit, the Alternative Minimum Tax, payroll taxes, standard deductions and personal exemptions (and their phase out), and all three filing statuses (single, married, and Head of Household).

Source: Tax Foundation and CBPP Calculations.

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TAX FOUNDATION @TaxFoundation

Comparing professional married couples to each other, households who have just one earner bringing in a \$200,000 income will pay about 10% less in taxes than the households with two earners each bringing home \$100,000. (Plus, the single earner households have fulltime caretakers whose imputed income is not taxed, while the dual-earner households are likely to spend part of their taxed income on housekeepers and daycare service providers.) These tax incentives do not seem to affect couples' decisions to get married, but they do cause the lower earner of the couple (almost always the woman) to work less.<sup>193</sup> They are incompatible with social commitments to improve gender parity within the professions and in positions of power. Bonuses should be reserved for the households contributing more to the economy, generating more work for daycare services, and modeling an equal partnership between spouses.

Employment law may also encourage couples to recreate traditional gender roles by making it difficult for women to take the time they need to care for newborn babies. The Family Medical Leave Act (FMLA) requires employers to hold the positions of new parents for them for up to twelve weeks, but to stay within the bounds of legal protection, women must be prepared to return to work full time when the twelve weeks are up.<sup>194</sup> This law can demotivate career women in two ways. First, the leave time may be too brief, and may end too abruptly. The first twelve weeks of a baby's life are often called the "fourth trimester" because the infant is very nearly as dependent on the mother's body and energy as it was before birth, and the mother's health is similarly compromised.<sup>195</sup> Thus, even under the best circumstances, the protected leave period ends when sleep deprivation just starts to subside, before the mother is sufficiently recovered. Under less optimal circumstances, trauma from birth-related procedures, colic, and a range of other problems ensure that the mother will not be able to work fulltime after twelve weeks. Moreover, because the law does not provide any pay during a new parent's leave, the break from work is often accompanied with changes in the family's spending habits to prepare for life on one income. The leave is, therefore, a trial run for single-earner families. For both of these reasons, when the clock starts to run out on the legally protected leave, many women will

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193. Second earners in a household work 7% less due to marginal tax rates that penalize the second income. Overall, couples who file jointly are 1.2% lower than they would have been if the couple had remained unmarried. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 12 (1997); see also Patricia F. Apps & Ray Rees, *Optimal Taxation, Household Production and Intra-Household Exchange* (forthcoming 2019) (concluding that taxing households as separate individuals will reduce the intrahousehold gender gap in earnings).

194. *Family and Medical Leave (FMLA)*, U.S. DEPT. LABOR, <https://www.dol.gov/general/topic/benefits-leave/fmla> [<https://perma.cc/PAC5-4H5P>] (last visited Oct. 24, 2019).

195. See Christina Caron, *A Survival Guide for the Fourth Trimester*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/well/a-survival-guide-for-the-fourth-trimester.html> [<https://perma.cc/4YKW-MMU6>] (illustrating the frequency of the term "4<sup>th</sup> trimester"); Brenda Goodman, *Getting Care in the '4<sup>th</sup>' Trimester*, WEBMD (Nov. 16, 2017), <https://www.webmd.com/baby/news/20171116/getting-care-in-4th-trimester> [<https://perma.cc/HFQ6-WQLV?type=image>].

consider quitting their jobs, perhaps with vague commitments to get another job later. By using unrealistic expectations for new mothers' reentry into the market, FMLA law may unintentionally signal to women that they are not cut out for both work and family.

The legal and economic literatures are full of proposals to modify leave policies to make work more workable for new mothers. Popular proposals include extending legally protected leaves to a year and requiring employers to compensate employees while they are out on maternity leave.<sup>196</sup> These might have salutary effects, but recent studies from other countries suggest that progressive leave policies have surprisingly small impacts on female labor participation. For example, over the last twenty years, Japan has implemented very progressive employment policies in stages, including up to a year of partially paid leave and state-run daycare programs. Despite the multifaceted intervention, Japan's maternal labor participation increased only slightly more than other countries during the same period, and the legal policies explain just 5–11% of that increase.<sup>197</sup>

In any case, big changes to federal leave policies will require careful design and study. Assuming these policies are politically viable, they may not have their intended effects if the leaves are too generous, permitting important skills to atrophy and lifestyles to significantly change.<sup>198</sup> And if the leave is compensated by the employer, this will create a very large cross-subsidy at her firm, potentially leading to more resentment, distrust, and discrimination against women from coworkers and supervisors. As Claudia Goldin has warned, "well-intentioned policies backfire 98 percent of the time."<sup>199</sup>

Nevertheless, some changes to employment law could be explored and evaluated to reduce the asymmetry in cultural expectations around work. Longer protected leaves followed by a transitional period of part-time work could facilitate a mother's return to work and reduce the opportunities for rationalizing quitting. Also, if leaves are at least partially compensated, loss aversion heuristics

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196. Anette Borchorst & Birte Siim, *The Women-Friendly Welfare States Revisited*, 10 NORA: NORDIC J. WOMEN'S STUD. 90, 98 (2002).

197. See generally Nishitateno & Shikata, *supra* note 153. The authors believe that cultural shifts that predate and, to some extent, explain the changes in law are more powerful explanatory factors. Some of these legal changes may also be indicative of cultural shifts. For example, World Values Survey data reveals an increasing fraction of Japanese respondents who believed that working mothers (in comparison to non-working mothers) could establish relationships with their children that were just as secure; from the early 1990s through the early 2000s, the fraction rose from percent to 86 percent. Over the same period, the fraction who agreed that both husbands and wives should contribute to household income increased from 31 percent to 39 percent. These changes in attitudes likely played a key role in facilitating increased women's participation.

198. This is one reason that some have concluded that the United States' relatively anemic protections actually help women stay focused on rising to managerial levels in the workforce. See generally Nima Sanandaji, *The Nordic Glass Ceiling*, CATO INST. POL'Y ANALYSIS, no. 835, Mar. 8, 2018.

199. Kliff, *supra* note 149.

will encourage new parents to maintain the second income when the leave is coming to a close. Finally, and most ambitiously, policymakers could explore the political viability of spreading the costs of maternity leaves across society instead of leaving them on employers. If compensation were paid through a public disability program, and if the costs to individual employers of hiring and training a temporary worker while holding a position open for a new mother are partially defrayed through tax breaks, the working environment is likely to be more friendly for women both before and after they have children. Precise terms for each of these policies deserve more attention than we can provide here to comply with the best available research on optimal incentives for public benefits.<sup>200</sup>

### C. Employer Policies

Every person's career has moments of disappointment, deflation, and stress, but women are particularly vulnerable to them. Pregnancy and sex discrimination cause problems at work that men do not experience. Employment antidiscrimination laws and mandated accommodations, discussed above, can potentially reduce the gender differences in treatment and felt experience at work, so those efforts are relevant to minimizing unnecessary setbacks. Women should also be encouraged to try male-dominated subfields like tax law that are always in high demand and provide job stability.<sup>201</sup>

Firms can also improve the working conditions for all employees. Employers are slowly starting to absorb research that questions the value of long working hours. Some are dropping the requirement that employees be, or pretend to be, obsessed with work.<sup>202</sup> One study found that managers could not identify any difference in work quality between employees who worked 80 hours and employees who only pretended to.<sup>203</sup> And a company in New Zealand decided to switch to a four-day work week after finding that productivity went up during an experiment.<sup>204</sup>

But we suspect there is a large and irreducible amount of career turbulence that is inherent to the early years of work, when new professionals are learning what they enjoy (and do not), what they are naturally good at (and bad at), and how to avoid manipulative or abusive people. Career setbacks can be better managed if women are prepared to expect them. Career counselors and law school programming can help their graduates adapt by giving consistent and accurate information about what working life will be like. This should include data and

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200. Recent work by Raj Chetty and others could help with the particulars of these proposals. See generally Raj Chetty, *Moral Hazard Versus Liquidity and Optimal Unemployment Insurance*, 116 J. POL. ECON. 173 (2008).

201. Niederle & Vesterlund, *supra* note 43.

202. Erin Reid, *Embracing, Passing, Revealing, and the Ideal Worker Image: How People Navigate Expected and Experienced Professional Identities*, 26 ORG. SCI. 997, 1006 (2015).

203. *Id.*

204. Graham-McLay, *supra* note 177.

personal stories about how often lawyers and other professionals run into career problems—dissatisfaction, lay-offs, poor inter-personal fit, and discrimination—and how career professionals overcame the problems. This second part is important, as it will help prepare students not only to expect disappointments but also to expect that these setbacks are temporary. Leaving law school, the rewards of a lifetime of work despite periods of growing pain should be obvious and in the front of the minds of new graduates—especially the female graduates. This, then, is another reason to encourage law schools to de-emphasize the “work-life balance” conundrum that dominates discussion in female-oriented programming and to celebrate the rewards of work.

The best way for professional women (especially mothers) to overcome the costs of long leaves is to not have one. The conducive cultural and legal support that will get women back in their jobs soon after having a child are designed to avoid the waning motivation and discouraging atrophy of skills that come with long leaves. To reduce these effects, firms could keep employees minimally engaged, for low or no pay, by inviting them to continue to attend lunch workshops or other events or by briefly consulting on cases.

#### CONCLUSION

Society suffers when talented and highly-trained professionals do not work. Lost productivity is a longstanding source of concern for the economy even when its sources have only short-term consequences, like traffic jams or minor illnesses.<sup>205</sup> The fact that roughly 15% of lawyers spend multiple years out of the full-time labor force and often never return should be downright shocking.<sup>206</sup> It happens to be that nearly all of this hemorrhaging comes from the careers of women. Thus, the draining of professional talent has multi-dimensional consequences as it reinforces and exacerbates gender inequalities. Within marriages, female underemployment puts women in a vulnerable position of dependence. Within families, it models gender disparities to children, shaping the expectations of the next generation. Within firms, it leaves large gender gaps in the ranks of senior associates and leadership, and this in turn leaves the profession lopsided.<sup>207</sup>

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205. See, e.g., Jianqi Liu et al., *High-Efficiency Urban Traffic Management in Context-Aware Computing and 5G Communication*, 55 IEEE COMM. MAG. 34, 34 (2017) (estimating that in 2014, the United States lost \$160 billion in productivity due to traffic delays); Joshua G. Petrie et al., *Illness Severity and Work Productivity Loss Among Working Adults with Medically Attended Acute Respiratory Illnesses: US Influenza Vaccine Effectiveness Network 2012–2013*, 62 CLINICAL INFECTIOUS DISEASES 448, 454 (2015) (discussing effects of the flu).

206. This figure combines male and female JD-holders, so it is about half of what the figure for just women would be. See *supra* Part I, for our tables analyzing the National Survey of College Graduates.

207. Gender inequality tends to reinforce itself in the workplace. See Andreas Born et al., *A Man’s World? The Impact of a Male Dominated Environment on Female Leadership* 3, 31 (Mar. 2019) (working paper) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3207198](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207198))



This Article has explored the well-meaning but counter-productive tendency for society to accept different levels of labor participation from women than we do for men. Workplace discrimination cannot fully explain the large and persistent patterns of underemployment that we documented in Part I, and voluntary choice cannot satisfactorily explain it, either. To date, culture has had an understated role in the American gender gap literature,<sup>208</sup> yet it is key to fully understanding and addressing the problem. Asymmetric cultural pressures keep men engaged in the workforce no matter what—even if their spouses have high earnings, and even during periods of high stress. Women do not feel this cultural pressure to work at nearly any cost, and so it should not be surprising that many will cannibalize their own careers and tend to the household during intense periods of stress.

Cultural acceptance creates an exit ramp for highly trained professional women, quietly siphoning them out of the profession for myriad reasons. The #MeToo movement, the Women's March, and the revival of the Equal Rights Amendment<sup>209</sup> prove that there is an appetite to make significant societal changes to level out gender imbalances. These movements address some of the most predictable and noxious reasons that women leave their careers (discrimination and inadequate support in the workplace). Their success will be multiplied if the newest members of the profession pursue the slow, steady, and attainable goal of equalizing the cultural expectations for both men and women to work.

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[<https://perma.cc/R3SP-34RX>] (“[W]omen in male majority teams are less confident in their relative performance, less influential, and more swayed by others in team discussions. They also (accurately) believe that they will receive less support from team members in a leadership election.”).

208. By contrast, culture has a prominent role in the literature diagnosing gender inequality in the developing world. *See, e.g.,* Alesina, *supra* note 162, at 473.

209. Allison K. Lange, *The Equal Rights Amendment Has Been Dead for 36 Years. Why It Might Be on the Verge of a Comeback.*, WASH. POST (June 18, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/18/the-equal-rights-amendment-has-been-dead-for-36-years-why-it-might-be-on-the-verge-of-a-comeback/> [<https://perma.cc/45YY-M4GB>].