

WORK–FAMILY CONFLICT AND THE PIPELINE TO POWER: LESSONS FROM EUROPEAN GENDER QUOTAS

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I. LEAKY PIPELINE: GENDER DISPARITIES AT THE TOP OF THE LEGAL PROFESSION

Despite the fact that women have entered law school in roughly equal numbers to men for two decades, gender disparities at the top of the profession remain. Women make up 19.5% of partners at the largest law firms, and 11% of the largest law firms have no women at all on their governing committees.¹ Only 23% of all federal judgeships are held by women, and 27% of state judgeships are held by women.² Women constitute 20.6% of law school deans and 29.9% of full tenured law professors.³ Gender parity has been achieved at the entry point, but not at the top.

The gender disparities at the top of the legal profession can be described as a “leaky pipeline” problem. In 1993, women constituted 50.4% of J.D. students.⁴ In 2011, women made up 47.2% of J.D. students, and they

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1. *Catalyst Quick Take: Women in Law in the U.S.*, CATALYST (Oct. 17, 2012), <http://catalyst.org/publication/246/women-in-law-in-the-us>.

2. *Id.*

3. *2008-2009 AALS Statistical Report on Law Faculty*, ASS’N AM. L. SCH., <http://www.aals.org/statistics/2009dlr/titles.html> (last visited Jan. 8, 2013).

4. AM. BAR ASS’N, *FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2010* (2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf.

have constituted roughly half in the intervening decades.⁵ They also made up 45.4% of law firm associates and 47.7% of summer associates.⁶ At the same time, only 31.9% of all lawyers are women, and fewer are partners, judges, and deans.⁷ Women are falling out of the pipeline to the positions of power.

A central explanation for the “leaky pipeline” is the impact of motherhood on women’s working lives, particularly in demanding professions like law. Forty-four percent of male lawyers have a spouse who is employed full time, whereas 84% of women lawyers do.⁸ Practically, this means that twice as many women lawyers than male lawyers must manage their households with a partner who also has a full-time job. Typically, the partner who is not employed full-time does more of the household work, becoming the “caregiver,” whereas the one who is employed full-time fulfills the role of “breadwinner.” If both partners are employed full-time, the breadwinner–caregiver model can no longer operate to fulfill the household’s caregiving needs. The vast majority of women lawyers are not in breadwinner–caregiver households, which means that the two breadwinners must spend more of their time and resources on performing or managing the caregiving functions. As a result, women are statistically more likely to experience work–family conflict, which can adversely affect their advancement in the workplace.

Over the last decade, the “motherhood penalty” in the workplace has come to be well documented. In 2003, the *New York Times* announced the “opt-out revolution,”⁹ suggesting that a significant number of highly educated women were choosing to quit their careers in order to stay home to raise their children full-time.¹⁰ The “opt-out” thesis attempted to explain the decline of women’s labor market participation that had begun in 2000.¹¹ Joan Williams countered that women were not opting out of the labor market—they were being pushed out.¹² Williams suggested that inflexible workplaces made professional advancement nearly impossible for working parents of young children when such workers did not have a spouse or partner who was available full-time to take care of the children and manage the household.¹³ Such workers were usually women.¹⁴ Without access to a full-time

5. *Catalyst Quick Take: Women in Law in the U.S.*, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42.

10. *Id.*

11. *See generally id.*

12. *See* JOAN C. WILLIAMS, *RESHAPING THE WORK–FAMILY DEBATE: WHY MEN AND CLASS MATTER* 12-41 (2010).

13. *See id.*

14. *See id.*

homemaker, a person cannot be in the labor market full-time unless it is possible—financially and psychologically—to outsource all childcare, and the workplace is flexible regarding hours and other expectations to accommodate the time the worker spends with family.¹⁵

U.S. law does not provide adequate solutions to the “pushed-out” problem. On the one hand, federal employment discrimination law now prohibits discrimination against mothers, as well as discrimination against men with family responsibilities. Under Title VII, an employer cannot treat any worker adversely based on stereotypes of traditional gender roles within the family. The employer cannot assume that a woman worker will be more devoted to caregiving than to work, and therefore unable to fulfill work responsibilities.¹⁶ The employer cannot discriminate against a male worker who does family caregiving on the assumption that only women should be doing family caregiving.¹⁷ Courts have recognized both of these patterns of conduct as violations of Title VII, as have the EEOC’s guidance on caregiver discrimination.¹⁸

Imposing liability on employers for “family responsibilities discrimination” is only a limited partial solution to the leaky pipeline problem,¹⁹ insofar as the problem is understood to result from actual work–family conflicts experienced by women in the legal profession, rather than false perceptions and stereotypes by employers. The EEOC’s enforcement guidance on unlawful disparate treatment of caregivers is telling. The EEOC guidance includes thirteen hypothetical examples to illuminate the legal theory of caregiver discrimination.²⁰ Of those thirteen examples, only one involves a lawyer, and it is the only example the EEOC gives of an “employment decision lawfully based on actual work performance.”²¹ “Example 6” reads as follows:

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla’s continued childcare difficulties resulted in her missing further deadlines for several important

15. See generally JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 40-54, 64-94 (2000).

16. See, e.g., *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 46-47 (1st Cir. 2009); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004).

17. See, e.g., *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001).

18. See *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC.GOV, <http://www.eeoc.gov/policy/docs/caregiving.html> (last modified Feb. 8, 2011).

19. I develop this critique in more detail in Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work–Family Conflict*, 110 COLUM. L. REV. 1, 54-60 (2010).

20. See *Enforcement Guidance*, *supra* note 18.

21. *Id.*

projects. Two months after Carla was given the written warning, the firm transferred her to another department, where she would be excluded from most high-profile cases but would perform work that has fewer time constraints. Carla filed a charge alleging sex discrimination. The investigation revealed that Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time. Therefore, the employer did not violate Title VII by transferring Carla.²²

Once Carla is transferred to another department, she is excluded from high-profile cases, which means that she is no longer in the pipeline to power.

It is no secret that, in order to advance to the highest levels in the legal profession—whether it is in private practice, judgeships, or legal academia—the competitive work environment demands at least fifty to sixty hours of work per week. Even if a full-time worker has access to “full-time” childcare, daycare centers are typically open only fifty hours a week (or less),²³ and nannies must be paid overtime rates for hours exceeding forty (assuming that one has elected to comply with the law).²⁴ Thus, even a worker with “full-time” childcare would face barriers to meeting the deadlines and requirements of a high-pressure legal job, a prerequisite to advancement to the positions of power. Workers who successfully meet such demands in the workplace are probably not seeing very much of their kids. This might explain why 36.1% of mothers with children under the age of six are not in the labor force, nor are 44.2% of mothers of infants under one.²⁵ A qualitative study published in 2007, based on extensive interviews with women who have opted out of full-time work, concludes that the demands of the American workplace are incompatible with the time they wish to spend with their children.²⁶ At the same time, many mothers report that, had it been possible to combine work and family, they would have preferred to do so.²⁷

So it's no surprise that many of the highly visible women in positions of power, particularly in the legal profession, are childless. The last three women nominated to the U.S. Supreme Court—Elena Kagan, Sonia So-

22. *Id.*

23. See Sabrina Tavernise, *Day Care Centers Adapt to Round-the-Clock Demand*, N.Y. TIMES, Jan. 16, 2012, at A12 (noting that day care hours are typically and traditionally 8 a.m. to 6 p.m. and profiling a few centers that have begun to open at night to accommodate nonstandard working time).

24. Worker Economic Opportunity Act, 29 U.S.C. § 207 (2006); Application of Minimum Wage and Overtime Provisions, 29 C.F.R. § 552.100 (2012).

25. BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2011, at 2 (2012), available at <http://www.bls.gov/news.release/pdf/famee.pdf>.

26. See PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 207-37 (2007).

27. *See id.*

tomayor, and Harriet Miers (who withdrew)—do not have children.²⁸ Janet Reno, the first woman attorney general, is childless, as is Janet Napolitano, the Secretary of Homeland Security.²⁹ In the business world, a 2010 study by economists Marianne Bertrand, Claudia Goldin, and Lawrence Katz shows that motherhood, rather than sex, accounts for the gender gap between business school graduates of the University of Chicago classes of 1990 to 2006.³⁰ The study found that at the outset of their careers, male and female MBAs had nearly identical incomes.³¹ Yet, fifteen years after MBA completion, significant disparities emerged. The presence of children was the main contributor to the lesser job experience of female MBAs as compared to male MBAs.³² Fifteen years after graduation, women MBAs with children have an eight-month deficit in post-MBA work experience compared to men, whereas women MBAs without children have only a one-and-a-half-month deficit compared to men.³³ Similarly, women with children work 24% fewer weekly hours than the average male, whereas women without children work only 3.3% fewer hours.³⁴

The leaks in the pipeline are largely attributable to the disproportionate adverse effects of parenthood on women's advancement to positions of power. It is more difficult for women to do as much as men because if they have children, they are much more likely to be doing more child rearing than men with children. When women and men compete for advancement in the pipeline to power, it is not surprising that women with children are significantly disadvantaged relative to women without children and men with children. Many feminist scholars have suggested that, to reduce the gender disparity in career advancement, the norms of the workplace must be redefined.³⁵ A fifty- to sixty-plus hour work week would have to cease to be regarded as necessary, or even desirable, for those who aspire to become law firm partners and Supreme Court justices; and the taking of maternity and paternity leave would not only have to be paid, but so widespread that it

28. David Leonhardt, *A Market Punishing to Mothers*, N.Y. TIMES, Aug. 4, 2010, at B1.

29. *See id.*

30. *See* Marianne Bertrand, Claudia Goldin & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J.: APPLIED ECON. 228, 230 (2010).

31. *Id.* at 229.

32. *Id.* at 230.

33. *Id.*

34. *Id.*

35. *See, e.g.*, WILLIAMS, *supra* note 15; Vicki Schultz & Allison K. Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS (Judy Fudge & Rosemary Owens eds., 2006); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

ceases to cause disadvantage. Daycare centers and preschools would have to be widely available and affordable, and the normal school day would have to be longer. Anyone who has been hanging out in the United States lately must realize how far-fetched these legal and cultural changes appear. Solving our pipeline problem this way is a pipe dream.

At the same time, there is a serious debate about the need to increase the numbers of women in positions of power. In Europe, women's representation in positions of power—in elected legislatures and corporate boards of directors—is being increased through legislation imposing gender parity quotas. In short, gender quotas requiring equal numbers of men and women in the top positions of power are a solution to the leaky pipeline problem. Although quotas are politically and legally problematic in the United States, the European discourse around gender quotas is worth engaging for its illumination of the link between gender parity in leadership positions and the long-term trajectory of work–family reconciliation. The new European policies and debates can provide fresh insights on the importance of gender parity at the top of the legal profession, not only at the doors of entry.

II. GENDER QUOTAS: AN EMERGING EUROPEAN TREND

In November 2012, the European Commission proposed a European directive requiring publicly traded companies in Europe to achieve gender balance on their boards of non-executive directors.³⁶ This proposal follows a wave of legislation in various European countries to require publicly traded companies to reach a minimum threshold—either 30 or 40%—of women on their boards of directors. The trend began in Norway in 2003. Norway passed a law requiring all public companies to achieve gender balance on company boards.³⁷ The law provided that each sex must make up at least 40% of the representatives on company boards, under threat of dissolution of the company.³⁸ While Norway was the first country to impose a gender quota on corporate boards of directors by law, gender quotas had been implemented in European countries in various contexts. Socialist parties in various Western European countries began to adopt gender quotas in the

36. See *Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures*, at 1-28, COM (2012) 614 final (Nov. 14, 2012).

37. Amendment to the Public Limited Companies Act, Ot.prp. nr. 97 (2002–2003) (Nor.).

38. *Id.*

1960s and 1970s.³⁹ In Sweden, these quotas gained momentum in the 1990s, and women now make up half of the Swedish parliament.⁴⁰

In France and Italy, the legislatures over the last three decades have attempted to impose gender quotas for certain elected legislative offices, but these electoral gender quotas were struck down by each country's constitutional court.⁴¹ In both of these countries, constitutional amendments paved the way for new legislation imposing gender quotas for certain elected offices.⁴² France adopted its gender parity law for elected offices at the municipal, regional, and national level in 2000.⁴³ In Italy, twelve out of twenty regions have adopted gender quotas for regional elections after the constitutional reform of 2003.⁴⁴ In Spain, a 2007 statute imposed gender quotas on

39. See MONA LENA KROOK, *QUOTAS FOR WOMEN IN POLITICS: GENDER AND CANDIDATE SELECTION REFORM WORLDWIDE* 107 (2009).

40. See Lenita Freidenvall, *Women's Political Representation and Gender Quotas—The Swedish Case* 3 (Research Program on Gen. Quotas, Working Paper No. 2003:2, 2003).

41. Loi 82-974 du 19 novembre 1982 modifiant le code électoral et le code des communes et relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales [Law 82-974 of November 19, 1982 modifying the Electoral Code and the Code of Municipalities and Concerning the Election of Municipal Councillors and the Registration of Frenchmen Established Outside of France on Electoral Lists], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, Nov. 20, 1982, p. 3487 (statute imposing quotas); Conseil constitutionnel [CC] [Constitutional Court] decision No. 82-146DC, Nov. 18, 1982 (Fr.) (Constitutional court decision striking down quotas); Legge 25 marzo 1993, n. 81 (It.) (statute providing that neither gender could have a presence of less than 25% on electoral candidate lists in municipalities of up to 15,000 inhabitants); Racc. uff. corte cost., 6 settembre 1996, n. 422/199 (It.) (invalidating the candidate quotas).

42. Loi 99-569 du 8 juillet 1999 relative à l'égalité entre les femmes et les hommes [Law 99-569 of July 8, 1999 Relating to Equality Between Women and Men], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, July 9, 1999, p. 10175 (constitutional amendment providing that the law shall promote equal access by men and women to elected positions); Legge 18 ottobre 2001, n. 3/2001, in G.U. 2001 (It.) (amending Article 117 of the Constitution to require regional laws to suppress any hindrance to full equality between men and women in social, cultural, and economic life and parity of access to elected office); Legge 30 maggio 2003, n. 1/2003, in G.U. 2003 (It.) (adding language to Article 117 authorizing the Republic to use special measures to promote equal opportunities of men and women). For an extended discussion in English of the French and Italian constitutional evolution, see Blanca Rodríguez Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 INT'L J. CONST. L. 287, 290-96 (2008).

43. Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 Tending to Favor the Equal Access of Women and Men in Electoral Mandates and Elective Functions], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, June 7, 2000, p. 8560 (favoring the equal access of women and men to electoral mandates and elected offices).

44. See Italy: *Quota at the Sub-National Level*, QUOTA PROJECT, <http://www.quotaproject.org/uid/countryview.cfm?ul=en&country=110> (last updated May 17, 2011).

both elected office in the legislature, as well as on corporate boards of directors, which was upheld by the Spanish constitutional court.⁴⁵

In 2011, France, Netherlands, Italy, and Belgium followed Norway and Spain by adopting laws imposing gender quotas on corporate boards of directors.⁴⁶ While these new statutes only adopt quotas for the boards of publicly traded companies, it is clear that in some countries, such as France, corporate boards are only the beginning: New laws and decrees will likely require gender parity in various domains of political and economic power, as required by the 2008 constitutional amendment providing that the law shall promote the equal access by men and women to positions of social and professional responsibility, as well as to elected office.⁴⁷ Indeed, in March 2012, the French legislature passed a statute adopting gender parity on most governing committees within the civil service,⁴⁸ and many similar laws are expected to follow. In this landscape, it would not be surprising if France eventually required the judiciary or the governing committees of large law firms to achieve gender balance.

45. L.O.P.J., B.O.E. n. 3/2007, Mar. 22, 2007 (Spain); S.T.C., B.O.E. n. 12/2008, Jan. 29, 2008 (Spain). For a discussion of the statute and the decision, see Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *Constitutional Justification of Parity Democracy*, 60 ALA. L. REV. 1171, 1189 (2009).

46. See Loi 2011-103 du 27 juillet 2011 [Law 2011-103 of July 27, 2011], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 27, 2011, p. 1680; Legge 12 luglio 2011, n. 174, in G.U. (It.); Proposition de loi visant à promouvoir une représentation équilibrée des femmes et des hommes dans les conseils d'administration d'entreprises publiques économiques et de sociétés qui ont fait publiquement appel à l'épargne, Sénat de Belgique [Proposed legislation to promote balanced representation of women and men on boards of directors of public enterprises and economic societies that we are publicly savings] of Feb. 1, 2011, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], June 30, 2011, 5-186-2; Act to Amend Book 2 of the Dutch Company Act, Stb. 2011, no. 275 (Neth.). See generally EUROPEAN COMM'N, WOMEN IN ECONOMIC DECISION-MAKING IN THE EU: PROGRESS REPORT 13 (2012), available at http://www.google.com/url?sa=t&rt=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fjustice%2Fgender-equality%2Ffiles%2Fwomen-on-boards_en.pdf&ei=h7pbUIvQEIbVyAGdtYgGaw&usq=AFQjCNEcO9oxcTN83nBC9PHURQmV-FXbQ&sig2=tR0mLLAb_TuogNeSVYvgg&cad=rja.

47. 2008 CONST. 1 (Fr.); Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (1) [Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 11890.

48. Loi 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique [Law 2012-347 of March 12, 2012 on Access to Employment and the Improvement of Conditions of Employment of Contract Staff in the Public Sector, the Fight Against Discrimination and Containing Various Provisions Relating to the Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 13, 2012, p. 4498.

III. COMPLETING THE REVOLUTION IN SOCIAL REPRODUCTION

A wide range of arguments have been advanced to support gender parity quotas. In the context of elections for the legislature, a central claim is that the democratic state cannot be legitimate if women do not participate in decision making.⁴⁹ In the corporate boards context, it is often argued that women directors are “good for business” because they will improve corporate governance, which in turn will yield higher profits and shareholder value.⁵⁰ In an earlier article, I have argued that the business case for gender parity in corporate leadership is closely linked to the democratic legitimacy argument for gender parity in the elected organs of the state.⁵¹

In the United States, the “business case” for diversity is the proposition that diversity in a firm (whether gender or race) will enhance the company’s bottom line, measured primarily by shareholder value.⁵² In Europe, I have argued that the business case for gender parity is not merely—or even primarily—a claim that women leaders will increase shareholder value.⁵³ Rather, owing to political traditions in which corporations are regarded as “social partners” of the state, particularly in the adoption and implementation of industrial and social policy, the power exercised by corporations must be legitimized just as state power must be legitimized.⁵⁴ Thus, if the lack of female representation in the leadership of the state tends to weaken the state’s democratic legitimacy, such underrepresentation will also harm the legitimacy of corporations. Women leaders are “good for business” because they provide the legitimacy without which a corporation would be less effective.

The justification of quotas from the standpoint of democratic legitimacy is different from conceptualizing quotas as equality of opportunity measures.⁵⁵ Democratic legitimacy arguments focus on the state and how its governance might be undermined by the absence of women.⁵⁶ Equality of

49. See Drude Dahlerup, *Introduction*, in *WOMEN, QUOTAS AND POLITICS* 3, 16-17 (Drude Dahlerup ed., 2006).

50. See, e.g., Arni Hole, *Government Action to Bring About Gender Balance*, 20-FIRST.COM, <http://www.20-first.com/406-0-a-personal-account-of-the-quota-legislation-in-norway.html> (last visited Jan. 8, 2013); see also EUROPEAN COMM’N, *supra* note 46, at 7.

51. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CONST. L. 449 (2012).

52. See David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008).

53. See Suk, *supra* note 51.

54. See *id.*

55. See Rodriguez Ruiz & Rubio-Marin, *supra* note 42, at 289.

56. See *id.* at 302.

opportunity arguments, on the other hand, focus on individuals and how their rights might be violated by the persistence of gender disparities.⁵⁷ In France, for example, gender quotas went from being unconstitutional in 1982 to constitutionally encouraged in 2008 because there was a transformation in the collective understanding of quotas as democracy measures rather than equal opportunity measures.⁵⁸ In 1982, the proposed quota law would only have required women to constitute 25% of the candidates for certain municipal elections.⁵⁹ By contrast, the quotas that were adopted following the 1999 and 2008 constitutional amendments required women to constitute half or nearly half of the positions in question.⁶⁰

The foundational text of the feminist parity movement, *Au Pouvoir, Citoyennes!: Liberté, Égalité, Parité* (“Towards Power, Female Citizens! Liberty, Equality, Parity”), proposed that parity, unlike quotas, would unite, rather than divide the democratic republic.⁶¹ Parity, unlike quotas, reaffirmed the universal aspiration of democracy by ensuring that both parts of humanity (male and female) were represented.⁶² By contrast, quotas—understood as a low minimum threshold (e.g., 15-25%)—served primarily to enhance women’s opportunities to compete for desired positions of power or to make sure their special interests as a group were heard.⁶³ The 25% quota treated women as a minority group with interests that may be at odds with the rest of the republic; hence it was divisive. On the other hand, “parity democracy”—understood as fifty-fifty male–female representation in all organizations exercising power in a democratic society—is not primarily aimed at enhancing women’s opportunities as individuals or even as a

57. See *id.* at 298.

58. See *id.* at 290.

59. Loi 82-974 du 19 novembre 1982 modifiant le code électoral et le code des communes et relative à l’élection des conseillers municipaux et aux conditions d’inscription des Français établis hors de France sur les listes électorales [Law 82-974 of November 19, 1982], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 20, 1982, p. 3487 (providing a statute imposing quotas).

60. Loi 2000-493 du 6 juin 2000 tendant à favoriser l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 Designed to Promote Equal Access of Women and Men in Electoral Mandate and Functions Electives], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 7, 2000, p. 8560; Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory and Professional Equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

61. See FRANÇOISE GASPARD, CLAUDE SERVAN-SCHREIBER & ANNE LE GALL, *AU POUVOIR, CITOYENNES!: LIBERTÉ, ÉGALITÉ, PARITÉ* 166 (1992).

62. See *id.*

63. See *id.* at 145 (describing 25% as arbitrary).

group.⁶⁴ Its primary purpose is to legitimize the larger institution's exercise of political, economic, and social power. The new model embraced gender balance as a collective democratic goal rather than as a means of achieving equal opportunity for a minority group.⁶⁵ It also envisioned the fifty-fifty gender equilibrium as a permanent feature of any just governing body of the state.⁶⁶ Democratic governance could not claim to be universal or legitimate if half of humanity were not represented.

But what about racial and ethnic quotas? Would the adoption of gender quotas open the floodgates to quotas for minority groups? According to the advocates of gender parity, gender parity could not form the basis for racial quotas because gender is unlike race or any other demographic category. Women have always constituted (roughly) half of humanity and always will. There were men and women two millennia ago, and there will be men and women two millennia from now. It is hard to tell the same story for race. On the one hand, this rhetoric sounds like biological sex essentialism. The difference between men and women is understood to be "natural,"⁶⁷ whereas the difference between blacks and whites is understood to be socially (and legally) constructed. This biological essentialism undergirds the traditional justification for the differentiated sex roles of men and women in the family and in political and economic affairs.

At the same time, recognizing the persistence of gender categories over time⁶⁸ need not collapse into biological sex essentialism. It is hard to imagine a future without men and women because the differentiation of men's and women's social roles has been the central mechanism by which societies have made arrangements for social reproduction—the diverse array of tasks that must be fulfilled in order for societies to perpetuate themselves across generations. Children must be born, educated, and socialized to take over the political and economic life of the society. In the modern European nation-states, men have been expected to participate as citizens of the state, and market-maximizers in civil society. This leaves men with no time for the tasks of raising and taking care of the next generation of citizens and market-maximizers.

The traditional solution to the problem of social reproduction is to assign these tasks to a category of persons—women—who are excluded from

64. See *id.* at 137-38 (describing analogies to minority groups).

65. See generally ÉLÉONORE LÉPINARD, *L'ÉGALITÉ INTROUVABLE: LA PARITÉ, LES FÉMINISTES ET LA RÉPUBLIQUE* 158-85 (2007).

66. GASPARD, SERVAN-SCHREIBER & LE GALL, *supra* note 61, at 126-30.

67. See Laure Bereni & Éléonore Lépinard, "Les Femmes Ne Sont Pas Une Catégorie": *Les Stratégies de Légitimation de la Parité en France*, 54 *REVUE FRANÇAISE DE SCI. POLITIQUE* 71 (2004).

68. See WILLIAMS, *supra* note 15, at 244-47.

political and economic citizenship. Known as the “sexual contract,”⁶⁹ this arrangement ensures social reproduction by creating a class of people who are primarily responsible for it and excluded from politics and civil society so that they could focus on child rearing. If everybody were included in political and economic citizenship, there would be a collective crisis, as nobody would be available for the reproductive tasks necessary to ensure the existence of the next generation.⁷⁰ This is why the advent of formal equality between men and women, and formal inclusion of women in political and economic citizenship, has not rapidly led to equal numbers of men and women in the positions of political, social, or economic responsibility. The demands of avoiding the extinction of one’s people have been too powerful, and have made it hard to disrupt the mechanisms by which social reproduction tasks get allocated to women, despite the formal redefinition of women as citizens and market participants. Women ascend to positions of political, social, and economic responsibility or leadership by becoming “men,” persons who spend little or no time on the tasks of social reproduction. “Men” are either childless or capable of avoiding their social reproduction functions—by delegating to spouses, family members, nannies, day-cares, or schools.

Parity democracy is a strategy for disrupting the assumption that democratic citizens are “men.”⁷¹ I am using the term “men” to include all persons (biologically men and women) who are marginal participants in social reproduction.⁷² Parity democracy is a social order in which all the positions of professional and social responsibility must be filled by (biologically defined) men and women in equal numbers. What happens when this is required? If all the biological women who are legislators and corporate board directors are marginal participants in social reproduction (this is the case today), the obvious crisis of social reproduction will then have to be confronted. The biological women in these positions will either not have children or will have to delegate social reproduction to others—whether they

69. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); see also CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 33-35 (1989).

70. Hegel used this logic to justify women’s exclusion from the state and civil society. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 166 (Allen Wood ed., H.B. Nisbet trans., 1991); MICHAEL O. HARDIMON, *HEGEL’S SOCIAL PHILOSOPHY: THE PROJECT OF RECONCILIATION* 183-89 (1994).

71. See SYLVIANE AGACINSKI, *PARITY OF THE SEXES* 66-68 (Lisa Walsh trans., Columbia Univ. Press 2001).

72. Gaspard, Servan-Schreiber & Le Gall argue that two “political” sexes were created out of the two “biological” sexes. See GASPARD, SERVAN-SCHREIBER & LE GALL, *supra* note 61, at 62-71. “Political” sex refers to the gendered division of labor by which men participate in the public sphere while women inhabit the private sphere of the family, the site of social reproduction. See *id.*

are private employees, a market-provided child-care center, or one that is state-based.

It is by no means clear what the world should look like once the sexual contract has been dismantled. Is it a world in which marriage is made more equal, or one in which it ceases to exist? Will there be there equal numbers of male and female breadwinners and equal numbers of male and female homemakers? Or will each person, male or female, engage equally in breadwinning and homemaking? What the world should look like when the sexual contract is dismantled will remain contested for a long time. We won't really know when this project has been completed, but we will know that it has not been completed if women—the losing parties in the sexual contract—have not participated in exercising public power.

Today, American women constitute roughly 25% or less of the positions of power in the legal profession, including law firm partners, judges, and tenured law professors at top schools.⁷³ In such a universe, the question of social reproduction is not confronted by the major institutions because it is an unspoken rule that the women who make it to the top of the pipeline must be marginal participants in social reproduction. They either do not have children or, if they have children, they outsource most of the necessary childcare. However, what would happen if biological women had to occupy 50%, rather than a mere 25%, of all the positions at the top? Would all of the women leaders in a parity regime be marginal participants in social reproduction? If so, we would have to accept the fact that the elite men and women barely participate in social reproduction. This could mean they either do not have children, or they have children who are primarily raised by others.

For better or worse, it is unlikely to be an appealing option for elite men and women not to reproduce at all. On the second option—by which childcare gets outsourced—gender parity would force a society to think hard about how best to do this: Who (if not the mother) raises and educates our children for the future of the democratic state and its social and economic life? What social and institutional arrangements are needed to raise the next generation of citizens, in light of the fact that mothers are no longer available full-time for this task? Do norms of work have to be reconfigured to allow mothers and fathers to become part-time participants in social reproduction? Do taxes, education, immigration, and other institutional arrangements have to be reconfigured to create an affordable, high-quality, well-maintained system of nannies and childcare facilities? The reconciliation of work and family thus becomes a central question for all major social institutions, and failure to resolve the crisis of social reproduction will hobble the ability of the state and the market to function efficiently.

73. See *supra* Part I.

A few recent examples from European politics illustrate this theory. European countries recently confronted the fact that individuals in key positions of state power can get pregnant and give birth. These are two tasks that commence the process of social reproduction. In France, the Justice Minister in 2009, Rachida Dati gave birth during her tenure,⁷⁴ as did an Italian member of the European Parliament, Licia Ronzulli.⁷⁵ In Spain, Defense Minister Carme Chacón became pregnant, gave birth, and even took a few weeks of leave to care for the baby in 2008.⁷⁶ Under these circumstances, the state had to figure out how to govern in light of its leaders' participation in the normal processes of social reproduction. The old model said that the state did not have to interrupt any functions to make time for social reproduction. A man could continue governing even at the moment that he becomes a father to a newborn.⁷⁷ But suppose a woman of childbearing age is now Defense Minister, as was the case in Spain, and she wants to participate in social reproduction. The question of whether she should take maternity leave—four months in Spain—comes up.⁷⁸ Does somebody else act as Defense Minister during this time? Can national defense proceed normally under these circumstances? If so, does our conception of what it means for national defense to proceed normally have to change? If not, must she simply forego the leave, given the importance of her position?

In France, Justice Minister Rachida Dati did not take any maternity leave; she was back at work five days after a C-section.⁷⁹ That is one answer to this question. Licia Ronzulli brought her baby to work and has continued to do so into the child's toddler years.⁸⁰ Carme Chacón just took five weeks of maternity leave instead of the four months to which she was entitled.⁸¹

74. See Eleanor Beardsley, *Minister Sparks Maternity Leave Debate in France*, NPR (Jan. 19, 2009), <http://www.npr.org/templates/story/story.php?storyId=99456513>.

75. Andrew Rettman, *It Was Maternal, Not Political, Says Italian MEP Who Took Her Baby to Work*, GUARDIAN (Sept. 24, 2010, 1:00 PM), <http://www.guardian.co.uk/world/2010/sep/24/licia-rozulli-baby-parliament>.

76. Victoria Burnett, *Spanish Defense Minister Begins Maternity Leave*, N.Y. TIMES (May 20, 2008), <http://www.nytimes.com/2008/05/20/world/europe/20iht-21madrid.13049526.html>; Sarah Morris, *In Defence of Spain*, GUARDIAN (July 3, 2008, 7:30 AM), <http://www.guardian.co.uk/commentisfree/2008/jul/03/spain.women>.

77. In 2000, when British Prime Minister Tony Blair's son was born, Blair did not take paternity leave. See Kenyon Wallace, *Will David Cameron's Paternity Leave Change Workplace Attitudes?*, NAT'L POST (Sept. 1, 2010, 6:00 AM), <http://news.nationalpost.com/2010/09/01/will-david-cameron%E2%80%99s-paternity-leave-workplace-attitudes>. In 2010, David Cameron became the first Prime Minister to take the two-week paternity leave. *Id.*

78. Burnett, *supra* note 76.

79. See Beardsley, *supra* note 74.

80. See Lisa Belkin, *Licia Ronzulli, European Parliament Member Takes Her Toddler to Work*, HUFFINGTON POST (Feb. 19, 2012, 9:57 AM), http://www.huffingtonpost.com/2012/02/18/licia-rozulli-parliament-with-toddler_n_1286827.html.

81. Morris, *supra* note 76.

Indeed, she split her maternity leave with the child's father, as the new Spanish equality law permitted her to do.⁸² Note these are three different solutions to the problem of social reproduction. But it is clear that, if women must take up almost half (40% plus), rather than a token minority (15-25%) of positions of political, social, and economic power, chances are that some of these women at the top are going to engage in social reproduction, by getting pregnant and/or by caring for their own children. Thus, the traditional paradigm of male-breadwinner-public sphere participant and female-caregiver-guardian of private sphere is disrupted. But it can be disrupted in many different ways.

IV. CRITICAL INSIGHTS FOR THE UNITED STATES

The politics surrounding President Clinton's nomination of female candidates for Attorney General in 1992 is illustrative of the ways in which the impetus to reach gender parity in leadership can affect the discourse of social reproduction.⁸³ As he assumed the Presidency two decades ago, Clinton was committed to naming a woman as Attorney General, a historical first. As is well known, his first two nominations were withdrawn.⁸⁴ Zoe Baird, the first nominee, had hired a nanny, an immigrant whose legal status in the United States was in question.⁸⁵ Baird had not paid the social security taxes she owed in connection with the hiring of a nanny.⁸⁶ In light of this "Nannygate" scandal, as it came to be known, Clinton withdrew her nomination.⁸⁷ His second nominee, Judge Kimba Wood, had engaged in similar (though legally distinguishable) conduct with regard to childcare.⁸⁸ Wood, too, had hired an undocumented immigrant as a nanny, but she had paid the required taxes during a time when the hiring of undocumented aliens was not illegal.⁸⁹ Nonetheless, Clinton withdrew Wood's nomination.⁹⁰ Ultimately, the successful nominee was Janet Reno, who was not married and did not have children.⁹¹

Might this story have unfolded differently if there had been a rule requiring women to occupy half of all Cabinet positions and/or political ap-

82. *Id.*

83. See generally Pat Wingert, *Nannygate II: A Women's Backlash?* NEWSWEEK, Feb. 15, 1993, at 20.

84. *Id.*

85. See Jill Smolowe, *The Zoe Baird Debacle: How It Happened*, TIME, Feb. 1, 1993, at 31.

86. Wingert, *supra* note 83, at 20.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Leonhardt, *supra* note 28, at B1.

pointments in the executive branch? Clinton only needed to find one attorney general, but what if he had to appoint seven, fifteen, or fifty women with these qualifications? In a recent article in the *Atlantic Monthly*, law professor Anne-Marie Slaughter, a former Obama State Department director of policy planning, has suggested that the only solution to the gender gap attributable to work–family conflict is to close the leadership gap, “to elect a woman president and 50 women senators; to ensure that women are equally represented in the ranks of corporate executives and judicial leaders.”⁹² Slaughter boldly declares: “Only when women wield power in sufficient numbers will we create a society that genuinely works for all women. That will be a society that works for everyone.”⁹³ She suggests that even a world that enables women to succeed and constitute 15-30% of the positions of power is inadequate to transform society into one that works for everyone.⁹⁴ If women had to constitute half of all positions of power (however defined), our political and business leaders would not be able to continue to dodge collective public-policy solutions to the complex issues raised by “Nannygate”: Is it possible for a woman who has children to ascend to positions of power? Must she outsource the care of children on the market? Why are so many of the available and affordable childcare workers illegal aliens? Do our labor and social security laws make it too difficult—both administratively and financially—for dual-earner families to employ nannies? Why does the state fail to provide early childhood education and nurseries? Why is high-quality childcare in day care centers so hard to come by? Why does the school day end at 3 p.m., when parents who work full-time work until 5 or 6 p.m. (or longer)?

When the successful nominee for Attorney General was a childless woman, the “Nannygate” problems shrank in the public conversation. They became the private foibles of a few accomplished individual women rather than a public problem that the Clinton Administration—and the federal government—needed to solve. A few years later, Nannygate reared its head again when President George W. Bush nominated Linda Chavez for Secretary of Labor.⁹⁵ She was the first Latina woman nominated to a cabinet position, but she withdrew after it was revealed that she had housed and given money to an illegal immigrant from Guatemala in exchange for domestic help.⁹⁶ After Chavez withdrew, Bush nominated Elaine Chao,⁹⁷ who became

92. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC, July/Aug. 2012, at 85, 89.

93. *Id.*

94. *See id.* at 89-90.

95. See Ron Fournier, *Chavez Withdraws as Labor Nominee*, WASH. POST (Jan. 9, 2001), http://www.washingtonpost.com/wp-srv/aponline/20010109/aponline172303_000.htm.

96. *See id.*

the longest serving Secretary of Labor. Although Chao's husband (Senator Mitch McConnell) has three children from a previous marriage, Chao is not a mother. And the problems raised by Nannygate still remain, without any significant coordinated public-policy solutions, and with very little serious public debate.

European countries have more friendly policies toward working mothers, such as paid maternity leaves, special job protections for pregnant workers, paid paternity leaves (though not equal to maternity leaves), paid childcare leaves, protection of part-time workers, and shorter work weeks.⁹⁸ But these policies are not the consequence of gender quotas; they evolved and developed since the beginning of the twentieth century, long before gender quotas were imagined. Policies allowing women to reconcile work with motherhood were largely motivated by pro-natalist politics in various European countries.⁹⁹ In other words, reconciliation of work and family has been a pursued not only to achieve gender equality and justice, but as solution to the problem of social reproduction. In European nations, the last century has solidified the recognition that women must contribute to society as both mothers and workers in order to optimize the resources of the nation. In short, the survival of modern democratic states and economies depend on women's increasingly varied and complex roles.

A democratic state cannot perpetuate itself unless its policies determine the arrangements for social reproduction. It is clear that the old arrangement, the "sexual contract" or the "breadwinner-caregiver model," based on a gendered public-private divide, needs to be replaced. Not only is this arrangement unjust because it deprives women of the human rewards of the public sphere and men the human rewards of caregiving, but as a practical matter, the old model is dead. Most households are dual-earner households; those that are not are more likely to be struggling to meet their basic needs.¹⁰⁰ The modern economy has evolved in such a way that most families with children now require two breadwinners to live a decent life. Yet modern politics and policymaking has not evolved to respond adequately to this fact. When women are half of the decision makers, the need for a solution

97. See David E. Sanger, *In a Swift Action, Bush Names Choice for Labor Dept.*, N.Y. TIMES, Jan. 12, 2001, at A1.

98. See generally Suk, *supra* note 19.

99. See generally KIMBERLY J. MORGAN, WORKING MOTHERS AND THE WELFARE STATE: RELIGION AND THE POLITICS OF WORK-FAMILY POLICIES IN WESTERN EUROPE AND THE UNITED STATES 1-32 (2006).

100. See ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 7-9 (2003). Elizabeth Warren and Amelia Warren Tyagi have found that the "average two-income family earns far more today than did the single-breadwinner family of a generation ago;" yet, two-income families barely have enough money to spend after "they have paid the mortgage, the car payments, the taxes, the health insurance, and the day-care bills." *Id.* at 8.

will become more pressing, and some decent options will become politically viable.

Although it is not currently politically or legally viable in the United States today to propose quotas of any sort, the European debates about gender parity can catalyze some critical insights. We need to think more creatively about why and how Americans should approach the underrepresentation of women in certain domains, particularly at the top of the legal profession, the subject of this Symposium. Based on the admittedly limited experience after the implementation of corporate board quotas in Europe, we do not know if gender quotas will be sufficient to complete the gender revolution that feminists are waiting for. Gender quotas will not solve all the problems of women's inequality in one fell swoop. In Norway, for instance, the corporate board quota has rapidly increased the percentage of women on the boards of directors of publicly traded companies, the only companies to which the law applies.¹⁰¹ In these companies, 40% of the directors are women as of 2008.¹⁰² Norway has the highest percentage of women on publicly traded company boards.¹⁰³ Before the 2003 law was passed, Norway's percentage of women on these boards was comparable to that of the United States, at 16%.¹⁰⁴ But the percentage of women directors in privately held companies (to which the law does not apply) has remained constant at around 17%.¹⁰⁵ If the gender quotas only fix gender stratification in the most powerful institutions, such as legislatures and corporate boards, they will not be sufficient to transform work–family norms for everyone.

CONCLUSION

Nonetheless, while gender parity in leadership positions is not sufficient to bring about gender equality in a democratic society, it may be necessary. With gender disparity, the institutions that exercise power and influence in the democratic state face an undermining of legitimacy, precipitated by its inattention to the crisis of social reproduction. Unless women make up a significant number of leaders, the problem of social reproduction is not

101. *Norway's Mixed-Gender Boardrooms*, EU-NORWAY.ORG, http://www.eu-norway.org/news/gender_rep_boardrooms (last updated Aug. 6, 2009).

102. *Board Representatives, by Gender, Age Groups, Level of Education, Size Groups and Economic Activity*, STAT. NOR. (Jan. 1, 2011), http://www.ssb.no/styre_en/arkiv/tab-2011-06-07-01-en.html [hereinafter *Board Representatives*].

103. *Catalyst Quick Take: Women on Boards*, CATALYST (Aug. 16, 2012), <http://www.catalyst.org/knowledge/women-boards>.

104. *Norway's Mixed-Gender Boardrooms*, *supra* note 101. Note that, in the United States, women hold 16.9% of the seats on corporate boards of directors. *Catalyst Quick Take: Women on Boards*, *supra* note 103.

105. *Board Representatives*, *supra* note 102; *Norway's Mixed-Gender Boardrooms*, *supra* note 101.

confronted and not addressed. When women hover at 15-25% of law firm partners, judges, and elite law professors, the pipeline to power will continue to leak, with only the most marginal participants in social reproduction remaining. Even if the United States never adopts quotas, the European debates around them provide a rich account of why gender parity in decision making is an important feature of powerful institutions in a democracy.

